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The Investor-State Dispute Settlement Reform Process: Design, Dilemmas and Discontents

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ABSTRACT

This Special Issue takes the pulse of the UN Commission on International Trade Law process on reforming investor-state dispute settlement (ISDS) at its midway point. It features contributions by members of the Academic Forum on ISDS, engaging with various topics on the negotiating table, as well as some that are off the table or hovering in-between. Together, these articles seek to address questions of design, dilemmas and discontent – especially how states negotiate the values and tradeoffs of reform, and engage (or not) with critics of the process. They do so from the perspectives of law, social science and public policy and they employ a range of methods, including computational approaches.

I. INTRODUCTION

The investment arbitration reform process at the UN Commission on International Trade Law (UNCITRAL) has moved into a new stage. States are working in the weeds on concrete reform proposals across a wide range of issues, from ethical rules for adjudicators, to the regulation of third-party funding, to the creation of a permanent appellate mechanism.[1] This is a marked shift from previous phases of the negotiation where states identified the core issues of concern with investor-state dispute settlement (ISDS) (2017–2018)[2] and explored the

[1] For an overview, see UNCITRAL, *Initial Drafts on Reform Options*, <https://uncitral.un.org/en/draftworkingpapers> accessed 28 February 2023.

[2] These were: legal costs and duration of proceedings, decisional consistency and correctness, and arbitral diversity, independence and impartiality. UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' UN Doc No A/CN.9/WG.III/ WP.149 (5 September 2018). Moreover, several other issues have emerged in the process such as third-party funding, prevention of investment disputes and calculation of damages: UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019)' UN Doc No A/CN.9/970 (9 April 2019), paras 26–40. To be sure, this initiative is not the first attempt. Since 2004, there have been attempts at

nature of the problems and possible solutions (2019–2021).[3] The focus is now on narrowing reform options, developing legal text, and working to achieve political consensus. In January 2023, UNCITRAL Working Group III (WG III) agreed to a code of conduct for judges appointed to a future standing appellate mechanism and/or multilateral investment court, and is on the cusp of completing work on a similar code for arbitrators.[4] These are the first 'early harvests' in a long institutional process.[5] The design phase continues and with a sense of urgency. With a self-imposed deadline of 2026, states are racing to finalize anywhere between six and 12 new legal instruments that would form part of a multilateral convention on procedural reform.[6]

This Special Issue takes the pulse of the UNCITRAL reform process at this midway point. It features contributions by members of the Academic Forum on ISDS, engaging with various topics on the negotiating table, as well as some that are off the table or hovering in-between. Together, these articles seek to address questions of design, dilemmas and discontent. They do so from the perspectives of law, social science and public policy and they employ a range of methods, including computational approaches.

Design questions concern how reforms target the distinct issues of concern on WG III's agenda. Often the top-line goals are simple and agreeable enough. For example, a proposed Advisory Centre would seek to address concerns over costs, equality of arms and correctness in decision-making by providing more inter-party equity in litigation.[7] And the proposed appellate mechanism is intended to contribute to improving the consistency of interpretive outcomes and to remove perverse incentives that can arise with party-appointed arbitrators.[8] But the granular details are what matter for the effectiveness and legitimacy of such reforms, and the 'how' can be the hardest part. Clean answers are hard to come by, and, unsurprisingly, states have differed quite dramatically on the preferred scope of the various reform projects on the table at WG III.[9] Points of divergence in the room have included, for instance, whether smaller investors and middle-income countries should have access to the Advisory Centre, and what should be the appropriate breadth of jurisdiction for an appellate mechanism or the ideal weight of its precedents.

Part of the problem is that making choices among institutional forms inevitably involves trade-offs and nothing is cost-free.[10] Hence, a major focus of the discussion in WG III, and of this Special Issue, is the *dilemmas* posed by institutional reform. For instance, a shift from party-appointed arbitration to a standing court with state-appointed judges would likely yield greater consistency, but at the perceived cost of increasing the duration of proceedings.[11]

bilateral, plurilateral and multilateral reform. Success has been mixed although the new reform process on investment facilitation in the context of the WTO has gathered steam.

[3] J Arato, 'ISDS Reform: Working Group III Gets Down to Brass Tacks' (*International Economic Law & Policy Blog*, 21 October 2019). For a history of the process, see M Langford and others, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction' (2020) 21(2–3) Journal of World Investment & Trade 167.

