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 (e.g., 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.
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
UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?

By Lorenzo Cotula and Terence 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) under UNCITRAL. Working Group III on ISDS has a three-pronged mandate to identify and consider concerns regarding ISDS, to consider whether reform is desirable to address these concerns, and whether reform is deemed desirable, to develop proposed solutions.

The asymmetrical nature of the investment regime, and of ISDS, has been a recurring concern in public debate: investors usually allow their businesses to be arbitrated based on investment treaties that are primarily aimed at protecting their assets. Some recent bilateral and regional investment treaties offer investors rights or even obligations for investors to uphold standards of responsible business conduct (RBC). For example in the areas of human rights, labor, the environment, corporate social responsibility, or even the prohibition of certain activities that are in dispute settlement contexts are not always clear. The UNCITRAL Working Group provides a unique opportunity for multilateral reform, but only if the full gamut of relevant issues is identified.

The Working Group has interpreted its mandate as being limited to the procedural aspects of ISDS and is expected to consider the possibility of identifying concerns meeting a four-fold test: (1) consistency; (2) substance; (3) “correctness” of arbitral decisions; (4) independence, impartiality, diversity and other issues about arbitral procedures.

II. The case for reform and recent trends in investor-state practice

Investment treaties involve protecting foreign investors and their investments, and (2) cost and duration of investor-state arbitration. These concerns are important, but they do not represent a comprehensive reform agenda that can align the investment regime with mainstream principles of sustainable development (SDGs) or address systemic imbalance in the investment regime.

While the discussion around ISDS 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 effects without complementary procedural mechanisms for sanctioning non-compliance (or ISDS enforcement). The UNCITRAL process has been criticized for not providing the opportunity to explore how procedural innovations could help ensure ISDS requirements imposed by domestic and international law, and help rebalance the asymmetrical nature of ISDS.

This policy brief takes much of recent development and explores possible options for ISDS reform. The remainder of the brief is organized as follows: Section I examines the case for reform and recent trends in investment treaty practice; Section II investigates the procedural dimensions of ISDS requirements, identifying potential reforms that could provide these requirements, as well as Section IV explores possible steps to connect with the UNCITRAL Working Group. The case for reform and recent trends in investor-state practice.

III. The case for reform

Foreign investors have used ISDS to pursue claims against the government of a host state. Provisions granting ISDS have been argued as a viable means of resolving disputes that arise from the implementation of ISDS. The case for reform is based on the need to ensure that ISDS requirements can be aligned with the principles of sustainable development, as well as the need to rebalance the asymmetrical nature of ISDS. The case for reform is based on the need to ensure that ISDS requirements can be aligned with the principles of sustainable development, as well as the need to rebalance the asymmetrical nature of ISDS.

IV. Case study on reforms implemented

Reforms implemented have focused on enhancing investor-state dispute settlement (ISDS) systems, which have led to an increased awareness of the need for reform. Results suggest that reforms can be effective and that continued efforts are needed. The case for reform is based on the need to ensure that ISDS requirements can be aligned with the principles of sustainable development, as well as the need to rebalance the asymmetrical nature of ISDS.

V. Conclusion

The case for reform is based on the need to ensure that ISDS requirements can be aligned with the principles of sustainable development, as well as the need to rebalance the asymmetrical nature of ISDS. The case for reform is based on the need to ensure that ISDS requirements can be aligned with the principles of sustainable development, as well as the need to rebalance the asymmetrical nature of ISDS.

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