

Report of Third EU Stakeholder Meeting on ISDS Reform



Yesterday (9 October 2018), the European Commission held its third stakeholder meeting on the reform of investor-State dispute resolution (**ISDS**) mechanisms (see [here](#) and [here](#) for reports of the two previous meetings).

The goal of this meeting was (prior to the third round of discussions on the ISDS reform which will be held in Vienna (29 October – 2 November 2018) within UNICTRAL Working Group III (**Working Group III**)) to share with civil society the key aspects of those negotiations.

As was the case in the two previous meetings, Mr Colin Brown (Deputy Head, Dispute Settlement and Legal aspect of Trade policy Unit) gave an overview of the current state of play, and responded to questions from attendees.

Mr Brown began by recalling that, given its inclusive and transparent process, UNICTRAL is a very desirable forum for discussing a possible reform of ISDS.

Mr Brown also recalled that Working Party III has been granted a three-tier mandate:

- identify and consider concerns regarding ISDS (**Step 1**);
- consider whether reform of the current system is desirable in the light of any identified concerns (**Step 2**); and
- should a reform of the system be desirable, develop and recommend relevant solutions to UNCITRAL (**Step 3**).

The first round of discussions (which was held in Vienna in November 2017) was devoted to the election of the Chair and began working on Step 1. The concerns identified during this meeting were essentially the costs and duration of ISDS proceedings, issues regarding transparency and issues regarding the lack of consistency of the case-law.

Discussions on Step 1 continued and were finalized during the second round of negotiations (held in New York City in April 2018). Issues discussed during this meeting included (i) the limited review of ISDS awards; (ii) the appointment of arbitrators; and (iii) third party funding.

In anticipation of the third meeting which will take place in Vienna at the end of the month, Mr Brown explained that he expected that most of the week will be devoted to discussions on Step 2 (*i.e.*, whether reform of the current system is desirable). In contemplation of this week of discussions, the UNCITRAL Secretariat [released a number of documents which summarise and consolidate the Step 1 discussions\[1\]](#). At this stage, it is unclear whether Step 2 will be completed during this third round of discussions. In any case, the fourth meeting (in New York City in April 2019) will continue the discussions initiated in Vienna and will therefore either continue Step 2 or start talks on Step 3. Assuming that Working Group III agrees that a reform of ISDS is desirable, Mr Brown expects Step 3 to last much longer than Step 1 and Step 2.

Importantly, Mr Brown also emphasised the rise of meetings

organised at regional levels. Those meetings are aimed at spreading knowledge and information about issues and possible solutions being discussed within Working Group III. The first of those meetings was held in South Korea in September 2018 and it is expected that other such meetings will be held in South America and North Africa in the coming months.

In response to a question by one attendee, Mr Brown explained that at this moment it was difficult to say how China, Japan and the United States will ultimately react to the idea of an ISDS reform. Nonetheless, he explained:

- that during the meeting held in April 2018, China expressed concerns very comparable to those expressed by the EU regarding the lack of consistency of ISDS award and on arbitrators' expertise.
- that although Japan is very much engaged in the discussions within Working Group III, its view seems to be that the contemplated reform of ISDS within the Trans-Pacific Partnership (TPP) is sufficient.
- The United States seems to agree that a reform is necessary but that such reform should take place bilaterally rather than multilaterally.
- Importantly, almost no country argued that there were no concerns with the existing ISDS system.

The entire stakeholder meeting can be visualized [here](#).

[1] Document entitled [WP/149](#) (and its [annex](#)) will serve as the basis for the discussions in Vienna in October-November 2018. This documents sets out potential options for a reform of ISDS.

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