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...
Contemporary investment disputes are complex — often rooted, at least in part, in disputes involving people affected by the investment

Box 1. The Sustainable Development Goals
In September 2015, the UN General Assembly adopted a plan of action containing 17 SDGs, accompanied by 169 more specific targets and a comprehensive set of indicators to measure progress. The SDGs aim to guide the global agenda for 2015–2030. They range from ending poverty to combating climate change and promoting access to justice.

SDG 17 recognises the relevance of a global partnership to realise the SDGs and calls for enhancing policy coherence for sustainable development. This reinforces the need for states to establish effective rules, institutions and processes to ensure that business activity is aligned with the SDGs and contributes to achieving them.
In such cases, the interests of third parties may be at stake in the investor-state arbitration. Proceedings may also affect their legal rights in domestic or international human rights law. Foreign investors can protect their rights through ISDS. But affected third parties may face legal and practical barriers in accessing recourse under international human rights law or advancing their rights or interests in investor-initiated ISDS proceedings.

One problem is that the remit of ISDS tribunals is usually limited to the relevant investment treaty. Often, these instruments do not affirm the rights of affected people — although the applicable international rules require tribunals to take account of any other relevant, applicable norms, including domestic and human rights law, when interpreting investment treaties and settling disputes. Even the few recent investment treaties that explicitly require investors to both comply with domestic law and uphold international standards of responsible business conduct, for example on human rights, labour or the environment, do not consistently spell out the implications of these provisions in a dispute settlement context. Workers or local residents may be most directly affected by investor non-compliance, and could play an important role in holding investors to account for violations. But this is not yet part of the international investment regime.

Taken together, these circumstances raise questions. How effective is the international investment regime in grappling with the complexities of contemporary investment disputes? This relates to substantive rights and obligations established in the treaties, but procedural aspects are also relevant.

**Why current procedures are inadequate**

Investment relations involve multiple actors with different — and often competing — rights and obligations. Most legal systems have substantive and procedural rules to address this type of complexity; for instance, courts have arrangements to consider the views, rights and obligations of actors who are not a party to a dispute. But ISDS lacks comparable mechanisms. Depending on applicable rules, third parties may be allowed to provide input in the form of *amicus curiae* (‘friends of the court’) submissions. But these are subject to the tribunal’s discretion and arbitration rules do not ensure third parties’ access to hearings or documents submitted by the parties. Also, *amicus curiae* submissions mainly provide the tribunal with relevant information on points of fact or law. They are not designed to grant effective voice or protection for actors whose rights or interests are directly at stake in a dispute.

Likewise, a government should represent the interests of rightsholders within its jurisdiction in any dispute with the investor. But this cannot be assumed in practice. There may be tensions and even litigation between authorities and communities. And a government may not wish to highlight possible human rights failures of an investor that might expose its own.

This lack of effective arrangements for third-party participation in ISDS can undermine their rights or interests, and closes a possible route to hold investors to account for non-compliance with their obligations. It can also hamper how ISDS tribunals consider different perspectives on the facts or relevant applicable norms, including domestic and human rights law. If third parties cannot independently voice their concerns in investment disputes this can erode the quality of decisions and the legitimacy of the system.

This runs counter to the aims of the SDGs, including ensuring ‘equal access to justice for all’ (SDG 16.3), developing ‘effective, accountable and transparent institutions at all levels’ (SDG 16.6) and ensuring ‘responsive, inclusive, participatory and representative decision making at all levels’ (SDG 16.7).

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**Figure 1. Third party rights in the factual fabric of ISDS disputes**

Source: adapted from Cotula and Schröder (2017), based on a review of 20 ISDS cases.
The need for systemic reform

Addressing these issues requires comprehensive reform of the international investment regime — starting by clearly identifying its fundamental problems and reforming wider domestic and international legal frameworks.

Where problems are rooted in domestic legal systems, national law reform could strengthen the substantive and procedural rights of those affected. This could include better local consultation and public participation in investment approval processes — providing a framework for investors, public authorities and affected people to discuss and cooperate before and after investment decisions, to prevent rather than quell disputes.17

If domestic mechanisms fail, international human rights law should provide the main arena for affected people to pursue international redress. It contains relevant norms and its recourse institutions are specialists in handling human rights issues. The ongoing negotiation of a proposed binding treaty on business and human rights could transform this area of international law.18

In this wider reform context, effective ISDS reforms could help ensure the rights and interests of third parties are properly considered in settling investment disputes.

The UNCITRAL process: possible reform options

The Working Group could address some of these concerns. 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 throughout the proceedings and enforce relevant investor obligations.19

Exploring these options will raise difficult issues. Tribunals may lack the appropriate expertise to adjudicate disputes where third-party rights — and possibly human rights — are at stake. Local communities may find themselves in an unfavourable dispute settlement forum: far from their locality, expensive and specialising in legal arrangements which protect foreign investors.

How can they represent themselves and participate in ISDS? How can they be sheltered from risks associated with legal proceedings? And how would the system intersect with domestic and international human rights litigation?

But in the short term, the challenge for the Working Group is to consider the issue and to include it in the reform agenda — while understanding that any reform will require careful thought and consideration.

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