OPPOSING ISDS

How Public Services International and affiliates can influence a key UN ISDS “Reform” discussion
Thanks to years of public education and organizing around the globe, the once-obscure investor-state dispute settlement (ISDS) system is on the ropes.

The ISDS system, buried in trade and investment agreements, grants extraordinary rights to multinational corporations to sue governments outside domestic courts. Corporations can be awarded unlimited sums to be paid by taxpayers, including for the loss of expected future profits.

The corporations need only convince the extrajudicial tribunal that laws like an environmental law, safety regulation or even minimum wage rises violates the expansive investor rights granted by such pacts.

As many governments are increasingly questioning the legitimacy of this system, the law firms and corporate beneficiaries of the regime and some ISDS-supporting governments are trying desperately to defend the system, including by trying to hijack a key international intergovernmental “reform” discussion.

To preserve the gains made by trade unions and our allies with governments around the globe, PSI with the support of its affiliates wants to influence these global discussions with some targeted advocacy with key national governments in the next four months and into 2019.

More information about ISDS and the MIC proposal can be found in PSI’s The Wolf In Sheep's Clothing Report accessible here: www.bit.ly/2JGaQ9q

Background

The United Nations Commission on International Trade Law (UNCITRAL) is a UN body that deals with questions of international law and commerce. UNCITRAL provides one set of rules under which many investor-state dispute settlement (ISDS) cases are litigated.

Very few people — even within governments — have paid much attention to UNCITRAL. But the arbitration industry, and the law firms that make millions bringing ISDS cases on behalf of corporations or sitting as arbitrators in these ad hoc tribunals, have been heavily invested in this process for decades.

In fact, nearly all UNCITRAL’s accredited observers have represented the arbitration industry, and many of the governments’ own delegations include or are wholly represented by private ISDS lawyers and arbitrators.

The global movement opposing ISDS has been so successful that even UNCITRAL has now been forced to undertake a discussion on how to reform the controversial ISDS system. The ISDS status quo interests have seen the writing on the wall. Governments from South Africa to Indonesia to Ecuador have terminated many of their treaties that include ISDS.
The Trans-Pacific Partnership (TPP) never achieved majority support in the U.S. Congress in large part due to bipartisan opposition to ISDS. Australia refused to include ISDS in the Australia/USA Free Trade Agreement.

The EU Trade Commissioner admitted that ISDS was “the most toxic acronym in Europe.” Even the Trump administration has proposed eliminating ISDS from the North American Free Trade Agreement (NAFTA).

Thus, last summer UNCITRAL member states passed a resolution that tasked a working group within UNCITRAL (Working Group III) to discuss the following agenda related to ISDS reform:

(i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.

The discussions in the working group’s first meeting in November 2017 in Vienna and in the second meeting in New York in April 2018 focused on the first agenda item; discussions about (ii) and (iii) have not happened yet, although some countries are already presenting/pushing their preferred solutions. A PSI EPSU affiliate represented the ETUC at the April meeting to monitor the progress.

Working Group III’s discussions follow a document drafted by the UNCITRAL Secretariat that lists some problems with ISDS. The discussions have been quite technical and to an overwhelming degree focused on specific areas of concern with procedural aspects of ISDS rather than looking at the system as a whole.

UNCITRAL has gone to considerable lengths to maintain the dominance of voices who want to preserve the ISDS system and extreme corporate rights for foreign investors, while excluding the voices of the mounting opposition to ISDS across the political spectrum and around the globe.

Those who wish to save the ISDS regime are aiming to hijack the UNCITRAL reform discussion to maintain the status quo or promote half-measures around the margins that do not address ISDS’s fundamental flaws. For instance, the European Commission has chosen this UNCITRAL Working Group as the venue to push for its proposal of a “multilateral investment court” (MIC), which could institutionalize and formalize the ISDS system. PSI has previously warned its affiliates and the global labor movement about the EUs attempts to highjack the debate with its proposed investment court system - when we published The Wolf In Sheep’s Clothing.

After the first two working group meetings, it became quite clear that the European Union is by far the most advanced and organized in setting the stage to push for its “solution” to the problems and concerns identified in the first stage of the discussion.

It is thus very important to ensure that other UNCITRAL governments understand the dangers of the EU’s MIC proposal, as well as other tweaks or half-measures that might be proposed by ISDS supporters to declare that ISDS is “fixed”. Ahead of the next Working Group III meeting to be held in Vienna in October 29 through November 2, 2018, targeted advocacy by trade unions with their country’s UNCITRAL representatives could make a critical difference. PSI is encouraging affiliates to do this in co-operation with civil society where possible.

