

INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION

II

Proceedings of the Washington and Lee University and UNCTAD
Joint Symposium on International Investment and Alternative Dispute Resolution,
held on 29 March 2010 in Lexington, Virginia, United States of America



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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Editors: Susan D. Franck and Anna Joubin-Bret



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Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

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A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.

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PREFACE

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making. The programme embraces policy research and development, including the preparation of a series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia, and training courses; and support to intergovernmental consensus-building.

This paper is part of the programme's research and policy analysis on international investment policies for development. The research builds on, and expands, UNCTAD's *Series on International Investment Policies for Development*. Like that series, this study is addressed to government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers.

This study compiles and synthesizes the ideas addressed and explored during the Joint Symposium on International Investment and Alternative Dispute Resolution, organized jointly by the United Nations Conference on Trade and Development (UNCTAD) and Washington and Lee University (W&L) School of Law. The Joint Symposium brought together a unique group of experts—before, during and after a conference in Lexington, Virginia, held on 29 March 2010—to focus on the use of alternative dispute resolution in the context of international investment law. Analysis arising from the various phases of the Joint Symposium identified three main areas for consideration that will be explored in this publication. First, it is vital to consider the current ISDS system holistically in order to have an accurate assessment of the system's application and implications in light of the net costs and benefits of the IIA network. Second, there is value for stakeholders to jointly explore their existing processes of addressing treaty conflict in an effort to learn and identify methods to improve the processes and design enhanced dispute resolution systems. Third, alternative means for ISDS such as the pro-active prevention and de-escalation of conflict are worth further exploring. While different investment stakeholders—such as States, investors and practitioners—may experience divergence in perspective, they nevertheless share common interests and objectives and usually consider the benefits of an investment to both the investor and to the economic development for host States as important.

The publication provides a timely discussion of a crucial issue in contemporary international investment policy making, implementing UNCTAD's mandate in the area of international investment agreements emanating from the Accra Accord (paragraph 151).

Supachai Panitchpakdi
Secretary General of UNCTAD

Geneva, June 2011

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This study benefited from the written contributions of conference participants Lisa Bingham, Jack Coe, Mark Clodfelter, Roberto Echandi, Mariana Hernandez Crespo, Jae-Hoon Kim, Dany Khayat, Wolf von Kumberg, Céline Lévesque, Vilawan Mangklatanakul, Lucy Reed, W. Michael Reisman, Jose Antonio Rivas, Andrea Schneider, Hi-Taek Shin, Margrete Stevens, Hannah Tümpel and Nancy Welsh. Washington & Lee University Law School students Caitlin Cottingham, Gene Hamilton, Brandon Hasbrock, Celeste Owens, Massie Payne, Jason Ratigan, Andrew Spievack, Jacob Stoehr, Elizabeth Stinson and William Li as well as Jenna Perkins (University of Nebraska Law College) also provided contributions to the paper. An additional contribution was made by Peter Jetton.

The paper and its contents were the product of extensive planning and over a year of research and collaboration. Comments and exchanges were received before, during and after a conference in Lexington, Virginia, in connection with the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution. The conference, held on 29 March 2010, was preceded by pre-conference discussions and exchanges on an online collaboration blog of experts. The symposium and this study benefited from a large variety of comments and posts made on this blog by experts from around the world, including those who did not attend the in-person conference.

UNCTAD's IIA research work is produced by a team under the direction of Jörg Weber and the overall guidance of James Zhan. The members of the team include Bekele Amare, Hamed El-Kady, Anna Joubin-Bret, Jan Knörich, Sergey Ripinsky, Claudia Salgado, Ileana Tejada, and Elisabeth Tuerk.

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ABBREVIATIONS

ABA	American Bar Association
ADR	alternative dispute resolution
ASEAN	Association of Southeast Asian Nations
BEE	black economic empowerment
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BIT	bilateral investment treaty
CBP	consensus building process
CEDR	Centre for Effective Dispute Resolution
CEPA	comprehensive economic partnership agreement
CMA	concurrent med-arb
CMSD	conflict management systems design
DMT	Don Muang Tollway Co. Ltd.
DPM	dispute prevention mechanism
DPP	dispute prevention policy
DRB	dispute resolution board
DSD	dispute systems design
EFTA	European Free Trade Association
ENE	early neutral evaluation
EU	European Union
FDI	foreign direct investment
FET	fair and equitable treatment
FIPA	foreign investment promotion and protection agreement
FPS	full protection and security
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
IMI	International Mediation Institute
ISC	Independent Standards Commission
ISDS	investor-state dispute settlement
JTEPA	Japan-Thailand Economic Partnership Agreement
LCIA	London Court of International Arbitration
LSA	lead State agency
MFN	most-favoured-nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OIO	Office of the Foreign Investment Ombudsman

SME	small and medium-sized enterprise
TAFTA	Thailand-Australia Free Trade Agreement
TNZCEP	Thailand-New Zealand Closer Economic Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USPS	United States Postal Service
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
W&L	Washington and Lee University

GLOSSARY OF IMPORTANT TERMS

This glossary of important terms is made to provide general guidance and reference to the reader on the terms frequently used within this publication. The definitions are not meant to represent any particular scholarly thinking or perspective. Most importantly, the definitions have been adjusted to the specific context of investment treaty arbitration and investor-State dispute settlement. This glossary was compiled based on Coe (2005), Smith and Martinez (2009), specific inputs and suggestions from Susan Franck, and the website on international investment and ADR maintained by Washington & Lee University School of Law and UNCTAD in preparation for the Joint Symposium on International Investment and ADR that took place on 29 March 2010 (see <http://investmentadr.wlu.edu/resources/page.asp?pageid=587>, accessed 01 September 2010).

Adjudication:

Adjudication is the resolution of disputes through a neutral third party (or parties) with the authority to bind the disputing parties—in this case the investor and the State—to the terms of an award or decision in accordance with the applicable law and facts presented by them. Typical adjudicative processes are national court trials and (international) arbitration (Smith and Martinez, 2009).

Alternative Approach to Treaty-Based Investor-State Dispute Settlement:

An alternative approach to investor-State dispute settlement is a dispute resolution, avoidance or prevention mechanism that constitutes an alternative to international investment arbitration. There are two main categories to alternative approaches. The first category addresses already existing disputes and approaches to their resolution. The use of Alternative Dispute Resolution (ADR) mechanisms is common in this context. The second category concerns the use of avoidance and prevention policies prior to the occurrence of a dispute, but in anticipation of the possibility that a dispute may emerge (at times referred to as preventative ADR).

Alternative Dispute Resolution (ADR):

ADR is an approach to the settlement of disputes by means other than binding decisions made by courts or arbitral tribunals. In the specific context of international investor-State disputes, ADR can be understood as an international dispute resolution mechanism that is an alternative to so-called "primary methods" for resolving investment disputes. Such primary methods are adjudication through investment arbitration or in front of national courts. ADR frequently involves the intervention of a third person to assist disputants in negotiating a settlement of their conflict. The process of ADR is normally initiated with the agreement of the disputants. While they are not limited to these processes, typical methods of ADR in international disputes involve mediation and conciliation. These techniques are not necessarily mutually exclusive in any particular conflict, and can be and often are used sequentially or in a customized combination with other adjudicative methods of resolving disputes.

Conciliation:

Conciliation is a relatively formal and structured process of facilitated negotiation. It involves the assistance of a third party, namely the conciliator (or a panel of conciliators), in a dispute between the investor and the State. The conciliator's main objective is to encourage the parties to settle their dispute amicably. The role of the conciliator is not necessarily a neutral one, and the degree of authority assumed by the conciliator may also vary (Smith and Martinez, 2009). Though there are differences from dispute to dispute, conciliators usually attempt to shape a more productive process of interaction between the parties and try to improve communications between them, while addressing the substantive issues of a dispute through advisory work. Conciliation usually follows formal rules and procedures and usually terminates with a written agreement or at least written recommendations. However, these written statements remain non-binding to the parties involved. Conciliators tend to maintain substantial control over the process of conciliation, which remains very formal, structured and result oriented. For example, conciliation procedures specified by the International Centre for Settlement of Investment Disputes (ICSID) have a degree of formality that leads to a decision which is non-binding upon the parties (ICSID, 2006a). The process of conciliation usually focuses strongly on working out a concrete solution to a dispute rather than improving the relationship between the disputants. Hence, conciliation is often identified as a process of "non-binding arbitration".

Direct Negotiation:

Direct negotiations are negotiations between parties of a dispute by means of immediate personal contact between the disputants in order to exchange interests and proposals. They normally do not involve the assistance or facilitation of third parties in the negotiation process.

Dispute Prevention and Avoidance:

Dispute prevention and avoidance involves minimizing potential areas of dispute through extensive planning in order to reduce the number of conflicts that escalate or crystallize into formal disputes. Preventative ADR is an important means to achieve effective dispute prevention and avoidance. In the context of investor-State disputes, dispute prevention may involve the establishment of adequate institutional mechanisms to prevent disputes from emerging and avoid the breach of contracts and treaties on the part of government agencies. Through adequate dispute prevention policies, it can be better assured that the State and various government agencies take account of the legal obligations made under investment agreements when enacting laws and implementing policy measures. In addition, the implementation of dispute preparedness mechanisms allows governments to identify more easily potential areas where disputes with investors can arise and respond to the disputes where and when they emerge. Dispute preparedness mechanisms involve, on the one hand, the delegation of relevant authority among State agencies, e.g. by defining who is responsible for the defence of investment disputes, who trains relevant employees, and who covers the costs involved. On the other hand, dispute preparedness also necessitates adequate coordination and communication among government entities, such as through improved channels for information sharing and better institutional cooperation. With such institutional arrangements in place, States are also better able to

undertake effective dispute avoidance, addressing the concrete concerns of the investors and making attempts to solve them. Agencies involved in dispute avoidance can be investment promotion agencies through their aftercare services, ombuds services, or other government agencies with direct responsibility for dealing with foreign investors (e.g. a lead agency).

Dispute Resolution:

Dispute Resolution involves the process of managing and resolving conflicts. It can involve parties resolving their conflicts according to their interests, their rights, or respective power. Parties focusing on interests consider factors such as needs, economics, relationships, politics and social values when resolving disputes. When there is a focus on interests, dispute resolution usually occurs through direct negotiation among parties or with the assistance of a third-party neutral, such as a mediator or ombuds. When the focus is on rights, dispute resolution requires a neutral third party to adjudicate and apply agreed-upon rules to a set of facts so as to determine who prevails. Rights-based processes, including binding arbitration and traditional court trials, have limited remedies and may not address the full range of interests and needs that the parties may have. Disputes resolved on the basis of power (e.g. through gunboat diplomacy, or at the extreme, violence and war) weight the outcome in favour of the party with the most leverage, status and resources, but this may be costly on the relationships involved and may result in failure to vindicate rights.

Dispute Resolution Board (DRB):

A private, voluntary and confidential procedure commonly used in the context of an ongoing long-term (contractual) relationship between the parties. An informed standing group of experts is set up, usually at the time when the relationship between the parties is established, to address disputes quickly when they arise between the parties involved. Determinations by the standing group of experts may be binding on the parties or only advisory in nature, or they may be binding for the period of performance permitting review by a third party upon completion of the contract.

Dispute Systems Design (DSD):

Dispute Systems Design is the systematic process of creating a dispute resolution system that harnesses the positive aspects of conflict or at least minimizes the negative aspects. It is not a dispute resolution methodology but involves the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system. The objective of DSD is to design better dispute resolution systems by (1) analysing the parties' patterns of disputing to diagnose the current system, (2) designing methods to manage conflict more effectively with practical principles, (3) approving and implementing the design architecture, and (4) testing and evaluating the new design to make appropriate revisions prior to disseminating the process to the rest of the system.

Early Neutral Evaluation (ENE):

Early Neutral Evaluation involves an evaluator, usually an attorney or other expert with specific knowledge of the subject matter of a case, who hosts an informal meeting with investors and their counsel. At such a meeting, both sides of the dispute (i.e. representatives of the investor and the State) will present their evidence and arguments, based on which the evaluator identifies areas of agreement and issues to focus on. The evaluator then writes a confidential evaluation of the prospects of a case and offers to present it to the disputants. Should parties not be successful in attempting settlement, the evaluator may assist the disputants in devising a plan for expedited exposure, assess realistic adjudication costs and explore the feasibility of a follow-up session in achieving successful settlement of a case (Smith and Martinez, 2009).

Facilitated Negotiation:

Facilitated negotiations are negotiations between parties of a dispute that involve the support and assistance of a third party (also called “third-party neutral”). The main role of the third party is to remove possible barriers to a negotiated solution of a conflict that may persist when the parties attempt the settlement of a dispute through direct negotiations. Conciliation and mediation are typical forms of facilitated negotiation.

Fact-Finding:

A private, voluntary, non-binding and confidential procedure in which the parties submit specific factual information (e.g. technical, scientific, accounting, or economic) to an expert for a neutral evaluation of these contested facts. The key objective of such a procedure is to gain an impartial assessment about the facts of an issue in order to prevent the escalation of disputes. ICSID has an Additional Facility for Fact Finding (ICSID, 2006b) that serves this purpose for conflicts between investors and States. Its Fact Finding Rules provide that an independent committee examines the disputed facts and gives an impartial assessment after oral proceedings, written submissions, evidence and witness testimony. Fact finding proceedings end with a report that is limited to findings of fact and does not offer recommendations to the parties. The parties must then determine what legal and practical effect the report will have.

Mediation:

Mediation is a rather informal process of facilitated negotiation. It involves the assistance of a third party, namely the mediator, in a dispute between the investor and a State. At the request of the disputing parties and subject to terms and conditions specified by them, mediators intervene in the dispute in order to assist in working out a viable solution. The role of the mediator is to bring the parties of a dispute together and assist them in compromising and reaching settlement. The involvement of the mediator may vary, ranging from fostering dialogue between the parties to effectively proposing and arranging a workable settlement to the dispute. Upon request by the parties, a mediator may eventually give an opinion on the likely outcome of an adjudicated proceeding and propose optimal solutions to the settlement of the dispute.

However, a mediator cannot impose a solution on the parties involved (Smith and Martinez, 2009). While mediators assume only some control over the process of settlement, they focus on assisting the parties to find a settlement while maintaining a constructive relationship between the investor and the host State. For this purpose, mediators tend to go beyond the substance of the issues, paying more attention to the nature of the negotiation process and making sure that communication between the disputants is effective. Mediators concentrate on identifying interests, reframing positions and canvassing a range of possible solutions to move the parties towards an agreement. Hence, mediation is often equated to a process of “assisted negotiation”.

Negotiated Settlement:

Negotiated settlement is the resolution of a dispute outside of national courts or arbitral tribunals. Such settlement can be achieved either through direct negotiations between the disputing parties, or with the support of a third party that facilitates the negotiations by means of conciliation or mediation techniques. ADR usually involves processes of negotiated settlement.

Ombudsman or Ombuds:

An ombuds is an official or institution with a mandate to remain impartial while receiving complaints or questions and making efforts to resolve conflicts between investors and the State at an early stage. To carry out this objective, the ombuds may be granted the authority to use various tools, such as directing stakeholders to other processes to resolve concerns, raising issues internally within an organization, conducting investigations for the purpose of making policy recommendations, or mediating disputes directly with interested parties.

Third-Party Neutral Assistance:

A third-party neutral is an impartial individual or group of individuals serving as mediator, conciliator, fact-finder or arbitrator to assist parties in resolving issues in controversy between an investor and a State. A third-party neutral is accepted by the parties and assists in the resolution of a dispute according to the authority granted by the parties to manage the process and/or outcome.

EXECUTIVE SUMMARY

Disputes arising out of international investment agreements (IIAs) between foreign investors and host States have been discussed extensively in recent years in various contexts. The number of such disputes has experienced a substantial increase within the last ten to fifteen years, as has the number of investor-State dispute settlement (ISDS) cases (UNCTAD, 2011; UNCTAD, 2010a). This explosion runs in parallel with an increase in the number of IIAs being negotiated worldwide—as of 2009, more than 2,760 bilateral investment treaties (BITs) and 250 free trade agreements (FTAs) with investment protection chapters had been concluded (UNCTAD, 2009b). At the same time, the importance of foreign direct investment (FDI) to the global economy is steadily increasing. Even with the impact of the recent financial crisis, flows and stocks of FDI are at par with trade flows and showing a rising trend.

While arbitration has been the traditional method for resolving investor-State disputes, there has been an increasing interest in preventing such disputes or in managing them more effectively through alternative methods (Coe, 2005; Franck, 2007a; Franck, 2008; Rubins, 2006; Salacuse, 2007; UNCTAD, 2010b). There are a broad range of alternative methods that can be used to avoid, to prevent or to manage disputes effectively. On the one hand, these include the institution of dispute prevention policies (DPPs) to prevent problems and conflicts between investors and host States to escalate into formalised disputes. On the other hand, the resort to traditional methods of alternative dispute resolution (ADR), such as conciliation, mediation and negotiation, is also a promising option. More concretely, alternatives to investment treaty arbitration could involve the establishment of cooperation and consultation mechanisms involving host and home States, diplomatic negotiations between States, direct negotiation between investors and States, the establishment of an ombuds office or lead government agencies, mediation, formalized conciliation, dispute resolution boards, early neutral evaluation, and fact-finding (UNCTAD, 2010b; Hamilton, *see below*). Such alternatives could be used in isolation or in combination with each other and/or with adjudication processes. Stakeholders might utilize these processes in a reactive way, by choosing tools to minimize conflicts once they arise, or proactively plan to manage and to eliminate conflict through dispute systems design (DSD). Through these alternatives, a conflict could be solved before it becomes a live dispute, permitting investors and States to continue their working relationship; good governance and other State regulatory practices may undergo improvement; and the speed of dispute resolution could be increased while the costs are diminished (UNCTAD, 2010b).

It was against this background that the United Nations Conference on Trade and Development (UNCTAD) and Washington and Lee University (W&L) School of Law partnered to create the Joint Symposium on International Investment and Alternative Dispute Resolution (the “Joint Symposium”). The Joint Symposium brought together a unique group of experts—before, during and after a conference in Lexington, Virginia—to focus on the use of alternative dispute resolution in the context of international investment law. Representatives from States involved in ISDS (from developing and developed countries), practitioners of international arbitration and mediation, investors, academics researching international investment law and international dispute resolution systems, and international organizations all engaged in the Joint Symposium.

The Joint Symposium was organized in three distinct phases. Phase I involved an online “diablogue” that promoted discussions through an interactive website. These discussions were synthesized in several rapporteur reports. Phase II involved a conference at W&L School of Law in Lexington, Virginia, where participants had the opportunity to discuss the issue in further detail and to explore relevant ideas. Integrated remote participation through the internet allowed colleagues to actively join the meeting from distant locations. Phase III involved the creation of reports and other materials to synthesize the findings from the Joint Symposium, and to direct the way forward towards improving the prevention, management and resolution of IIA-related conflict.

Analysis arising from the various phases of the Joint Symposium identified three main areas for consideration that will be explored in this publication. First, it is vital to consider the current ISDS system holistically in order to have an accurate assessment of the system’s application and implications in light of the net costs and benefits of the IIA network. Second, there is value for stakeholders to jointly explore their existing processes of addressing treaty conflict in an effort to learn and identify methods to improve the processes and design enhanced dispute resolution systems. Third, alternative means for ISDS such as the pro-active prevention and de-escalation of conflict are worth further exploring. While different investment stakeholders—such as States, investors and practitioners—may experience divergence in perspective, they nevertheless share common interests and objectives and usually consider the benefits of an investment to both the investor and to the economic development for host States as important. Participants in the Joint Symposium identified several temporal opportunities to promote common objectives and to maximize mutual interests (rather than focusing on areas of divergence). The opportunities to avoid dispute crystallization, prevent conflict escalation and minimize the scope of the dispute occur at various junctures, including:

- During the **preliminary design phase** of creating appropriate dispute resolution systems when States negotiate and draft IIAs;
- During the **pre-conflict phase** when an investor identifies an area of concern, but the problem has not been attributed to a particular cause or communicated from the investor to the State;
- In the **pre-dispute phase** when an investment-related conflict has been identified related to an investment’s regulatory framework but the conflict has not yet escalated;
- In the **formalized dispute phase** where an investor has submitted a formal notice of dispute or similar document, such as a Request for Arbitration; and where there is still room for dialogue and settlement between the parties to the dispute;
- **During** the course of **adjudicative proceedings**, such as arbitration, where there may be areas to either narrow the range of issues in dispute or settle aspects (or possibly all) of the on-going dispute in light of changes over the course of the proceedings; and
- After the award has been rendered and during the **post-award phase**, there may nevertheless be policy space for settlement of outstanding issues.

In an effort to explore these phases more systematically, investment experts engaged in a rich dialogue. Having considered the strengths and weaknesses of existing ISDS processes, Joint Symposium participants identified various alternatives worthy of ongoing consideration as well as new alternatives for consideration. Areas for continued exploration included:

- Institutional procedures to promote the dissemination of information within States about their rights and obligations to foreign investors and foster communication amongst various levels of government as well as with external stakeholders, such as investors (Kim; Rivas; Stoehr & Perkins I - *see below*);
- Internal structures—for both States and investors—to prevent and manage conflict effectively and the use of DSD to facilitate these efforts (Bingham; Hasbrouck and Ratigan; Schneider; Welsh - *see below*);
- The establishment of DPPs, such as Peru’s Law Establishing the System of Coordination and Response of the State in International Investment Disputes (Hernandez Crespo; Khayat; Reed; Stoehr & Perkins II - *see below*);
- The use of an ombudsman or “ombuds office” to facilitate communication and dispute settlement, such as in the Republic of Korea (Bingham; Lévesque; Schneider; Shin - *see below*);
- The creation of a Lead Agency, such as in the efforts underway in Colombia and several Latin American countries, to coordinate government agencies potentially involved in conflicts, formal disputes and arbitral proceedings (Rivas; Mangklatanakul; Pawlak and Rivas; Owens - *see below*);
- The value of State-to-State cooperation and communication in dispute prevention and settlement (Mangklatanakul; Franck & Ratigan; Rivas - *see below*);
- The development of “good practices” or guidelines in the prevention, management and settlement of IIA-related disputes (Coe; Echandi; Franck & Ratigan; Hasbrouck & Ratigan - *see below*); and
- The recognition of the ongoing value of arbitration in light of the current cases (Reisman; Clodfelter; Franck & Ratigan; Welsh - *see below*).

The Joint Symposium identified further methods for promoting the effective use of existing approaches and expanding alternatives to traditional ISDS. These include:

- The creation of State “aftercare” programmes (Mangklatanakul; Khayat; Reed - *see below*);
- The value of an agreement to participate in “Early Neutral Evaluation” with a third-party neutral on the basis of limited materials (Rivas; Reed; Schneider; Welsh - *see below*);

- The creation of internal “Preliminary Legal Assessments” (Lévesque, *see below*), for possible recourse by investors and/or States; and
- The strategic intervention of mediators operating in parallel to arbitration during pre-determined “Mediation Pre-Sets” (Coe, *see below*).

Joint Symposium participants also highlighted that infrastructure will be necessary to ensure the success of these objectives. In particular, the existence of empirical research to identify the conditions (when, where, why and how) most likely to lead to effective settlement would prove helpful (Clodfelter; Franck and Ratigan; Reed - *see below*). Institutions also have a role in facilitating the effective selection, identification and training of appropriate third-party neutrals (Tümpel; von Kumberg - *see below*). Technical assistance and other capacity building initiatives would likewise offer stakeholders the requisite background to be able to participate in and utilize DPP and ADR modalities effectively (Hasbrouck and Ratigan; Schneider; Kim - *see below*). This may require various steps such as, for example, developing rules, or provisions in institutional rules or IIAs, that offer precise and conducive language that enhances predictability, possibly increasing the role of State-to-State consultations and cooperation. Likewise, to generate pathways for effective ADR, it may be prudent to generate a working group to consider guidelines related to settlement choices, to develop frameworks and rules for mediation, to create mediation training tools and to establish a mediation pilot project (Franck & Ratigan; Hasbrouck & Ratigan - *see below*).

