ITUC CSI IGB

Summary of the proceedings and trade union advocacy to the 38th session of UNCITRAL's Working Group III on ISDS Reform,

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Process and agenda items

The previous sessions were spent identifying problems with ISDS and after a set of topics emerged, members discussed how desirable is reform for each of the identified problems.

The 38th session started with a day's discussion on the agenda as members could not agree where to start from. Original plans included discussions and consideration to developing solutions for the areas where reform was deemed desired in previous sessions, and the EU hoped to discuss the multilateral investment court (MIC). After a long discussion on whether they should prioritise structural reform items or not and what constitutes 'structural issues', the meeting decided that its work on reform options should be guided by a set of criteria including, presence of consensus, maturity of reform option, whether other bodies work on the reform option, etc.

Finally, the members decided to discuss the items: multilateral advisory centre and related capacity-building activities, code of conduct, and third-party funding. Items for future discussions are the following: alternative dispute resolution mechanisms, calculation of damages and compensation, counterclaims, dispute prevention and mitigation, exhaustion of local remedies, means to address frivolous claims, selection and appointment of arbitrators and adjudicators, security for costs, stand-alone review or appellate mechanism and standing multilateral investment court (to be discussed together), reflective loss and shareholder claims, and treaty interpretation by State Parties.

A multilateral *instrument* (different than EU's MIC proposal) on ISDS reform (which could provide an opt-in approach) could be an additional matter for discussion.

1. Establishment of an advisory centre

There was general support for establishing an advisory centre on ISDS that could "*address some of the concerns previously identified by the Working Group, for example, those with respect to the cost of the proceeding, correctness and consistency of decisions as well as access to justice*". Some members mentioned that "*the establishment of the advisory centre should not lead to unjustifiable increase in the number of ISDS cases.*"[1]

The beneficiaries would be states, with priority to LDCs but developed countries could also benefit from some of the services. A set of criteria to determine which States would be given priority would be developed. Members also decided that investors, including SMEs, would have no access to it.

1 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019), available at: https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_for_website.pdf

The centre would provide "*assistance in organizing the defence, support during the proceedings including in the selection and appointment of arbitrators, general advisory services as well as capacity-building and sharing of best practices*".

It would be financed through voluntary contributions by states but a report shared by the Columbia Centre on Sustainable Investment (CCSI) in the meeting makes clear that the cost of establishing and running the centre would be multiple times the budget of the Advisory Centre on WTO Law (ACWL), which was used as inspiration for the details of establishing the ISDS Advisory Centre.

In ITUC's view, an advisory centre would be an unnecessary allocation of many millions of dollars (potentially many hundreds) into a system that is build to promote the interests of foreign investors. The centre would be industrialised states tax payers helping poor states defend against the industrialised states investors adding to the multitude of ways public's resources are captured by the elites.

2. Code of conduct

The meeting expressed general support for developing an enforceable code of conduct for ISDS tribunal members. The code could address some of the concerns identified, among them most importantly, the lack or apparent lack of independence and impartiality of ISDS tribunal members. The code would be binding and mandatory and, therefore, it should come in the form of concrete rules rather than guidelines and take care not to add to the normative fragmentation that the multiplicity of codes of conduct present.

Among other areas, the code would cover independence and impartiality, integrity, diligence and efficiency, confidentiality, competence or qualifications, and disclosure. Some members included in their speeches references to national experiences on double-hatting (as part of the independence and impartiality rules) and the general view was that "*arbitrators, upon appointment, should generally refrain, and be prevented, from acting as counsel or party-appointed expert or witness in any pending or new ISDS cases*". The solutions presented included complete ban, introducing a transitional period after which the arbitrator would be prevented from acting as counsel or expert, and limiting the number or type of cases that an arbitrator could take.

The members expressed views on how the code's enforceability would look like, however, more discussion will follow on this as an in-depth study would reveal options for an effective sanctions mechanism.

The ITUC believes that a code of conduct could help bring reason into some of the system's most provocative aspects, though it would still be far from addressing any of the structural issues.

3. Third-party funding

Capital holders gambling on the outcome of an ISDS case is a well-established practice. They offer to pay the costs of a case in return for a percentage of the award. This practice unnecessarily increases the number of cases as investors that would otherwise have not brought the case to ISDS, have nothing to risk and take it up. This practice is called 'third-party funding' of ISDS cases. In very few occasions, wealthy donors have supported a defending state – most famously when Bloomberg assisted with Uruguay's legal costs against a Philip Morris case.

