

REFORMING THE ISDS SYSTEM: IN SEARCH OF A BALANCED APPROACH?

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ABSTRACT

The challenge to the legitimacy of investor-state dispute settlement (hereinafter “ISDS”) has gained force in the past years and there are now various forums addressing the concerns with ISDS and, in particular, with the arbitration of such disputes. The UNCITRAL Working Group III is probably more visible in this respect, but, nevertheless, restricted to three main concerns: with inconsistency in arbitral decisions, the lack of predictability of such outcome and limited mechanisms to ensure the correctness of arbitral decisions; the arbitrators appointed in these cases and the increasing duration and costs of the proceedings. No such forum is set up to have a holistic approach to a reform of the ISDS system.

The paper is an attempt to discuss the real concern with the ISDS system and with arbitration is particular. It is often suggested that the system is only addressing investors’ claims against states and that societal interests are not represented in the resolution of investment disputes—although they do have wide-ranging effects—among others. As such, the paper addresses the need of a desired re-balance in the system, which would shift the view from investment promotion and protection to investment regulation. It is suggested that a procedural balance it is, indeed, easier to achieve, but, a substantive

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balance, addressing both state and investor rights and obligations, would be desirable.

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