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UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting

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On 17 July 2019, South Africa made its submission to UNCITRAL on investor–state dispute settlement (ISDS) reform in which it seeks a "paradigm-shift" in investment law. In keeping with our description of South Africa as a "widener" in the UNCITRAL debates, the submission brings a wide-angle lens to the negotiations, first placing ISDS in a broader context and then discussing a multitude of possible reforms, several of which have not been on the UNCITRAL agenda so far. Time will tell whether South Africa seeks to get other states to rally around its cause, but for now its submission represents an important anchor in the incremental/structural/paradigmatic reform dynamics.

1. Toward a New Paradigm for Investment Treaties and ISDS

The South African submission starts from first principles, by describing the ideological foundations on which investment treaties rest. It highlights that investment treaties were tied to a narrow vision of development that prioritized "economic growth through the free market, individual property and free flow of capital" and limited the role of a state to "securing property rights to optimize market development."

These foundations have led to a system in which “the investors’ property and contractual rights supersedes public interest and public needs," South Africa states. While foreign investors have access to the supranational level, “people and communities harmed by foreign investments do not have clear mechanisms to claim justice and reparation. Their rights are subject to a system driven by purely private commercial reasoning prompted to award cases exclusively focused towards serving the private economic interest of investors.”
a. Reframing the Purpose of Investment Treaties

South Africa foregrounds purpose by arguing that “any reform about the international investment regime needs to begin with the very purpose of the regime.” South Africa notes that the principal purpose of investment treaties has been to protect investment, but that this purpose is insufficient and needs to be expanded. For South Africa, “promoting and attracting investment should not be an end in itself, but a step towards realising the broader objectives of the [Sustainable Development Goals] and the human rights obligations, such as reducing poverty and hunger, empowerment of indigenous peoples, promoting decent work, and reversing environmental degradation and climate change.”

b. Including All Affected Parties in Proceedings

In a paradigm that prioritizes these broader objectives, all affected parties are included in proceedings. South Africa notes the asymmetry of the current system: “ISDS allows foreign investors to bring claims against host governments to an international arbitral tribunal and gives private parties access to the supranational level. ... Yet, people and communities harmed by foreign investments do not have clear mechanisms to claim justice and reparation.” Ecuador’s submission also wants to ensure that all affected parties are included, recalling their experience with “situations where the rights of specific groups with a legitimate interest in a dispute have been affected by an arbitral award and yet those groups were not given the opportunity to be parties to the proceeding.” The principle is clear — all affected parties should be included in proceedings — but the means through which it is achieved are flexible. South Africa observes this principle can be achieved through various reform paths. South Africa suggests “the development of an inclusive investment-related dispute settlement alternative” and also urges more clarity on third-party interventions in the Multilateral Investment Court (MIC) proposal.

c. Imposing Investor Rights and Investor Obligations
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global economic order in which corporations hold a greater power of influence over people's lives without the need for being accountable for their actions; at least, not by formal means.” Arguments for both states and investors to have obligations at the international level are as old as investment treaties. As the very first investment treaties were discussed in the 1960s, the World Bank was asked if it would take over negotiations for a substantive multilateral treaty. Aron Broches responded for the World Bank: “I said that we wouldn't do it, because the code was a one-sided document limited to the protection of foreign property and the obligations of the host countries. If we were to take it over, we would have to look at the other side, namely the obligations of investors” (Broches Oral History, May 1984). Negotiators carefully balanced obligations on investors and states in the UN Code on Transnational Corporations between 1972 and 1988, before those negotiations were shut down by the US and UK. Is the contemporary political climate more auspicious for agreeing binding legal obligations for investors? South Africa's submission makes its position clear — both investors and states should have binding obligations — and here again mentions multiple means through which this goal could be achieved, suggesting that many investor obligations could be added directly into treaties while also expressing support for the UN Treaty on Business and Human Rights.

