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Investor Protections: Options and Proposals for Reform

Manuel F Montes

Preparatory Session for UNCITRAL Working Group III

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Lists of Issues and Proposals

- Concerns pertaining to cost and duration
- Concerns pertaining to arbitrators and decision makers
- Concerns pertaining to consistency and correctness
- Other concerns

Concerns pertaining to cost and duration

1. Lengthy duration and high cost of arbitration process

- Proposition: Possibility for fixed duration & fixed costs

2. The need to provide States more time to respond to ISDS claims – upfront period

3. Limited internal governmental capacity to respond to ISDS cases, including capacity of domestic institutions/Outside Counsel Costs

4. The need for bifurcation of the arbitration process

-> Jurisdiction => Merits => Damages

5. Procedural safeguards for security for costs, which will help to reduce and to prevent frivolous and premature claims

Propositions:

- Not limited to insurance + contingent responsibility of investor in case of provisional/ interim measures
- Claimant always pays cost of initial proceedings into escrow account to initiate ISDS, then tribunal determines how to allocate costs proportionality after decision
- States should not have to pay similar costs to initiate counterclaims

Concerns pertaining to cost and duration -

6. Early dismissal for frivolous and bad faith claims, and premature claims

7. Impact of third-party funding and lack of rules regulating the practice

Propositions:

- Allow third-party funding for claimants or full transparency (including of agreement at least to the tribunal, or with certain redactions potentially permitted)
- In case of 3rd party funding—> automatic security of costs to be given

8. Procedural safeguards for transparency requirements, including in regard to payments to arbitrator

9. Inconsistent standard on valuation and damages calculation

Concerns pertaining to arbitrators and decision makers-

1. Lack of standards on appointment and compensation

Propositions:

- Fixed-term for arbitrators/Roster
- Standing body appoints the arbitrators, arbitrators answerable to this body
- Salaried compensation allocated from common body
- Standing board determining quality/qualifications of arbitrators

2. General code of conduct for arbitrators

- Sanctions for non-compliant arbitrators

3. Rules to ensure accountability and transparency

Propositions:

- Maximum number of cases per arbitrator, end double/triple hatting, clear rules on accountability and transparency
- Requirement for a final decision on arbitrator disqualification (E.g. even if an arbitrator resigns, need legal outcome of conflict-of-interest challenge)
- Minimum disclosure requirements (Could include mechanism for arbitrators to disclose prior conflict-of-interest challenges)

Concerns pertaining to consistency and correctness

1. Inconsistent standard on valuation and damages calculation

Propositions:

- Clear standard of damages and burden of proof for establishing damages
- Would include valuation of damages (capping)

2. **Lack of clarity regarding the process and impact of issuing joint interpretations by the States**

Propositions:

- Stress the importance of home-state involvement
- Encourage pre-arbitration joint-interpretation
- Consider mandatory joint-interpretation approaches in relation to specific arbitration

3. Parallel proceedings and claims initiated multiple fora

Propositions:

- Limiting shareholder claims and treaty shopping
- Mechanism for consolidating claims (see: Colombia-Mexico BIT)
- Possibility for state to request consolidation to apply to different investors in similar circumstances (same law applicable to similar facts)

Concerns pertaining to consistency and correctness

4. Mechanism for reviewing awards and staying enforcement

- Currently challenges are associated with the process of seeking to set aside awards, given the need for local lawyers and knowledge of the laws of the seat of arbitration. Other challenges arise in cases where the State seeks to set aside the award while at the same time the investor seeks to collect the award.

5. Application of domestic law in the adjudication process

- For example, what role for domestic courts in interpreting domestic laws when they apply to the ISDS case

6. Inconsistent format and structure of awards

Propositions:

- Minimum criteria/structure for arbitral awards for arbitrators to follow
- 1) Standing 2) Specific norms and rules of applicable law 3) Facts of the case 4) Standard of proof used to find facts 5) Causal link between measures of state and damages 6) Value of compensation

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Other concerns

1. Concerns pertaining to admissibility

2. Other procedural concerns

- Capacity building, institution-building
- Broad mandate of tribunals on types of remedies

