ISDS Reform and Advancing All "Generations" of Human Rights

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Reforms Are Afoot

Calls for investor-State dispute settlement ("ISDS") reform have catalyzed efforts to evolve the regime. Concurrently, the ISDS system continues to wrestle with tensions between an investment regime primarily oriented towards protecting investor rights, and the human rights normative architecture for protection of individual rights and associated State obligations for protection of such rights. ISDS reform efforts have specifically endeavored to address procedural barriers that in practical terms have prevented assuaging persistent tensions. Such efforts further present an opportune moment to address so-called first, second, and third "generations" of human rights *in toto*. States can likewise support such efforts with adoption of investment agreements and policies that further both the procedural and substantive dimensions of human rights across all generations.

Three "Generations" of Human Rights

Human rights are often conceptualised as falling into three interdependent "generations of rights":

- First-generation rights relate to civil and political liberties (e.g., right to a fair trial or freedom of speech)
- Second-generation rights relate to social, economic, and cultural rights (e.g., right to housing or right to education)
- Third-generation rights, or 'rights of solidarity', relate to collective rights (e.g., right to a healthy environment)

The ISDS regime has tended to recognize certain civil and political rights including, *inter alia*, the rights to property, access justice, and due process. However, these rights are often made available only to a very narrow set of entities (i.e., foreign investors), without also focusing on second- and third-generation human rights (either of those investors, or other stakeholders). For ISDS, the challenge becomes balancing which rights apply to which entity (i.e., investor or State), as well as acknowledging that ISDS *qua* system impacts all generations of rights.

Ongoing ISDS Reform Efforts

There have been three notable ISDS reform efforts:

- Discussions at the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) (the "Working Group III") (see recent blog coverage here)
- The European proposal of a Multilateral Investment Court (the "MIC") (see recent blog coverage here)
- The current Proposal for Amendment to the ICSID Rules (the "Proposed Amendment to ICSID Rules") (see recent blog coverage here)

These institutional reforms focus largely on procedural rights including, *inter alia*, fostering transparency, reducing arbitration costs, and encouraging *amici* participation. Therefore, they primarily focus on certain critical civil and political rights (e.g., public and community participation, rule of law) over second- and third-generation rights (e.g., right to water, right to a healthy environment). Altogether, they seek to address *how* the dispute itself should be resolved, rather than directly addressing substantive human rights concerns, perhaps because they can be negotiated separately between States.

Working Group III

At the 48th session of the UNCITRAL, the Commission took note of "concerns" with the current ISDS model, as well as proposed reforms. While the proposals do not engage with substantive human rights issues, they do envision a greater role for certain human rights considerations (e.g., right to trial, right to a due process, access to justice). However, others that have often featured in investment disputes are not mentioned (e.g., the rights to health and water).

The Multilateral Investment Court

The EU has proposed the creation of a permanent multilateral investment court in lieu of the current ISDS system. In principle, reforms on transparency and third-party participation provide increased opportunity to raise human rights considerations relating to access to justice and enhanced public participation. Limiting frivolous claims and providing stronger rules on security reduces the financial burden placed on public funds and the prospect of regulatory chill.

Proposed Amendment to the ICSID Rules

In February 2020, the ICSID Secretariat published its fourth working paper on proposals for rule amendments. These procedurally-driven proposals largely impact first-generation human rights (e.g., access to justice, due process) and remain silent on second- or third-generation rights. For example, they aim to increase transparency, even admitting observers to hearings, as well as allowing ICSID to publish hearing recordings and hearing transcripts.

The Three Proposals and Human Rights: The Whole Is Greater Than the Sum of Its Parts

Although we recognize that the reform process does not explicitly seek to address second- and third-generation rights, we weigh the proposals against several interrelated human rights considerations.

Reconciling Investment Treaties with the Sustainable Development Goals ("SDGs")

Critics argue that investment treaties often impose significant costs that negatively affect the sustainable development objectives of States. The SDGs focus largely on second-generation rights, such as the right to food or a healthy environment, while all three ISDS reform proposals focus on procedural reforms and, therefore, are primarily oriented towards certain civil and political rights. However, all three proposals conform with Goal 16 of the SDGs, which seeks to promote the rule of law through, *inter alia*, access to justice and transparency. Each is a focal point of the reforms envisaged by Working Group III, the MIC and Proposed Amendment to the ICSID Rules. Goal 16 supports the broader goal of a consistent legal system, which procedurally will help ensure the success of human rights claims. The reform process, therefore, helps promote a narrow and specific SDG (i.e., Goal 16), but is silent on and indirectly may hamper other SDGs.