The Joint Symposium demonstrated that ADR, as a potential means of addressing IIA-related conflict, is an area of clear interest to stakeholders and experts. The commentary in this volume nevertheless reflects that ADR may not be appropriate for every conflict, but that ADR’s untapped value deserves systematic consideration.

The materials in this volume are intended to help stakeholders assess the IIA system, understand the scope of their obligations, appreciate the possibility of risk and permit informed choices that give investors an opportunity and States a chance to promote their development objectives in an environment that provides sufficient policy space. The objective should be to create the most efficacious dispute prevention and resolution system possible; arbitration can be used in appropriate circumstances, while alternative modalities can also be used to maximize shared interests and create efficient dispute settlement. It is vital to move beyond simple rejection or scepticism of alternative modalities, but instead engage in honest and thoughtful consideration in light of inputs offered by a broad cross-section of experts. The findings, discussions, views and proposals that follow are intended to facilitate concrete developments, new thinking and novel approaches. The ultimate objective is to build on the synergies among the related areas of IIAs, ISDS and ADR in order to encourage the development of a system that is not only more beneficial to investors and States but also supports economic development, in particular by reducing costs and improving the investment environment in developing countries.

INTRODUCTION

The Joint Symposium consisted of three distinct phases that integrated technological innovation at various strategic junctures (Jetton, *see below*). This introduction provides an overview of each phase in order to orient readers to the materials in this volume.

Phase I of the Joint Symposium involved the collection of expert commentary through an online collaboration blog constructed and moderated by Washington and Lee University (W&L) School of Law. This phase was designed to generate a fruitful discussion, irrespective of the geographical location of experts, and to ensure common understanding among participating experts with different backgrounds. The objective was to set the stage and to explore the current state of disputes related to international investment agreements (IIAs) in an effort to assess the prevention and management of international investment disputes and the advantages and disadvantages of different dispute resolution processes for stakeholders. Experts explored IIAs and dispute resolution rules to analyse ways to better implement treaty obligations, to prevent disputes, to facilitate settlement, and to promote effective dispute resolution. Experts also evaluated the current state of investor-State dispute settlement (ISDS) to identify possible impediments affecting the exploration and implementation of alternative approaches to prevent, manage and resolve IIA-related conflict. Section I of this publication explores the stakeholder dialogue that occurred through this “diablogue”. It provides four rapporteur reports that synthesize the expert commentary. Eight “blog digests” that describe various blog posts in further detail can be found in Annex 2.

Phase II of the Joint Symposium involved an in-person conference at W&L School of Law in Lexington, Virginia, United States, with three different panels and keynote speakers. The Lexington conference was simultaneously web-casted to permit remote participation and interaction from stakeholders throughout the world. It also included interactive commentary via social networking sights, which moderators integrated into the conference discussion. Section II of this publication provides a description of the commentary offered by Keynote Speakers and a synthesis of the ideas offered in various formats at the Lexington conference by other Key Participants, including those exploring the perspectives of States, investors, institutions, academics and practitioners.

The Keynote speakers explored possible approaches, assessed the costs and benefits of arbitration and alternative dispute resolution (ADR), and offered concrete suggestions about using ADR at various junctures. Michael Reisman explored the judicialization of international investment law and the move away from pure diplomatic protection. Suggesting that ADR methods may have utility in certain contexts, Reisman underscored the on-going value for a forum that offers final and binding compulsory adjudication in investment disputes. Focusing on the value of depoliticized dispute settlement, Margrete Stevens considered recommendations by the Centre for Effective Dispute Resolution’s Commission on Settlement in International Arbitration and posited that the use of non-mandatory ADR has the potential to create efficiencies and cost savings for some disputes and some parties. She then identified possibilities for parties, counsel and arbitrators to consider in making effective use of ADR. Pushing forward on the theme of alternative modalities, Lucy Reed offered an intellectual “shopping list” that offered seven different opportunities where ADR may improve the process of addressing IIA conflict, including researching settlement outcomes, proactively involving stakeholders at an

early stage, considering investment “aftercare” programmes and building capacity to permit stakeholders to use ADR effectively.

In another session, experts explored how host States, whether developing or developed, can create pro-active policies to implement treaty obligations, to prevent inadvertent breach of international law obligations and to manage treaty conflict efficiently. These policies may range from more formalized dispute prevention policies (DPPs) to programmes designed to facilitate the management of formal disputes against States. DPPs could involve, for example, initiatives that disseminate information about treaty obligations and create programmes to educate government officials about the possible arbitration risk and scope of arguable liability. Similarly, DPPs might include the implementation of policies to create communication systems among various actors and different levels of government institutions within the State; likewise DPPs may construct early alert systems to ensure that problems are addressed by the relevant authority, within different levels of government, at the appropriate stage. Roberto Echandi advocated using IIAs to create rule-based development to foster domestic internal reform that can promote economic growth and innovations in dispute prevention. Others explored the implementation and application of DPPs within their home jurisdiction. Vilawan Mangklatanakul discussed the lessons to be learned from Thailand’s experience with investment disputes and the potential value for strategic reform of IIA obligations, State-to-State consultations and a Lead Government Agency tasked with managing ISDS procedures. Jose Antonio Rivas similarly explored the creation of a Lead Government Agency and identified textual requirements in two treaties involving Latin American States and a North American counterparty that foster State-to-State cooperation in the implementation of the treaties. Hi-Taek Shin and Jae Hoon Kim described proactive steps by the Republic of Korea’s Ministry of Justice to enhance awareness of ISDS among various government agencies, presumably thereby decreasing the risk of an inadvertent violation of international legal obligations. Shin also explored the Republic of Korea’s experience of using an independent ombuds facility. Dany Khayat described the experience of Egypt and identified the value in creating “investment treaty savvy” civil servants who negotiate treaties and defend claims, and are also in a position to: (1) train others about IIA obligations, (2) implement these obligations at different levels of government, and (3) be attentive to awards rendered in ISDS cases so as to adapt treaty practice and prevention measures.

The role of other stakeholders, particularly international institutions and investors, was also considered. In addition to building awareness, institutions can provide key infrastructure and support that create a framework for the viable use of ADR, such as mediation techniques. Wolf von Kumberg articulated that institutions, such as the International Mediation Institute, play a critical role for parties in creating transparent standards for certifying and identifying credible third-party neutrals, particularly mediators. Hannah Tümpel described the experience of the International Chamber of Commerce to explain cost and time savings some State parties experienced when using mediation; and she explained how institutions serve a unique role in facilitating effective mediation. Meanwhile, during the in-person conference in Lexington, Michael McIlwrath described the value that investors can gain by having internal corporate practices to mitigate and minimize conflict, such as IIA-related disputes. Certain international investors have been proactive about mitigating conflict and managing disputes through internal dispute management processes (Smith & Martinez, 2009). These lessons may be beneficial, for example, to small and medium-sized enterprises that could benefit from internal disciplines promoting efficient conflict management. This would allow investors to adapt their business

practices, to avoid unnecessary disputes with host States and to save resources by eliminating arbitration costs.

Others within the practitioner's community—such as lawyers, arbitrators, and academics—offer insights about how to promote conflict prevention and management that maximize parties' mutual interests. These insights, experiences and open-mindedness are crucial in encouraging parties to approach ISDS through a new lens and reminding stakeholders of the value of the underlying investment, the importance of development objectives, and balancing those related interests.

While practitioners in international commercial arbitration are fully conversant with the systemic recourse to ADR and see potential for the same evolution to take place in ISDS, this may still require practitioners to enhance their capacity to use alternative modalities or to expand the scope of services. Yet the system can benefit from their unique expertise in investment law to design the dispute prevention and management systems of the future. Mark Clodfelter explored dispute management from a prevention perspective in light of the current state of cases. While arguing that ADR is currently underutilized, he suggested that certain categories of disputes—such as contractual breaches, measures affecting few investors or investments involving long-term-relationships—may be uniquely situated to benefit from ADR. Clodfelter also suggested that further analysis is necessary to assess why cases settle and how the current state of arbitral awards brings uncertainty and is not conducive to settlement. Céline Lévesque explored opportunities for when disputes were formalized but nevertheless at an early stage. She considered the value in creating a “preliminary legal assessment” whereby disputes would be directed towards dispute resolution processes likely to provide the greatest efficiency and value. Lucy Reed also recommended considering an early neutral evaluation (ENE) of the parties' respective claims and defences at an early stage.

Scholars of ADR and dispute systems design (DSD) offered key contributions that encouraged the international investment system to evolve by thinking about more than legal rights (and identifying whether a State is at fault, the need for compensation and the scope of damages) by also considering what type of resolution would result in maximizing the parties' mutual interests. Several contributions by ADR experts recommended researching, constructing and evaluating opportunities at the intersection of traditional ISDS, ADR methods and systemic DSD. In the context of ADR, there was a particular interest in the value of mediation. Jack Coe considered the concurrent use of mediation and arbitration and examined opportunities for strategic interventions by mediators (“Mediation Pre-Sets”) and the value of co-mediators. Nancy Welsh described different types of mediation, particularly those that might address variations in the application of mandatory aspects of mediation, mediation's potential application for IIAs and the need to adapt mediation processes in IIAs to States' mutual domestic concerns. DSD scholars also posited a series of questions for stakeholders to consider and suggested how to use DSD to prevent disputes and manage conflict effectively. Lisa Bingham identified various levels—within a State, within investors and within communities—where DSD might be used to create alternatives, including mediation, negotiated rule-making and other settlement methods. Andrea Schneider likewise explored the application of DSD given its net social and economic benefits; yet she explained that DSD will require broad stakeholder participation and the development of capacity in conflict prevention and management skills, perhaps even the development of mediation advocacy skills. Mariana Hernandez Crespo recognized that DSD is a paradigm shift;

but she suggested challenges can be redressed by building committees to communicate effectively about investment conflict, building dispute systems to promote efficiency given party needs and crafting conflict management systems to address problems through consensus building before problems arise.

Phase III of the Joint Symposium relates to the follow-up from the previous phases to consider opportunities for further development. On the basis of the foregoing pre-conference discussions, observations made in Lexington and simultaneous online interactive debate, conference rapporteurs created post-conference reports to synthesize the experience of stakeholders, to assess the system in light of current considerations, and to integrate this information to outline potential avenues for further exploration, development and implementation. Section III of this publication provides those post-conference rapporteur reports and explores the way forward for the prevention of investment treaty disputes and alternative methods of dispute management.

* * *

THE JOINT SYMPOSIUM—PHASE I— PRE-CONFERENCE RAPPORTEUR REPORTS

The Joint Symposium’s pre-conference expert collaboration blog generated thought-provoking discussion amongst 88 registered participants. About 40 active bloggers contributed 70 posts, 38 video blogs, 18 video podcasts, and 82 comments. The blog participants included attorneys with experience in advising and representing investors and States, investment law scholars, experienced arbitrators, investors, and government representatives. These participants provided perspectives on investment law and policy affecting Africa, Asia, Australia, Europe, the Middle East, North America and South America.

In the password-protected cyber environment, this diverse group of stakeholders and international investment experts was able to dialogue openly as well as to identify critical issues that arise during dispute prevention, conflict management and ultimate dispute settlement. The discussions fell primarily into various categories of issues including: (1) “Alternative Dispute Resolution (ADR): Definitions, Types and Feasibility”, (2) “Perspectives of Stakeholders”, (3) “Assessing the Current System: Systemic Issues”, and (4) “The Way Forward”. The objective of this discussion related to ISDS was to explore the implications of IIAs and how to maximize their support of development objectives.

With these objectives in mind, Phase I participants contemplated the propriety of arbitration or mediation as a general matter and also considered the implications for certain socio-cultural and political contexts. Their discussions centered upon the utility of mediation and arbitration, standards for mediators, and ways to prevent investor-State conflicts from reaching the adjudication stage. Suggestions for methods to aid the prevention and management of disputes included:

- Identifying communication protocols between investors and government officials;
- Developing policy frameworks related to international investment;
- Building capacity to aid government officials in implementing the policy frameworks and understanding the scope of investment related risk;
- Authorizing State regulatory agencies to implement treaty “aftercare” to prevent conflicts; and
- Finding methods to promote predictability and consistency in adjudicative decisions.

Given the robust dialogue on the pre-conference collaboration blog, it was necessary to synthesize these materials to set the stage for the Lexington conference. In a first step, individual blog posts were summarized in 8 blog digests to provide for easy reference. Washington & Lee students then reviewed the online dialogue and blog digests to create Pre-Conference Rapporteur Reports, considering the different forms of DPPs, ADR, systemic issues and possible solutions for a way forward. These reports were then made publicly available to all conference speakers and participants to orient the discussion at the Lexington conference, to spark debate and to generate dialogue. Various keynote speakers and panelists relied upon these materials during Phase II of the Joint Symposium. These reports are also made available in this publication (Hamilton; Perkins & Stoehr; Cottingham; Hasbrouck & Ratigan - *see below*), as are the blog digests (see Annex 2).

1. Alternative Dispute Resolution (ADR)—Definitions, Types and Feasibility

by *Gene Hamilton**

Introduction

The Joint Symposium defines ADR as an approach to the settlement of disputes by means other than binding decisions made by courts or tribunals. As a general matter, ADR is broadly understood as involving the use of negotiation, mediation, conciliation, or arbitration. These techniques are not necessarily mutually exclusive in any particular conflict, but can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes. ADR is typically a consensual process that involves the intervention of a third-party neutral to assist parties in resolving their conflict. In the specific context of investment treaty based investor-State disputes, ADR is better understood as an international dispute resolution mechanism that is an alternative to adjudicative mechanisms such as investment treaty arbitration or national court litigation.

Although a layperson might consider various ADR methods to be synonymous, each process has unique attributes. Perhaps the best analogy of different dispute resolution mechanisms is that of a carpenter's tool-kit. Skilled carpenters use more than one tool; they select tools suited to the task at hand and use tools in combination to create valuable services for end-users. Similarly, there is more than one method for managing investment treaty conflict. Skilled practitioners recognize that investment-related concerns may not always be suited for adjudication; and investors and States may wish to avoid the escalation of conflict to prevent disputes from becoming formalized. Skilled stakeholders can create and use appropriate tools to achieve outcomes that create the optimal utility in a given situation. The key is to understand the range of dispute resolution options, to assess their utility for managing treaty-related conflict and to transform dispute-settlement into a process that is a net wash or possibly adds value.

The pre-conference discussion focused on a variety of topics, including the value of alternatives to investment treaty arbitration, different types of ADR processes, the implications of settlement, the mediation of investment disputes, matching cases with ADR methods, and engaging in systemic dispute systems design.

Synthesis of the pre-conference discussion

In the pre-conference discussion, experts explored issues related to the use of ADR in ISDS arising under IIAs. There were wide-ranging discussions related to ADR and its feasibility. This report covers both the range of ADR methodologies and key themes that arose repeatedly.

There are a broad range of ADR methods available for resolving investment treaty disputes. The overall objective of these ADR methods is to avoid, prevent or effectively manage disputes. Pre-symposium discussion identified methodologies such as: (1) indirect diplomatic negotiations between States, (2) direct negotiation between investors and States, (3) the use of ombuds or lead government agencies to manage and resolve conflicts at early stages, (4) mediation, that can involve the use of interest-based or adversarial models of mediation, (5) formalized conciliation through institutions such as the International Centre for Settlement of

Investment Disputes (ICSID), (6) ENE by a third party, and (7) formal fact-finding related to the entirety (or a part of) the dispute conducted by a third-party neutral. Theoretically, these options could be used in isolation or in combination with each other and/or with adjudication processes. Stakeholders can choose to use these processes in a reactive way, by choosing tools to minimize conflicts once they arise; but stakeholders can also proactively plan to manage and eliminate conflict before it arises through the process of DSD. One ADR method that was not discussed was the role of client counselling in the assessment and adjustment of clients' needs, expectations and objectives in relation to perceived investment treaty conflict.

The first theme was classifying where a situation is along a problem management spectrum. A client may use certain terms, such as "conflict" and "dispute," interchangeably, but the consensus was that such terms' meanings are quite different. Commentators suggested that: first a "problem" or dissatisfaction can arise during the course of foreign investment as a result of government measures; thereafter, if the problem or concern is not minimized, redressed or re-assessed, it can become a live conflict requiring resource allocation; and if the conflict is then not managed properly it can evolve into a more formalized dispute (Felstiner, 1981). Understanding where a particular situation stands along this spectrum can aid a skilled practitioner to know what tool is best for the situation. It was even suggested, "conflicts get managed, and disputes get resolved." Although there was some discussion that problems, conflicts and disputes may not be radically different, there was a general consensus that the demarcation can facilitate dispute resolution and prevention. Without a proper assessment of where the matter falls within the spectrum it is difficult to craft ideal solutions and select particular tools for unique situations.

A second theme was, assuming that a conflict or dispute exists, that parties should consider how to prevent unnecessary escalation in order to conserve resources and preserve relationships. Open questions related to whether different ADR methods enable stakeholders to de-escalate or prevent disputes more effectively than others. Stakeholders should consider the costs associated when any problems arise in the context of an investment relationship. The costs associated with the time spent planning how to prevent disputes from arising could then be weighed against the costs of a problem occurring, and potentially turning into a dispute. Part of this consideration may include whether parties wish their relationship to continue into the future, or whether they are simply interested in a one-time transaction. Some suggested the creation of lead government agencies, the exchange of information, or the use of government ombudsmen as viable options to prevent disputes. By contrast, others suggested dispute prevention is a process in and of itself.

A third theme was that parties can gain value in carefully assessing when, where and how to resolve formal disputes. In certain circumstances, both investors and States could benefit from settling problems through various alternatives to adjudication or perhaps even using adjudicative modalities and non-adjudicative efforts (i.e. ADR) simultaneously. Commentators identified challenges in using ADR settlement strategies. In certain circumstances, there may be incentives not to settle. Where outcomes are uncertain, it may be challenging to "bargain in the shadow of the law". Nevertheless, such uncertainty in outcome could also create incentives for settlement to avoid the potential variation in arbitration outcomes. Other commentators expressed concern that, in some jurisdictions, government officials could face personal liability for reaching a settlement that a State considers at some point to involve a sub-optimal resolution. Such a situation may, even where settlement would be objectively reasonable, decrease the likelihood of settlement as

civil servants may be concerned about the scope of risk given factors such as the lack of public baselines, the effect of de facto precedent or general uncertainty about the scope of the law. It may be useful to explore whether setting guidelines or establishing practices related to settlement might be useful in alleviating such concerns.

A final theme was related to factors affecting the efficacy of ADR. Particularly in an international and investor-State context, commentators suggested that respecting traditional methods of resolving disputes and cultural context may add to the value of ADR opportunities. Other factors were also identified as possibly effecting the feasibility of ADR including: (1) parties' capacity to understand and participate in the dispute resolution process, (2) the role of a possible power imbalance between the parties due to differences in political, economic or legal resources, (3) the presence of individuals with authority to resolve the dispute and the scope of settlement authority, (4) the entrenchment of those generating the conflict in the dispute resolution process, (5) changes in administration, whether corporate or governmental, (6) the availability of resources including financial and informational, (7) stakeholder knowledge of and experience with ADR methods, (8) the scope of processes designed to promote transparency in different types of dispute resolution procedures, and (9) the skills and effective selection of ADR professionals, particularly mediators. Commentators identified that assessment of these factors in light of the actual dispute and available methodologies would be useful as, without having the right infrastructure in place, it will prove challenging to use ADR effectively. One aspect that was not discussed was the variability in how stakeholders might approach the assessment of these issues and understand the definition of each method. Expectations about how parties and third-party neutrals may use the dispute resolution process might also differ.

Implications for future discussion

To use ADR effectively, it will be critical to understand when there is a problem, what tools are available to solve those problems, and when particular tools might be more (or less) suitable for particular situations. This may involve creating dispute resolution strategies after the fact, but it may also involve creating pathways for *ex ante* dispute management and prevention. Issues for future discussion might include:

- What incentives are there to make dispute resolution more effective? How can incentives be used to effectively prevent conflict escalation and promote optimal settlement in the future? How might stakeholders create incentives (i.e. via international law, domestic law, institutions, contractual arrangements, soft law, formal and informal market mechanisms or some other venue)?
- What circumstances make arbitration more valuable than other potential remedies, such as negotiation or mediation? What types of investors, projects, industrial sectors may be most suitable for particular dispute resolution strategies? How can commercial usages of trade, cultural contexts and local dispute resolution traditions be drawn upon to facilitate effective ADR?
- What is the role of mediation in the settlement of investment treaty disputes? How can different mediation strategies offer the greatest value? When may it be most useful to use an

interest-based model of negotiation, which focuses on shared values? When is a distributive-model, which is concerned about allocating scarce resources, of greatest efficacy?

- What is the value in combining different types of dispute resolution strategies in a single IIA? What are ways to maintain the value and flexibility of the dispute resolution process while still providing a degree of certainty related to the process for stakeholders?
- What value is added by having dispute prevention and management strategies in place as part of a host State's basic domestic dispute management options? How can various types of assistance, whether in terms of training or capacity building, be most effectively used to facilitate the effective use of ADR?

Notes

* The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

2. Perspectives of Stakeholders

by Jenna Perkins and Jacob Stoehr*

Introduction

As critical stakeholders, States and investors are a focal point for the Joint Symposium on International Investment and ADR.

The Joint Symposium aims to address the current status of the ISDS process, discuss alternatives to the present system, and explore how those alternatives can yield better outcomes. The objective is to create an improved ISDS system that provides greater predictability, promotes systemic legitimacy, and offers faster, cheaper, and fairer results for investors and States alike. The success of ADR in the international investment context has consequences for the continued and expanded use of foreign investment as a force for economic growth and development across the globe. In order to provide a complete picture, this Report uses a broad notion of stakeholder that extends to include counsel, institutions, and arbitrators, as well as States and investors.

The pre-conference discussion on stakeholder perspectives provided a fruitful discussion on the current state of ISDS and addressed issues for future consideration. Much of the discussion focused on States—both as the host States for foreign investment and as the investors' home States. One critical area for consideration at the Lexington conference will be the exploration of the role of States as well as the perspectives of investors, counsel, institutions, arbitrators, and other players. Effectively creating ADR models for investment disputes will best be achieved through a balanced discussion involving multiple groups of stakeholders.

Synthesis of the pre-conference discussion

The pre-conference discussion focused on the role that States play in the resolution of investment disputes, especially in a depoliticized dispute resolution environment. One commentator considered the role that States play in avoiding disputes in the first instance and the possibility of the investor's State inadvertently re-politicizing dispute resolution, which was described as normatively undesirable. On the other hand, others expressed the increased need for States to play a role in the interpretation of investment treaties and establishing precedent for current and future disputes. One commentator suggested that the absence of precedent in international investment dispute resolution is an area of concern for States. Another observer noted that often States do not become involved in the dispute resolution process until intervention is no longer effective and, instead, recommended the increased presence of States at earlier stages of the dispute resolution process. Another potential area of concern arises as a result of the arbitration process itself. One commentator focused attention on investors within the arbitration process, and the enforceability concerns when a State has no assets that can be attached. Alternatively, another commentator described how a State might take other measures, including domestic law reform and bi-lateral commercial relationships, to promote foreign investment and focus less on international investment regimes, such as IIAs. This commentator indicated that a reluctance to engage in investor-State dispute resolution may arise from the belief that IIAs are not a per se necessary precondition for attracting FDI at home; but nevertheless there may be an interest in providing protection to the State's citizens making investments abroad.

A prominent theme was the dual role that States play in the ISDS process. States play one role in seeking to attract investment, but another role in attempting to protect their investors abroad. Representatives from two developing countries highlighted this duality. Having observed transitions in their own countries, some commentators recognized the importance of the government's role in engineering systems that both solicit foreign investment but now also seek to protect their investors abroad. One commentator encouraged the increased use of a rules-based dispute resolution process as beneficial to their State in its dual roles, but acknowledged that the high costs of the current ISDS system make the modern process untenable for smaller investors abroad. Other commentators questioned whether there is value in dispute resolution approaches that do not focus on rules-based results but nevertheless consider what it means to “bargain in the shadow of the law.” To assist the process of rules-based or interest-based dispute resolution, one stakeholder expressed a need for governments to offer training, information and manuals on investment disputes to their investors abroad, as well as to their local governments. These efforts to distribute information can also aid the development of capacity building related to IIAs, investment treaty dispute resolution and ADR.

