Procedural reforms and investor rights & obligations

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Asymmetrical nature of ISDS a recurring concern, calls for rebalancing rights and obligations

A few recent investment treaties affirm investor responsibilities or obligations, but implications for dispute settlement not always clear

UNCITRAL WG could provide an opportunity for multilateral reform

Responsible investment issues primarily hinge on substantive rights and obligations, but also present procedural dimensions

Ensuring that responsible investment provisions are effective requires clarifying the consequences of non-compliance in dispute settlement

Jurisdiction

In some treaties / arbitrations, investments made in violation of applicable law excluded from protection

But uncertainty remains, particularly for non-compliance *after* investment made

A new instrument could explicitly condition access to ISDS on legal compliance

Damages

Most treaties govern compensation for lawful expropriations but are silent on damages for unlawful treaty breaches

Some tribunals reduced damages due to investor conduct, approach found its way in some recent treaty practice. See also Art 39 ILC Articles

Procedural reforms could clarify on damages and elaborate on implications of investor non-compliance

Counterclaims

Several respondent states filed counterclaims – but rarely succeeded in full

Procedural reforms could clarify the conditions and arrangements for states to bring counterclaims

Eg “connectedness” test

Third parties

Many investor-state disputes are rooted, at least in part, in conflicts that involve third parties

Third parties (eg workers, affected people) may be most directly impacted by investor non-compliance, could help hold investors to account

Amicus submissions not designed for this, reform could create a right for third parties to intervene

Costs

Should non-compliance with investor obligations have a bearing on the tribunal's decision on costs?

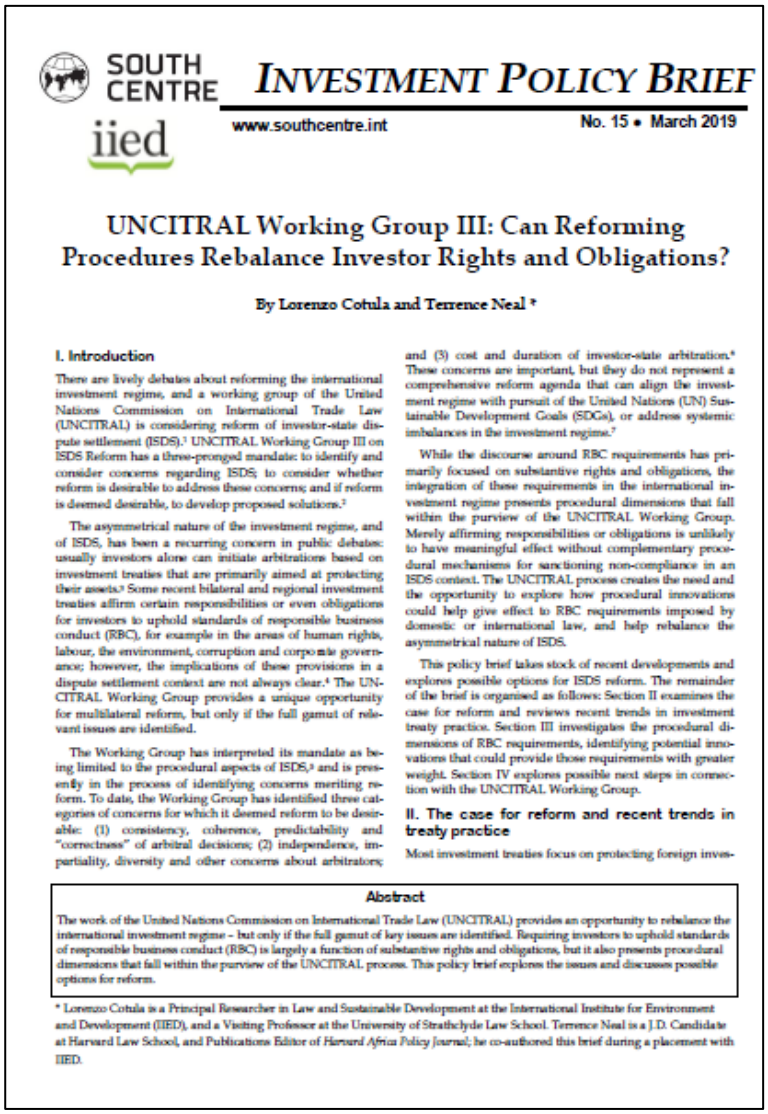
Eg shifting the respondent's costs to the claimant, in part or in full

To conclude

Balance of investor rights and obligations at the centre of public concerns about ISDS

This issue presents substantive dimensions, but also procedural aspects that fall within the WG's remit

Comprehensive reform would require considering this issue



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INVESTMENT POLICY BRIEF

www.southcentre.int

No. 15 • March 2019

iied

UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?

By Lorenzo Cotula and Terrence Neal *

I. Introduction

There are lively debates about reforming the international investment regime, and a working group of the United Nations Commission on International Trade Law (UNCITRAL) is considering reform of investor-state dispute settlement (ISDS).[1] UNCITRAL Working Group III on ISDS Reform has a three-pronged mandate: to identify and consider concerns regarding ISDS; to consider whether reform is desirable to address these concerns; and if reform is deemed desirable, to develop proposed solutions.[2]

The asymmetrical nature of the investment regime, and of ISDS, has been a recurring concern in public debates: usually investors alone can initiate arbitrations based on investment treaties that are primarily aimed at protecting their assets.[3] Some recent bilateral and regional investment treaties affirm certain responsibilities or even obligations for investors to uphold standards of responsible business conduct (RBC), for example in the areas of human rights, labour, the environment, corruption and corporate governance; however, the implications of these provisions in a dispute settlement context are not always clear.[4] The UNCITRAL Working Group provides a unique opportunity for multilateral reform, but only if the full gamut of relevant issues are identified.

