

Reforming the ISDS at the United Nations Commission on International Trade Law (UNCITRAL) – a note for the positions of trade unions

Brussels, 14/3/2019

Not too long ago, we, unions and civil society allies, achieved a major victory against the Investor-to-State Dispute Settlement (ISDS). Although we did not specifically ask for an ISDS reform, rather for ISDS to be dropped altogether, governments now discuss possible reform options in the United Nations Commission on International Trade Law (UNCITRAL).

The stages of the discussion that could lead to reform

In July 2017, UNCITRAL Members mandated a three steps discussion aiming at:

1. identifying concerns regarding ISDS (stage 1 - finished);
2. deciding whether reform was desirable and in which areas (stage 2 – October 2018 meeting); and if reform was desirable,
3. developing solutions to be recommended for decision-making (stage 3 – April 2019 meeting).

The ITUC obtained observer status in UNCITRAL and attended already the October 2018 meeting and will also attend the April 2019 and following meetings.

The scope

As an [UNCITRAL note](#) puts it, “[t]he preliminary outcome of the consultations indicated [16 potential areas for amendments](#), including arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs.” More to this, the UNCITRAL Director who presides the meetings, Anna Joubin-Bret, has stated on record that governments could introduce new reform areas at any point and stage in the discussion, as for instance did the government of Indonesia in the last meeting in October 2018 in Vienna. The next UNCITRAL meeting in New York on April 1-5 will discuss [Indonesia’s proposal paper](#), which contains a list of ideas that, if agreed, would change ISDS radically.

The identified problems

The meetings so far identified only the following problems:

1. divergent interpretations of substantive standards (same provision in similar cases has been interpreted very incoherently by different ISDS-tribunals), lack of mechanisms to deal with these inconsistencies, and the issue of multiple proceedings (the ability of shareholders to start multiple proceedings under different treaties on the same case);
2. concerns about arbitrators and decision makers, including lack of independence and impartiality, arbitrators gender and origin; and
3. concerns regarding the costs and duration of proceedings, including lack of a mechanism to address frivolous or unmeritorious cases.

The Multilateral Investment Court (MIC)

Recently the EU submitted in writing their [proposal for an all-encompassing solution: the Multilateral Investment Court](#).

This proposal does not address all the concerns we have but it makes a few improvements. However, these few improvements come together with the entrenchment of the ISDS. Indeed, the MIC is ISDS moving from an ad-hoc basis to a standing mechanism able to create new privileges and 'rights' for foreign investors through its expansive interpretations of current Bilateral Investment Treaties (BITs). Arguing for case law production in investment arbitration might put workers' bargaining power against global capital in an even more disadvantageous position than it currently is.

The EU MIC proposal creates dispute avoidance mechanisms (mediation) followed by a first instance court and an appellate tribunal to which both governments and investors will have access to. There will be full-time adjudicators, ethical requirements, qualifications and diversity provisions. The appointment process will be more transparent than the current one. Developing countries will bear lighter weights in financing the MIC.

"It is vital that a standing mechanism be able to rule on disputes under the large stock of existing and future agreements" reads the proposal, so we should have no illusions that the MIC will replace many of the 3300+ investment treaties. It would largely be additional to the current system, giving the options of: *"(1) accession to the instrument establishing the standing mechanism and (2) a specific notification ("opt-in") that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism."* This practically means that states will keep their existing BITs for all parts except they will be replacing the ad-hoc ISDS with the standing ISDS mechanism, if they choose to opt-in. Around 7% of the current BITs do not have any ISDS and therefore, we might see an increase of ISDS-covered investment if countries decide to accede to the MIC.

Currently, most of the global investment is not covered under an ISDS. For instance, the US, the EU, Japan and other major developed countries do not have a BIT with an ISDS. It is among these countries that the bulk of FDI and other investment is located. If the US, Japan and other developed countries acceded the all-welcoming MIC, it would have the equivalent effect of massive BITs between these economies. It is, so to say, the Multilateral Investment Agreement (MIA) of the 1990s in modern apparel.

Other features of the EU proposal comprise codes to address ethics concerns, eliminate double-hatting (when the same person who is appointed an arbitrator is also hired by the client), and remove incentives flowing from the current system.

The real problems

Although reform in these areas is welcome, it is clear that the scope of this reform process falls disappointingly short of our expectations. [Indonesia's proposal paper](#) brings important issues that could respond better to our concerns:

1. Addressing frivolous cases (with check-and-balances mechanisms for claims, an established method for valuation of businesses in accordance with internationally recognized standards in financial reporting, a code of conduct for arbitrators in appraising such valuation, etc)
2. Regulatory chill (for which wider reform or dropping ISDS would be an option)
3. Clause on exhaustion of local remedies (so that foreign investors need to get all the way to the highest national court before having access to ISDS)
4. A more balanced definition of covered investment (so as to cover assets with certain exceptions and limitations, state ability to require an admission test in accordance with domestic laws – here we would argue that employment creation should be one of the factors)
5. Requiring separate written consent as a requirement for an investor to make ISDS claims to international arbitration (so states give their consent to be taken to ISDS on a case-by-case basis)
6. Mandatory mediation before any proceedings
7. Other issues: measures against corruption, corporate social responsibility (CSR), exclusion of claims, general and security exceptions, balance of payments (BoP), prudential measures and public debt.

The ITUC/ETUC stance

In the next UNCITRAL meeting, the ITUC/ETUC will support the proposals of Indonesia as they promise a farther-reaching reform. We would also add one more consideration, which is only marginally captured by the Indonesian paper. The need to include actionable responsibilities for investors benefiting from Bilateral Investment Treaties (BITs), and states signing BITs. In particular, both Parties and certainly the investment-sending country should have legislated mandatory CSR as defined in the UN Guiding Principles for Business and Human Rights, including human rights due diligence and compensation mechanisms. Investors should be able to show at any point what measures they have taken in order to prevent and address human rights abuses as well as a condition to accessing any international arbitration. Such agreements shall require that both Parties have ratified and effectively implemented the ILO Fundamental Rights at Work and other up-to-date Conventions.

The ITUC/ETUC will also express wider concerns about entrenching this parallel system of justice reserved only for foreign investors; the imbalance of power between labour and capital and labour's falling share of total income; and the lack of any comparable effort (in terms of zeal and time invested) to create a global mechanism for the protection of human rights, including labour rights, and the environment.