

# **BORDERLEX: ISDS reform: UNCITRAL process moves to next level**

12/10/2020 by [Nikos Lavranos](#)

Following one week of intense talks in Vienna and online, the reform process of international investor-to-state dispute settlement currently held under the umbrella of the United Nations Commission for International Trade Law's Working Group III is moving nearer the endgame.

The process of drafting new concrete 'model clauses' and agreeing on them will now begin. After last week it has become clear once again that there will be no general consensus for more radical reform plans pushed in particular by the European Union.

## **Alternative dispute resolution and pushback against frivolous claims**

Last week's meetings focused on the following areas of reform: dispute prevention and mitigation and alternative dispute resolution; reflective loss and shareholder claims; multiple proceedings including counterclaims; security for costs and means to address frivolous claims; treaty interpretation by host states; and multilateral instrument on investor-state dispute settlement – ISDS – reform.

The discussions built on [incremental reforms already agreed in 2019](#): the establishment of an *Advisory Centre for Investment Disputes* similar to the one that exists at the WTO, the regulation of third party funding by requiring its disclosure and the development of a binding *Code of Conduct for Arbitrators*.

Participants at last week's meeting tasked the secretariat with developing guidelines and possible model clauses for dispute prevention and mitigation tools as well as for the best use of mediation. Drafters were also asked to develop proposals as to how the coming new advisory centre could assist in this regard.

Drafting will also commence on model clauses that would ensure that states can request more easily security of costs orders from arbitral tribunals, in particular if third party funding is involved. This would help government recoup costs of frivolous claims more easily.

The secretariat will also draft language that would limit the possibilities for investors to initiate multiple proceedings, for instance by requesting claimants to waive their rights for initiating any other proceedings once an arbitration has been initiated. This could also involve restrictions of shareholder rights to obtain compensation for their losses where called for, and the possibility for states to bring counter-claims for breach of *Corporate Social Responsibility* obligations.

## **Binding treaty interpretations?**

In contrast to the overall consensus within the group regarding the above-mentioned issues, there were many divergent views on the role and scope of treaty interpretations.

Many delegations considered the use of treaty interpretation, which would be binding on arbitral tribunals, as a useful tool to update and reform existing investment treaties without the need to go through a cumbersome ratification process. It was pointed out that the EU Canada agreement CETA and other recent agreements contain such provisions.

However, many delegations cautioned against the widespread use of treaty interpretations – which are effectively concealed treaty amendments. Under this view, the tools of treaty interpretations and treaty amendments should be clearly distinguished. The same delegations also cautioned against the use of treaty interpretations with retroactive effect, which would interfere in ongoing disputes.

## **MIC opt-in**

The proponents of a multilateral instrument, such as in particular the EU and its member states, Canada, Australia and Mauritius, want to establish a multilateral instrument. Such an instrument would offer a framework for the replacement of the more 3,000 currently existing bilateral investment treaties with one treaty that would contain all the procedural and substantive provisions for investment protection and investor-state disputes.

Drawing on the experience of the Mauritius Convention, which implements the UNCITRAL Transparency Rules for arbitration disputes, these ‘radicalists’ propose an

opt-in instrument, which would provide for maximum flexibility and freedom of choice for each state.

Under this system, every participating state would be able to choose whether, and if so, to what extent, it wishes to opt into the multilateral instrument and thereby replace its existing investment treaties. States that wish to move quickly and radically can do so without being held back by states that take a more cautious approach.

Eventually, this multilateral instrument would also form the framework for the multilateral investment court or MIC, which is intended to replace arbitral ISDS tribunals.

Mauritius went as far as stating that there was no need to talk about how such a multilateral instrument could be developed since that was **already successfully done with the Mauritius Convention**.

Proponents of the MIC referred to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* for bilateral tax treaties, which has been agreed within the context of the OECD. The convention also provides for an opt-in system by which existing tax treaties can be updated without the need for cumbersome ratification procedures.

However, Russia, Japan and the United States, among other countries, pushed back against the perception that there is already a done deal regarding the multilateral instrument and by extension the multilateral investment court.

Among others, they highlighted that the creation of such a multilateral instrument could lead to the existence of two parallel systems for a significant time. This would increase rather than reduce the perceived fragmentation and inconsistencies of the current ISDS system.

The Working Group's next meetings in April and October 2021 will be of crucial importance and might even bring the work of the group to an end by presenting a final text for a multilateral instrument, including the investment court.