Preventing Regulatory Chill Due to Threat of Investment Claims

A common criticism of ISDS is that it creates an investor-friendly environment that can result in regulatory chill, due to the threat of investment claims. Given the procedural focus of all three proposals, they do not directly address the substantive human rights dimension of regulatory chill. However, they clearly seek to streamline the process to remove cases that are not meritorious on an expedited basis (thereby reducing costs) and/or provide a capacity to seek security for costs. For example, Working Group III in its 39th session aimed to address frivolous claims and reduce the possibility of repeatedly filing cases. The MIC proposal similarly includes provisions against frivolous claims (Article 17), as well as provisions providing for security for costs (Article 21). The Proposed Amendment to the ICSID Rules allows parties to object to claims that are manifestly without legal merit (Rule 51). Moreover, the Tribunal may determine costs based on several factors (Rule 63), including party conduct, which would in principle allow for greater costs to be imposed on obviously frivolous claims.

Permitting Counterclaims to Turn the Tables

Counterclaims offer another avenue for holding investors accountable for alleged human rights violations. The Working Group III underscored that its efforts would not foreclose the possibility of States bringing claims against investors, assuming an appropriate legal basis, and aimed to increase the admissibility of counterclaims, thereby improving the first-generation right to fair trial. It also discussed the possibility of increasing investor obligations, including regarding human rights, the environment, and corporate social responsibility, marking a notable diversion into second-generation rights for reform proposals largely focused on certain first-generation rights.

The MIC proposal has not explicitly considered counterclaims, but it was noted that there was the possibility of the MIC being able to hear counterclaims. The MIC does not envision increasing investor obligations, leaving that to the investment treaties to determine. However, the MIC would theoretically increase consistency on admissibility of counterclaims because of its permanent nature.

The Proposed Amendment to the ICSID Rules allows for counterclaims—termed "ancillary claim"— arising directly out of the subject-matter of the dispute, provided that they are within the scope of party consent and Centre jurisdiction. The amended section now creates an implied consent for counterclaims, requiring explicit party agreement against admissibility. In effect, this counters the prior system, which rejected counterclaims that lacked investor consent, and increases the likelihood of raising human rights considerations.

Increasing Third Party Participation

Calls for ISDS reform frequently raise the issue of third-party participation, given that the rights of third parties are often affected by international investment projects, without providing them the avenue of ISDS for relief. While some tribunals have accepted third party submissions (e.g., *amicus* briefs), this is subject to tribunal discretion and has not been universal. Moreover, given the confidentiality of ISDS, the third parties who are affected often are unaware of the investment disputes that directly impact their rights.

The Working Group III briefly considered allowing non-party submissions in relation

to the appellate process, but did not discuss it substantively. The MIC proposal provides, in Article 23, for third parties to participate, allowing "any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party." The right to intervene is without prejudice to *amicus* briefs, and extends to the Appeal Tribunal. The Proposed Amendment to the ICSID Rules includes measures taken to allow for greater public participation (Rules 62 and 63) to increase publication of awards and decisions, and observe (Rule 65). However, these rules require party consent and, for Rule 65 in particular, are at the discretion of the tribunal. While such efforts are procedural in nature, increasing third party participation can help raise second- and third-generation rights in disputes.

Comparing the Proposals and the Future for Human Rights Considerations

In summary, the proposals tend to be procedural in nature and, therefore, they promote certain first-generation human rights. However, as seen in the table below, there is a nascent support for the alignment with SDGs, which may touch upon second- and third-generation human rights, although the references are often ambiguous or aspirational.

Reform Agenda	Alignment with SDGs	Transparency	Regulatory Chill	Third party participation
Working Group III	Indirectly addressed in a fairly limited manner	Directly addressed	Outside scope	Not substantively addressed
MIC	Indirectly addressed in a fairly limited manner	Directly addressed	Not substantively addressed	Directly addressed

Reform Agenda	Alignment with SDGs	Transparency	Regulatory Chill	Third party participation
ICSID Amendment	Indirectly addressed in a fairly limited manner	Directly addressed	Not addressed	Directly addressed

Looking ahead, the future for second- and third-generation rights in ISDS reform efforts remains uncertain. The procedurally-driven reforms provide a sound foundation for subsequent development of substantive rights beyond the civil and political rights that have historically predominated ISDS. Yet without attention afforded to second- and third-generation rights in reform efforts, resultant pressure is placed on other avenues for raising such considerations including, *inter alia*, modification of investment treaties. States play a critical role in this process and can support alignment between procedurally-driven reform efforts and substantive provisions in investment agreements and policies. If the ISDS system is to evolve to better recognize human rights considerations, then reform efforts must provide for a foundation that envisions all generation of rights.