The Working Group has interpreted its mandate as being limited to the procedural aspects of ISDS,[5] and is presently in the process of identifying concerns meriting reform. To date, the Working Group has identified three categories of concerns for which it deemed reform to be desirable: (1) consistency, coherence, predictability and "correctness" of arbitral decisions; (2) independence, impartiality, diversity and other concerns about arbitrators; and (3) cost and duration of investor-state arbitration.[6] These concerns are important, but they do not represent a comprehensive reform agenda that can align the investment regime with pursuit of the United Nations (UN) Sustainable Development Goals (SDGs), or address systemic imbalances in the investment regime.[7]

While the discourse around RBC requirements has primarily focused on substantive rights and obligations, the integration of these requirements in the international investment regime presents procedural dimensions that fall within the purview of the UNCITRAL Working Group. Merely affirming responsibilities or obligations is unlikely to have meaningful effect without complementary procedural mechanisms for sanctioning non-compliance in an ISDS context. The UNCITRAL process creates the need and the opportunity to explore how procedural innovations could help give effect to RBC requirements imposed by domestic or international law, and help rebalance the asymmetrical nature of ISDS.

This policy brief takes stock of recent developments and explores possible options for ISDS reform. The remainder of the brief is organised as follows: Section II examines the case for reform and reviews recent trends in investment treaty practice. Section III investigates the procedural dimensions of RBC requirements, identifying potential innovations that could provide those requirements with greater weight. Section IV explores possible next steps in connection with the UNCITRAL Working Group.

II. The case for reform and recent trends in treaty practice

Most investment treaties focus on protecting foreign inves-

Abstract

The work of the United Nations Commission on International Trade Law (UNCITRAL) provides an opportunity to rebalance the international investment regime – but only if the full gamut of key issues are identified. Requiring investors to uphold standards of responsible business conduct (RBC) is largely a function of substantive rights and obligations, but it also presents procedural dimensions that fall within the purview of the UNCITRAL process. This policy brief explores the issues and discusses possible options for reform.

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Briefing

Law

Keywords: International investment, foreign investment, international law, investment treaties, human rights, legal tools

iied Durham University

Issue date February 2019

Policy pointers

Disputes between investors and states can affect third parties, including local residents and indigenous peoples. Yet those actors have little or no voice in investor-state dispute settlement (ISDS) proceedings, which can undermine their rights.

The ongoing UNCITRAL process is an opportunity for states to reform ISDS. But meaningful change requires addressing fundamental asymmetries in the system, including how to strengthen third-party rights.

Possible reform options include requiring that investors exhaust domestic remedies before accessing ISDS, so third parties can intervene in national proceedings, and creating a legal right for directly affected third parties to intervene in ISDS, to protect their rights and enforce relevant investor obligations.

The immediate challenge is for the relevant UNCITRAL working group to inscribe the issue in its reform agenda – understanding that any solutions will require careful thought and consideration.

Reforming investor-state dispute settlement: what about third-party rights?

The international investment regime is facing sustained calls for reform. Most debate centres on disputes between investors and states. But foreign investment projects can also affect third parties — including local residents and indigenous peoples. Existing arrangements for third parties to participate in investor-state dispute settlement (ISDS) are not designed to protect people whose rights and interests are directly at stake. This can undermine their rights and the ability of tribunals to consider all relevant facts and laws. A working group of the United Nations Commission on International Trade Law (UNCITRAL) is now considering reforming ISDS. Meaningful reform requires addressing fundamental asymmetries in the international investment regime and exploring how to strengthen the procedural rights of third parties. This policy brief discusses the issues and outlines possible ways forward.

The case for reform

Foreign investors use broad substantive protections granted by international investment treaties to challenge wide-ranging measures host states may have taken to advance public policy goals. Concerns about the balance between corporate and public interests have been magnified by the fact that arbitral tribunals — usually comprised of three private individuals — are called to review the conduct of governments, legislatures or domestic courts based on treaty standards that leave significant scope for discretion.

One problem is that the international investment regime is asymmetrical. Usually investors alone can initiate investor-state arbitrations under investment treaties primarily aimed at protecting their assets. A few respondent states have brought counterclaims against the investors that initiated the proceedings, asking the tribunal to examine whether alleged investor misconduct caused social or environmental harm. But counterclaims rarely succeed and raise questions about how payments can be used to provide redress to those most directly affected.

Similarly, a few recent investment treaties (or treaty templates) require investors to comply with international instruments — for instance on labour, environmental protection or human rights.[1] States could invoke such clauses in investor-state dispute settlement (ISDS). But treaty practice is yet to consolidate. And the clauses are less likely to make a difference if the people affected by their violation have no means to enforce them.

As investor-state claims increase, public scrutiny has intensified — leading commentators to talk of

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