Others delved into alternatives to the current investor-State dispute resolution process, with several stakeholders describing or proposing innovative strategies to avoid conflicts before they start. One commentator explained its country's efforts to achieve amicable settlement with foreign investors under its IIAs and offered specific examples. Some of these provisions include: (1) timeframes within which to settle a dispute before arbitrating, (2) required negotiation or conciliations through diplomatic channels, and (3) expert advice from a third party. Although there is an open question as to the precise contours of “amicable settlement,” both in practice and in theory, one benchmark is to define it as anything short of arbitration.

Still others explored ideas for avoiding an investment dispute altogether. In thinking about DPPs, one person described the creation of an ombudsman for foreign investment, which involves innovative staffing choices. As the ombuds office has a civilian character separate from the State, the office is able to “amicably” facilitate an investor's potential grievances with the host State. Another commentator proposed a similar model, like a lead government agency, in which the host State creates a committee on investment that then serves to monitor investment and address potential or arising conflicts. Both of these models have the advantage of disseminating information between States and investors prior to a fully developed dispute. Closing the information gap might play a pivotal role in allowing investors and States to address conflicts before investment treaty conflict crystallizes into a formal dispute.

Another proposal advocated a regional, as opposed to national or bi-lateral, dispute resolution model. One commentator suggested that there is a perception in some developing countries that they experience differential treatment and may therefore find regional investor-State dispute resolution systems that account for the local colour of dispute resolution to be more palatable. Taking a more multilateral approach, another suggestion involved the role of international organizations to manage international investment disputes. Through an informal and consensual process that allows both investors and States to win, international organizations may be in a position to facilitate amicable settlement. Nevertheless, there may still be concerns given the non-binding consent-based nature of mediated agreements, which may not necessarily address States' and investors' needs for finality in the same way that arbitration might.

Several commentators explored the increasingly complex environment in which foreign investment operates. Today's investment climate should address the rights of investors but also the issue of State sovereignty, such as environmental and social concerns. The lens through which each State views investment treaty arbitration will depend upon its own history with ADR, and circumstances which make the country unique. For example, one commentator focused on its home State's modern, comprehensive constitution and national dispute resolution processes. This suggested that a consideration of the utility and operation of ADR for investor-State disputes must not only address the direct needs of the State and the investor, but also country-specific characteristics and the broader needs of the society and communities directly affected by foreign investment.

Implications for future discussion

As various stakeholders explore their concerns, the discussion of solutions to the prevention and management of investment treaty conflict—and the possible use of ADR—are beginning to emerge. Moving forward, the discussion should establish the role of States, as both host States and investor's States, in creating frameworks that continue to draw investment, but that also avoid disputes before they ripen into arbitration. The views of a broad base of stakeholders will be critical for assessing these concerns and balancing solutions. We hope that the Joint Symposium's activities will begin the process of developing this dialogue, evolving into a larger discussion about what strategies could be utilized most effectively within the larger system of IIAs and ISDS. The ADR strategies discussed, proposed, and generated during the Joint Symposium will pave the way for analysis and assessment, and for future dissemination and adaptation. We stand at a crossroads in the ISDS context; tomorrow's solutions may come to fruition from seeds planted today.

Notes

* The views expressed in this article are those of the authors and do not necessarily reflect the views of the UNCTAD Secretariat.

3. Assessing the Current System—Systemic Issues

by *Caitlin Cottingham**

Introduction

The Joint Symposium on International Investment and ADR seeks to generate ideas and explore good practices for preventing, managing, and resolving investment treaty conflict in order to facilitate investment, development, and sustainable dispute resolution systems. In an effort to generate conversation that aids this effort, academics, governments, practitioners, investors, representatives from international organizations, and non-governmental entities from around the world have participated in lively pre-conference discussions. These stakeholders endeavoured to assess the current system and identify systemic issues about the value of IIAs and related dispute resolution mechanisms. Such a discussion is a necessary precursor to a meaningful dialogue about how to reform the current system, to prevent the unnecessary escalation of conflict and to facilitate the effective management of treaty disputes. The discussion offered a critique of the current system of primarily resolving disputes via arbitration with a limited number of disputes addressed through ADR. This report summarizes the issues identified as critical, particularly procedural and substantive fairness in light of the primary use of investor-State arbitration, and identifies areas for further assessment.

Synthesis of the pre-conference discussion

During the pre-conference discussions, several key themes emerged. They related primarily to procedural integrity of the dispute resolution, prevention and management processes and the substantive implications for IIAs as these issues pertain to the future of foreign investment and related development objectives. On the procedural level, participants cited concerns about the process of selecting arbitral tribunals and other third-party neutrals, transparency during the arbitration process, the potential implications for transparency in mediation, facilitation of settlement opportunities, the availability of methods to prevent disputes from crystallizing, and the encouragement of non-adversarial approaches to dispute resolution. Other procedural concerns related to the creation of the necessary infrastructure to facilitate mediation and other ADR methods, including the creation of skill sets for stakeholders, transparent availability of information, and other infrastructure needed to facilitate mediation processes. Experts also raised concerns about party access to dispute resolution and the implications for the balance of substantive rights in IIAs.

Questions about the legitimacy of and participant confidence in the current system

The discussions identified that, for the IIA system to function effectively, both States and investors must have confidence in the legitimacy of a dispute resolution system. Stakeholders need to eliminate the risk related to foreign investment and government regulatory authority. This requires a dispute resolution system that offers a fair and enforceable result. Otherwise there is little incentive for parties to utilize the dispute resolution system, and one of the major advancements of IIAs could be undermined. Commentators identified concerns related to arbitral procedure, the enforceability of awards, and the selection of fair, neutral, and appropriate

tribunals. Addressing these concerns can promote confidence in the system and ensure that, when arbitration is used to finally resolve investment treaty conflict, it is resolved properly.

Barriers in attempting to reach amicable settlements

The divergence of tribunals' decisions on issues, including procedural requirements, jurisdiction, applicable legal standards, and the selection of tribunals leads to inconsistent awards along various dimensions. This inconsistency, in turn, creates uncertainty for parties trying to conduct a cost-benefit analysis in the settlement process. Moreover, when States sign IIAs, the procedural and substantive uncertainty can create challenges in understanding the precise benefits and costs they are securing by entering into the agreement. Clarity and determinacy, at least as regards the dispute resolution system, is vital. Commentators noted that inconsistent procedures create challenges for setting a baseline of mutual expectations, which, in turn, may make arbitration a less attractive option. Inconsistency may also lead to a perception of bias that can adversely affect party confidence in a dispute resolution system.

The values of adversarial arbitration versus other forms of dispute resolution

Commentators identified that there may be an over-reliance on adversarial forms of dispute resolution, such as arbitration and other adjudicative processes.¹ There was a particular interest in using more collaborative processes to resolve disputes, such as mediation and amicable settlement. There was also interest in creating infrastructure that would minimize conflict and prevent disputes from arising. Several commentators suggested the overall dispute management system should be more inclusive of ADR either in addition to or, in some cases, in lieu of, the current arbitration default. Consensus-building approaches such as mediation and negotiation offer unique benefits to parties; but they can also be time-consuming and do not necessarily result in the same outcome with an award that is easily enforceable as a matter of law. Future discussion might therefore assess the relative costs and benefits of arbitration and other ADR strategies. Debate at the Joint Symposium might also consider the value of institutional reforms and the creation of governmental (whether intra-governmental or inter-governmental) infrastructure to prevent conflict from becoming a formalized dispute and, thus, avoid the issue of the need for an appropriate dispute resolution process.

The role of transparency in international investment disputes

Another key area of discussion is the appropriate level of transparency for investment disputes. While the degree of transparency varies depending on the method and forum of dispute resolution, there was an underlying concern about what degree of transparency should permeate all international investment dispute settlement. The benefits of transparency run largely to public confidence and an overall perception of fairness while the costs include decreased privacy and potential participation. The costs and benefits of transparency should be explored further both for the system as a whole and specific dispute resolution methods.

Training and capacity building for parties and independent, third-party neutrals

The current system primarily uses third-party neutrals to make adjudicative determinations for the parties in order to finally resolve disputes. Commentators also recognized

that the process sometimes does benefit from using third-party neutrals to facilitate dispute prevention and promote negotiated settlement. The question remains how to build pathways, capacity, and standards to capture additional benefits from those processes. The training and capacity building of parties as well as third-party neutrals will perhaps be a critical aspect of this evolution. Training parties will promote party autonomy in selecting proper third-party neutrals. With the relevant knowledge base, they can approach conflict resolution according to the needs of the individual situation. Training third-party neutrals will provide skills and education to enhance the quality of the process and, presumably, the ultimate result. The question then becomes what should the normative baseline be for the standard skills required of third-party neutrals, how should that be determined and assessed, and whether this skill set should include negotiation, mediation, arbitration or a hybrid of such skills.

Resolving cases via arbitration awards versus through settlement

Recent ICSID data indicates that nearly 40% of ICSID cases are resolved without a final award. This could suggest that a high percentage of cases brought before ICSID could be more appropriately resolved through other dispute resolution techniques. In light of this, the Joint Symposium might usefully explore the business case for attempting ADR before, during or after arbitration. Similarly, it could prove useful to explore if there are particular types of disputes, parties or situations that make a conflict best suited for a particular type of dispute resolution. An exploration of the relative costs and time allocated to these different mechanisms may also be useful.

Implications for future discussion

Having identified several key issues with the current system, stakeholders should begin to evaluate their relative importance and consider how best to address the identified concerns. Issues of fairness, whether substantive or procedural, should be considered. Substantively, stakeholders should strive to achieve outcomes that are appropriate and reliable; and these substantive objectives have procedural implications. The process of resolving investment treaty disputes might consider encouraging procedures that protect participants, encourage informed participation, promote efficiency and fairness, and support the long term sustainability of the process of managing investment treaty conflicts. Effective management is only part of the solution as it presumes that dispute resolution is even necessary. The current assessment suggests that there is value in exploring methods that may prevent party dissatisfaction from emerging and escalating. Putting safeguards in place that might minimize conflict before it becomes a formal dispute—and potentially alleviates the value of the investment and underlying relationships—is therefore worthy of consideration.

Notes

* The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

¹ The commentary did not discuss how both negotiation and mediation can involve the use of adversarial bargaining techniques (sometimes referred to as “hard bargaining,” positional negotiation or evaluative mediation) (e.g. see Riskin *et al.*, 2009).

4. The Way Forward

by *Brandon Hasbrouck* and *Jason Ratigan**

Introduction

The time and expense of arbitration under IIAs has caused many to re-examine the existing system of resolving investor-State disputes arising under IIAs. Although methods of amicable settlement are available, arbitration has remained the mainstay. Processes which prevent conflict escalation, manage disputes that have arisen, and channel disputes to their efficient resolution have been lauded during the pre-conference dialogue. Why are these potentially more cost effective, relationship maintaining and development friendly methods foregone when many believe it to be in all parties' interests to utilize them? The Joint Symposium is designed to integrate our collective experience to find an answer to this and many other questions. It may be that the ultimate answer is arguably less important than the process of joining together to create collaborative solutions. Understanding the viewpoint of practitioners, States, investors, academics and others will provide the information needed to diagnose conflict and find the remedy.

The pre-conference brainstorming has primarily considered the perspectives of practitioners and academics on evaluations of the current system and the possible alternatives to arbitration. In the future, it may prove useful to offer practical guidelines or hypothetical conflicts as a baseline for assessing the value of unique dispute resolution processes and their relative merits. Moving beyond abstract discussion of ADR methods could facilitate the formation of concrete solutions in light of existing experiences and shared values.

Synthesis of pre-conference commentary

DSD involves the systematic process of creating a dispute resolution system that harnesses the positive aspects of conflict or at least minimizes the negative aspects. The pre-conference discussion has considered what principles and processes might underlie that future system. One commentator discussed the "multi-door courthouse" metaphor (as an effective architectural design) together with consensus building (as a participatory procedural design) to maximize value. This post emphasized consensus building and using creative options to address the interests of stakeholders. Other opportunities, such as the DPPs (UNCTAD, 2010), might also involve establishing inter-institutional alert mechanisms within States or encouraging information sharing among government entities. The hope is that, by considering these opportunities, the system should be sustainable, the results should be less objectionable across stakeholder groups and the process would be more likely to be honoured in the future.

As pointed out by one commentator, it is critical to consider the role of various cultural and legal traditions. That is, in some cultures, the imperative to save face is such that conflict escalation is unavoidable once the dispute becomes public. This supports the claim that non-adjudicative models in such cultures will be far cheaper and sustainable because the parties will not become intransigent or risk a loss of public reputation. As another commentator suggested, beyond cultural issues, State practice must be cognizant of the bargain that IIAs naturally include—i.e., investment for stability. Taken together with cultural awareness, the way forward

should include the consideration of constructive practices that facilitate investment while also addressing sources of conflict and avoiding counter-productive tactics. This may require consideration of a stronger network among States and investors to resolve budding conflicts.

Another commentator went further to suggest a categorical approach to channelling and screening disputes before they escalate to arbitration. That commentator suggested that categories of meritorious, uncertain, and unmeritorious claims can be used to designate the appropriate method of resolution. Using DSD to channel particular disputes to particular dispute resolution processes in advance permits parties to choose their dispute resolution strategy and manage their expectations. Commentators recommended using a “learning perspective” to build knowledge about alleged treaty violations to find the root causes and thereby avoid dispute escalation.

Moving forward, issues of transparency will also need to be addressed. Transparency issues can evolve in different dispute resolution settings. Transparency in adjudicative processes, like in many national courts, appears to be on the rise in the context of investment treaty arbitration. The question then arises whether the same concerns can or should apply in the context of other ADR mechanisms. Pre-conference discussion highlighted concerns about who is the public, who represents the public, and should there be different levels of transparency in different contexts? On one hand, State entities with a defined public interest goal might be obliged to intervene in mediations for the sake of transparency. Nevertheless, in other contexts, different situations might lead to different needs and different transparency obligations.

A different discussion has arisen over the conception of arbitration panels and ways to address the delegation of sovereignty. It may be that, beyond simply using arbitral tribunals to adjudicate IIA-based rights, there may be other opportunities to provide guidance to both States and investors about the scope of their rights and responsibilities. This might take the form of interpretive notes issued by a joint commission or more particularized guidance within treaties. The objective would be to offer guidance prior to dispute resolution (or even prior to investment) to manage the expectations of States and investors.

Although this report represents a synthesis of a sub-set of discussions, ultimately the totality of pre-conference discussions and the symposium itself is about the way forward. When considering the scope of material, symposium participants are encouraged to keep in mind the salient learning points that expand knowledge, facilitate improved diagnosis and generate superior remedies for conflict management and prevention. Guidelines and hypothetical cases with common fact patterns would allow participants to illustrate timelines and processes to make intangible theory concrete for those less familiar with these institutions.

The way forward: Future discussions

The conference in Lexington will explore existing approaches, develop alternative approaches, and introduce new alternatives available to States and investors to resolve their disputes. Moving forward, all actors in the area of international investment should be encouraged to give these alternative approaches more intensive consideration. Their nature of involvement in this area, however, will differ in many ways.

States could engage in active policy-making on alternative approaches. For example, States could pay more attention to ADR techniques as alternatives to conventional investment treaty arbitration by making them available and building the necessary capacity and authority within the government to enable the appropriate application of such techniques. This includes the delegation of authority, including budgetary authority, to the relevant government officials or authorities at the appropriate level of the government, allowing them to settle a claim through amicable settlement, conciliation, mediation, or other relevant techniques, and providing them with the necessary protection and safeguards under law. Such an approach by a government would implicitly communicate to investors that mediation or conciliation are viable options to be considered as alternatives to arbitration and not merely additional bureaucratic hurdles preventing a swift response to a problem arising with State authorities.

Investors will also have to take an active role. Investors experiencing difficulties, managing conflict or in the midst of a more formal investment dispute related to government measures could give more consideration to alternative means. In particular, small and medium sized enterprises may wish to seek out modalities to have their concerns heard and addressed through the institutions put in place for dispute prevention.

As the legal community of practitioners sits at the interface between both parties of an investment dispute, advising both investors and States and providing for settlement between the two, their involvement in the process may be of particular significance. Legal practitioners can create awareness among investors and States of the multiple alternatives, especially when both parties are not aware of or have full appreciation for the variety of options in place to aid them in the resolution of disputes. Practitioners may even encourage the use of alternative approaches in cases where it seems particularly viable. The community of practitioners may need to consider enhancing its capacity to handle an increase in the use of alternative means, especially for ADR techniques. This requires that lawyers become more familiar with and gain experience in using mediation, conciliation and other methods to resolve investment disputes. Practitioners may expand their scope of services and adapt their expertise in international investment law by adding substantive experience in the use of ADR.

We are at a unique juncture where, in the context of IIA conflict, the world of arbitration and mediation are converging in a way that permits the creation of unique value. In light of this and the issues raised in this report, it may be worthwhile for the Joint Symposium to explore a variety of themes and issues.

First, it may be prudent to go back to the text of IIAs themselves and consider how to draft the dispute resolution terms more effectively, concretely and precisely. This might include drafting and implementing: (a) more precise references to those individuals responsible for resolving disputes, (b) specification of timeframes and other obligations, or (c) greater opportunities for State-to-State consultation.

Second, exploration of institutional re-design, at the national or international level, may prove fruitful. This might, for example, involve enacting national legislation and programmes or training at the local level to facilitate policy programmes that might prevent conflict from escalating into a formal dispute. Similarly, it may also involve the creation of international entities to enhance coordination between States and among other stakeholders.

Third, consideration of rules or guidelines related to ADR methods may provide useful baselines. This might, for example, involve consideration of the procedures and expectations of parties, their lawyers and mediators in the conduct of arbitration proceedings. It might also usefully involve consideration of the different types of mediation approaches—whether evaluative or facilitative—and how to adopt the mediation process to promote useful outcomes. Likewise, it may be helpful to explore the standards for when, where and how settlement is appropriate in the context of ISDS. Presumably, such rules, guidelines and baselines will promote simple, nimble and efficient dispute resolution.

Finally, it may be useful to explore opportunities for institutional support of ADR and DPPs. This is likely to require the creation of capacity to serve the expanded need for ADR and conflict management services. This may mean that government stakeholders, private sector law firms and other individuals may need to gain enhanced training in mediation skills. Likewise, it may require the identification of a pool of mediators competent to manage investor-State disputes and with the proper background in international investment, development and international law. Such consideration will permit the reality-testing of ideas and aid in the assessment of what steps will be required to put systems in place that maximize the value of ADR and DPPs.

The consideration of these issues requires the active participation of investors and States. It also necessitates a willingness to think about how to achieve improvements in practical terms and the concrete steps required to accomplish such ideas. Ideally, by identifying these areas in this report, we hope that the Joint Symposium will generate debate, discussion and perhaps even concrete suggestions for implementation now and in the future.

Notes

* The views expressed in this article are those of the authors and do not necessarily reflect the views of the UNCTAD Secretariat.

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THE JOINT SYMPOSIUM—PHASE II— CONFERENCE COMMENTARY BY EXPERTS

During Phase II and at the Lexington conference, various experts offered a variety of insights into stakeholder perspectives to explore issues related to the prevention and effective management of ISDS. The conference was buttressed by three key presentations from Michael Reisman, who explored the utility of alternatives to arbitration, Margrete Stevens, who discussed the potential value of mediation, and Lucy Reed, who highlighted areas to explore in the future. Other experts provided critical commentary to assess the current state of stakeholder experiences, the scope of possible innovations and the way forward in the future.

The next section provides the written remarks of the keynote addresses as well as the formalization of remarks made by panelists and other key participants at the Lexington conference. There was a consensus that arbitration is a fundamental method for resolving investor-State disputes and that without the possibility for final adjudication of international law rights in a neutral forum, the value of other ADR methods might be limited. On that basis, the experts explored issues related to the implementation of DPPs, the creation of communication infrastructure to build capacity to implement dispute prevention and management, and the utility of other ADR methods such as mediation and ENE. Although there will inevitably be challenges associated with innovation, the consensus amongst the experts in Lexington was that the possible value in alternative modalities was worthy of ongoing consideration.

A. Keynote Addresses and Observations

1. International Investment Arbitration and ADR: Married but Best Living Apart*

by W. Michael Reisman**

Any international lawyer of my generation would be bemused by the title and aspiration of today's conference. Since the great American "Peace Movement" of the nineteenth century, with its almost religious belief in compulsory international arbitration as the preventer of war and the panacea for international disputes—the movement which provided much of the impetus for the establishment of the Permanent Court of Arbitration in 1899—the international legal system has moved decisively away from a very soft notion of ADR to a firmer one of binding arbitration as the means for resolving international differences. The United Nations General Assembly periodically recommends that States resort to third-party dispute settlement, and the *Institut de Droit International* has passed numerous resolutions urging States to arbitrate and further insisting that the exercise of a right to initiate an arbitration or adjudication is not an "unfriendly act."

One hundred years ago, disputes between foreign investors and States would have been "settled" by what was called euphemistically "the diplomatic protection of nationals." The *ultima ratio* of diplomatic protection was the threat of gunboats seizing and then managing the customs houses of weaker States until the debts were paid off. To replace that with the BIT generation's compulsory arbitration was an extraordinary accomplishment.

Of course, the mere fact that some 2,700 BITs with compulsory arbitration clauses have been concluded would, in itself, mean little. International legal institutions are unsurpassed in their ability to churn out vast reams of paper, and the path of international law is littered with paper promises that have proved to mean nothing where some issues are concerned. In this case, however, the treaties have meant a great deal. UNCTAD has identified 318 arbitral cases based on investment treaties, most of them having taken place in the last five years. Very recently, an analysis in the *Financial Times* observed that bringing an international action against a State, which was once considered the "nuclear option," is now viewed by both putative claimants and respondents as a serious but nonetheless acceptable strategic move (Beattie, 2010).

Ironically, what international lawyers proudly point to as a significant systemic progression, the ADR community seems to view as a problem. ADR proponents appear to believe that there is too much third-party dispute resolution in the field of international investment. In point of fact, there is actually very little, and much of it is already being disposed of through informal settlement. The above-stated number 318, which seems enormous in comparison to other international judicial or arbitral instances (for example the dockets of the Permanent Court of International Justice, the International Court of Justice, and the Permanent Court of Arbitration) must be put into context. The gross amount of foreign direct investment is very large, indeed greater than the volume of world trade. There are approximately 80,000 multinational enterprises, which are by definition foreign direct investors. These entities have some 100,000 affiliates. If these 180,000 potential claimants are factored by the number of BITs, bearing in mind that many of these entities are multiple foreign direct investors and that not every

foreign direct investor is a multinational enterprise, then the number of actual disputes going to arbitration seems to be a miniscule fraction of the universe of foreign direct investment.

Professor John Jackson, the great authority on international trade law, has observed that approximately one half of the disputes that begin in the World Trade Organization's (WTO) Dispute Settlement System actually proceed to GATT² panels, and only a fraction of those then proceed to the Appellate Body (Jackson, 2009).

Think of the relations between a foreign investor and the various levels of a host State's government as a continuum: at one pole of the continuum are the innumerable and varied "differences" that bedevil any relationship. Beyond them are those "differences" which, if unresolved, degrade into "disputes." At the other pole of the continuum are those "disputes" which if unresolved proceed to third-party settlement. I am unaware of any figures on the number of "differences" arising between foreign investors and some part or level of the apparatus of host States which actually evolve into "disputes." But given their contraposed interests and the very real potential for disagreement between investors and governments (a point to which I will return), and the continuous problem-solving that is at the heart of contemporary business management, I would guess that most of the millions of such "differences" are nipped in the bud, with only a small percentage of them evading settlement and actually degrading into "disputes."

Nor do I know the number of those "disputes" that are resolved before they proceed to the submission of a notice of arbitration. I would assume, however, that such a figure would not be negligible either. Once a dispute has reached the notice-of-arbitration stage at ICSID, Eloïse Obadia reports that 34% are even then still settled (ICSID, 2010). The point of emphasis is that, given the gross numbers of foreign investors and their myriad daily differences with some level of the government of the host States in which they operate, the number of disputes that actually go to arbitration is low. I would go further and assert that not only is there not "too much" arbitration, but that the very availability of arbitration promotes settlement. One of the reasons for settling is surely the prospect, down the road, of compulsory arbitration. With apologies to Dr. Johnson, it could be observed that compulsory arbitration, like "the prospect of being hanged, wonderfully concentrates the mind."