PSI affiliates could advocate that UNCITRAL member governments reject attempts to use the Working Group III process push the MIC proposal, and instead propose more fundamental changes to the current investment treaty regime, such as laying the basis for states to multilaterally agree to terminate investment treaties. Other interim measures that governments could support would be to seek multilateral instruments to withdraw governments’ consent to arbitrate, require the exhaustion of domestic remedies and to ban third-party funding of ISDS arbitration. (See Annex A: Draft Model Letter for PSI Affiliates to National Governments re: UNCITRAL)
Recommendations for Targeted Advocacy With UNCITRAL Member Governments:

The UNCITRAL governing body is comprised of 60 member states which are elected for 6 year terms. Civil society groups that have been closely following the first two meetings of the UNCITRAL Working Group III have identified four groups of countries, with respect to their positions vis-à-vis potentially supporting a mandate for a MIC and/or promoting more fundamental changes to ISDS:

*Defenders of ISDS status quo*

A relatively small group of countries, including Russia, Japan, Chile and Mexico have defended the current system very strongly. They seem to be pushing for maintaining the status quo and question whether there is any need for change. The United States acknowledged areas that need change, but has maintained that any changes should be addressed bilaterally through treaties themselves and not through any multilateral process.

*Proponents of the MIC*

The EU (which is a special observer) and EU member states have consistently raised concerns related to ISDS that would (supposedly) be solved by the MIC. The countries that have most strongly supported the EU position are Mauritius (which seems quite influential and is represented by a private ISDS lawyer Salim Moolland), Canada, and Switzerland (represented by prominent private arbitrator Gabrielle Kaufmann-Kohler). Ecuador also seemed to indicate it would potentially support a MIC.

*Countries critical of ISDS, but without a discernible position on a solution*

The largest group includes governments who made many critical comments about the current system, but who have not decided or articulated what they would support as a solution. These countries would especially benefit from targeted advocacy from PSI affiliates and other partners. They include in Asia: Indonesia, India, Pakistan, Thailand and Sri Lanka; in Africa: Morocco, Algeria, Cameroon, Uganda; in Latin America: Colombia (which seems to be in a leadership position for the continent), Venezuela and Argentina.

*Countries that reject ISDS, and seemed most likely to advocate for more fundamental reform*

The country that most clearly emerged as being critical, well prepared and interested in testing the limits of the UNCITRAL process was South Africa (which is currently an UNCITRAL observer state). Other countries that were also highly critical of ISDS were Kenya, Nigeria and El Salvador.

