Investor Protections: Options and Proposals for Reform

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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
Concerns pertaining to consistency and correctness

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

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1. Introduction
The United Nations Commission on International Trade Law (UNCITRAL), Working Group III (referred to as WG III) has been one of the main issues for multilateral deliberations concerning reform of investor-state dispute settlement (ISDS). Discussions are advancing with a significant pace and both increasing convergence among States and non-state actors. The mandate entrusted with WG III was established at UNCITRAL's latest annual session held in July 2017. It is three-folded and includes (i) identifying concerns regarding ISDS; (ii) considering whether reform is desirable; and (iii) developing specific solutions to be recommended to the Committee, taking note of the ongoing work at relevant international organizations.

Given this mandate, the multilateral debate on reform of ISDS is expected to largely be concerned at UNCITRAL. Yet, this issue has been a matter of discussions for some years at the national, regional, as well as the multilateral level, including at the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Overall, the discussions at UNCITRAL, which cover both the substantive as well as procedural aspects of international investment agreements, have portrayed the United Nations (UN) Member States agree that the “question is not whether or not to reform the investor-state arbitration regime, but choose the right time and the speed of such reform.”

The discussions pertaining to reforming ISDS are complex, and there are no obvious signs to the challenges arising from the current ad hoc system. Moreover, the reforms being discussed are interrelated and interdependent. While it is important to address and get a deeper look into each, it is important to consider how they interact 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 into two sections. The first section gives a summary overview of the challenges and avenues pertaining to ISDS. The second section provides highlights from some of the ISDS reform proposals and approaches already adopted by some countries. The third section gives an overview of the process at UNCITRAL and highlights of some of the major actors in this process. The final section discusses the nature and context of the challenges facing reform to ISDS. 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. The provisions provided here are not meant to be an exhaustive discussion of the challenges and issues 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 an overview of the challenges than the brief will make in respect to the discussions at UNCITRAL/WG III.

Abstract

Tensions of investor-state dispute settlement (ISDS) are 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 2nd of April 2018. For several years, the ISDS regime has been under scrutiny from both developed and developing countries. ISDS reform has been addressed at multiple levels, including national, bilateral, regional, and multilateral levels, such as the United Nations Conference on Trade and Development (UNCTAD), which could include the creation of a new mechanism or the reform of the current arbitration as well as the existing framework of dispute settlement between foreign investors and host States. This report provides an overview of the challenges and issues 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 an overview of the challenges than the text will make in this report.