Contemporary investment arbitration has also played a law-making role which dispute resolutions achieved by ADR cannot. In a triumph of transparency, most of the decisions in those cases which culminate in investor-State arbitration have been published, so there is now an accessible body of case law which can guide government officials, investors and practitioners, and which scholars can use to analyze and codify jurisprudence. There are, to be sure, discrepancies in this large body of case law; every human enterprise (and that includes all the branches of law) contains "outliers." As anyone who has participated in a "Restatement" exercise well knows, there are discrepancies in American case law, and it is still considered to be a well-organized, hierarchical system. Treatises on international investment law face the same demands for judgment and synthesis that treatises on developed national legal systems encounter—just look at any recent edition of *Dicey and Morris on the Conflict of Laws* in order to see how many questions remain uncertain in parts of the private international law of a developed national legal system. In short, uncertainty is not a problem bedeviling only international law. One is reminded of the index to H.L.A. Hart's famous book, *The Concept of Law*. The item reads, "Certainty of Law, See Uncertainty."

Nor has the system of decision-making in investment proved to be loaded against the government party. Unquestionably, contemporary international investment law is designed to encourage foreign direct investment, and all of the obligations in the *current* generation of BITs are imposed solely on the State. (I emphasize the word “current” because, as I will explain, the dynamism of contemporary international investment law is felt in both the law-making as well as the law-applying functions.) But Susan Franck’s important empirical research has shown that the cases break fairly evenly between investor claimants and State respondents (Franck 2009). Moreover, given the dynamics of three-person tribunals, the successful claimant rarely receives all for which it has prayed.

Now I appreciate that many speak of a crisis in international investment law. There have been a few wrong-headed decisions, a few States have denounced the ICSID Convention, and others in the State, investor and ADR communities are grumbling about what they perceive as the rigidity and unfairness of the system. Some politicians—in various parts of the business and industrial world, and not only in developing countries—are resorting to populist and protectionist rhetoric, and, echoing from the past, we are hearing occasional jeremiads about the “inherent” exploitation of foreign investment.

The very effectiveness of investment arbitration has been blamed, and there are suggestions to move it toward—or even replace it with—ADR, even though, as the figures show, informal ADR arrangements already account for the radical reduction of most differences, disputes and many arbitrations. Before we all rush off to join Chicken Little and conclude from the various tensions and complaints that the sky is falling on the international investment regime, we ought to step back a bit and consider the nature of the legal process and, in particular, the process of international investment law.

International investment law is a process comprised of law-making and law-applying. The law-making is carried out largely through the negotiation of investment agreements and adjustments in international and national dispute resolution mechanisms. Application of the law takes place in arbitral and judicial fora. We think of the latter as uniquely and quintessentially adversarial, but so is the former. The creation of new agreements, the revision of old ones, and even the creation of “model” treaties are all adversarial. But rather than indicate a systemic crisis, the conflicts in all of these areas evidence a commitment to building international investment law.

Let me explain this point a bit further. The stresses which investment law-making and law-applying have experienced in the recent past are part of a dialectical process characteristic of all robust systems of law. Every legal arrangement is the product of the identification of some common interest shared by those who have shaped it. No sooner than any such arrangement is installed, however, it begins to be tested and challenged—not only by those who do not share in that specific common interest, but even by actors within the entities and communities which established and participated in the arrangement but who have since come to believe that their interests are either being insufficiently served or have changed. Thus every legal arrangement, whether substantive or procedural, is always under some pressure for change. The net result is that law, for all its pretensions to being stable and unchanging, is actually a continuously dynamic process of agreement, challenge, adjustment, accommodation, new agreement, new

challenges and so on *ad infinitum*. The struggles through which this process operates are not indicative of a weak system, but rather of a robust system that is in full vigour.

The especially dramatic dynamism of international investment law derives from the convergence of very different interests which it must accommodate and manage. The popular demand to increase national wealth and, through some form of distribution, to expand economic and other life opportunities for all citizens, is a universal feature of modern political life. That this demand can be met solely by autochthonous national development is no longer seriously argued. Responsible officials at the national level, knowing that positive development now requires a constant flow of incoming and outgoing investment, have little choice but to participate in the making and applying of international investment law. Ironically, one of the consequences of more efficient democracies is that these same officials, however clearly they may see their States' long-term interests in an effective international investment regime, can become prey to a populist clamour for protectionist measures, especially in times of crisis. Corporations, which are simultaneously vital instruments for achieving national economic goals as well as actors seeking to maximize their profits for their own more restricted universes of shareholders, for their part appreciate that they must operate globally in pursuit of resources and markets. They understand the indispensability of international investment law, but they too can fall prey to the sirens of protectionism when they believe that it may serve their short-term interests.

Everyone—governments, businesses and people—is seeking increased trade and investment. At a certain level of generality, all appreciate their centrality in the achievement of many other developmental and politically transformative goals. But they often disagree on the fine print and its application in particular contexts. Decisions in international law must balance claims seeking respect for the special requirements of national communities, concern for which is one of international law's central postulates, against the need for sustaining the international rule of law. When the proper balance is struck, economic activity can continue to flow freely about the globe. International law must accomplish this balance in an environment in which short-term political interests, often driven by intense domestic constituent pressures as well as by power considerations, may lead critical State actors to try to set aside the law for *raisons d'état*.

International investment arbitration plays an indispensable role in the process of accommodation of the competing interests which I have described. But can this system of arbitration be replaced by another modality of dispute resolution? As I observed earlier, the actual number of "differences" that degrade into "disputes" and then proceed to an arbitral decision in international investment law, appears to be infinitesimal. So one may infer that, much like Molière's M. Jourdain, who discovered that he was speaking prose without knowing it, a substantial amount of what we call ADR is already occurring. But it is all taking place within the framework of a compulsory arbitration system. Can ADR go further and actually replace investment arbitration?

Consider first negotiation. Agreements that can be secured by negotiation are unquestionably superior to solutions imposed by third-party decision. Negotiated agreements are, at least in the short term, self-executing and do not require enforcement, which is the most formidable problem in international law. For this reason, international law puts a high premium on such settlements. Both the Permanent Court of International Justice and the International Court of Justice have suspended proceedings when negotiation seemed to promise a settlement.

But negotiation alone, without the prospect of compulsory arbitration, is a different creature entirely. A multi-national entity may have annual revenues vastly exceeding those of the host State in which it has invested, but all of that potential influence may be neutralized in particular investment disputes. A common feature of foreign direct investment is that the investor has sunk substantial capital in the host State, and cannot withdraw it or simply suspend delivery and write off a small loss as might a trader in a long-term trading relationship. The Romans said “*potior est conditio defendentis*,”¹ and this is likely to be the situation in foreign direct investment. So rather than having an equality of bargaining power in an exclusively negotiation-based regime, parity will cease and things will tilt heavily in favour of the respondent State. *Unless*, that is, both sides appreciate that if negotiations fail, compulsory arbitration will follow. So allowing for, or even requiring, a period of negotiation prior to arbitration may produce a settlement that obviates arbitration, while simply replacing arbitration with negotiation would not assuage the concerns of the community of foreign investors whose interests are necessarily a central concern of international investment law.

Conciliation and mediation, as optional modalities prior to compulsory arbitration, have proved to be effective dispute resolution techniques in transnational transactions that have not involved government respondents, and I advocate their use. But their promise in international investment law disputes, in which one of the parties is always a government, seems to me to be more limited. As many in this audience will know, all large and complex organizations in which authority is allocated among many different departments will experience difficulty in making major decisions. This seems especially to be the situation with respect to governments in international investment law disputes. Indeed, in States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having “betrayed” the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal careers. This seems to be one of the reasons why many land and maritime boundary disputes, in which the ineluctable legal decision is often clear to outsiders, are still submitted to third-party decision. It is often easier for governments to have the right decision imposed by an outside tribunal rather than “conceded” by the government.

An additional problem with expanding the use of ADR modalities in international investment disputes is, paradoxically, the demand for transparency. Mediation in private disputes can be conducted under conditions of confidentiality that are unbeknownst to a subsequently established tribunal should the ADR initiative fail. Ensuring confidentiality in international investment law is much more difficult, not simply because governments are often “leaky” but also because within States there is often popular concern over the possibility of corruption. There are, moreover, intense demands by non-governmental organizations (NGOs) and other stakeholders, with very diverse interests, for transparency and even participation in processes leading to decision.

Conflict is part of every legal system, and that includes international investment law. There is certainly a role for various forms of ADR, but compulsory arbitration has been until now the ultimate mode of conflict resolution in the BIT generation. Are there better modalities? Winston Churchill famously observed of democracy that it was “the worst form of government ... except for all those others that have been tried.” I would suggest that investment arbitration—

conflictive, expensive, and sometimes inconsistent in its results—is the worst system of resolving international investment disputes ... except for all the others. Various ADR methods promise an increase in dispute resolution utility, but only as long as there is the prospect of compulsory third-party dispute resolution if other efforts fail.

The challenge for international investment law is to continuously ensure globally productive enterprise by accommodating diverse interests in arrangements which must be, by the nature of things, at once both competitive and collaborative. In the best of times, this challenge is daunting. In this unusually difficult economic moment in history, all things considered, the present system for arbitrating investment disputes has not done badly in meeting the challenge.

Notes

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¹ The phrase translates as “the defendant’s position is stronger”.

² General Agreement on Tariffs and Trade.

2. Synopsis of Remarks

by *Margrete Stevens**

Margrete Stevens provided the lunchtime address to the participants at the Washington and Lee and UNCTAD Joint Symposium on International Investment and ADR. The focus of her remarks was on the usefulness of expanding the avenues for settling investor-State disputes. Stevens noted that ICSID had been administering 5 disputes in 1995, and that that number now stood at some 120. The enormous growth in the number of investor-State cases had shown considerable diversity in the kinds of disputes brought to the Centre, both as regards factual and legal issues, scope, size of claims and overall complexity and nationality of parties. The legal costs of individual proceedings were another indicator of the diversity that these disputes presented. These differences raised the question of whether more varied dispute settlement procedures were not justified.

In her remarks, Stevens touched on whether the use of non-arbitral ADR (i.e. mediation or conciliation) would be a positive development, suggesting that for some disputes or for some parties, there might be efficiency and cost gains in exploring these kinds of dispute settlement procedures. Stevens also considered whether the use of ADR methods should be mandatory, concluding that this would not be desirable insofar as the very underpinning of non-binding procedures was based on the parties' good will, confidence and engagement in the process, and that the default mechanisms that applied to arbitration proceedings would not work well in a procedure that relied on collaboration and flexibility. Stevens also provided observations on the 2009 Report released by the Centre for Effective Dispute Resolution (CEDR) Commission on Settlement in International Arbitration (CEDR, 2009). The commission had been chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler. The commission's mandate was to review best practices by international tribunals dealing with settlement of disputes and suggest methods to improve settlement. Stevens observed that the commission did not limit its analysis to international commercial disputes and argued that recommendations contained in the report could in some instances find use in the investor-State context, either as means to improve the overall framework for arbitral proceedings or as a way to introduce opportunities to discuss settlement in individual proceedings.

Stevens highlighted a few of the recommendations that parties to investor-State disputes might consider:

1. "Internal party representatives" should be present at procedural hearings to ensure that all parties were aware of the available ADR options.
2. Arbitrators should recognize that there are various opportunities in the arbitral process that provide a chance to discuss these ideas.
3. Subject to the parties' agreement, the tribunal's preliminary views on the merits of the case should be disclosed to the parties.
4. Party representatives ought to have authority to take an active role in the case, ensuring the approach by the lawyers "is consistent with [a party's] own objectives and interests."

In conclusion, Stevens reminded the audience that the ICSID dispute settlement system had been elaborated in order to “depoliticize” investment disputes. While such depoliticization to a large extent had succeeded at the international level, there was a risk that investment disputes could become politicized at the internal or domestic level, for example in connection with a change of government. In these circumstances, there would be less opportunity to pursue non-binding procedures, especially in the absence of a strong domestic framework allowing for mediation or conciliation of such disputes, including the payment of possible damages.

Stevens concluded her remarks by stating that UNCTAD’s paper on dispute prevention and alternatives to arbitration (UNCTAD, 2010b) had provided many new ideas of how to improve the current investor-State dispute settlement system. She acknowledged the many challenges that lie ahead but expressed optimism that the discussions occurring at the conference would help improve the existing framework for investor-State ADR.

Notes

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3. Synopsis of Closing Remarks

by Lucy Reed*

Lucy Reed delivered the closing remarks for the Joint Symposium on International Investment and ADR. Rather than attempting to synthesize the remarks of the impressive array of speakers, Reed highlighted the speakers' creative suggestions and offered her own views to generate insights for the future. In particular, she focused on the core goal of offering ideas, guidance and areas for improving use of ADR to enhance management of investment treaty conflicts. Recognizing that mediation and ADR can be useful alternatives to arbitration for resolution of both commercial and investment treaty disputes, Reed challenged participants—whether participating in person or remotely through the Internet—to take what they had learned at the conference and use it productively.

First, she commented on the Joint Symposium's unique use of technology, which she called “Web 2.0”. Observing that the Joint Symposium uniquely used technology to offer meaningful pre-conference interactivity through blogs and pre-conference rapporteur reports and then simultaneously used interactive blogging and real-time streaming of the conference proceedings, she observed such innovative uses of technology could expand stakeholder participation and also minimize the carbon-footprint of international conferences. As Reed later noted, “one of the key achievements of the Joint Symposium was its genuinely innovative use of technology—before, during and after the conference.”

Second, Reed expressed a degree of scepticism about the value of mandatory ADR for international investment disputes. She indicated that while there is value in the way national court systems rely on mandatory ADR, including court-ordered mediation, this does not readily translate to resolution of disputes between States and foreign nationals. Nevertheless, she suggested there can and should be an open door to mediation and other forms of ADR and conflict management in investor-State disputes. She encouraged the growing interest in this area.

Noting *realpolitik* concerns, Reed identified four aspects that differentiate investor-State disputes from commercial disputes in the ADR context. First, investor-State arbitration is something of an aberration in international law. Having a sovereign on the same plane as a private corporation is a relatively new paradigm, and shifting the forum for dispute settlement from arbitration to mediation does not eliminate the power imbalance within that paradigm. Second, in investment treaty disputes, the relationship between investors and the host State is often fractured, which means that there is no future relationship to protect. The lack of shared future interests obviously affects the design and utility of dispute resolution systems. Third, money is rarely if ever the only issue. It is difficult to mediate jurisdiction and policy issues where economic risk management is not a primary driver of settlement factor. Finally, problems often arise because States have limited authority to settle and voluntarily compensate foreign investors. Reed highlighted the typically complex and burdensome inter-agency process for approval of a settlement.

Reed next offered her intellectual “shopping list” and urged the international ADR community to focus on a few key issues. These primarily relate to creation of dispute resolution systems through treaties and management of investment treaty related conflict. On the agreement

and treaty side, the Reed “shopping list” focused on three practical issues to avoid full-fledged dispute. First, more attention needs to be paid to stepped processes, such as multi-tier dispute resolution. Second, participants in these treaties and agreements need to articulate expectations and policies. Finally, the cooling off period in treaties should perhaps be made expressly jurisdictional, to confirm an affirmative obligation of the parties to engage in consultations. As for the dispute phase, the Reed “shopping list” explored seven ways to improve the dispute resolution process.

First, studies should be conducted to analyze the cases that do not result in a final arbitration award on the merits, as well as those awards that memorialize settlement agreements. She suggested that the research might explore specific patterns that foster settlement and lead to successful non-adjudicative outcomes. Reed argued that it is necessary to move beyond theory and consider the demonstrable specifics of how, when and why settlement occurs.

Second, States need to be actively kept involved in the process of managing investment disputes, such as the “aftercare” and dispute prevention activities of countries such as Peru and Colombia.

Third, critical stakeholders need to be involved in the dispute resolution process at an early stage. This would mean that States, investors, and key individuals with decision-making authority need to be involved in the process, and perhaps be literally in the room, during preliminary meetings and the mediation process to make key decisions.

Fourth, UNCTAD, ICSID and other institutions should create a space to publicize and reward success by States in settlements without disclosing confidential information. This would let the community know which States are willing to settle, which might influence investment decisions positively.

Fifth, stakeholders should continue to wrestle with transparency issues.

Sixth, there should be a process to build lists of neutral third party facilitators who can offer honest evaluative assessments of a claim. Reed observed that expanding this pool, like the pool of chairmen and chairwomen for arbitrations, is critical.

Seventh, offering her own view of what ADR methods are most likely to be successful, Reed suggested ENE of the parties' respective claims and defences. This might even include an opportunity for a tribunal itself to offer—on an agreed and preliminary basis—its views of the merits of the claim, on the basis of a minimal record. This might provide the parties with a framework for moving forward and streamlining the arbitration process.

In conclusion, Reed identified herself as a guarded supporter of ADR in investment treaty disputes, provided that ADR specialists recognize that domestic ADR techniques do not and will not apply indiscriminately in international investment disputes.

Notes

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B. Expert Commentary from Key Participants

1. Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels

by *Lisa Blomgren Bingham**

Investment treaty disputes present multiple opportunities for DSD: the global, regional, national level, individual investor/State partner, within the individual investor corporation, and community levels. Developed and developing worlds may present different design considerations. Each jurisdictional level requires a different group of stakeholders for the design process. Moreover, each may benefit from different structural choices. This piece will touch briefly on examples.

One way to conceptualize the ADR continuum is between consensual or facilitated and adjudicative processes. An alternative is between interest-based and rights based processes. Interests are underlying fundamental needs based on security, economic well-being, belonging, recognition, and autonomy (Fisher *et al.*, 1991). Rights-based processes generally examine laws, regulations, or contract language. Binding and non-binding arbitration processes are rights-based and adjudicative in that they involve questions of law and fact examined in respectful and somewhat formal forums. Facilitated and consensual processes differ in the nature of the discussion or dialogue, which centres on interests in informal forums.

An alternative framing is to think of conflict upstream and downstream, earlier and later in its development. Cathy Costantino distinguished between conflict management and dispute resolution. However, options for preventing, managing, and resolving conflict fall on a continuum. A comprehensive design starts at the earliest point in the life of the conflict (conflict management upstream) and moves toward fallback options for ending the conflict (dispute resolution downstream), with a variety of options in between. Typically, most DSDs use interest-based facilitated processes upstream and rights-based adjudicative processes downstream.

Professor Michael Reisman suggested in his keynote remarks that facilitated or mediated processes may be unworkable for BIT disputes (Reisman, *see above*). He argued that certain cases that go to arbitration are not amenable to settlement; politics prevent governments from admitting wrongdoing. There is relevant research in United States public sector labour relations showing that elected officials can prefer not to agree voluntarily to terms of a new contract with the union because taxpayers will blame them for the budget effects. When binding arbitration is available, elected officials may prefer to blame an award of a salary increase on the arbitrator. A related concept is the chilling effect of interest arbitration; why should parties take personal risk of agreement when they can blame it on the arbitrator? However, arbitration awards set industry patterns and perhaps even international practice; research suggests that people negotiate in the shadow of patterns and resolve bargaining disputes in preceding steps of mediation and non-binding interest arbitration.

Moreover, Reisman also reported that a substantial proportion of these disputes are resolved short of arbitration through voluntary settlements. If so many cases settle or are

withdrawn, what happens in those settlements? Are they adjusting the contracts? Are they agreeing to terms that depart from the expected value of the contracts? Why not provide structures to assist? This itself suggests opportunities for DSD upstream, before investment arbitration. Before the advent of court-connected ADR in the United States, cases in litigation were already settling, but after two decades of ADR, the trial rate has dropped from 12 to 2 percent. Marc Galanter's studies attribute this in part to dispute resolution (Galanter, 2006). The question is not ending arbitration, but adding structure for facilitated processes. Negotiation and mediation function differently in shadow of a binding alternative and may be better than without one.

In other words, there may be better ways to address international investment disputes. There may be additional designs that could foster agreement. Each level of jurisdiction may entail different design components. These components include the context for DSD, its structural features, and its administration (Bingham, 2008). These vary widely across institutions. Some common components are as follows:

Context for DSD

- The sector or setting for the programme (public, private, or non-profit);
- The overall dispute system design (integrated conflict management system, silo or stovepipe programme, ombuds programme, outside contractor);
- The subject matter of the conflicts, disputes, or cases over which the system has jurisdiction;
- The participants eligible or required to use the system, their roles, and demographics.

Structural features

- Nature of the process or intervention (training, facilitation, consensus-building, negotiated rulemaking, mediation, early neutral assessment or evaluation, summary jury trial, non-binding arbitration, binding arbitration, or “adjudication”, a term representing an informal, less litigious, legalistic alternative to arbitration);
- The sequence of processes or interventions, if more than one;
- Within intervention, the model of practice (if mediation, evaluative, facilitative or transformative; if arbitration, rights or interests, last-best offer, issue-by-issue or package, high-low, etc.);
- Other structural elements of the process (decision standard in arbitration);
- The timing of the intervention (before the complaint is filed, immediately thereafter, after discovery or information gathering is complete, and on the eve of an administrative hearing or trial);
- Whether the intervention is voluntary, opt out, or mandatory;
- Procedural safeguards like a due process protocol (with and without) or the right to counsel (with and without);
- Other due process protections (discovery, location of process, availability of class actions, availability of written opinion or decision).

Administration of the system

- Level of self-determination or control that disputants have as to process, outcome, and dispute system design; is it both parties together, one party unilaterally, or a third party for them?
- The nature, training, qualifications, and demographics of the neutrals;
- Who pays for the neutrals and the nature of their financial or professional incentive structure;
- Who pays for the costs of administration, filing fees, hearing fees, hearing space; and
- Structural support and institutionalization with respect to conflict management programmes or efforts to implement the design.

Structural design elements must be embodied in a contract, policy, guideline, regulation, statute, or other form of rule. Each level of jurisdiction may involve different participants, stakeholders, and design choices. A number of examples came up during the conference:

- *Global level:* ICSID currently provides arbitration services. It could offer disputants a choice and guidance across a family of consensual, advisory, and binding processes. Useful metaphors include the integrated conflict management system, ombuds programmes in organizations, or the multi-door courthouse model for courts.
- *Global level:* In the alternative, ICSID could undertake an advisory function for DSD, similar to one served in the United States federal government by the Federal Mediation and Conciliation Service¹ and federal Interagency ADR Working Group². It could be a central resource that is a clearing house for information. It already provides model language on consultation, negotiation, and third party help.
- *IIA level:* The bilateral treaty itself could include clauses containing a pledge to use mediation or facilitated processes before resorting to arbitration.
- *Regional level:* Regional entities, like the Organization of American States (OAS), could adopt model clauses or plans for dispute resolution and recommend them to member States.
- *State level:* States can adopt their own dispute systems designs for conflict management, prevention, and dispute processing at national level. They can foster dialogue with investors before arbitration. States likely have unilateral control over this form of DSD as long as participation is voluntary.
- *Individual investor/State partner:* A design might permit the State to convene a process involving residents and the investor later in the life of the conflict. It might involve other stakeholders, including local units of government or non-governmental organizations.
- *Within the individual investor corporation:* The company could establish an ombuds programme to address conflict.
- *Community level:* An investor could adopt a design to address conflict between it and residents in a community over the impact of a development or project early in the project through a partnering project. This might entail training and a retreat with local community

leaders before construction or investment begins to discuss mechanisms for handling conflict as it arises during the project.

Each of these jurisdictional levels presents an opportunity to build a voluntary, facilitative alternative that is a loopback to a negotiated solution.