3. On reforming ISDS

- Limited role for alternatives, such as state-to-state dispute settlement

Concerns pertaining to consistency and correctness

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Thank you

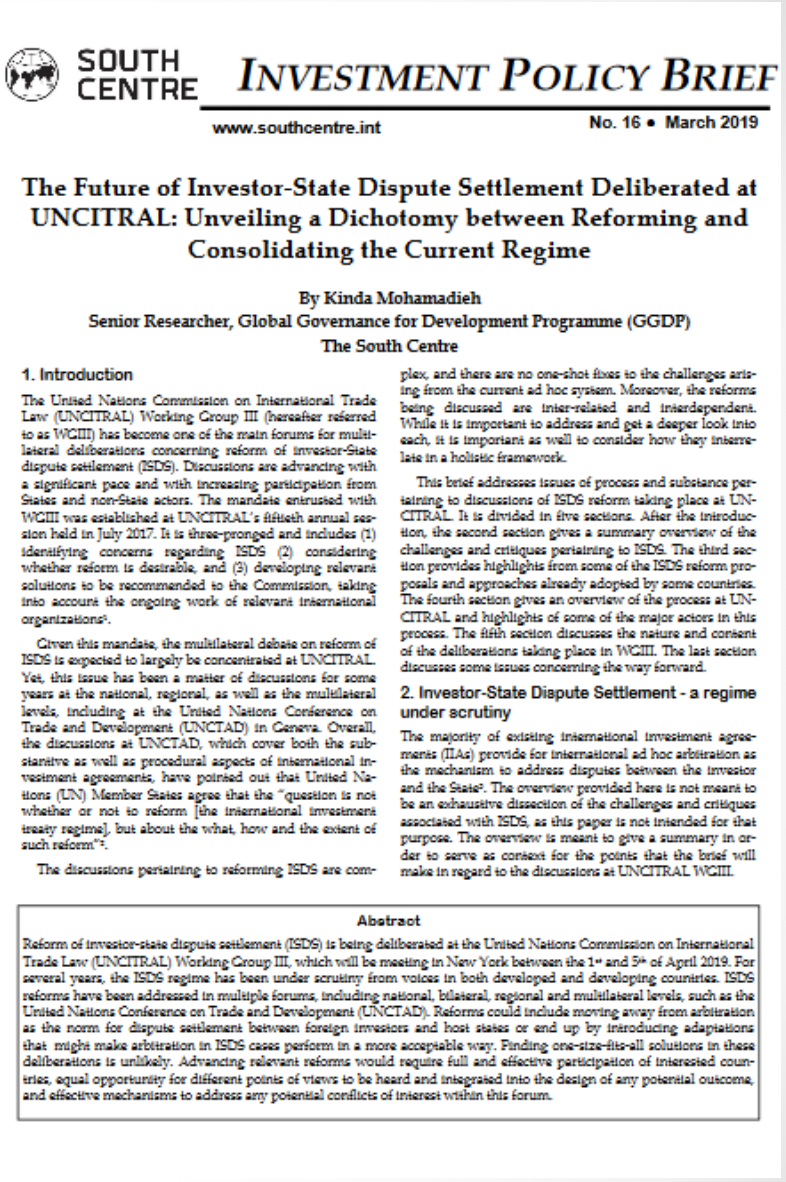
montes@southcentre.int
www.southcentre.int

Tel: +1 917 932 7188

South Centre

Main Office

Chemin du Champ d'Anier 17
C.P. 228 1211 Geneva 19
Switzerland



SOUTH CENTRE INVESTMENT POLICY BRIEF

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The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime

By Kinda Mohamadieh
Senior Researcher, Global Governance for Development Programme (GGDP)
The South Centre

1. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III (hereafter referred to as WGIII) has become one of the main forums for multilateral deliberations concerning reform of investor-State dispute settlement (ISDS). Discussions are advancing with a significant pace and with increasing participation from States and non-State actors. The mandate entrusted with WGIII was established at UNCITRAL's fiftieth annual session held in July 2017. It is three-pronged and includes (1) identifying concerns regarding ISDS (2) considering whether reform is desirable, and (3) developing relevant solutions to be recommended to the Commission, taking into account the ongoing work of relevant international organizations[1].

Given this mandate, the multilateral debate on reform of ISDS is expected to largely be concentrated at UNCITRAL. Yet, this issue has been a matter of discussions for some years at the national, regional, as well as the multilateral levels, including at the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Overall, the discussions at UNCTAD, which cover both the substantive as well as procedural aspects of international investment agreements, have pointed out that United Nations (UN) Member States agree that the "question is not whether or not to reform [the international investment treaty regime], but about the what, how and the extent of such reform"[2].

The discussions pertaining to reforming ISDS are complex, and there are no one-shot fixes to the challenges arising from the current ad hoc system. Moreover, the reforms being discussed are inter-related and interdependent. While it is important to address and get a deeper look into each, it is important as well to consider how they interrelate in a holistic framework.

This brief addresses issues of process and substance pertaining to discussions of ISDS reform taking place at UNCITRAL. It is divided in five sections. After the introduction, the second section gives a summary overview of the challenges and critiques pertaining to ISDS. The third section provides highlights from some of the ISDS reform proposals and approaches already adopted by some countries. The fourth section gives an overview of the process at UNCITRAL and highlights of some of the major actors in this process. The fifth section discusses the nature and content of the deliberations taking place in WGIII. The last section discusses some issues concerning the way forward.

2. Investor-State Dispute Settlement - a regime under scrutiny

The majority of existing international investment agreements (IIAs) provide for international ad hoc arbitration as the mechanism to address disputes between the investor and the State[3]. The overview provided here is not meant to be an exhaustive dissection of the challenges and critiques associated with ISDS, as this paper is not intended for that purpose. The overview is meant to give a summary in order to serve as context for the points that the brief will make in regard to the discussions at UNCITRAL WGIII.

Abstract

Reform of investor-state dispute settlement (ISDS) is being deliberated at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, which will be meeting in New York between the 1st and 5th of April 2019. For several years, the ISDS regime has been under scrutiny from voices in both developed and developing countries. ISDS reforms have been addressed in multiple forums, including national, bilateral, regional and multilateral levels, such as the United Nations Conference on Trade and Development (UNCTAD). Reforms could include moving away from arbitration as the norm for dispute settlement between foreign investors and host states or end up by introducing adaptations that might make arbitration in ISDS cases perform in a more acceptable way. Finding one-size-fits-all solutions in these deliberations is unlikely. Advancing relevant reforms would require full and effective participation of interested countries, equal opportunity for different points of views to be heard and integrated into the design of any potential outcome, and effective mechanisms to address any potential conflicts of interest within this forum.

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