[4] Annotated Provisional Agenda, UNCITRAL WG III 45th Sess., 27–31 March 2023, A/CN.9/WG.III/WP.225, para 10.

[5] Submission from the Government of Costa Rica, Possible reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.178 (31 July 2019) 4 (framing the code of conduct as a potential 'early harvest').

[6] A Roberts and T St John, 'UNCITRAL and ISDS Reform: What to Expect When You're Expecting' (*EJIL: Talk!*, 5 October 2022).

[7] KP Sauvant, 'An Advisory Centre on International Investment Law: Key Features' (2021) 17 University of St Thomas Law Journal 354; Note by the UNCITRAL Secretariat, 'Possible reform of investor-State dispute settlement (ISDS): Advisory Centre', UN Doc A/CN.9/WG.III/WP.212 (3 December 2021).

[8] J Arato, C Brown and F Ortino, 'Lack of Consistency and Coherence in the Interpretation of Legal Issues' (2020) 21 (2–3) Journal of World Investment & Trade 336.

[9] A Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112(3) American Journal of International Law 410.

[10] S Puig and G Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112(3) American Journal of International Law 361, 379.

[11] See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (Vienna, 20–24 January 2020)', UN Doc No A/CN.9/1004/Add.1 (28 January 2020), paras 17–22. Note that some states considered that the dilemma here was more perceived than real. '[V]iews were expressed that an appellate mechanism would actually lead to a decrease in costs and duration of ISDS in the long run as certainty and predictability were

Similarly, a shift towards a judicial model might mitigate rent-seeking incentives inherent in party appointment at the cost of depriving disputing parties of direct voice in the selection of adjudicators—a matter of considerable importance to both investors and certain states.[12] States vary dramatically in how they would resolve these dilemmas, as they differ in how they assess the effects of each option and how they weigh the competing values, including as ends in themselves or instrumentally (eg as a means towards incentivizing cross-border investment).[13] The identification and negotiation of such dilemmas have become central in the UNCITRAL WG III discussion. All participants, including states, the UNCITRAL Secretariat and observer delegations have come to engage frequently in such comparative institutional analysis in both oral and written submissions.[14] Indeed, two of the papers in this Special Issue arose out of a formal request by states for the Academic Forum to identify and explore empirically the benefits and costs of different methods for selecting and appointing adjudicators. Happily, it has been a hallmark of the WG III process that these discussions of trade-offs have been largely constructive; by and large, a spirit of cooperation pervades the room.[15]

Finally, however, there are the *discontents*. Like any public policy process, there are winners and losers at every juncture, leaving some parties disappointed with particular decisions (or in some cases indecision). But two groups have proven more existentially sceptical of the reform endeavour. One comprises defenders of the status quo, who have questioned the need to reform ISDS in any serious way.[16] This view is especially represented by prominent members of the investment law bar, as well as some business associations and a handful of states.[17] They assert that concerns with ISDS are exaggerated or overblown, and that the regime evolves to address criticism, attracts more support than is acknowledged, protects genuinely vulnerable investors, promotes investment and the rule of law, and ensures arbitrators have the requisite commercial and contextual competence.[18]

On the other side, some commentators criticize the reform process as underambitious. WG III's mandate is limited to ISDS procedure, and largely excludes reforming the substantive rules in investment treaties like the 'fair and equitable treatment' standard or the scope

increased, and first level decision makers became more disciplined and rigorous. It was pointed out that that effect would be even greater with a permanent appellate mechanism . . .' or in a two-tiered standing court system. *Ibid*., para 23.

[12] See UNCITRAL, ibid paras 103–104. The report captures the split in states' priorities in confronting this dilemma, expressing how supporters of state-appointed judges 'said that party appointment was the main reason leading to concerns about the lack or apparent lack of independence and impartiality of decision makers in ISDS' (para. 104) while supporters of party appointment 'said that such a mechanism whereby disputing parties had a say in the constitution of the tribunal brought confidence in the current ISDS system, particularly to the investors but also to States regarding their accountability to their policy stakeholders.' (para 103).

[13] See further J Arato, 'Two Moralities of Consistency' in S Schill and A Reinisch (eds), *Investment Protection Standards and the Rule of Law* (OUP 2023) 235.

[14] WG III cannot be accused of focusing doggedly on just one design option, or of falling into the trap identified by Puig and Shaffer of 'focus[ing] on the defects of a single institution while failing to apply the same rigor to its alternatives.' Puig and Shaffer (n 10) 379.