Within each design, there are opportunities to explore a variety of structural elements. During the conference, participants mentioned structural elements including:

- Use collaborative law to facilitate the use of settlement counsel (Lande, 2007). The National Commission on Uniform State Laws has approved a draft Uniform Collaborative Law Act that would permit clients to hire counsel only for negotiating/mediating settlement.¹ If settlement fails, the collaborative law agreement requires the client to seek alternative litigation counsel.
- Pay mediators by how early they get a settlement.
- Use contingent fees for attorneys for resolving disputes through mediation early.
- Use DSD to address the problem of good faith participation in mediation (Lande, 2002).
- Use negotiated rulemaking or multiparty public policy dispute resolution to do DSD.
- Use facilitated processes early so as not to contribute to delay in ending the case, given that research suggests that the sooner ADR is implemented the sooner the dispute terminates (Bingham *et al.*, 2009).
- Use mandatory mediation with an opt-out clause; this presumes use and avoids the problem that some stakeholders fear asking for mediation because it makes them look weak.
- Use a different model of mediation, not directive or evaluative, but transformative or facilitative mediation, to avoid arm-twisting.
- During and after a dispute, use something like negotiating a consent decree, or use an arbitrator-supervised consent decree for political disputes.
- Use non-binding arbitration of interests, or baseball arbitration, that focuses on fundamental needs like economic well-being, as a loopback to negotiation before arbitration of rights under law or contract.
- Use dispute panels, which handle United States federal government procurement disputes as a matter of law.

These are just a handful of ideas that participants began to brainstorm during the conference. They warrant further thinking.

Investment disputes are hybrid public/private disputes. Like contracts, IIAs are negotiated, consensual agreements with certain obligations. Yet they have legislative characteristics given that details of the application must be fleshed out through regulation. As in the case of public and administrative law, DSD for investment disputes may need to balance six fundamental and sometimes competing values: transparency, accountability, participation, collaboration, efficiency, and effectiveness (Bingham, 2010; Bingham, 2009). The current system provides transparency, accountability, and is effective in rendering a final resolution to disputes. However, it is possible to provide a more facilitative system that also comports with important public values. Transparency and settlement are not always inconsistent. Parties can agree to

disclose settlements. Facilitative and consensual designs can foster greater participation and collaboration; they may ultimately be more efficient and equally effective.

Notes

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¹ See www.fmcs.gov.

² See www.adr.gov.

³ Unif. Collaborative Law Act, § 5 (2009).

2. “Why Aren’t More Investor-State Treaty Disputes Settled Amicably?”

by Mark A. Clodfelter*

Finding ways to bring investment disputes between State and foreign investors to mutually agreed and amicable conclusions is an important goal, one that unfortunately was underemphasized at the time that the founding instruments on ISDS were created. While the amicable settlement of disputes is not an easily achievable goal, it is worthy of serious discussion since mutually agreed resolutions are more consonant with the goal of increasing investment flows than the adversarial dispute resolution model inherent in investor-State arbitration.

The challenge of enhancing prospects for amicable settlements—in investor-State disputes—at least disputes that have reached a stage at which some form of dispute resolution procedure is invoked—grows every day as investor-State disputes proliferate. By the end of 2008, 357 known investor-State cases have been brought, with more than 80% of them having been filed only in the last seven years (UNCTAD, 2010c). With the continual, if somewhat slowed, increase in the number of investment agreements (UNCTAD 2010c), together with expanding foreign investment and increased investors' awareness of the availability of investment treaty arbitration, this proliferation will almost certainly continue. At the same time, there is increasing discomfort with the investor-State arbitration process. Investors and States alike feel burdened by the sheer costs of the arbitration option, which often run into the millions of dollars in attorney and arbitrator fees, and administrative costs (UNCTAD, 2010b). Moreover, arbitration is disruptive of the very kinds of ongoing relationships between foreign investors and States that investment protection regimes seek to establish. Furthermore, awards against a State can be large. Prof. Jeswald Salacuse has observed:

“[A] host country faces the risk of having to pay a substantial arbitration award in an amount that, in relation to the country’s budget and financial resources, may prove onerous. Whereas the average award in an ordinary international commercial arbitration is less than a million dollars, an award in an investor-State arbitration is usually many times that” (Salacuse, 2007: 142).

Finally, arbitration awards can have a serious chilling effect—right or wrongly—on public policy initiatives.

These considerations—the growing proliferation of cases together and with growing discontent with investor-State arbitration—support two basic propositions. First, in general, it would be better if disputes were settled amicably than adjudicated. Second, a variety of different processes, including ADR techniques, should be brought to bear more often in order to increase the likelihood of amicable settlement.

Here, there are some things we know and some things we do not know. While, as the 2010 UNCTAD study on alternatives to investment treaty arbitration points out, “comprehensive statistics on negotiated settlements of investor-State conflicts are not available” (UNCTAD, 2010b: 41), we know that in fact many cases are settled amicably. UNCTAD has pointed out that “estimates are that, over the last two decades, such settlements vastly outnumbered” cases actually taken to arbitration. (UNCTAD 2010b: 96). Moreover, many cases where arbitration is actually commenced are also settled.

ICSID statistics suggest that nearly 40% of registered ICSID cases, a majority of which are treaty-based cases, have been resolved without a final award (ICSID, 2010: 13). Some of these may be cases where the claimant simply chose not to pursue a case any further. But clearly, many of these represent instances where both parties agreed to end the arbitration proceedings. UNCTAD reports that at least 55 of the 357 known investor-State arbitration cases “were settled” (UNCTAD, 2010c: 83). Interestingly, Professor Jack Coe estimated in 2005 that 30 percent of ICSID cases are settled through negotiations (Coe, 2005: 35). It therefore appears that, whatever the exact percentages, a substantial proportion of ICSID cases settle without resort to an adjudicated arbitration award. There is no reason to suppose that the figures would be very different for cases under the United Nations Commission on International Trade Law (UNCITRAL) rules or the rules of institutions other than ICSID.

This much is known. What is not known is why some disputes settled and the others did not. A careful study of the discontinued cases at ICSID would yield some valuable insights on this question. But, pending the development of that work and an analysis of the data, it is probably safe to say the cases involving one or more of the following factors are more likely to be settled amicably than others:

- Contractual breaches, rather than broader government policies, i.e., commercial behaviour rather than governmental behaviour;
- Measures by the State that affected only one or a few investors, as opposed to a class of investors; and
- Ongoing, long-term relationships of interaction between the investor and the government or a government entity.

It is also worth observing that ADR techniques have been used in very few instances, and there is at least some evidence that bears this out. UNCTAD reports that “[d]espite the existence of rules and facilities dealing with conciliation and mediation procedures, their application in the investor-State context has to date been minimal” (UNCTAD, 2010b: 61). For example, the ICSID website reports that only six cases have ever been commenced under the ICSID Conciliation Rules, even after nearly thirty years of existence. And no cases have ever been registered under the Additional Facility of the Conciliation Rules or under the ICSID Centre Fact-Finding Rules. Of the six registered conciliation cases, none of them have involved a dispute under an IIA.

This is in sharp contrast to the experience of private commercial arbitration where conciliations have been used frequently in the past (Salacuse, 2007: 174). As UNCTAD observed, “approximately two-thirds of all arbitration cases filed with the Court of Arbitration of the International Chamber of Commerce are settled by negotiation before an arbitral award is rendered” (UNCTAD, 2010b: 97).

Irrespective of whether the percentage of cases that settle is 15%, 30% or higher, there are two questions that are of particular relevance. First, why was not ADR used more frequently? And, second, why did other cases not settle?

To address the first question, it is useful to refer to the advantages often attributed to ADR techniques. Use of ADR can be more efficient in terms of costs and, if successful, saves money; it can preserve working relationships between the host State and its agencies with the investors; it provides greater protection of confidentiality; and it avoids setting legal precedent (Salacuse, 2007). Various reasons have been cited for the reluctance to pursue ADR despite its perceived benefits. It may, for example, be a matter of lawyers' reluctance. Professor Wälde observed that a "considerable arbitration service industry has emerged in the main arbitration centers. It is in the interest of this industry to maintain arbitral litigation as the preferred form of dealing with disputes between commercial companies and between companies and governments" (Wälde, 1985). Other, perhaps less provocative, explanations have been also offered, including: (1) bureaucratic obstruction, (2) a lack of an easy access to qualified mediators, (3) the perception that ADR is ineffective and used for purposes of delay, (4) limits on authority to spend public funds in a settlement, (5) the concern that the cost incurred in an unsuccessful resort to ADR are wasted, (6) the lack of transparency (which makes it difficult for governments to get involved), (7) the precedential risk with respect to the claims of similar investors, and (8) ignorance about mediation and conciliation procedures (Rubins, 2006; Salcuse, 2007; Legum, 2006; Onwuamaegbu, 2005; Coe, 2005).

As regards the second question, there is no easy answer to why cases do not settle. There are clearly barriers that face States and investors in attempting to reach amicable settlements in investor disputes that do no limit parties in private commercial cases. Two of the most fundamental barriers are (1) the public nature of both the respondent and the measures at issue, and (2) the inability of parties to assess the merits of their respective cases due to uncertainties in the governing principles applicable to investor-State claims.

The public nature of the parties and the measures at issue in most investor-State disputes makes them very different from commercial disputes. This public nature has many implications, but the fundamental problems go beyond issues related to cautious public employees, or confused lines of authority or budget limitations. The fundamental problems relate to the fact that most investor-State disputes arise out of treaties and are based upon alleged violations of international legal obligations undertaken between two or more States to other States. This is quite different from a claim based upon a contractual promise between private parties. A claim under a treaty standard involves an allegation that a sovereign State has breached its international obligations. This serious charge makes it difficult for States to voluntarily concede such an allegation. Moreover, many investor-State claims implicate the reputation of the nation and its citizens; in one sense, the investor attempting to negotiate a settlement is negotiating with the entire citizenry. Furthermore, investor-State disputes commonly relate to public values, often involving scrutiny of actions of public authorities in the execution of their public duties or to advance policies stated in the law. Disputes of this nature raise much more difficult questions than do commercial disputes and implicate deep seated values concerning sovereignty, sovereign reputation and the basic role of the State in managing economic affairs. Consequently, the underlying nature of most investor-State disputes is a real limiting factor on the possibility of amicable settlement.

The second fundamental obstacle to amicable settlement in investor-State cases is inability of parties to assess the value of their litigating positions caused by the tremendous divergence in decisions of arbitral tribunals about some of the main issues raised in treaty claims.

Successful settlement negotiations require means by which both parties can properly assess the relative strengths and weaknesses of their own and the opponent's cases (Mnookin and Kornhauser, 1979). But the ability of the parties in many investor-State cases to make such assessments is severely impaired by the fact that, on these key issues, tribunals follow disparate paths to decision and bring about very different outcomes (Gelinias, 2005). On a wide range of issues, there is significant uncertainty about how an arbitral tribunal will rule. Consequently, a party's probabilities of success often cannot be reliably estimated and neither party can get a true picture of what it may be giving up or gaining through a "negotiated" conclusion to the dispute.

This is not the occasion for an exhaustive review of these divergences, yet there are several well-known areas of inconsistency related to both jurisdictional competency and substantive protection. On the jurisdictional side, is the dispute arbitrable as a result of a most-favored-nation (MFN) clause, even though it falls outside of the scope of the treaty's arbitration clause or even though the claimant has neglected a treaty prerequisite to arbitration, by operation of the MFN clause, because it meets the tests of other treaties?¹ The range of outcomes on these questions has been quite broad and has provoked heated differences among tribunals. Does the claimant's activity qualify as an investment entitled to treaty protection? Some tribunals have held that the activity must be shown to have certain inherent characteristics, such as contributing to the economic development of the host State, while others have vehemently rejected this view.

Certainly, some issues of liability and standards of responsibility under treaties remain very much up in the air. Will a claim for a violation of the fair and equitable treatment (FET) standard be limited to proven elements of customary international law or will standards developed under a semantic reading of the standard be applied? If the latter, will a claim that the government measure at issue disappointed the legitimate expectations of the investor be limited to expectations based upon specific assurances made or will they include general expectations of stability in regulatory regimes. The divide among awards on FET is enormous. Similar questions of outcome relate to the standard of full protection and security (FPS), particularly in relation to whether FPS is limited by customary international law to physical protection.

With regard to the national treatment standard, there are issues about whether investors can prevail even if it can be shown that locally-owned investments identical to the claimant were treated in exactly the same way as the foreign-owned investment, or may the claimant invoke treatment of non-identical local investments? Questions abound with respect to so-called umbrella clauses of treaties, including the fundamental issue of whether a contract claim may be recognized as arbitrable under such a clause. Finally, tremendous controversy surrounds the meaning of the essential security clauses of investment treaties and in particular what circumstances can be deemed to be in a State's essential security interests. While a significant number of awards have favoured investors on these questions, two ICSID tribunals' awards on these issues have recently been annulled by *ad hoc* committees.

These questions are among the most fundamental issues at stake in investor-State cases and only represent a sample of the issues upon which there is divergence. The resulting inability of parties to predict—within an acceptable range of certainty—what outcome is likely to obtain, deprives them of basic information needed to assign a value to claims raising these issues. This inability is a serious impediment to meaningful settlement prospects for most cases.

The issue becomes, what can be done to overcome the unique and fundamental barriers to amicable settlements of investor-State arbitrations? Can third party involvement lead the way to making public policy questions more amenable to resolution outside of arbitration? How can parties achieve a greater ability to predict outcomes, allowing them to assess with greater confidence the relative merits of their cases, even in the uncertain world of treaty standards? These are among the questions that have to be explored in any endeavour to enhance the prospects for amicable settlements in more investor-State disputes.

Notes

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¹ Even though treaties have periods to encourage settlements, many tribunals have disregarded any waiting period. See *Ethyl v. Canada*, Decision on Jurisdiction, para. 77; *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003), para. 184; *Occidental v. Ecuador Occidental II*, Decision on Jurisdiction (Sept. 9, 2008), para. 94; *Lauder v. Czech Republic*, Award dated 3 September 2001, paras. 187-191.

3. Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress

by Professor Jack J. Coe, Jr.*

A few years ago I speculated that the routine use of mediation¹ in the investor-State disputes process as an adjunct to arbitration might lessen average process costs and shorten average process duration while producing durable results. I have come to call this combination by the shorthand CMA (Concurrent Med-Arb). The basic notion is that one or more mediators would “shadow” the arbitral process (concurrently), applying mediation techniques at various junctures throughout that process with a view to helping generate a settlement that might then be embodied in an award on agreed terms. To the extent, however, that the parallel activity implied the services of one or more additional neutrals (there already being three arbitrators) my proposed hybrid could be criticized for being “fee-heavy”. As I acknowledged, arguably:

“A robust role for a conciliator implies potentially significant additional costs, assuming an hourly rate basis of remuneration. Where the mediator is unsuccessful, so that ultimately the arbitrators issue a deliberated, reasoned award in the usual way, the conciliator will have constituted a fourth neutral where three would have sufficed.” (Coe, 2005: 42-43)

Thus, with fees and efficiency in mind, I sketched in passing two alternatives; they have in common single arbitrator panels, but differ in the number of mediators used in the concurrent process:

“If the tribunal were composed of one, instead of three arbitrators [...] the proceedings will likely be faster and the total neutrals’ fees reduced. There are of course valid reasons to empanel three arbitrators [...]” (Coe, 2005: 42)

“Yet, in many cases a dedicated, properly chosen arbitrator can serve without significantly greater risks to the disputants. Particularly where the shadow neutral has lent clarity to the issues framed by the parties and perhaps performed other functions that facilitate the tribunal’s grasp of the case, the sole arbitrator adjudicative exercise might be as trustworthy as one involving three arbitrators. A variant of [the above model] would employ co-shadow conciliators (each party designating one conciliator) and a sole arbitrator. The introduction of a second conciliator would add costs, but may bring added ingenuity or credibility sufficient to precipitate a settlement that would not otherwise occur” (Coe, 2005: 42-43).

The notion of using concurrent mediation and a sole arbitrator deserves greater development. In this tranche of our on-going discussion, I accept the challenge to confront, if still in an introductory manner, the proverbial devil lurking at lower and less comfortable levels of abstraction.

General principles, considerations and assumptions

A framework for dispute settlement must be anchored in basic assumptions, preferences, putative best practices, and tolerable solutions to difficult problems. The following are illustrative of the more important elements that come to mind as I make the case for CMA.

The preference for sole arbitrators and battling inertia

A frequent source of delay in contemporary arbitration is the sometimes limited and idiosyncratic availability of arbitrators that makes consecutive days for hearings and other important joint activities difficult to identify and organize in a non-episodic manner. Best practices generally suggest that these operations be carried out when the tribunal members are physically together and without interruption; modern technology thus can only mitigate the problem to a limited extent. The over-committed arbitrator obstacle to speed and efficiency can be much less pronounced when only one arbitrator serves.² Although CMA can certainly function when there are three arbitrators, it is the unflinching march toward an award that is likely to focus the individual and collective minds of the disputants on settlement possibilities; and, the smarter the pace, the sooner attention will be drawn to those non-arbitral possibilities.³

Admittedly, the current practice of appointing three arbitrators may be difficult to supplant. Risk averseness and resistance to change understandably result from several factors including the very large sums in dispute, the potential precedential effect of investor-State awards, and the regular involvement of important questions of sovereignty. Disputants and many default rules therefore opt for the three-arbitrator model that arguably is less prone to tribunal misadventure. (Disputants are protected from caprice because important decisions ordinarily require the agreement of two arbitrators, each party will usually have unilaterally appointed one arbitrator, and three arbitrators in theory combine to enhance diversification and thoroughness.) Arbitrators in turn often prefer to work as a collegial body for the above reasons, and others, while institutions may feel that a three-person assessment adds legitimacy to the awards they sponsor—at least if the award is unanimously formed, which is not always the case.

Despite the prevailing three-arbitrator model, presenting a CMA option to investors might generate a counter-trend. Just as under IIAs, investors have sometimes preferred UNCTIRAL *ad hoc* arbitration to ICSID proceedings, so too might investors be willing to exchange two arbitrators for one or more mediators. The new option could be packaged, moreover, within an architecture that incorporates techniques for expediting the proceedings, such as those found in the International Chamber of Commerce's (ICC) Report on *Techniques for Controlling Time and Costs in Arbitration* (ICC, 2007). Such a hybrid might be quite attractive to a claimant who expects to win and for the usual reasons is sensitive to the opportunity costs involved in lengthy proceedings. The State perspective, of course, may differ from that of investors. If, by giving investors the CMA election, States relinquish the ability to insist upon a standard three-arbitrator tribunal in a given case, States may well be reluctant to offer investors that option; initial experiences with CMA, therefore, must be calculated to demonstrate its value to States as well as to investors, and it will be paramount to appoint sole arbitrators of especial ability.

With respect to existing IIAs, CMA could be made available through bilateral protocols adding the election, or more ambitiously, through a multilateral agreement amending among its adherents existing IIAs. Future IIAs could embed the option directly in the disputes portion of text.

It would be particularly helpful if a CMA regime were engineered and sponsored by an institution such as ICSID or the Permanent Court of Arbitration, complete with a rules text and the full suite of administrative services. Nonetheless, there is no reason why an *ad hoc* variant of

the method could not be pursued using, for instance, the separate conciliation and arbitration rule texts of UNCITRAL.

Order and manner of appointment: One mediator or two

The mediator and arbitrator appointment process should commence as soon as the claimant notifies its intention to file a claim. Priority should be given to appointment of mediators, however, so that they might begin to work with the parties during the cooling off period if possible. The period before an arbitral appointment may offer significant opportunities for settlement, partial or total, and might allow the mediators to help the parties refine their claims (and defences) by identifying manifestly weak theories likely to waste the arbitrator's time or to be vulnerable to dispositive motions. Additionally, early appointment allows the mediator or mediators to assist the parties in identifying potential sole arbitrators.

Under a regime in which the investor is entitled to choose CMA, the State should also enjoy an election of sorts—the determination whether there will be two mediators or one. The default will be one arbitrator and one mediator—each jointly appointed subject to the use of institutional appointments machinery in cases of deadlock. As I envision the process, upon being informed that CMA has been chosen, the State by seasonable notification could change the model into one in which each side selects a mediator; the arbitrator's appointment would continue to be a joint matter or institutional endeavour, unless the parties supplant the one-arbitrator default by agreeing that three arbitrators will serve.

When by virtue of the State's election each disputant will select one mediator, those unilateral appointments may occur after an *ex parte* interview limited in the same manner as should occur when a prospective arbitrator is interviewed; alternatively, by agreement, both co-mediators can be jointly interviewed and jointly appointed. If any party refuses to appoint a co-mediator, or the parties are unable to agree upon a sole mediator, a mediator will be appointed by the institution or appointing authority as the case may be. For this purpose, institutions should maintain a list of the most highly qualified investor-State mediators. By agreement of the parties, the appointment of mediators can of course be delegated to an institution in the first instance.

However appointed, mediators must make disclosures and be independent and impartial. Additionally, any prospective arbitrator or mediator should be required to disclose existing dates when he or she is not available (e.g. 18 months prospectively) (Reed, 2010), and should formally undertake to maintain a professional calendar conducive to paying full attentions to the duties of the appointment. Upon being challenged by any party, or released by the agreement of both parties, a mediator should step down. Once designated, the sole arbitrator—by contrast—is subject to the normal challenge procedure (challenge for cause only).

Momentum and cooperation in parallel proceedings

Mediators and arbitrators should cooperate during CMA to prevent either process from sabotaging the other, but ultimately arbitration should be core of the enterprise unless mediation should clearly take priority. Because an arbitration that moves forward efficiently generates sustained “court house steps” pressure on parties, they are encouraged to value the mediation

opportunities they are given; although by mutual agreement, the arbitration may be slowed or suspended to prolong promising mediation activities, no such agreement can be taken for granted.

An element of fast-tracking may also help generate or sustain momentum. For instance, the first organizational meeting with the arbitrator might be held on an expedited basis, such as not later than 15 days after the arbitral appointment and that meeting might cover a range of topics. The co-mediators would attend the meeting as observers. With leave of the tribunal, they might make suggestions bearing on the proper integration of mediation “Pre-Sets” (see below) into the arbitral process, and other architectural matters. When procedural understandings are left to the parties to fashion in the first instance (such as the rules concerning confidentiality) the mediators may assist them; such accords may then supply a basis for a tribunal procedural order.

Mediation “Pre-Sets”: Opportunities for mediator invention

CMA’s use of multiple points of engagement is based on the premise that the parties’ respective views of their cases change throughout the course of the arbitration, perhaps creating fresh opportunities for settlement. Mediators should be allowed to invite an *ad hoc* mediation session whenever a basis for promoting settlement is presented, but predictability would be enhanced if presumptively fruitful junctures were identified in advance; these opportunities would be triggered by common benchmarks in the arbitration process and listed in a rule set or procedural order. For example, the following milestones might serve as triggers: the first meeting with the arbitrator (as noted above, a brief session before the meeting, and a more extensive process thereafter), after any ruling on a potentially dispositive issue that does not end the arbitration (such as finding of jurisdiction or liability), after each round of pleadings, and after the hearing on the merits. These are presumptive opportunities only. If the mediators decide there is no reason to convene, or the parties persuade the mediators that it would be fruitless to do so, the session need not occur, or may occur on a limited basis only.

The firewall between the arbitrator and the mediator(s)

Although cooperation between the arbitrators and mediators is essential, ordinarily and unless the parties agree otherwise, the arbitrator should not be exposed to the *ex parte* views of the mediators regarding the merits, including but not limited to any predictions or evaluations of the merits offered by one or more mediator. In principle, the *ex parte* interaction between the arbitrator and the mediator should be confined to discussing scheduling and clerical matters required to mesh the two parallel processes. Less conservative policies can certainly be formulated, but every consideration must be given to protecting the award from set aside or annulment.

Good faith participation

The investor and the respondent State would be under a duty of good faith to cooperate with the mediators and to participate meaningfully in the mediation process. For each, in the absence of countervailing episodes of manifest bad faith, this duty should be deemed discharged merely by attending the “Pre-Set” sessions described above. Although mediators should not communicate with the arbitrator regarding the merits, the tribunal may be informed if either party failed without good cause shown to convene at a preset meeting, and may properly take that

failure into account in awarding costs. Ordinarily, a failure to convene in response to the mediators' or a party's *ad hoc* invitation to mediate (i.e., not one based upon a "Pre-Set" opportunity) should not be deemed an act of bad faith, even in the absence of an explanation. Retaining as much voluntariness as possible is important.

