

ClientEarth intervention at UNCITRAL WORKING III 38th session - October 2019, Vienna

Thank you very much Chair for giving the opportunity to ClientEarth to contribute positively to the discussions.

I'm addressing governments present in the room today because I'd like to draw your attention to an issue that has been overlooked so far in the discussion, and that should be taken very seriously when developing solutions to reform ISDS.

I'm referring to the urgent necessity to align the current reforms with international obligations under the UN SDGs and the Paris Agreement, and to ensure that ISDS is not used, and abused, as a tool to challenge, or frustrate government actions to advance the SDGs including, crucially, action on climate change.

All sensible people can agree that climate change is real, and that the consequences of not acting, will be devastating.

That's why the historic Paris Agreement of 2015 set a goal of keeping temperature rises "well below 2 degrees" while "pursuing efforts" to keep them below 1.5 degrees.

The consequences of not achieving these targets, would un-imaginably and dramatically alter our world.

On the timetable of last year's UN IPCC report, there are now only 11 years left to take decisive action.

We need a 45 per cent cut in global emissions to have a chance of meeting the 1.5 degrees.

If we are to have a chance of preventing levels of global warming, governments must take action: we must stop burning fossil fuels.

However, fossil fuel companies, following the advice of experienced practitioners, may want to use ISDS to delay or discourage climate change policies – or to shift stranded asset risk onto states and try to secure payouts with taxpayers' money.

Examples of companies using ISDS to prevent the urgently needed energy transition, or to simply seek compensations for their poor business decisions, can already be observed.

Needless to say, these threats and claims represent a highly dangerous precedent and risk regulatory chill of other governments' climate actions. And this is regardless of whether a government ultimately wins or loses.

The Phillip Morris case against Uruguay and Australia challenging plain packaging laws, caused countries including NZ to put their decision on hold pending the outcome of these cases.

Chair, Members and Observers of the Working Group, there is an overriding need to avoid a similar chilling effect in the narrow window for climate action described by the IPCC.

As we are discussing ISDS reforms, the clock is ticking.

We are running out of time to take the necessary action to completely transform our energy systems in order to avoid catastrophic climate change, and importantly, we cannot afford the risk that the ISDS undermines our efforts.

You now have a unique opportunity to push for a deep and systemic reform of ISDS, so that it does not harm your efforts and international commitments to advance the SDGs and achieve the Paris agreement targets.

ClientEarth has made a written submission, which is available on the UNCITRAL website, and aims at assisting the Working Group in identifying solutions that will address the regulatory chill effect of ISDS.

Our submission puts forward a series of procedural options that can help tackle the issue, including third party funding, calculation of damages, exhaustion of local remedies, and counterclaims, but it also encourages to carefully consider the option of moving away from traditional investment treaties and ISDS, and use readily available alternatives to protect your investments.

I'd like to conclude by thanking the distinguished representative of UNCTAD for her very useful presentation over lunch time, and for rightly pointing out to the necessity for governments to keep in mind the bigger picture of SDGs while pursuing their technical discussions on ISDS reforms.

Thank you Chair.