[15] For instance, the United States has engaged constructively in efforts to design permanent judicial bodies despite its clear and articulated opposition to their creation. Indeed, the striking moments in the WG III are when observers (eg arbitrators) or specific states (eg Russia) have departed from this practice and articulated comprehensive doctrines, eg equating the court reform proposal with totalitarianism: see M Langford and A Roberts, 'UNCITRAL and ISDS Reform: Hastening Slowly', (*EJIL: Talk!*, 29 April 2019); A Roberts and T St John, 'The Originality of Outsiders: Innovation in the Investment Treaty System' (forthcoming 2023) European Journal of International Law.

[16] See, eg C Brower, 'ISDS at a Crossroads' (2018) 112 Proceedings of the American Society of International Law Annual Meeting 191.

[17] Roberts (n 9).

[18] For example, EFILA concludes that, 'The bottom line of this analysis is that most of the criticisms are neither supported by the facts nor by the treaty practice and case law. The fact is that the system has been functioning satisfactorily and that it generally provides for adequate resolution of investment disputes.' European Federation for Investment Law and Arbitration (EFILA), *A response to the criticism against ISDS*, 17 May 2015, 42. See also James Crawford, 'The Ideal Arbitrator: Does One Size Fit All?' (2018) 32 (5) American University International Law Review 1; and J Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of International and Comparative Law* 77.

of most-favoured nation treatment.[19] This limited mandate has attracted critique from certain states, civil society observers and some academics.[20] They argue that it unnecessarily overrides the wishes of some states,[21] presumes incorrectly that the core concerns cannot be addressed without accompanying substantive reform,[22] and, in any case, the distinction between substance and procedure in ISDS is frequently illusory.[23] South Africa has stated that the 'Working Group would not be fully discharging its mandate if discussions on the substantive reforms were excluded.'[24] These advocates argue that the substance of the regime is where the real battle lies[25]—a fact with increasingly inescapable salience as states confront increasing challenges to their regulatory autonomy on sensitive subjects in high-profile cases.[26] To be sure, many of these critics welcome the attempt to address perceived procedural problems with the regime.[27] But for these critics, such reforms do not strike at the core of the problem; and, worse, a blinkered focus on procedure may take the wind out of the sails of a broader substantive realignment.[28]

At least within the Working Group, this mandate dispute has been resolved pragmatically and with a degree of strategic ambiguity in wording. While some states defend the strict procedural interpretation on feasibility grounds, the Working Group chair and others acknowledge that the mandate is flexible and some space can be given to discussion of substantive reforms.[29] Some proposed procedural reforms will have substantive implications[30] and the envisaged legal architecture for reform could, over time, facilitate changes to the substantive provisions of investment treaties. It is this compromise that provides the departure point for several articles in this Special Issue. They address issues that have received only marginal attention in the WG III process (damages, mediation, and investor accountability), although there is a formal commitment to consider reforms in these areas.[31]

[19] This is extrapolated from the mandate which refers to 'regarding ISDS'. See UNCITRAL (n 2).

[20] G Dimitropoulos, 'The Conditions for Reform: A Typology of 'Backlash' and Lessons for Reform in International Investment Law and Arbitration' (2020) 19 Law and Practice of International Courts 416.

[21] eg see the exchange of states in *Report of the United Nations Commission on International Trade Law*, Fiftieth session, 3–21 July 2017 (UN 2017) para 257: 'It was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements.' See discussion of legal interpretation of the mandate in G Van Harten, J Kelsey and D Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter' (2019) Osgoode Legal Studies Research Paper 2.

[22] See A Roberts and T St John, 'UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting' (*EJIL: Talk!*, 20 September 2019).

[23] A Arcuri and F Violi, 'Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, So that Everything Stays the Same?' (2020) Diritti umani e diritto internazionale. Indeed, substantive provisions often shape the asymmetric contours of the procedure (eg only investors not affected communities have rights) while the procedure has a transformative effect on substantive provisions (eg expanding or shrinking investor protections).

[24] Submission from South Africa to the United Nations, UN doc A/CN.9/WG.III/WP.176 (17 July 2019) para 20.

[25] 'The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors', *Economist* (11 October 2014).

[26] See J Paine and E Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 *Journal of International Economic Law* jgad011; K Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606; G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); and D Schneiderman, *Constitutionalizing Economic Globalization* (CUP 2008).