*Based on information gathered thus far, PSI affiliates could prioritize engagement with the following target UNCITRAL member governments ahead of the October 2018 UNCITRAL Working Group III meeting in Vienna.* PSI affiliates in the EU should continue to work with PSI/ EPSU and their national confederations to put pressure on governments to withdraw their support for the MIC and lobby for the abolition of the ISDS system.
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<tr>
<th>Country</th>
<th>Background</th>
<th>Contact information</th>
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<tbody>
<tr>
<td>Argentina</td>
<td>Faced many ISDS cases; At 1st meeting, seemed to support MIC but at 2nd meeting delegation indicated they would not support MIC</td>
<td>Silvina Gonzalez Napolitano, Ministry of Foreign Affairs, <a href="mailto:skv@mrecic.gov.ar">skv@mrecic.gov.ar</a>; <a href="mailto:silvinanapolitano@gmail.com">silvinanapolitano@gmail.com</a></td>
</tr>
<tr>
<td>Australia</td>
<td>Considers ISDS in treaties on a case by case basis (no ISDS with US); have not decided position on MIC</td>
<td>Patricia Holmes, Trade and Investment Branch, Dept of Foreign Affairs and Trade, <a href="mailto:patricia.holmes@dfat.gov.au">patricia.holmes@dfat.gov.au</a>; Lucia Pante, Legal Officer, Trade and Investment Law Branch, <a href="mailto:lucia.pante@dfat.gov.au">lucia.pante@dfat.gov.au</a></td>
</tr>
<tr>
<td>Brazil</td>
<td>No ISDS treaties in force; At 1st meeting vocal about ISDS as inherently flawed, relatively quiet at 2nd meeting; hope could become a leader against MIC and for fundamental reform</td>
<td>Mr. Evariste Ngendankengera, Second Counsellor, Permanent Mission to the UN, <a href="mailto:ngenda.evariste@yahoo.fr">ngenda.evariste@yahoo.fr</a></td>
</tr>
<tr>
<td>Burundi</td>
<td>EAC member which has new model BIT without ISDS; underresourced delegation that did not have position on MIC/process</td>
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<td>Cameroon</td>
<td>At 1st meeting raised ISDS concerns, no mention of position on MIC</td>
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<td>Colombia</td>
<td>Newly concerned about system as faced new spate of ISDS cases since 2016; 2nd meeting said not inclined to support MIC</td>
<td>Ana Maria Ordonez Puentes, International Legal Defense Director, <a href="mailto:ana.ordenez@defensajuridica.gov.co">ana.ordenez@defensajuridica.gov.co</a></td>
</tr>
<tr>
<td>Ecuador</td>
<td>Terminated BITs, historically highly critical of ISDS; government currently inclined to support MIC</td>
<td></td>
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<tr>
<td>El Salvador</td>
<td>Faced high-profile mining cases and won; 2nd meeting delegate demanded fundamental reform of the substance of treaties – not inclined to support MIC</td>
<td>Mr. Aquiles Roberto Parada Viscarra, Deputy Attorney General</td>
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<td>Honduras</td>
<td>Attended 1st meeting but not second meeting – position on MIC is unknown</td>
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<tr>
<td>India</td>
<td>Terminated BITs – new model with restricted ISDS and exhaustion of domestic remedies; not inclined to support MIC but negotiated with EU</td>
<td>Vaibhav Rundwal, Deputy Director, Investment Division, Department of Economic Affairs, Ministry of Finance, Email: <a href="mailto:vaibhav.rundwal@nic.in">vaibhav.rundwal@nic.in</a></td>
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| Indonesia    | Terminated BITs – new model that hasn’t been made public; concerned about protecting policy space from past ISDS cases; undecided about MIC | Syahda Guruh L. Samudera  
Deputy Director, Trade and Investment  
Ministry of Foreign Affairs,  
guruhsamudera@kemlu.go.id ;  
ceotradelaw@kemlu.go.id |
| Kenya        | EAC member which has new model BIT without ISDS; 2nd meeting delegation very critical of ISDS; appeared to support more fundamental reform | Njeri Mwangi Wachira,  
Head, International Law Division  
Office of the Attorney General  
njeri.wachira@ag.go.ke ;  
njerimwangi@gmail.com;  
James Ndirangu Waweru, Kenya  
Mission to the UN,  
jwaweru@kenyaun.org ;  
jimmywaweru@yahoo.co.uk |
| Lebanon      | Did not attend either meeting; position on MIC is unknown                  |                                                                                      |
| Lesotho      | Member of SADC that has a model BIT without ISDS; Did not attend either meeting; position on MIC is unknown |                                                                                      |
| Liberia      | Did not attend either meeting; position on MIC is unknown                  |                                                                                      |
| Malaysia     | Recently signed CPTPP that includes ISDS, negotiating FTA with EU so likely pushed to include MIC; position on MIC is unknown |                                                                                      |
| Namibia      | Been critical of ISDS in UNC/TAD; attended 1st meeting, position on MIC unknown |                                                                                      |
| Nigeria      | Will try to cancel or renegotiate some old BITs, interested in exhaustion of domestic remedies, undecided on MIC | Patience A. Okala, Deputy Director,  
Nigerian Investment Promotion  
Commission  
patience.okala@nipc.gov.ng |
| Pakistan     | In 1st meeting indicated the MIC could be an improvement                   | Ahmad Irfan Aslam, Head,  
International Disputes Unit  
Office of the Attorney General,  
ahmad.aslam@agfp.gov.pk |
| Panama       | Attended 1st meeting, but not 2nd; position on MIC is unknown              |                                                                                      |
| Sierra Leone | Concerned about ISDS; undecided on MIC; underresourced                    |                                                                                      |
| South Korea  | Conflicting reports of whether might support MIC; reportedly wanted to remove ISDS from Korea-US deal | Eunkyung Park, Economic Legal Affairs  
Division, Ministry of Foreign Affairs,  
ekpark16@mofa.gov.kr |
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<tr>
<th>Country</th>
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<th>Contact Information</th>
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</table>
| Sri Lanka | Critical of current system; Undecided on MIC                                 | Susantha N. Balapatabendi, Deputy Solicitor General  
s.balapatabendi@gmail.com;  
susantha@attorneygeneral.gov.lk  
&Tilani Silva, Assistant Legal  
Advisor, Foreign Affairs  
tilanie.silva@mfa.gov.lk |
| Thailand  | Critical of current system; unclear position on MIC                          | Charlie Garnjana-Goonchorn,  
International Law Development  
Division, Ministry of Foreign Affairs  
charlieg@mfa.go.th |
| Uganda    | EAC member with new model BIT without ISDS;  
unclear what position is on MIC                                                |                                                                                       |
| Venezuela | Terminated BITs; indicated opposed to MIC;  
potential to push for more fundamental reforms                                |                                                                                       |
| Zambia    | Member of SADC that has a model BIT without ISDS;  
Did not attend either meeting; position on MIC is unknown                      |                                                                                       |