Mediators' best practices in meeting with the parties

Ordinarily, when there are two or more mediators, all mediators shall be present at any caucus with a party or joint meeting with the parties. In any caucus or joint session, a single mediator may take "the lead" in conducting the session. No *arbitrator* should attend a mediation session prior to the finalization of a settlement agreement but may meet with the parties in the presence of the mediators to craft an award on agreed terms.

Front-loading

The governing rule text should encourage parties to "front load" to the greatest extent possible. That is, initial filings (e.g., requests for arbitration and replies thereto) should contain fact—not "notice"—pleading, an initial listing of proofs expected to be relied upon (including descriptions of witness statements expected to be produced and their import), and attachments of key documents (contracts, legislative texts, correspondence and the like).⁴ To concentrate on facts and proofs early in the CMA process should enrich both processes.

The mediators should be given copies of the principal arbitral submissions. If under the prevailing arbitration rules, the respondent need not file a responsive document until relatively late in the process, it will be useful for it nonetheless to supply to the mediator with a detailed, if informal, reply to the claimant's initial filing to help consolidate the issues.

Other architectural innovations

To the basic model just outlined could be added numerous techniques or procedures that might exert an influence on the concurrent mediation activities. I mention two for the sake of further discussion. The first is circulation of draft awards. Article 28(9)(a) of the United States' model IIA contemplates that upon the request of either disputant, any decision on liability will be circulated in draft form to the disputants, and the non-disputant State, for comment. Article 5.1.2 of the *CEDR Rules for the Facilitation of Settlement in International Arbitration* (CEDR, 2009b) contemplates a similar procedure, allowing the arbitrator to circulate non-binding preliminary findings of fact and law. Obviously, such a glimpse of the future is even more compelling than any evaluation a mediator might venture concerning the merits, and presumably will in many cases promote settlement.

The second procedure that might be introduced is some form of sealed offer practice, similar to CEDR's Settlement Rules in Article 6 (CEDR, 2009b) and the approach known in several common law jurisdictions (Casey and Mills, 2004). The variants of this practice have in common that a failure to accept an offer of settlement can affect a tribunal's allocation of costs, when later that settlement offer is made known to the tribunal. Thus, a disputant who is awarded substantially less than the amount of the earlier offer may be penalized for persisting. In the

context of investor-State proceedings, these two techniques carry advantages and disadvantages. They nevertheless merit further examination.

Notes

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¹ This article uses the terms mediation and conciliation interchangeably.

² In pursuing CMA, there will continue to be two or three calendars in play, but the sole arbitrator will not need to accommodate the mediators' availability to the same extent that a Chair would need to find common openings with fellow arbitrators. Admittedly, the preferred practice would be for the mediators to be present in person at all arbitration hearings and meetings. Nevertheless, mediators can stay informed by reading the moving papers and a transcript of the meeting in question, and possibly by use of conferencing technologies of various kinds.

³ Without settlement or an agreement suspending the arbitration, the parties' control over the outcome will eventually be overtaken by the tribunal's award. Thereafter, one party will face only the more limited negotiation options that characterize post-award relations between disputants. Even in the post award context, however, mediators can assist the disputants.

⁴ For an example of the current governing rule text requiring notice pleadings, see UNCITRAL Arbitration Rule 3(3)(d).

4. Investor-State Dispute Prevention Mechanisms: Why Are They so Important for Developing Countries and for the Healthy Evolution of the International Investment Regime?

by Roberto Echandi*

Introduction

Over the last decade, investment has become one of the most prolific areas of international economic law. This shift has occurred in part as a result of the negotiation of a patchy but extensive framework of IIAs worldwide and also because of the adjudication of IIAs to address conflicts surging between foreign investors and host States.

IIAs have included provisions for ISDS since the 1960s. Nevertheless, investors rarely made use of these dispute resolution rights. Yet, since the late 1990s, the number of cases has grown enormously. By mid-2009, the cumulative number of treaty-based cases had risen to more than 300, with more than 200 brought before ICSID and more than 100 before other arbitration fora (UNCTAD, 2009).

The increase in ISDS over the last decade has highlighted certain shortcomings and challenges of the existing investor-State treaty arbitration. Yet the proliferation of IIAs and increase in ISDS cases have also made evolution of international investment law more lively, gearing international investment relations to become increasingly “*rule-oriented*” rather than being “*power-oriented*”. Investment relations are increasingly being governed by rules and principles included in conventional instruments of international law rather than by political or economic might (Jackson, 1997; Franck, 2009). This paper argues that such development has significant advantages, not only for international governance (Shea, 1955; Cable, 1981), but also for the strengthening of domestic institutions in developing countries. As will be explained below, among other aspects, IIAs exert pressure over developing countries to improve their rule of law as well as the transparency and coherence of their public administrations. Such pressure is necessary to foster internal reform and economic development.

Regardless of the potential benefits, if developing countries lack the ability to respond effectively to the economic and political pressures generated by ISDS, the risk exists that stakeholders—namely States and/or civil society—will express retaliation against the international investment regime¹ as a whole. Such a backlash would be counterproductive to the global economic common.

As will be discussed below, the international investment regime may be far from perfect and it may require numerous improvements. However, a pronounced backlash could question its very existence, making stakeholders to lose the opportunity to maximize the benefits of IIAs. It is within this context that the development of investor-State dispute *prevention* mechanisms becomes critical. This paper argues that such mechanisms can be instrumental to promote the objectives of IIAs and to maximize the benefits of a rule-oriented international investment regime.

This article conceptualizes dispute prevention mechanisms (DPMs) as techniques to permit officials of host States and foreign investors to resolve concerns related to the interpretation and application of an IIA before it becomes a formal investment dispute (i.e. before an investor submits a notice of intent or a request for arbitration). This paper argues that developing effective DPMs will be critical to achieving three common investor and State interests, namely (1) overcoming shortcomings associated with existing ISDS processes, (2) enabling IIAs to provide models and techniques for improving the rule of law in developing countries; and (3) safeguarding the legitimacy of the international investment regime as a whole. This paper develops these points by first explaining the multiple functions a rule-oriented investment regime performs for developing countries. Next, it summarizes some of the main shortcomings of the current investor-State arbitration process and explains how DPMs could redress these issues. Finally, it offers some recommendations for moving forward.

Why is a rule-oriented international investment regime important for developing countries?

In the current international economic context, a rule-oriented international investment regime can be instrumental to developing countries in various contexts—whether economic, political or legal. This plays out in three ways. First, to some extent, ISDS limits the State-to-State politicization of investment disputes. Contrary to pure trade disputes where the private sector must enlist the aid of its home State to espouse a claim through a unified and multi-lateral dispute settlement process, investors do not require any assistance from their home State to submit a claim to investment treaty arbitration. Further, numerous IIAs provide that an investor's home State can be prevented from getting involved in the conflict via diplomatic protection while an investor-State arbitration is pending. Second, ISDS provides the means to solve investor-State differences not in accordance to the parties' relative power but rather on the basis of agreed legal principles, rules and disciplines. As State relationships become increasingly intertwined and complex, where tensions arise, developing countries—especially the smaller ones—have limited economic, political and/or military power to defend their interests. Consequently, international law—despite all its limitations—is one of the few instruments that smaller economies have at their disposal to promote their agendas. Thus, it is in the best interest of developing countries to foster the development and effective implementation of the rule of law in international affairs, including investment relations. Third, ISDS has gained importance for developing countries as their local investors and business grow and also begin to seek investment opportunities abroad to develop their businesses at home. This is not insignificant, as UNCTAD's 2010 World Investment Report suggests FDI from the developing world accounts for 25% of worldwide FDI (UNCTAD, 2010c: 6). A rule-oriented international investment regime helps developing countries provide their investors with the same level of protection that investors from developed countries enjoy when doing business abroad.

The importance of a rule-oriented international investment regime also has a domestic dimension. In particular, IIAs should serve developing countries to attain at least three fundamental objectives, namely: (1) locking in domestic reform, (2) promoting rule of law infrastructure, and (3) enhancing the coordination of policy implementation.

The rules in IIAs provide an opportunity to lock-in the effects of IIAs in domestic reform. Some developing countries have relatively weak legal and political institutions that can be vulnerable to economic and/or political interest groups. A State's capacity to implement coherent

and consistent investment policies over an extended period of time can be trumped by short-term policy reversals emerging from interest-group advocacy. Variations caused by changes in political winds can send confusing signals to domestic and foreign investors and creates issues for the implementation of what might be viewed as erratic economic policy. In developing economies, policy inconsistency is a secure path towards perpetuating underdevelopment and perhaps even opening up States to arguable liability. From this perspective, a stable international investment regime implemented through a set of consistent paradigms implemented in IIAs can act as a deterrent to pressures from interest groups advocating short-term policy reversals.

The international investment regime can also assist developing countries to promote greater effectiveness of the rule of law at the domestic level. IIAs promote this through two different mechanisms. One is indirect and results from the discipline that IIAs require of national authorities, namely the elimination of patterns of arbitrary behaviour. Although the obligations of IIAs are in principle legally enforceable only by foreign investors and States, there is a “spill over” effect benefiting host State nationals as there is a gradual development of national administrative practices to comply with international investment best practices. The international investment regime can also promote the rule of law and due process by including specific clauses in IIAs to promote transparency. Transparency is no longer about the exchange of information on issues of mutual interest (i.e. the existence of investment opportunities for investors, or the legal framework applicable to foreign investment). Over the last decade, transparency is also about providing *ex ante* stakeholder consultation on proposed investment-related legislation. Some IIAs even include explicit obligations on transparency of administrative procedures and the right of individuals for an impartial review and appeal of administrative decisions (UNCTAD, 2007). These new transparency rules do not provide exclusive rights to foreign investors but rather are geared towards providing all interested persons with a reasonable opportunity to comment on proposed investment-related measures. Thus, obligations are not only applicable to host States and foreign investors, but also host States and national citizens.

Another important domestic effect of a rule-oriented international investment regime is the promotion of coordination and coherent policy implementation by the different State agencies. Investment policy touches upon a plethora of public policy matters handled by multiple governmental agencies, which may not necessarily have the same approach to economic reform and foreign investment. Implementation of IIAs and domestic transformation certainly requires leadership at high levels of government. Yet governments are seldom monoliths and reforms must occur on several scales of decision-making. States often face internal challenges in reform as resistance can come from typical political sources such as ideological differences and “turf politics”. Yet there are other forms of reticence related to path dependence, bureaucratic inertia or simply the basic human condition that diffusion of innovation over a broad population simply takes time (Rogers, 2003).

Part of the challenges, particularly for developing countries, is to obtain a coherent policy approach between those negotiating IIAs and those implementing them during domestic reform processes at the local level on a daily basis. Administering concessions for public works and services, and granting construction permits are examples of tasks performed by public agencies that regularly deal with foreign investors. These agencies—which can be part of the national, regional or sub-regional administration—may be bureaucratic and resistant to modernization. Limited communication—and perhaps even conflicts—between “reform-oriented” agencies and

“conservative” ones explains the origin of numerous investment disputes against developing countries. The prospect of making the host country internationally responsible for the violation of a legal obligation places pressure on national authorities to treat the issue seriously. In other words, IIA liability is a serious incentive to tackle inconsistencies in policy implementation.

Given that disciplines related to the implementation of IIAs generate pressure towards constructive domestic change, they do not guarantee that developing countries reach the desired end results. Complementary measures—such as designing effective investor-State DPMs—should be considered to maximize the potential benefits of the transformations promoted by the international investment regime.

Increase in the use of ISDS: Implications and the need for DPMs

The increase in the use of ISDS over the last decade has evidenced various shortcomings and challenges of the existing mechanisms. One issue relates to time. Investment disputes are fact intensive and may take years to resolve. For both investors and States, such a lengthy process entails not only a high economic and political cost but also the possibility of irreparable damage to the parties’ long-term working relationship. Another critical issue is the high cost of arbitration, which represents an important financial burden governments have to face when defending a case. Governments are confronted with the possibility of having to pay—using taxpayer money—the damages if the dispute is lost, but also attorney’s legal fees and arbitral fees. These are not insignificant sums and can create political challenges for States. The high cost of arbitration leads to a sense that neither the investors nor the States are the “real winners” of the existing ISDS system. This high cost has other implications, including challenges to the political legitimacy of the ISDS system. For small and medium-sized enterprises (SMEs), the investments of which may represent only several million United States dollars, ISDS may be *de facto* unavailable if the costs of bringing a proceeding exceed the value of the investment. This feeds into concerns that the current system primarily offers legal protection to multinational entities and dis-empowers SMEs. Civil society groups have expressed concern that ISDS involves monetary compensation and sensitive public policy issues. With host States tending to regulate a wider variety of fields, such as health and the environment, and investors more participating in concession-based activities regulated by States, arbitral tribunals have begun to address matters beyond pure commercial acts and to consider matters of public concern. Despite useful increases in ISDS transparency, certain groups have questioned whether the problem is more structural and suggested revising the totality of the investment protection system.

Among others, the shortcomings referred to above pose a risk to the legitimacy and functionality of the international investment law framework as a whole. The issue is: how can stakeholders prevent the negative by-products of ISDS yet simultaneously maximize the potential benefits of the international investment regime? DPMs play a critical role in addressing this question. By preventing disputes, many of the shortcomings of ISDS could be avoided. Both States and investors could save taxpayer funds by avoiding arbitration. Meanwhile, DPMs could also avoid the entrenchment of adversarial positions during adjudicative proceedings that could damage the long-term relationship between the host State and investors. Further, the risk of having inconsistent awards amongst arbitration tribunals addressing issues of public policy would also be significantly diminished. Furthermore, development of effective DPMs would likely

create opportunities to enhance the performance of the public administration in the host State. This could promote policy coherence, transparency and the rule of law.

Under the supervision of a coordinating agency, DPMs could address at least two fundamental elements. First, there should be an early alert system, by which one supervisory agency could be alerted of the existence of a problem between a foreign investor and a public authority. Such an alert should come early enough in order to maximize the chances of solving the problem before any important damage is caused to the investor.² A second element of the DPM would be the creation of incentives and enforcement means to ensure compliance of the applicable rules and disciplines (whether an IIA applicable domestic law or regulation) by the public agency involved. This would likely require the creation of effective communication mechanisms to enable relevant State agencies to know and understand their IIA obligations. Further, DPMs should provide for specific means to ensure effective implementation of IIA obligations in a full, efficient and prompt manner. There is no easy, nor a monolithic, solution to this challenge—particularly as many States have at least three independent branches of government (each capable of violating IIA obligations) as well as national and sub-national levels of government with various degrees of autonomy. Moreover, there are variations within States related to culture, legal prerogatives and power dynamics within the public administration. While this suggests that a “one size fits all” DPM may be inappropriate, further consideration is necessary to create a conceptual framework for DPMs in the investment field that will permit stakeholders to create adaptive solutions that incorporate the principles and approaches to their own specific political, legal and economic contexts.

Conclusion

Developing effective investor-State DPMs is one of the best vehicles to maximize the potential benefits that a rule-oriented international investment regime can have for developing countries. IIAs can be instrumental in “locking in” domestic economic reforms, fostering domestic transparency and the rule of law in the public administration, as well as promoting greater coherence among the different governmental agencies in the implementation of investment policies.

Despite these potential benefits, the legitimacy of the international investment regime is currently being eroded as a result of the effects derived from the increase in investor-State adjudication. Controversy has been triggered by factors like the high cost of arbitration, the possible compensations resulting from arbitral awards, and the legal fees of law firms providing specialized legal assistance. DPMs offer the possibility to overcome a significant part of these problems and yet let developing and developed countries, as well as international investors, reap the benefits of having a rule-oriented international investment regime.

This context calls for the exploration of other domestic and international law instruments, besides investor-State arbitration, to solve investment-related problems. Further research is required in this regard. Both international and domestic law should entail much more than litigation. International investment law should then be used to respond to the real social need of finding effective ways to solve problems between investors and host States, and prevent disputes from arising in the first place. There is a need to unveil this key but yet undiscovered dimension of international investment law, which could have a huge impact not only in terms of economic

gains for international investors and host States alike, but also for the stability of the international investment regime and the good governance of the international economy as a whole.

Notes

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¹ For purposes of this paper, the “international investment regime” is understood to be the network of international agreements of various kinds comprising rules and disciplines on investment.

² This is a critical aspect as, if damage is not crystallized, problems might be resolved by undertakings, according to applicable laws, to redress the measures of the relevant government actor(s) rather than focusing on fiscal compensation as the sole remedy (and incurring all related legal, political and economic costs).

5. From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction

by *Mariana Hernandez Crespo* *

Introduction

Historically, foreign investors have been wary of risky investments in the developing world, leading the developing world to attract foreign capital by attempting to create a secure environment for investors. The solution to date has been found in IIAs.

Yet the volatile nature of the developing world continues to be a challenge to the system, generating ongoing instability in investor-State relations. As the main means for conflict resolution, investor-State arbitration of IIA infringements has increased over the last decades. In the long run, this pattern is not in the best interests of either investors or host States. Nowhere is this pattern more prevalent than in Latin America.

The current state of affairs brings a number of questions to the surface: How can the investor-host country relationship be strengthened? How can viable incentives be sought that benefit both parties? Can a more encompassing architectural design be conceived? To address these issues, it is critical to examine some of the underlying assumptions on which the system is built. Of central importance is expanding the notion of self-interest from that of “I” (the individual) to that of “we” (the collective). Investors might benefit long-term if they thought less in terms of strictly protecting investments (individual interests) and more in terms of promoting the best interest of the investor-State business relationship (joint gains). The expansion of this paradigm—from “I” to “we”—could open opportunities until now unimagined. This collective paradigm requires the building of conflict resolution capacity in stakeholders and the crafting of a specific framework in which the satisfaction of the interests of all parties is sought.

Building conflict resolution capacity consists of enabling stakeholders with the necessary skills to assess, to manage and to resolve conflict, while knowing when to employ a wide range of facilitative and adjudicative processes. Since the 1970s in the United States, lawyers have been developing conflict resolution capacity. This trend has been of special importance to the business sector, whose need for a cost-effective and relationship-driven method for dispute resolution has led it to turn to processes besides traditional adjudication. In recent years, corporate actors in commercial international disputes at the ICC have begun to use ADR facilitative mechanisms such as mediation. Similarly, organizations such as the World Bank, the United Nations, and the Inter-American Development Bank have incorporated internal dispute resolution systems.

A framework for the satisfaction of investor-State interests expands beyond merely an adversarial model of zero-sum adjudication of rights (such as arbitration) to a broader spectrum of options that also includes interests-based methods (such as mediation, among others). If the investor-State business relationship is to be strengthened, stakeholders could emphasize an overarching principle of knowledge building and concrete areas of strategic development, including implementation committees, DSD, and conflict management systems design (CMSD).

The background issue: The need to protect foreign investment

Foreign investment has always had the challenge of intermediate political and legal barriers, hampering foreign investors from recovering capital. Out of a need to move beyond methods of gunboat diplomacy or diplomatic espousal, IIAs began appearing in the 1960s in which host States committed to providing a series of guarantees to foreign investors. Representing a significant step forward, IIAs also provide foreign investors with a direct recourse against the host State through arbitration in the case of a treaty violation. Nevertheless, given the adjudicative nature of the arbitration process, investors are limited to demanding rights and seeking financial compensation through the arbitration award. While this may provide greater investment security, indirectly benefiting the host country seeking investment, there is still opportunity left untapped to increase investor-State satisfaction by broadening options for conflict management and dispute resolution.

Table B.5.1. Historical overview of conflict resolution systems in international investment

	Method	System	Process	Result	Implementation mechanisms
Historically	Force:	Power-based	Coercion	Impose measures	Dominance
	Diplomacy:	Positions-based	Compromise	Agreement	Political pressure
	Arbitration:	Rights-based	Adjudication	Award	Enforcement
Alternative path ahead	DSD and CMSD:	Interest-based	Value creation “joint gains”	Sustainable agreement	“Nearly self-enforcing”

A paradigm shift: From strictly protecting investor’s positions to satisfying investor-State interests through the maximization of joint gains

IIAs are designed around the need for foreign investors to protect their capital from the adverse consequences of social, economic, or political instability in the host country. This approach focuses on protecting investor’s positions through a so-called “Bill of Economic Rights.” Investment security is achieved by guaranteeing these rights through the use of arbitration. As with any adjudicative process, arbitration operates under a rights-based, zero-sum assumption in which one party necessarily wins while the other party loses. In such a paradigm, the losing party is nearly always unsatisfied. The absence of the satisfaction of both parties is not optimal and can weaken the ongoing investor-State relationship.

Rather than focusing strictly on protecting investors through a positions-based paradigm, a shift needs to be made to an interest-based paradigm. Broadening the focus could allow the parties to cooperate when addressing investor-State interests, leaving the protection of the

investor's rights as the last and final resort. If the maximization of joint gains becomes the main focus, three areas of strategic development (implementation committees, dispute and conflict management systems design) could help to provide the necessary framework for sustainable implementation.

The first step in this paradigm shift requires understanding the "maximization of joint gains". A classic example of this maximization involves two children arguing over an orange, in which the mother solves the argument using a position-based paradigm and leaving each child with half the orange. By contrast, if the mother opted for an interest-based model of dispute resolution, she would ask each child why she wants the orange and why it is important to her. One child may want to make juice, whereas the other may want the zest. By discussing why they want the orange, the children could arrive to a solution that would satisfy both: one gets the pulp, the other the peel.

Under the position-based model, half the value of the orange was wasted: each child throws away the part of her half that she did not want but the other did. Under an interest-based solution the orange could be divided differently and the entire orange, pulp and peel, could be used. In this way it is possible to step beyond a strictly zero-sum/win-lose binary, and generate a wider spectrum of options, referred to as maximizing joint gains (Fisher & Ury, 1991).

Maximizing joint gains begins by discovering the underlying interests and values of each party. It is critical not just to know the parties' positions (what they want) but their interests (why they want it) and their values (why it is important to them). Moreover, when parties express their interests and values to one another, it can create a bond of solidarity between them. This bond can be a catalyst in the creative process, encouraging them to consider the satisfaction of all the parties' interests when creating options.

Table B.5.2. A paradigm shift: From protection to the maximization of joint gain

From	To
Protection	Cooperation
Investor's positions	Investor-State interests
"Bill of Economic Rights"	"Joint Gains Maximization"
Arbitration awards	Implementation Committees, DSD and CMSD
Investment security	Investor-State sustainable business relationship through maximization of joint gains

The overarching goal: Sustainable investor-State relationship

In order to achieve the maximization of joint gains, besides a paradigm shift from rights to interests, the relationship between the foreign investor and the host country needs to be placed at the centre of a sustainable framework.

An analogy that could illustrate the dynamic of the relationship between a foreign investor and a host country is that of a renter of a room in a landlord's home. Just as a renter is subject to the rules of the house and vulnerable to the decisions of the landlord, so too the foreign investor has to operate within the framework of the host country's political, social, and economic landscape. Under the current structure of IIAs, if the renter (foreign investor) was not satisfied with the landlord's (host country's) implementation of some aspects of the agreement, no matter what kind of dispute, the main recourse available is to sue the landlord (arbitration), likely resulting in the severance of the relationship. Rather than resolving tensions with extreme options, IIA disputes might consider other options. Foreign investors have a significant relationship with the host country, made up of joint human resources, environmental concerns, and an interlocking of the foreign entity into the larger economic network of the country. That relationship is generally worth preserving. By the time conflict arises there is a substantial interconnection between the two entities, even if through a myriad of representatives. The central issue in developing a sustainable relationship between investors and host States is the marked gap between the IIA rights and offered IIA remedies—namely the arbitration process. Focusing on after-the-fact monetary solutions as a catch-all, without considering more constructive processes, inhibits the growth of the relationship.

Ongoing knowledge building: A key to developing conflict resolution capacity

Ongoing knowledge building is critical for sustainable implementation of IIAs, given the intricacies of the investor-State relationship. The longer an association endures the more intertwined become its nexuses. Ongoing knowledge building is vital and should be an overarching principle for designing a sustainable framework of implementation.