[27] Such as pro-investor bias, undue secrecy, conflicting jurisprudence and high levels of compensation, and the burden for developing countries in legal costs and high loss rates. Among the first scholarly critiques was SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 107. The idea of a legitimacy crisis was well-established by 2010 with the publication of M Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010). For current critiques, see, eg G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211, 251; Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' (2011) 2 Journal of International Dispute Settlement 97; G Kahale, 'Is Investor-State Arbitration Broken?' 7 (2012) TDM <www.transnational-dispute> accessed 31 October 2019.

[28] See J Benton Heath, 'The Anti-Reformist Stance in Investment Law' (forthcoming 2023, working paper on file with authors); see also W Alschner, *Investment Arbitration and State Driven Reform: New Treaties, Old Outcomes* (OUP 2022) 270–8.

[29] See discussion in Langford and Roberts.

[30] eg L Johnson and others, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (CCSI Policy Paper, April 2018).

[31] UNCITRAL (n 2) paras 26–40.

II. OVERVIEW OF THE ARTICLES

The Special Issue brings together experts with direct experience working on the UNCITRAL reform process, in some cases through serving as Observer Delegates to WG III itself and in others through working within the Academic Forum on ISDS and other activities. Each of these papers began as or stemmed from Academic Forum working papers—some generated *sua sponte* by interested authors, and others initiated in response to requests by the UNCITRAL Secretariat for research on particular questions (in particular, the two papers on the selection of adjudicators). Several of the contributions are authored by groups of colleagues from different disciplines and research streams. They provide a novel and cross-cutting analysis of some of the most important topics in focus for the Working Group, covering ethical, procedural, substantive, and institutional issues that span the entirety of the arbitration process. Together, this collection also provides a snapshot of the reform process in the early design phase, from roughly 2020 to 2022.

The Issue begins with a contribution by Olof Larsson, Theresa Squatrito, Øyvind Stiansen and Taylor St John, who study the selection and appointment of adjudicators in two dozen international courts and tribunals. In *Selection and Appointment in International Adjudication: Insights from Political Science*, the authors scrutinize the political science and empirical legal literatures that focus on dilemmas such as balancing judicial independence and accountability, and weighing the promotion of diversity against the need for high qualifications on the bench. The authors survey different institutional design features related to appointment procedures: representation, reappointment, screening procedures and procedures for removing judges. They study options for reform that would address concerns about representation such as tailored voting rules, and geographic or gender quotas.

Malcolm Langford, Daniel Behn and Maria Chiara Malaguti analyse how selection and appointment dilemmas might operate in different ISDS reform models and which of them might address the central legitimacy concerns advanced by critics of the system. In *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, they first set out seven reform models, which range from unreformed ISDS, to narrower reform options (such as rosters) to options entailing more systematic overhaul (such as a standing tribunal and appellate body) and exit (no ISDS). They construct a 'quadrilemma' as a heuristic, to recognize and frame the key design trade-offs among the values of judicial independence, judicial accountability, judicial diversity, and procedural fairness. Applying this heuristic to a set of selection and appointment reform models, the authors find no ideal solution. While some approaches to appointment are more likely to satisfy states' concerns, the authors argue that even this finding should be treated conditionally and with some caution. The article concludes by studying the advantages and disadvantages of individual reform choices with an eye to the broader system.

Next, a timely article by Chiara Giorgetti concerns the draft code of conduct under consideration by WG III. In *The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: A Low-Hanging Fruit in the ISDS Reform Process*, she reviews the key features of the proposed code, which has been since bifurcated into separate codes for judges and arbitrators. Giorgetti also examines the process of negotiating the code(s), which she suggests has doubled as an experiment in developing negotiation processes at WG III more generally. After outlining the history and content of the code, Giorgetti analyses three sensitive issues that have informed the debates around it: repeat appointments, issue conflict, and double hatting. These topics remain under consideration in the negotiations of the draft code for party-appointed arbitrators, and Giorgetti offers thoughtful policy recommendations on how to address each. She also emphasizes the importance of ethical matters left out from current

discussions on the code of conduct, such as those relating to implementation and enforcement.

The Special Issue then moves on to several matters that have only lately (and tentatively) made their way onto the agenda and into a formal UNCITRAL Secretariat working paper.[32] The first is mediation as an alternative or complement to arbitration. This proposal gained increased traction in recent years, and could be included in WG III's focus on prevention of disputes. In *Mediation in Future Investor-State Dispute Settlement*, Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis and José Maria Reis consider how mediation and dispute prevention have been used in practice, using supervised machine learning techniques. The authors study closely the developments that led to the rise of mediation as an appropriate and important option for dispute settlement in the field. They likewise critically examine where civil society voices have raised alarm about the further risks to the public interest posed by mediation of investor-state disputes, such as reduced transparency. The authors underscore a set of lessons from the few known mediations and articulate a list of common obstacles preventing the wider use of mediation. Last, they develop a map for future work on mediation in ISDS reform.