2. Concrete Reform Proposals Within and Beyond UNCITRAL

South Africa makes clear that in its view, procedural reform is not enough. A wider agenda that includes substantive issues is needed. That said, procedural reforms are part of a broader package of reforming the whole system, so South Africa has engaged earnestly with proposed procedural reforms, including the MIC. The 31 possible reform solutions listed in their submission are wide-ranging; some go beyond procedural reform, while others would be compatible with structural reforms.

a. Advocating for Substantive Reforms

South Africa seeks to widen the agenda, to include reform of substantive standards. Its submission makes clear that “reforming ISDS is in itself not sufficient to solve all problems that the international
submission that “Indonesia is of the view that procedural law is inherently substantive and vice versa.”

South Africa proposes several reform solutions that many actors would consider substantive reforms, including a unifying language of substantive obligations (to ensure consistency), public interest carve-outs (to exclude challenges to public interest laws, regulations and legislation), and a supremacy clause (to ensure investment protections do not outweigh countries’ social, environmental and human rights commitments). South Africa also proposes new approaches to precedent (decisions should be binding), legal standing (should be available to everyone affected by a proceeding), and jurisdiction (should be limited to claims by investors who have not violated any law).

South African officials know that negotiated multilateral agreement is likely very difficult to reach. Yet raising these possible reform solutions keeps them in consideration for future negotiations, widening the agenda beyond procedural reforms. At the same time, South Africa wants to ensure their views about the shape of a MIC or other procedural reforms are represented, and that alternative processes, such as domestic courts and state-state dispute settlement, are respected and possibly accommodated within the design of a MIC.

b. Making Space for Other Procedural Reforms

In its list of possible reform solutions, South Africa emphasises several means through which disputes can be resolved prior to arbitration, including dispute prevention policies, alternative dispute resolution, an ombuds office, and state-state cooperation in dispute prevention. Several other states express support for dispute prevention tools in their submissions; ombudsman are elaborated in the Brazilian and Korean submissions, and the idea of mandatory mediation is raised in the Indonesian submission. These dispute prevention proposals seem complementary with a range of reform proposals and are not necessarily in conflict with a MIC or other structural reform options; dispute prevention steps could be built in by governments into the current system of investor-state arbitration or into a system that has been structurally reformed.
entrench their weaknesses. The availability of ISDS on the international level relieves States from external pressure to improve domestic government mechanisms and practices." South Africa proposes that actors must exhaust local remedies before they can access ISDS. Other states' submissions, including Indonesia and Morocco, also propose that investors are allowed to make a claim to international arbitration only after exhausting local remedies. Requirements to exhaust local remedies are compatible with ISDS and with a range of reform proposals, including a MIC or other structural reform options; this requirement could be part a government’s consent.

On the MIC specifically, South Africa emphasises that “full membership in the court should not be required to experiment with its use” and that “the court should be designed as a forum both for State-to-State and investor-State dispute settlement.” Brazil’s submission also highlights the usefulness of state-state dispute settlement. South Africa makes clear that it views state-state dispute settlement as potentially compatible with a MIC or other structural reform options.

**Conclusion: One Reform Process, Many Recipes?**

States’ experiences with and views on how to reform ISDS vary. South Africa’s experience and public reflections on it provide valuable contributions to ISDS reform debates. This submission continues South Africa’s serious engagement with the UNCITRAL process and provides an excellent example of attempts at agenda-widening and paradigm-shifting. It will be welcomed by several other states and by civil society groups. As other governments create their own policy recipe for ISDS reform, they can use ingredients from UNCITRAL as well as the wider range of ingredients in South Africa’s submission, including reforms to substantive standards and procedural options that have not been discussed at UNCITRAL. Indeed, as we wrote last year, “paradigmatic reformers often have the advantage of proposing approaches that do not require collective agreement.”

Yet multilateral negotiations are also a collective endeavour. Those actors that are committed to structural reform are likely to express concern that by trying to widen the agenda to include substantive as
do not emerge from shared foundations of paradigmatic reform yet may be compatible with transformative aims. This submission suggests that South Africa wants its views represented in discussions of these proposed procedural reforms, but that it will continue to push for reforms beyond procedural ones, advancing the need for a paradigm shift in investment law.
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