To strengthen investor-State relationships, some principal areas should be considered, including: (1) moving from the particular to the systemic by identifying patterns of behaviour, incentive, resistance and culture, (2) learning from failure through systemic introspection using reflective practices, and (3) applying the knowledge built toward a future strategy. Reflecting on assumptions and testing hypotheses are a central component of developing stakeholder's conflict resolution capacity (Argyris, 1991).

Three areas of strategic development: The ABCs of closing the gap between IIAs and arbitration

Strengthening the investor-State relationship through knowledge-building diminishes the gap between IIAs and arbitration. Three areas of strategic development, “the ABCs of closing the gap between IIAs and arbitration,” can help:

- Assembling implementation committees
- Building dispute systems design
- Crafting conflict management systems design

Table B.5.3 Three areas of strategic development: The ABCs of closing the gap between BITs and arbitration

Area of strategic development	Function	Specific Objective
What?	Why?	How?
A Assembling implementation committees:	Promoting dynamic communication and cultural understanding	Consult Decide Monitor
B Building DSD:	Ensuring parties' self-determination in investor-State Disputes	Resolve specific dispute (architectural design, multi-door courthouse)
C Crafting CMSD:	Promoting participatory decision-making to foster investors-State relationships	Manage underlying conflict (supplement CMSD with architectural method, consensus-building for State participation)

A) Assembling implementation committees: Promoting mutual understanding

Implementation committees can be established to promote consultation, make decisions about ongoing matters, monitor the implementation of the agreement, and foster dynamic communication and cultural understanding between the parties. Consulting mechanisms serve to establish trust, promote communication, avoid disputes and manage conflicts.

In materials posted on the Joint Symposium website, certain conference participants have explored various options. For example, José Antonio Rivas has suggested that model clauses on management and implementation of IIA obligations could encourage compliance with investment treaty obligations at the domestic level (Rivas, *see below*). He suggested doing so by incorporating implementation clauses into the IIA and crafting steps to prevent and manage investor-State disputes. A noteworthy example is the Investment Committee of the Colombia-Canada FTA. Similarly, when engaging these mechanisms, Noriyuki Mita of Japan's Ministry of Economy, Trade and Industry recommended starting with a "soft approach" instead of the familiar "legal approach" (Mita, 2010). He points out that in Japan, consultation mechanisms are stipulated in the chapter on "Improvement of the Business Environment" in Japanese FTAs and IIAs, and also notes that the Japanese government has experience on consultation mechanisms of this kind. The soft approach builds from a win-win situation in which the investor and host State aim for an increasingly trustful relationship. The method uses voluntary and agreed actions, improvement of the business environment, and problem solving to prevent disputes. The "soft approach" requires (1) both the investor's and host country's perspectives, (2) a common vision,

(3) trust-building, and (4) transparency. It offers a broader scope, a lower risk factor, is more cost effective, and incorporates the opinions of SMEs.

B) Building DSD: Tailored resolutions

In DSD, parties can choose a dispute resolution option that is tailored to address their situation. For instance, mediation can be highly effective, but may not be most appropriate in every case. Susan Franck contends that it is important to explore all dispute resolution options across the continuum, determining how to best facilitate “an effective, efficient, and fair and legitimate process for resolving investment treaty conflict” (Franck, 2008). Others have suggested that relevant factors should be taken into account when determining whether mediation is an appropriate forum, despite all the benefits that mediation offers, including speed, cost, innovative solutions, and preserving the relationship between the parties. Laurence Boulle pointed out that a diagnosis of the appropriateness of mediation is necessary, noting specific cases when complex factors affected the determination (Boulle, 2010). Andrea Schneider stressed that these options would operate under the shadow of investment arbitration (Schneider, *see below*).

DSD generally exhausts all interest-based processes, aiming to address the interests of all of the parties involved, before resorting to adjudicative procedures (Ury *et al.*, 1988). One widely used and effective architectural DSD is the “multi-door courthouse”, which was first proposed by Frank Sander, and offers a spectrum of options for selecting the most appropriate forum for dispute resolution, according to the specific context, needs, and interests of each of the parties involved. The “multi-door courthouse” emphasizes the party’s right of self-determination, which can increase party satisfaction and the sustainability of the agreement.

C) Crafting CMSD: Managing conflict before it escalates

Cathy Costantino, an expert on CMSD, makes a critical distinction between conflict and dispute. She explains that conflict is a manageable disagreement, while disputes are escalated conflicts needing to be resolved. While a system for assessing disputes is necessary, it should also include mechanisms to deal specifically with conflict. CMSD looks to manage conflict before it escalates into a dispute. It begins by assessing the situation and designing an architectural model based on incentive and rewards. CMSD builds strategies to deal with potential resistance (perhaps caused by fear, culture, power, personality preferences, symbols or images used) and potential constraints (such as structural resources, leadership and orchestration), embedding these strategies directly into the system design (Costantino and Merchant, 1996). Professor Costantino articulates six critical components of CMSD: (1) participation—involving all who will use it in the creation of the system, (2) fluidity—embedding adaptability mechanisms into the process, (3) sustainability—the capacity to effectively manage change, (4) suitability—the capacity of matching a specific dispute with the most appropriate forum, (5) permeability—ensuring that stakeholders have ownership over the system, and (6) accountability—the capacity to evaluate the process and results.

Given the private-public relationship of BITs, the consensus building process could be advantageous, given its inclusive nature. A specific ADR method designed for the public sphere, Consensus-Building Process (CBP) is a participatory model that helps to ensure that the interests

of all stakeholders are fully and accurately represented. The success of consensus building lies in producing a “nearly self-enforcing agreement”; stakeholders are better off with the agreement than with no agreement at all (Susskind and Cruickshank, 2006; Susskind *et al.*, 1999). This approach, advocated by Lawrence Susskind, radically departs from the traditional approach, which focuses on producing uniformity through a process of assimilation by which participants adopt a single view, therefore not ensuring inclusion. Instead, Susskind’s model is an inclusionary process that seeks unity through a process of integration so as to include the interests of all participants. Lisa Bingham, an expert in DSD, has emphasized the need for citizen participation in public decision-making, but it needs to be designed and implemented well (Bingham, 2009).

Consensus building is an excellent methodology for the detection of potential disputes and managing conflict at an early stage. Seen in the light of Costantino’s six critical components of CMSD, consensus building can supplement conflict management for IIAs by: aiding fluidity by identifying mechanisms for dispute resolution and addressing change; ensuring suitability by enabling stakeholders to select the appropriate method for a specific dispute; encouraging permeability by giving stakeholders the decision-making power; and promoting accountability through ratification and monitoring processes.

An example of a situation in which consensus building could contribute to an already existing and effective CMSD is in Peru, which in 2006 passed legislation establishing the System of Coordination and Response of the State in International Investment Disputes. This nation already coordinated information sharing between local government agencies and companies but could be further integrated to encourage a larger scope of participation among citizens to increase effectiveness. To this end, a structure could be created in which consensus building facilitators lead a process that includes convening (which includes identifying representatives of stakeholders), assigning roles and responsibilities, facilitating group problem solving, reaching an agreement, and holding people to their commitments (Susskind & Cruickshank, 2006). This kind of large-scale process was carried out in Brazil, showing how representatives of different sectors of civic society could engage an issue of public importance (Hernandez Crespo, 2009).

Conclusion

Nancy Welsh accurately observed, “as negotiations become increasingly global and virtual, it may be the development of old-fashioned relationships that will be found to matter most of all” (Welsh, 2007). This seems to be the case of BITs, where rights alone have proven to be insufficient and the needs for a sustainable business relationship has become paramount. The time has come in which it could be said: “*We need to move from paper to people.*” By doing so, we will be better equipped to effectively address the complexity of each investor-State relationship.

Notes

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6. Bridging the Investment Claim Gap Between Sophisticated Investors and Unprepared Host States

by *Dany Khayat**

One of the most striking features of international legal affairs is the difference in preparedness and awareness of foreign investors on the one hand, and States on the other hand, as to potential disputes under IIAs.

More often than not, sophisticated foreign investors know their rights under IIAs; moreover, increasing numbers of smaller foreign investors learn about treaty protection when disputes are discussed in media outlets of the host State. Investors take advantage of the flexibility afforded by IIAs (as well as the varying interpretations given by arbitral tribunals) to structure their investments to benefit from the most favorable IIA structure possible. They often recognize how to avoid the pitfalls of certain treaties to maximize protection, particularly when they have thoughtful legal representation. Investors also control the timing of disputes, by initiating formal disputes at their discretion.

On the other hand, many host States are passive when it comes to confronting foreign investors subject to the protection of IIAs and understanding the full scope of their regulatory obligations under IIAs. They rarely identify a conflict early enough to realize that a dispute with an investor may lead to international arbitration under an IIA. As a result, States too often miss opportunities to settle or avoid, early on, potential investment disputes. Given the scope of the broad standards of protection that are offered, IIAs often do not provide any customized answer to investors entitled to rely on treaty protection. As a result of precise and clearly delineated rules, States take an approach that may seem to be akin to a lack of diligence in investment protection management; and such a “hands off” approach may have the potential to further fuel disputes with foreign investors. The consequence is that States might skip opportunities to defuse early on what develops later into a costly arbitration but might also miss a chance to develop a strategy to build a defense when it can still be realistically organized.

This disparity in the way parties—namely investors and host States—treat investment treaty disputes was widely addressed at the Joint Symposium. Many participants touched upon this issue and shared experiences and ideas to increase the awareness of States and their preparedness to face investment treaty claims. Among the very interesting debates was the one initiated in relation to the concept of “treaty aftercare” for effective management of a State's treaty obligations vis-à-vis its foreign investors. Peru's recently implemented law on government response to investor-State disputes is an example of this policy. Peru's law includes provisions defining empowerment, information sharing between government agencies and local governments, and alert systems to detect potential investment disputes as early as possible. One should wonder why many other States have not yet enacted similar laws or regulations to address effectively potentially difficult relations with investors. One part of the answer is precisely the lack of knowledge on the part of certain States to devote resources to this important issue. In addition, the real challenge with such laws resides in their balanced implementation and avoiding the law's obsolescence or lack of enforcement.

In this context, many years after the “explosion” of investment arbitration before ICSID or *ad hoc* arbitral tribunals with billions at stake, and despite the huge efforts put up by organizations such as UNCTAD, many States still lack effective internal mechanisms and organization to tackle with minimum efficiency the challenges of their investment treaty undertakings (Franck, 2007b). There are many reasons for this situation. Some may be related to States’ internal economic or political contexts as there may be a gap in internal resources that would be required to improve reaction to the challenges of investment treaty-related conflict. But there are others. One common challenge is the waste of expert knowledge that is related to poor management of the career and positions of experienced civil servants. Those trained to understand and deal with the provisions of IIAs—as well as to manage their implications in the concrete economical environment of their country—are the key actors in a position to protect their countries against massive treaty claims from unintentional violation of their international legal obligations. As a result, it may be possible to implement effective policy measures by training and developing the capacity of “investment treaty savvy” civil servants who will be in a position to both implement the legal obligations and consider opportunities for dispute prevention. There are four specific aspects that may be worthwhile pursuing, including: (1) putting trained officials into central posts of the administration, (2) implementing mandatory consultations, (3) establishing new types of investment treaty practice and (4) implementing continuing legal education of civil servants in investment related matters.

Central position in the administration

Investment treaty claims may concern virtually any agency, department or subdivision of a State. Typical entities involved are ministries related to finance, trade and justice. Civil servants specialized in IIAs should be positioned in an autonomous department, much like the positioning of ombudsmen in certain countries such as France, as part of their role would be to assess and potentially provide advice or directions to other State agencies (Didier, 2007). As such, they cannot be part of a given ministry but perhaps could be placed directly under the office of the head of government. This would allow easier and more efficient relations with other ministries, State entities and local authorities who are themselves in direct contact with foreign investors as well as providing them with sufficient authority. In reaching this objective, it is also important that the highest organs of a State also recognize and promote their role including in certain politicized investment disputes. This is one way to achieve the necessary centralization of experience and know-how in reacting to growing difficulties or full-fledged disputes with foreign investors.

Mandatory consultation

Civil servants experienced with international investment issues—whether in treaty negotiation, treaty arbitration or conflict management—should be given enough powers within the administration to implement that they be mandatorily consulted in certain cases such as bilateral or multilateral investment treaty negotiation, follow-up on major foreign investment projects, negotiation in disputes with foreign investors and so forth. It is of particular importance that such civil servants be implicated when investment treaties are negotiated with foreign States in order to require, to the extent possible, that key provisions of national investment treaty practice be included. The main risk of leaving the negotiation of IIA's to those who are not specialists, as is too often the case, is relying on the other party to propose a draft and accept it as

is, without paying enough attention to national policies or certain particular provisions of national law. Lebanon, otherwise not at the forefront of foreign investor protection policies, has developed a very small yet efficient team of specialists that attempt to screen draft investment treaties to include provisions they consider to be essential. As an example, Lebanese law provides for certain exceptions to the principle of national treatment in relation to the acquisition of real estate which, thanks to the efficiency of the team of specialists mentioned above, are systematically reflected in the IIAs signed by Lebanon.¹

Establishing the “minimum requirements” in terms of national investment treaty practice

For many years, model investment treaties have been the privilege of investment-exporting States, such as the United States, the United Kingdom, France, Germany, and the Netherlands. With the development of investment disputes between developing countries and the growth in south-south investment, model treaties should be re-considered particularly by the developing world. This was recently experienced in Egypt where the government and other State agencies have promoted an Egyptian model treaty project, with the help of foreign institutions, consultants and lawyers.² The Egyptian model treaty is an example for other States that they can—and must—determine their own objectives in IIAs. This is all the more important as the provisions of an IIA are part of the economic policy of States and provide insights on investment regulations and their application. Egypt's example shows clearly that there is no reason why developing countries should not have their set of “minimum requirements” that they would seek to include in the treaties they negotiate. This also means that States may wish to consider using a “model” to create a coherent network of IIAs with a broad set of international economic partners and that such a unified approach may incorporate unique national considerations. Nevertheless, the differing requirements of State counterparties will also need to be addressed and incorporated. The definition of the nationality of physical persons in an investment treaty, for instance, would be an important point if one State sought to exclude dual nationals. In such a case, the history of migrations of a State could have a bearing on the outcome. By way of example, countries such as Egypt, which faced several claims brought by dual nationals on the basis of the United States-Egypt IIA, could seek to exclude dual nationals from the scope of this treaty if it was to be renegotiated. The same would apply to many other State counterparties with high emigration levels.

Continuing legal education

The field of investment treaty arbitration is ever expanding. The interpretation of certain key notions of investment treaty claims has evolved considerably in the recent years, generally deciding that more and more actions taken by States may be considered to be breaches of IIAs. In other words, those applying international law either to prevent treaty related conflicts with foreign investors or to negotiate new IIAs will need to continue to peruse recent case law in order to assess those areas of government regulation that may create State responsibility. When those risks are more readily understood, States can target areas for dispute prevention.

Establishing a body of specialized civil servants to deal with investment treaties is a challenge to many States, in terms of costs and effectiveness. Unfortunately, those States that have best developed this approach are those that were subjected to the most investment

arbitrations, such as Egypt and countries in Latin America. Others must follow suit, whether or not they have faced investment arbitration.

Today's investment policies, including IIAs and the concrete manner in which investment disputes are handled are a major issue given the considerable amounts that foreign investors claim in investment arbitration. IIAs must no longer be a matter of etiquette and a must-do of official State visits as they still are for many States. Also, the attitude of States towards foreign investors has become a matter of concern in terms of economic regulations given the threats of investment disputes. States must modernize their dealings with such matters and, as in other fields, reforms are necessary to grasp investment policies and regulations in their entirety, that is, including investment disputes and international law. This should be a main area of improvement for many countries.

Notes

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¹ The Lebanese legislation in question is the following: decree No. 11614 of January 4, 1969, decree No. 5131 of 19 March 1973 and Law No. 296 of 3 April 2001. On this matter and in French, see Diab (2008). For the list and main provisions of the IIAs signed by Lebanon, see Fouret and Kayat (2007) in French.

² The provisions of a model Egyptian BIT were discussed in 2006 and 2007 in cooperation between the Egyptian Ministry of Investment and UNCTAD.

7. Republic of Korea's Development of a Better Investor-State Dispute Resolution System

by *Jae Hoon Kim**

Introduction

In the world of global economy, the Republic of Korea has been making advancements in IIAs. Both in quantity and quality, the Republic of Korea's advancements in the FTAs and IIAs can be seen as significant. The Republic of Korea's Ministry of Justice has been making various efforts to develop expertise in ADR and further develop a more effective investment dispute resolution system.

Development of the Republic of Korea's investment agreement regime

The last four years coincide with the Republic of Korea's most aggressive pursuit of trade policies in its history. It is in these recent years that the Republic of Korea has concluded FTAs with the United States, the European Union (EU), India, and the Association of Southeast Asian Nations (ASEAN). Currently, the Republic of Korea is continuing its treaty negotiations with various other countries, including Canada, Mexico, Peru, Columbia, Australia, New Zealand and Turkey. The Republic of Korea has also been negotiating a trilateral investment treaty with China and Japan for many years. Moreover, apart from the trilateral investment treaty, the Republic of Korea has also been discussing the possibility of separate bilateral FTAs with both China and Japan, and the preliminary discussion of FTA between China and the Republic of Korea will likely begin this fall.

As a result of these efforts in the recent years, the number of the Republic of Korea's IIAs reached a total of 106 by the end of May 2010, thus placing the Republic of Korea as sixth among the G20 nations in the number of investment agreements concluded. In addition, with respect to IIAs, the Republic of Korea is ranked as the tenth largest signatory in the world. Considering that the Republic of Korea's first IIA was in 1967 with Germany, this has meant that the Republic of Korea has concluded, in average, 2.5 investment agreements a year.

Republic of Korea's current dispute resolution system and its needs

Despite the large number of investment agreements, the development of a more effective dispute resolution system has not been as successful. In many of the existing investment agreements, the dispute resolution provisions are often simple and only allow for arbitration, and not other forms of ADR. Even when the provisions allow arbitration and conciliation, they simply refer to the ICSID rules and the UNCITRAL rules, and are not detailed in their description of the procedures. This characteristic is found not only in IIAs, but also in the FTAs. In fact, except for the FTAs between the Republic of Korea and the United States and the Republic of Korea and Chile, all FTAs entered into effect as of June 2010 contain one simple article with few paragraphs that deal with ISDS.

These simple dispute resolution provisions in many of the investment agreements can be attributed to several factors. First, most negotiators involved in treaty negotiations in the Republic of Korea are public officials that are not familiar with the complex procedural issues

surrounding ADR. Traditionally, the structure of the Republic of Korea Government has allowed only public officials to be engaged in treaty or international agreement negotiations. Consequently, many of the public officials involved in these negotiations were experts only in economics, international law or trade law, and not in international litigation. Until recently, most Republic of Korea experts of international litigation or ADR were found only in the private sector and not in the government. Since these experts in the private sector were traditionally not allowed to participate in treaty negotiations, the negotiators were often unable to adequately address the complex procedural issues surrounding ISDS. As a result, they often resorted to using the same simple provisions as in previous investment agreements.

Table B.7.1 ISDS provisions in the Republic of Korea's investment agreements

Investment Agreement	Article/Paragraph Number
Republic of Korea-Chile FTA	24/64
Republic of Korea-United States FTA	13/61
Republic of Korea-ASEAN FTA	1/14
Republic of Korea-EFTA ¹ FTA	1/9
Republic of Korea-India CEPA ²	1/7
Republic of Korea-Singapore FTA	1/6
Republic of Korea-Japan BIT	1/6
Republic of Korea-China BIT	1/6

Second, the Republic of Korea Government's experience in ADR is limited. In fact, the Republic of Korea has yet to be involved in any investment treaty arbitration. Furthermore, even domestically, any issues involving the Republic of Korea Government are resolved by litigation and rarely by ADR. As a result, the Republic of Korea Government lacks first-hand knowledge in ADR that it can use to structure more detailed ISDS provisions in its investment agreements. This will present a bigger problem in the future given that more than 80 governments have already faced investment treaty arbitrations and arbitrations become the norm or standard way of settling disputes arising from investment agreements.

Finally, investment agreement negotiations take place under strict deadlines and constant time pressure. As is the case with many other countries involved in investment agreement negotiations, there is often a deadline for the conclusion of the negotiations set by one or more parties. As a result, negotiators choose to focus more on the substantive issues surrounding the investment agreements in their limited time. This often means that the procedural provisions, such as those dealing with ISDS, must take a backseat in the negotiation.

However, provisions dealing with dispute resolution remain one of the most important and crucial items in international investment law. With increasing numbers of disputes involving IIAs, the need for more detailed and clearly laid out dispute resolution provisions is becoming apparent. Accordingly, the Republic of Korea is beginning to pay closer attention to developing more thorough dispute resolution provisions in its IIAs.

The Republic of Korea's response

Signs that the Republic of Korea is paying closer attention to dispute resolution are apparent in both the public and the private sector. In the private legal sector, especially in the recent years, law firms have been quickly adapting to the trend of international arbitration, mediation, and conciliation as popular means of dispute resolution arising from investment agreements. Thus, law firms in the Republic of Korea have been developing expertise in the field of ADR by recruiting both domestic and foreign attorneys that have extensive knowledge and experience in ADR. As a result, the Republic of Korea's law firms have become internationally reputable in the field of international arbitration.

Moreover, in part due to the private sector's focus on the development of expertise in ADR, the Republic of Korea has now become a leader among Asian countries in the field of international arbitration. In fact, according to statistics released by the ICC, entities of the Republic of Korea were parties to 30 newly registered international arbitration cases in 2008 (Hughes & Kim, 2011). Additionally, the Republic of Korea's development and advancement in the field of international arbitration was recognized when Seoul was chosen to be the location for the International Bar Association's (IBA) Arbitration Day in March, 2011. This indicates that the Republic of Korea has become a major player in the international arbitration community, and is rising as a leader in the international arbitration market in Asia.

Similarly, the Republic of Korea Government has also been successful in responding to the need to develop expertise in international arbitration. One main effort that the Republic of Korea Government has undertaken thus far is to provide to its officials, especially those that are involved in investment agreement negotiations, the necessary information related to international arbitration. In pursuing this effort, the Republic of Korea Government has started to hold seminars for officials in various different ministries, in which international arbitration experts both from abroad and the domestic private sector are invited to speak. In this way, the Republic of Korea Government has been successful in gleaned the necessary knowledge and expertise in the field of international arbitration.

In addition to holding these seminars on a regular basis, since 2008, the Republic of Korea Ministry of Justice has formed a committee with various other ministries, including the Ministry of Foreign Affairs and Trade, which is responsible for establishing policies regarding investment treaties. This committee has been having regular bi-monthly meetings, during which times they discuss the recent developments in the field of international arbitration and ADR. The information gathered in these meetings is also being circulated to officials in the local governments in the form of an educational programme conducted by the Ministry of Justice. Moreover, the committee has been working on developing an effective system for the prevention and resolution of investment disputes.

Lastly, the Republic of Korea Government has also started to invite international arbitration experts practicing in the private sector to participate in negotiations of investment agreements. More specifically, the Ministry of Justice has greatly increased communication with the experts in the private sector, while other ministries, such as the Ministry of Foreign Affairs and Trade, the Ministry of Knowledge Economy, and the Ministry of Strategy and Finance are actively hiring lawyers.

Conclusion

Although in the past, the Republic of Korea's development of a more effective dispute resolution regime was not as quick as the large number of investment agreements that it signed with other countries, there are clear signs that the Republic of Korea is making efforts to close that gap. The continual development of expertise in international arbitration in the Republic of Korea's private sector along with the Republic of Korea Government's development of an effective information sharing and educational system show positive signs of the Republic of Korea's ability to develop investment agreements that contain more effective dispute resolution provisions in the near future. Moreover, UNCTAD's analysis of the world's trends of investment treaties and disputes as well as UNCTAD's continual endeavour to develop more effective investment treaty regimes has been and will continue to provide guidance in achieving that goal. With the talks of an FTA between China and the Republic of Korea soon to begin, and as the efforts both of the government and the private legal sector continue, the Republic of Korea is expected to make a positive impact in the field of ADR in Asia.