In the session, some members noted that such recipients might be Small MNEs that do not have enough resources to initiate cases.

The problematic areas previously identified are third-party funding's impact on the proceeding (for example, conflicts of interest or when the funders exert control or influence over the arbitration process, and the discouragement of amicable resolution) and on the ISDS system as a whole (an increased numbers of ISDS cases and frivolous claims, and increased amounts of claimed damages).

The adopted outcomes document mentions that "*while some support was expressed for prohibiting third-party funding, it was generally felt that flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources, particularly SMEs and, in limited instances, to States.*" In support of this outcome, a couple of members mentioned that that prohibiting third-party funding could lead to other, unregulated, forms of funding.

The outcomes document explores a few potential options for the regulation to be developed. It could prohibit funding certain types of claims, including frivolous claims, claims made in bad faith or without legitimate

reasons, and claims with political purposes. It could also prohibit "*speculative funding, funding provided on a non-recourse basis in exchange for a success fee, and other forms of monetary renumeration or reimbursement wholly or partially dependent on the outcome of a proceeding*". Others suggested that third-party funding should take a positive list approach (so to call it) where it is permitted only in certain circumstances (instead of identifying circumstances where it is prohibited).

Some members argued that the definition of third-party funding should be "*comprehensive to cover a wide range of arrangements*", while others argued that the definition should not be broad. The meeting agreed on the need for early disclosure of the existence of third-party funding and the terms of the funding agreement, and that non-compliance with disclosure obligations should lead to sanctions, including suspension or termination of the proceedings, annulment of the award and cost allocation.

The session instructed the Secretariat to accordingly draft legal text that could be "*deployed by States in their treaties, used in arbitration rules, or incorporated in a multilateral convention which could apply to all treaties and allow for a harmonized approach.*"

The ITUC view is that all third-party funding to investor cases should be prohibited and all funding to states should be allowed.

Future work and policy options for trade union advocacy

It seems that the EU proposal for a multilateral court has not gathered sufficient support yet and, instead, governments might be tilting towards a multilateral convention. If agreed, the convention would provide an option menu on all different identified areas for reform and states would choose their options with a schedule. Once they ratify the convention, their investment treaties with ISDS would be automatically updated as per the scheduled options. So, a government could opt in for prohibition of multiple proceedings, for exhaustion of national remedies and for the ability to counterclaim, while opting out from the appellate body. In previous sessions a few members mentioned the Mauritius Convention on Transparency in Treaty-based Investor State Arbitration as well as the Multilateral Convention to Prevent Base Erosion and Profit Shifting (BEPS) as potential sources of inspiration for such a convention.

The meeting agreed to instruct the Secretariat to commence work on outlining the structure and function of such a multilateral instrument for possible consideration in the 40th session of the Working Group.

The ITUC believes that between the MIC and a Reform Convention, the latter would be preferable as it avoids entrenching the system, guarantees rapid reform of the 3300 bi lateral investment treaties (BITs) currently in force and therefore a quick alleviation of some ISDS asymmetries. More interestingly, this development could become vastly more useful if the members agree that the last option on the reform menu is the termination of investment treaties or the withdrawal of consent for ISDS that would terminate the ISDS provisions in all its investment treaties. This option is thoroughly developed and supported by the CCSI[2].

The meeting noted that an additional work week was agreed by the Commission for the Working Group 3 and so, the thirty-ninth session will be held in Vienna on 20–24 January 2020 and discuss the following reform options: "*(i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection and appointment of arbitrators and adjudicators.*"

The fortieth session would then discuss: *"(i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) treaty interpretation by States parties; (iii) security for costs; (iv) means to address frivolous claims; (v) multiple proceedings including counterclaims; and (vi) reflective loss and shareholder claims based on joint work with the OECD.*"

The meeting also agreed that "*it would be necessary to balance the discussion on structural reforms and other types of reforms in accordance with the decisions made by the Working Group at its previous session by allocating the fall session of the Working Group in 2020 to address structural reform options*".

2 Columbia Centre on Sustainable Investment, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*, available at: http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/?utm_source=CCSI+Mailing+List&utm_campaign=a20b86dd19-ISDS+Reform+at+UNCITRAL&utm_medium=email&utm_term=0_a61bf1d34a-a20b86dd19-62940433