



UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Peter M. Robinson
President & CEO

September 2, 2021

The Honorable Jose W. Fernandez
Under Secretary for Economic Growth,
Energy, and the Environment
United States Department of State
2201 C Street, NW
Washington, DC 20520

Mr. Kenneth Schagrin
Acting Assistant USTR for Services & Investment
United States Trade Representative
The Winder Building
600 17th Street, NW
Washington, DC 20508

Mr. Richard C. Visek
Acting Legal Advisor
United States Department of State
2201 C Street, NW
Washington, DC 20520

Ms. Greta Peisch
General Counsel
United States Trade Representative
The Winder Building
600 17th Street, NW
Washington, DC 20508

Dear Under Secretary Fernandez, Mr. Visek, Ms. Peisch, and Mr. Schagrin,

I write regarding ongoing negotiations on reform of Investor-State Dispute Settlement (ISDS) in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The United States Council for International Business (USCIB) has been the lead private sector observer delegation throughout these negotiations and has long been a leading voice for the U.S. private sector on international investment policy issues. In this capacity we have worked with the U.S. government delegation in the UNCITRAL negotiations, led by experts from your offices.

We have been consistently impressed with the expertise, strategy, and diplomatic skills of the U.S. negotiating team in the UNCITRAL WG III talks. The U.S. negotiators have deftly raised questions regarding the European Union's ill-conceived proposal to replace ISDS with a multilateral investment court, which the United States has opposed under successive Democratic and Republican administrations. Going forward, we urge you to instruct U.S. negotiators to vigorously object to the creation of a multilateral investment court. While there are different views regarding ISDS, we have seen almost no support for the court amongst U.S. stakeholders, including business, labor, and environmental groups.

We in the American business community believe the EU's multilateral investment court proposal is fundamentally flawed and does not provide an appropriate basis for the WG III negotiations. It would completely replace a carefully balanced arbitration system featuring appropriate and equal roles for the two parties to the dispute – the investor and the host government – with a politicized, bureaucratized permanent panel of judges. It does not address the areas of the ISDS system that most need fine-tuning – e.g., the increasing cost and duration of disputes – but rather introduces new potential issues regarding the expertise, balance, and accountability of the adjudicators. It also seems “tin-eared,” given the considerable difficulties other court-style multilateral dispute resolution systems (e.g., the WTO) are clearly encountering.

Foreign investment can promote economic growth, the efficient use of capital, employment, and development, but history shows that foreign investors face a heightened risk of discrimination and unfair treatment before national courts. For this reason, investors value ISDS as a tool that guarantees neutral, third-party dispute resolution to ensure that states play by the rules. Based on feedback from USCIB members, U.S. investors will not trust a multilateral court which will be viewed as one-sided, statist and rigged against investors.

Similarly, we would like to make you aware that UNCITRAL WG III is considering other “reforms” to ISDS that would be unfavorable to U.S. business. For example, some states have proposed that investors who own shares in a foreign company should be prohibited from seeking a remedy for damages to their investments if they do not control the company. Such an approach would leave U.S. investors entirely without a remedy in many cases, even where the law *requires* them to invest through a joint venture with local partners.

We have heard the criticisms from the new Administration regarding ISDS; while we may not be in full agreement, we believe in and support real ISDS reform which curbs commonly recognized abuses but maintains a vibrant and effective system. For USCIB and our member companies, these UNCITRAL negotiations are a very important opportunity to update and strengthen the rules and procedures for resolving disputes between international investors and host governments.

As such, we make three requests for the Biden Administration to consider:

- that the U.S. government continue to assign a high priority to the UNCITRAL WG III negotiations;
- that the U.S. government continue the practice of dialogue and cooperation with USCIB, the broader U.S. private sector, and other stakeholders; and
- that the U.S. government seek to include on the agenda for any upcoming high-level U.S.-EU meeting, a frank discussion of the EU’s multilateral investment court proposal and the UNCITRAL negotiations.

USCIB looks forward to working with you to ensure that ISDS continues to help investors obtain fair treatment but does not compromise legitimate regulation, including with respect to public health, labor rights, and the environment. My team and I are always available to discuss these important issues with Administration officials at appropriate levels. You can contact Senior Advisor, Ambassador (retired) Shaun Donnelly (sdonnelly@uscib.org), Director of Investment, Trade, and China Alice Slayton Clark (asclark@uscib.org) or me (probinson@uscib.org) on any matters regarding these important UNCITRAL negotiations.

Thank you,



CC: Mr. Ted Posner, Department of Treasury
Ms. Cara Morrow, Department of Commerce