The next article concerns damages, an issue championed by several developing states in the negotiations. In *Damages and ISDS Reform Between Procedure and Substance*, Jonathan Bonnitcha, Malcolm Langford, José M. Álvarez-Zárate and Daniel Behn begin by analysing statistically the general trends in damages awards, noting the upwards trend in compensation (after adjusting for inflation). This analysis is followed by a review of the predominant ways that damages are calculated within those awards, with the controversial discounted cash flow method becoming increasingly predominant. Against this backdrop, the authors ask whether the main procedural concerns identified by WG III might be present in the context of calculating damages—focusing on consistency, correctness, legal costs, and independence and impartiality. The authors find that these concerns arise here, identifying significant variation in approaches adopted by ISDS tribunals, the costs of this variation, and the impact it has had on ISDS jurisprudence and state budgets. Finally, like other authors in this Special Issue, they offer new thinking to address these questions in future reform efforts, both procedural and substantive.

The following article confronts the availability of shareholder claims for reflective loss in ISDS which has become a dominant mode of claims within the system. In *Reforming Shareholder Claims in ISDS*, Julian Arato, Kathleen Claussen, Jaemin Lee and Giovanni Zarra begin by noting that shareholder claims for reflective loss—or claims by shareholders based on injury to the corporation that purportedly diminish share value—are generally barred in domestic corporate law. Yet, the authors describe how ISDS panels have consistently found that a shareholder's right of action includes not just direct claims but also claims for shareholder reflective loss. They point out that such claims are almost always allowed, despite being not clearly grounded in the treaties (and in some cases apparently even proscribed by them). The authors argue that the availability of such claims creates harms that outweigh any benefits. For example, permitting shareholder reflective loss claims can allow investors multiple bites at the apple, and creates risks of double recovery. The rule can also cause mischief for corporate investors, inefficiently exacerbating agency costs among shareholders, creditors, management and the company itself. The authors argue that shareholder claims provide a ripe and non-zero-sum site for procedural reform, with benefits for all stakeholders.

[32] See Note by the UNCITRAL Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Mediation' UN Doc No A/CN.9/WG.III/WP.217 (13 July 2022); Note by the UNCITRAL Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Assessment of Damages and Compensation' UN Doc No A/CN.9/WG.III/WP.220 (5 July 2022); Note by the UNCITRAL Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Shareholder Claims and Reflective Loss' UN Doc No A/CN.9/WG.III/WP.170 (9 August 2019).

The final article concerns investor accountability, an issue that has largely remained off the table within UNCITRAL, with the exception of some discussion of counter-claims.[33] Yet investor accountability has been central to ISDS reform debates outside of WG III. Martin Jarrett, Sergio Puig and Steven Ratner pick up this theme in *Investor Accountability: Indirect Actions, Direct Actions by States, and Direct Actions by Individuals*. They maintain that the 'one-way' approach to ISDS—with investor rights and host state duties—was the product of a particular historical period and a political dynamic that has passed. There is no demand for holding investors accountable, but innovations in the procedural infrastructure of international investment law are needed, and it is on that need that the article concentrates. The authors unpack three key strategies for holding investors accountable: indirect methods, direct claims by states, and direct claims by individuals. They conclude that one advantage of all three options is that each draws on existing features of ISDS, and that the biggest barrier to implementing them is political rather than legal.

These contributions capture and engage with the process of ISDS reform at a particular moment, *in medias res*. They offer a snapshot of a reform in motion and seek to inform that movement. They speak to a *potential* institutional realignment, but one that may not materialize. While the immediate objects of their study will continue to evolve, these pieces mark an historical milestone in the UNCITRAL reform process—a moment in which conversations have turned to the granular detailed work. Whatever happens in the political sphere, we hope that these articles, mobilizing the analytical resources of investment law and social science, might stand the test of time as relevant contributions to the analysis of institutional design on the international stage.

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[33] See *Possible reform of investor-State dispute settlement (ISDS) Multiple proceedings and counterclaims*, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session, New York, 30 March–3 April 2020, A/CN.9/WG.III/WP.193.