

EFILA's written comments made at the UNCITRAL Working Group on ISDS reform

June 2018

1. EFILA is grateful for having been granted Observer status for attending the UNCITRAL Working Group on reforming the ISDS. EFILA is a think tank and its membership consists of various stakeholders including investors, law firms and academics.
2. EFILA attended and actively participated in the last meeting in New York.
3. These written comments summarize some of the key points, which EFILA made at the meeting. The purpose of these comments is to inform the delegations and engage with them in a more detailed and fact-based discussion.
4. From the outset, EFILA wishes to underline the importance that all three phases of the mandate should be thoroughly and extensively discussed. In particular, it is important that before moving to the next phase, all delegations have had the chance to fully reflect on all the arguments instead of being pushed towards a certain outcome pre-determined by some delegations. EFILA acknowledges that this is state-driven process. However, EFILA also stresses out the importance that Observers continue to receive the opportunity to actively engage in the discussion and share their practical expertise.
5. Generally, EFILA regrets that the debate is still dominated by misrepresentations and negative perceptions against ISDS, which are not always based on facts and the actual arbitration practice. Therefore, it continues to be of utmost importance that all delegations become familiar with the facts rather than perceptions.
6. In principle, it should be noted that the ISDS system works – for both States and investors. This is reflected by the fact that more than 3,000 BITs contain ISDS provisions and more than 150 States are parties to the ICSID Convention and the New York Convention.
7. As UNCTAD reports, the outcome of the disputes is fair, with States even winning slightly more cases than investors. Even when investors prevail on the merits, they only rarely succeed fully in their monetary claims. This also proves that arbitral tribunals are sufficiently conscious to take any justified public policy concerns into account and balance them against legitimate rights of investors.
8. In this context, it should be stressed that the large majority of arbitral awards are of high legal quality and show a high level of consistency, taking into account the specific aspects of each case and also typically referring to other published awards. As in all judicial systems, there are always some exceptions, but that does not mean that the whole system is not working.
9. Indeed, the current system of party autonomy and equality of arms ensures that both States and investors can select the most appropriate arbitrators and arbitration institutions and rules. This freedom of selection enables States and investors to broaden the pool of arbitrators by selecting more young, female and non-Western arbitrators with the required expertise.
10. Indeed, the arbitration institutions as well as the arbitration community have started more than a decade ago to address existing shortcomings – and continue to do so. For example, already in 2006 ICSID started to publish information on ICSID disputes and the awards. Also, the rules on conflict of interests are applied and adhered to by arbitrators and arbitration institutions in an increasingly systematic manner.
11. While EFILA agrees that further reforms of the ISDS system are desirable and effectively possible within the current arbitration institutions and treaties, it is important to underline the point that destroying the current ISDS system is not a solution but will have significant negative effects for States, investors and the Rule of Law generally.

12. Therefore, the discussion in the Working Group should continue to be conducted with an open mind, which means to seriously consider also gradual steps of reforms within the current arbitration institutions and rules, instead of focusing on the radical proposal for creating a permanent multilateral investment court as is actively pushed for by some delegations and observers.
13. Most importantly, any reforms should be fair and balanced by continuing to provide effective and efficient access to an independent and impartial dispute settlement system. Any new court or tribunal that is pro-State biased will not have the necessary authority in order to be accepted and used by investors.
14. Finally, it is within UNCITRAL's historical and contemporary mandate to facilitate trade and reduce trade and transactional barrier and promote wealth through trade and non-judicial settlement of disputes. In this context, investor protection is to be ensured through ISDS, to the extent possible, also in the context of the work undertaken by Working Group II.
15. In order to have a fact- and merit based debate, EFILA wishes to invite all delegations to study its extensive reports. In particular, the following reports should be of interest:
 - [EFILA response paper to the criticism against ISDS](#)
 - [EFILA TASK FORCE PAPER regarding the European Commission's proposal for the International Court System \(ICS\)](#)
 - [EFILA's submission for public consultation on MIC DEF 15-3-2017](#)
16. Reference is also made to the recently established [European Investment Law and Arbitration Review](#), which is co-edited by Prof. Loukas Mistelis and Prof. Nikos Lavranos and published under the auspices of Queen Mary University of London and EFILA. The Review is also available as an electronic version and all articles can be ordered individually.
17. EFILA remains committed to actively engage in the future work of the Working Group and stands ready to share its deep knowledge and extensive practical expertise with the delegations.
18. Any questions should be directed to Prof. Nikos Lavranos, Secretary General of EFILA, n.lavranos@efila.org