Notes

* The author is currently a foreign attorney at Arnold & Porter LLP and a former public prosecutor and trade negotiator with the Republic of Korea Ministry of Justice. The views expressed herein are those of the author and do not represent the views of the Republic of Korea Ministry of Justice, any other government agencies, or the Republic of Korea. The views also do not necessarily reflect the views of the UNCTAD Secretariat or Arnold & Porter. The author would like to thank Samuel Kim for his contribution and assistance in writing this article.

¹ European Free Trade Association

² Comprehensive Economic Partnership Agreement

8. Making Mediation Mainstream: An Application for Investment Treaty Disputes

by Wolf von Kumberg*

Experienced counsel and their clients recognize the utility of mediation in international disputes and share a concern about how the field is positioned to grow globally.

The main challenges facing mediation are evident to anyone who seeks to use it to resolve disputes today, particularly in the context of investor-State disputes. In most countries—even those where mediation is widely practiced—it is only barely self-regulated, the requirements to entry are non-existent or low, and anyone can practice as a mediator—creating variation in the quality of available mediators. In order to ensure the future effective use of investor-State mediation, it will be critical to have the requisite building blocks and supporting infrastructure, particularly the existence of mediators with the requisite levels of quality and experience. This commentary suggests that the voluntary approach to the establishment of high, transparent and verifiable standards, such as proposed by the International Mediation Institute (IMI), will aid in making mediation and mediators more likely to be used for the effective resolution of investor-State treaty disputes.

The first thing to note is the context in which international business disputes, including investor-State disputes, occur today. There has recently been a severe global economic downturn. Those experiencing disputes invariably need earlier, less resource-intensive outcomes, as well as outcome certainty. Ever-tighter financial pressures have prompted even greater scrutiny of the long-standing belief that the longer disputes are allowed to continue, the harder they are to resolve on acceptable terms.

In-house counsel for parties to international commercial and investment disputes are seeking access to mediation service providers to move beyond being an *ad hoc*, unregulated, inconsistent practice popularized largely through its few star mediators, and to evolve into a globally recognized, highly respected profession, populated by many well-regarded practitioners. Professor Wilensky captured this concern well in his seminal piece *The Professionalization of Everyone?* Professor Wilensky explained that any occupation wishing to exercise authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training and convince the public that its services are uniquely trustworthy and tied to a set of professional norms (Wilensky, 1964).

Users, whether commercial investors, States or other parties to conflict, need access to third-party neutrals who are recognized not just as generic professionals but as mediation professionals. There are some international mediators who have been mediating full time for years and have established reputations. But they are a tiny number, even on a global scale. For so long as the number of recognized mediation professionals remains small, so will the practice of mediation itself. This issue needs to be addressed on a more holistic and also international level. To that end, this commentary considers how different stakeholders might promote mediation, what are some of the essential features of a professional mediation body and how IMI can fill the untapped need within the marketplace of conflict management services. The objective is to offer a global supply of individuals who are able to prevent disputes from crystallizing, de-escalate existing conflict and facilitate negotiated settlements of formal disputes.

User contribution

Users of dispute resolution services (in this case, both States and investors) of all types cannot ignore their vital role in ensuring that disputes that would benefit from an early resolution follow a path designed to increase the likelihood that mediation will be attempted. International treaties—in a way akin to commercial contracts—might feature multi-step dispute resolution clauses that include mediation at some stage of the process, usually prior to arbitration, or simultaneously with the commencement of litigation or arbitration but prior to them being employed. Particularly in the commercial context, model multi-step clauses are available online and some companies have developed their own preferred clauses. Including a provision that specifies a mediation step in a treaty or other investor-State dispute resolution instrument enables parties to avoid any perception of weakness but rather conveys a proposal to mediate representing good preventive lawyering.

Knowing where to find the right mediator is critical. Always seeking independently-prepared summaries of prior user feedback provides vital information about both the competency and the suitability of the candidate mediators.

There are other activities companies can undertake to enhance the perception of mediation as an effective settlement tool. For example, publishing a conflict resolution policy that favours early negotiation and mediation before litigating can make it a practice to propose mediation, rather than be seen as an implicit weakness in a particular case. Some State entities and some corporations already do this. Internal training programmes to enhance awareness are also key.

Mediator contribution

A fundamental first step is for those who hold themselves out as mediators to subscribe to a common professional community that sets high practice and ethical standards and establishes clear criteria for what it takes to gain admission as a mediator, and maintain the status of a mediator. The ethical principles and other professional norms by which they operate should be made known upfront to users—that is, without having to ask. We would want those principles to be meaningful and backed up by disciplinary action that can result in loss of status as a professional mediator. We need mediator evaluation and certification to occur within a framework of transparency.

Mediators cannot achieve this just by joining one or more mediation provider panels and cloaking themselves with that provider's historic market reputation (which in many instances is often rooted more in arbitration than mediation, with the institution making little or no distinction in qualifications for these very different practices). Members of some mediation provider panels gain admission because of their vested networks or status, not because of objective assessments of their skills and experience as competent mediators. If users are to treat mediation as seriously as it deserves, mediators need to become part of a transparent, independent, high profile professional body

Because mediations happen behind closed doors and in confidence, checking a mediator's competency is a major challenge. The flip side of this coin is that mediators can exaggerate their skills and experience in ways that cannot be contradicted and mechanisms should screen out

unscrupulous mediators who would otherwise dilute the credibility of the real professionals. Users need a reliable and credible way of securing information about mediators. In other words, end-users of mediation services need competent mediators who ascribe to defined international professional standards. While mediation can be practiced in different ways by different mediators, users expect mediation to be adapted to the cultural, factual and personal circumstances at stake. However, the standard of quality can be set at a universally high level, meeting globally applicable criteria. IMI is currently the only professional international mediation body that meets these needs.

Mediators should provide information related to their competency and suitability. This feedback should be in an easily digestible form—ideally where a named independent source summarizes and provides anonymous feedback that is then openly made available for the benefit of future users. Similarly, mediators should publicly declare the code of ethics they subscribe to, beginning with their own websites, and provide a link to a copy of that code, and explain what redress is available in the unlikely event of a breach of that code. The inclusion of a video portrayal of the mediator explaining their style and experience, direct to camera or in interview mode, would also be useful to users. These steps are neither difficult nor costly but will have a positive effect on user confidence in mediation and mediators, projecting professionalism and engendering respect on the part of the user.

Mediation institutional provider contribution

Users of mediation services expect that mediation institutional providers will only select mediators with high professional standards of competency. Yet credible assurances are often not readily available. If institutions published their own minimum entry criteria, this would help users and decrease the circulation of possibly unrepresentative war stories that can denigrate the good name of providers. Most providers monitor and assess the competency of their mediators by requesting user feedback for quality control and professional development. Yet, this data is often not published, even in a format that summarizes the feedback in a way that offers information while protecting users' anonymity.

Providers can also promote transparency by providing other information. This might include information about the distinction between administered and non-administered mediation that outlines respective costs, drawbacks and benefits. Similarly, providers might also offer strict criteria for mediation certification that are certified by an independent source that crosses over national boundaries and is truly international in scope. IMI offers examples of these.

Trainer contribution

Trainers perform a vital function in promoting mediation and the professionalization of mediation. There seems to be no professional body for mediation training organizations.

There are many training courses at different standards and having different aims. Programmes aimed at training people to be mediators should result in accreditation at basic or advanced levels. It would be helpful to users and prospective trainees if the criteria for gaining accreditation are published, including whether independent assessment is used to determine accreditation awards. If these criteria are set on an industry-wide, and global, basis and regularly

monitored, users would know exactly what stage a mediator has reached in their professional development. Trainees would know that they are following a course respected by users and that establishes high standards of competency. The leading training organizations could collaborate to bring these criteria to fruition. This would include specific training for mediators interested in the theory and doctrine of investor-State disputes.

An increasing number of users want training organizations to provide programmes to businesses that want to train their own staff to be better negotiators, to become more familiar with mediation, and to be equipped to represent their companies in mediations.

Educator contribution

Universities and law schools could positively influence the way disputes are resolved if they primed students with practical skills that augment doctrinal education. Universities and professional institutions should consider the introduction of comprehensive mediation theory and practice into their obligatory curricula at degree level as well as courses designed to prepare students for legal professional qualifications. Similar considerations apply to business schools.

Arbitrator contribution

Arbitration and mediation are related in that they offer dispute resolution by a third-party neutral outside national courts; yet the roles of third-party neutrals providing the services require different skills. Just because one is qualified as an arbitrator does not mean one has the requisite skills to act as a mediator. An arbitrator renders a decision, whereas a mediator helps facilitate a resolution agreed by the parties.

Arbitrators should be amenable to mediation. Efforts such as the CEDR Commission on Settlement in International Arbitration are welcome initiatives, as they recommend steps to encourage parties in international arbitrations to consider settlement. CEDR recommendations could be adopted as best practice by the global arbitration community and the existing arbitration mechanisms for investor-State disputes could provide leadership in this regard. Nevertheless, arbitrators—whether of investor-State or any other disputes—should not assume that because they can arbitrate they are automatically qualified to mediate. Nor should parties make that assumption.

Similarly, arbitration institutions with mediation facilities should ensure that potential mediators are selected for their competency as experienced mediators and promote norms similar to providers of mediation services. Several well-established arbitration institutions, among them the American Arbitration Association / International Centre for Dispute Resolution (ICDR), the Chartered Institute of Arbitrators, the ICC, and the World Intellectual Property Organization (WIPO) have developed strong and distinctive mediation expertise to complement their arbitration services. There is also the theoretical difference between conciliation and mediation to consider. Formal conciliation is still provided by institutions like the ICC and ICSID. This is a more formal process by which non-binding advice or opinions are provided to the parties to assist them in finding a settlement. Mediation is perhaps a more flexible and informal method of facilitation in investor-State treaty disputes. In any event, it is an alternative to existing international conciliation models.

None of these suggestions, which reflect common user needs, is particularly difficult to implement. While there are many more actions that could be taken, if all those proposed above were to be taken up, the positive effect on the growth of mediation would be dramatic. From a structural perspective, the IMI now exists to achieve most of the suggestions made here if all stakeholders would take advantage of its mission.

The case for the IMI

The IMI was established in 2007 to provide a common global platform for all stakeholders to make mediation mainstream around the world for the reasons, and in the ways, indicated above. It represents a diverse collaboration of the demand side and the supply side, with equal representation of each on the Board.

As a global public service initiative, IMI's mission is to promote transparency and high competency standards into mediation practice. This is being achieved through a transparent international mediator competency certification scheme, based on visible high standards and creating a diverse cadre of IMI Certified Mediators. Mediation users are assisted by an open, easily accessible search engine to surface concise and comparable information relating to suitable competent mediators. Because IMI is not a service provider, it earns no income from the provision of any mediation, training or other services. It provides objective information.

The standards are established by the IMI Independent Standards Commission (ISC), which convenes over 60 of the field's thought leaders from over 25 countries. The ISC establishes the IMI practice and ethical standards and reviews and approves the assessment programmes by which institutions qualify mediators for IMI certification. Over 300 of the world's leading mediators have achieved IMI certification and are openly searchable on the IMI portal, with many more in process. IMI sets high standards for mediators, but does not conduct assessments itself. Instead, institutions that conduct assessment of mediators, such as providers and trainers, are invited to adjust their programmes, or develop new programmes, to meet the specific criteria determined by the ISC, and to apply to the ISC for approval to qualify mediators passing those programmes and meeting the criteria for IMI certification. Those mediators then will become IMI certified and their profiles will be included on the IMI portal.

In addition to passing an ISC-approved assessment programme, IMI Certified Mediators are required to complete an online profile for inclusion in the IMI portal's search function to enable users to identify qualified experienced mediators. They can search via core preferences—location, languages, mediation style(s) and practice areas—and then be presented with a selection of IMI Certified Mediator profiles meeting those preferences. The search engine is openly accessible from the IMI homepage¹. IMI does not keep any record of visitors using the search engine.

In addition to setting standards and enabling States and investors to make informed decisions on mediators, the IMI portal provides a variety of other services which such users can benefit from, including: (1) impartial guidance and information to mediation to explain how and why mediation works, (2) downloadable material about mediation and related areas of assisted negotiation and dispute resolution to assist users which can be enhanced to cover investor-State

disputes, (3) support for a Young Mediators Initiative to encourage interest in mediation by young professionals in legal, business and other areas, and the acquisition of practical mediation skills by young mediators including the creation of a model covering investor-State disputes, (4) a scholarship programme designed to enable aspiring mediators, particularly in developing countries and including those who mediate family and community disputes, to be properly trained and to enable them to get necessary experience for being assessed to become IMI Certified, and (5) a convening function, to help disputing parties consider mediation as an option.

Conclusion

Skilled mediators, regardless of their field of practice, geographical location or nationality, can use IMI to become part of a movement that is professionalizing mediation. It will benefit users, such as investors and States given that these stakeholders and others can look to mediation as a means for resolving their disputes. As the need for qualified mediators with special skills in investor-State disputes increases, IMI can act as a portal through which such mediators can be certified, registered and thereby be made available to the users requiring the unique expertise needed to resolve the underlying disputes.

Notes

* This article is based upon a chapter, "Making Mediation Mainstream", featured in Arnaud Ingen-Housz (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures, Volume II* (Kluwer Law International, October 2010) by Patrick Deane, Wolf von Kumberg, Michael Leathes, Deborah Masucci, Michael McIlwrath, Leslie Mooyaart and Bruce Whitney. The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

¹ See www.IMImediation.org.

9. Preliminary Legal Assessments of Investor Claims as a Tool to “Fitting the Forum to the Fuss”

by *Céline Lévesque**

Introduction

The use of ADR mechanisms by investors or by host States in relation to FDI is influenced by many factors, including whether the investment is long term, whether it is based on a contract with the State, whether it involves sunk costs, whether it involves many stakeholders, etc. In many cases, dispute avoidance may be the best recipe to maintain the relationship between the foreign investor and the host State and to make the most out of the FDI. Ombudsman type services, for example, may be an efficient way to handle conflict prevention.

There are instances, however, when a government first hears about a complaint only when investors deliver a notice of intent to submit a claim to arbitration under an IIA (Franck, 2007a). It may be that the conflict developed at the sub-national government level—far away from central government’s ears. It may be that the investor has no relationship with the government other than through its regulation (now alleged to be discriminatory or expropriatory) and that early discussions with the sectoral department involved did not lead to a resolution of the conflict. Or, it may be a case of an unscrupulous investor trying to (ab)use the IIA dispute settlement regime.

This contribution addresses such situations where a first legal step has been taken by investors under an IIA that could lead to a full-fledged investor-State arbitration. The aim is to explore the use of one tool—preliminary legal assessments—that could help governments increase efficiency in dispute settlement under IIAs by opening up options. It proposes a merits-based approach to exploring the use of ADR as an alternative or a complement to international arbitration. Part I describes the tool of preliminary legal assessment. Part II studies three points along the “merits spectrum” and considers the potential for ADR.

Preliminary legal assessments

When a government receives a notice of intent to submit a claim to arbitration or a claim to arbitration, it is useful to weigh the merits of the claim as soon as possible. Ideally, legal counsel in the department responsible to defend against such claims at the central government level would perform this assessment. However, if capacity is limited, outside counsel could perform a similar task. As the title indicates, such assessments are “preliminary”. They are performed before evidence has been gathered and generally only assess the claims as made by the investor. They are also preliminary in the sense that they do not assume that an exhaustive legal research has been performed that covers all possible angles of the dispute. Rather, the assessments provide early evaluation of the risks of liability faced by a government. Furthermore, they also provide an opportunity to consider different ADR options.

In terms of content, the assessment should cover the context for the dispute: the facts as alleged by the investor and the legal instrument under which the claim either has been or will be made. The legal analysis should consider potential jurisdictional objections, evaluate the merits

of the claim, and provide an opinion on alleged damages. The conclusion should weigh the merits of the claim, evaluate the risk of liability for the government and the opportunity for ADR.

The merits spectrum and ADR

The “merits spectrum” represents one way of categorizing legal claims. At one end of the spectrum are meritorious claims and, at the other end, those that are unmeritorious. In the middle zone are claims of uncertain merit (either as matter of law, fact or mixed questions of law and fact). ADR may more efficiently resolve meritorious and unmeritorious claims, but dispute settlement for claims of uncertain merit could also be improved.

Meritorious claims

There are cases where the breach of an IIA obligation is fairly clear. A sub-national government may have proceeded to expropriate the investment of a foreign investor without compensation or may have blatantly discriminated against a foreigner. The preliminary legal assessment would evaluate the claim and may conclude that the government faces a high risk of liability. In such a case, a negotiated settlement, a facilitated negotiation—with the assistance of a third-party neutral—or mediation could be suggested as options.

Governments, however, may face a number of obstacles or barriers in settling claims even though they have merit. The obstacles—both real and perceived—to the use of ADR by governments include: (1) the lack of political cover provided by a negotiated solution as opposed to a third-party binding decision, (2) the risk of appearing to cave in to foreign investors, especially where the claim is of public interest, (3) intergovernmental issues such as when the claim relates to sub-national measures adopted by municipalities or provinces/states that are not signatory to the IIA, (4) intragovernmental issues such as when multiple ministries and agencies are involved and not a single decision-maker can make the decision to settle, (5) the risk of upsetting public expectations when ADR is confidential and arbitration would be more transparent, (6) the fact that ADR may unnecessarily lengthen the dispute settlement process if the parties ultimately have recourse to arbitration in any case (Coe, 2006; Legum, 2006; Rubins, 2006; Salacuse, 2007). Such potential obstacles have to be explored with the aim of reducing their impact.

Unmeritorious claims

Some claims lack legal merit because they are frivolous, because they are brought in bad faith or represent an abuse of process. The preliminary legal assessment would evaluate the claim and may conclude that the government faces a low risk of liability. This does not mean, however, that the government should proceed with a full-fledged arbitration. Even if the government prevails in the end, the cost and energy involved in defending such claims are substantial. For obvious reasons, some of those claims cannot be settled (e.g. where there is some evidence of corruption).

The preliminary legal assessment, however, could analyse other options. A third-party “early neutral evaluation” of the merits could discourage the investor from proceeding any further. A government facing a claim under the ICSID Convention or ICSID Additional Facility

Rules can also have recourse to the process of expedited review of claims.¹ There are also claims that do not “lack legal merit” but, for other reasons—such as the amount of damages claimed is relatively minor—do not belong in international arbitration. Because of the high cost of arbitration, alternatives should be explored to resolve such claims as well.

Claims of uncertain merit

Most investor claims will probably lie in the middle of the spectrum. However, claims of uncertain merit (either as matter of law or fact) might still be more efficiently handled, for example through mixed ADR/arbitration models. As described elsewhere, the uncertainty in international investment law makes it difficult for governments to perform the type of risk assessments required to make decisions regarding settlements. For example, a preliminary legal assessment may present the holdings of divergent awards on a certain legal issue and be unable to conclude either way on the risks of liability. Nonetheless, the legal assessment can be useful to weight the strengths and weaknesses of different claims and arguments. This analysis can in turn be used to tailor a more efficient dispute settlement process—that is “fitting the forum to the fuss” (Sander and Goldberg, 1994).

Often there will be room for improvement from the single international arbitration model. In many cases, investors have a tendency to make numerous claims in the hope that some claims will “stick”. This strategy involves costs and delays. Mediation prior to arbitration or concurrent with arbitration could help narrow and refine claims for the arbitration (if not lead to a settlement). Arbitration with a “mediation window”, as discussed recently, could be explored (CEDR 2009a; CEDR, 2009b).

Conclusion

Preliminary legal assessments can be a useful tool for governments to evaluate the risk of liability they face under IIAs and explore possible avenues for increasing efficiency through the use of ADR mechanisms. Capacity building in this field should be a priority of governments currently lacking such skills in-house. Alternatively, or meanwhile, outside counsel advice should be considered. Governments will also need to analyze seriously how obstacles to the use of ADR can be overcome.

In the final analysis, preliminary legal assessments are not a panacea. They are just what the name implies: a tool used early on by governments to navigate better the stormy seas of international dispute settlement under IIAs. It is hoped, however, that their use will bring more efficiency to the process.

Notes

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¹ See, e.g., ICSID Arbitration Rule 41(5), allowing a party to object on the grounds that a claim is “manifestly without legal merit”.

10. Thailand's First Treaty Arbitration: Gain From Pain

by *Vilawan Mangklatanakul**

Introduction

Like many countries, Thailand has signed a number of IIAs designed to protect its investors abroad and simultaneously attract investment from abroad into the country by offering an additional layer of protection for foreign investors. As a matter of pure domestic law, foreign investors in Thailand are entitled to legal protection under its national laws as well as to have access to courts, tribunals and ADR mechanisms. Some foreign investors have access to extra international law rights, courtesy of Thailand's relatively extensive network of IIAs.¹ Despite the existence of a network of investment treaties and constantly increasing flow of FDI into the country, Thailand's experience with investment disputes was confined to a small number of issues arising under its domestic framework. In 2005, Walter Bau AG, a German investor, filed the first investment treaty arbitration against Thailand. This case was significant in many respects. Since it was the first investment treaty claim against Thailand and involved the adjudication of international law, including jurisdictional considerations in Article 2(2) of the Germany-Thailand BIT related to the meaning of whether the protected investment must be "specifically approved in writing", Walter Bau was a real test for Thailand's loosely non-institutionalized investment dispute management and prevention mechanism. Although the ultimate outcome was never the cherished part of the experience, the case offers a wealth of experiences and an opportunity for the reflection on treaty implementation and dispute management. Though it may be financially costly for Thailand, the case is nevertheless "a valuable learning experience" for States. In an effort to share Thailand's lessons in managing Walter Bau, this paper explores: (1) procedural lessons on the experiences from the process of dispute prevention and management, (2) substantive lessons on the coverage of the investment treaty, and (3) ideas about the way forward.

Background of *Walter Bau AG v. Thailand*

Walter Bau AG (In Liquidation) was a company incorporated under the laws of the Federal Republic of Germany, and the investor acted through its insolvency administrator. The Respondent was the Kingdom of Thailand. The dispute involved Walter Bau's purchase of shares in Don Muang Tollway Co. Ltd. ("DMT"), a Thai company. In 1989, DMT entered into a concession agreement with the Department of Highways for the design, construction, operation and maintenance of the Don Muang Tollway near Bangkok in return for the right to collect tolls for the duration of the concession (25 years). Thailand's refusal to adjust toll rates was alleged to negatively affect the operation of DMT, in which Walter Bau had equity participation. Walter Bau alleged breaches of various IIA provisions, including claims relating to (1) FET, (2) impairment of enjoyment of investment, (3) expropriation, and (4) national treatment.

At the jurisdictional phase, the key issue was whether Walter Bau's 9.87% shareholding in DMT constituted an "investment" deserving of protection under the Thailand and Germany BIT (2002).² Despite Thailand's objection to the jurisdiction, the tribunal decided that Walter Bau's purchase of shares was an investment that enjoyed protection under the treaty. Thereafter,

the tribunal ruled that Thailand breached its treaty obligations related to FET³ and assessed damages against Thailand to pay €29.21 million plus interest.

Procedural reflections on dispute management

There are three stages in dispute management: (1) pre-dispute, (2) dispute, and (3) post-dispute. This section explores the pitfalls in each stage that Thailand experienced.

There are two key possible “pre-dispute pitfalls”. First, government agencies can often lack experience with investment treaty arbitration. Thailand signed the first BIT with Germany in 1961 and many other countries thereafter; yet its first treaty arbitration only arose in 2005. The government officials were not fully well versed with the legal implications of the treaty, let alone the early dispute settlement or litigation under the arbitral rules of procedure. The realisation that an investor could invoke ISDS in a treaty was perhaps not fully appreciated. For instance, agencies may not be sensitive that their decisions to revoke or not renew permits can, in some circumstances, create potential State responsibility under IIAs. Likewise, officials may not have appreciated that Ministry of Transport decisions affecting highway concessions of certain types could be a qualifying “investment” subject to treaty protection.

Secondly, there might be a lack of an institutionalized dispute-filtering mechanism or liaison unit that could prevent a “problem” related to investment from escalating into a formal investment “dispute”. In this case, there were several attempts to settle the case but none resulted in settlement. The existence of the lead agency specialising in managing the dispute might have been a more effective solution.

Once the conflict had evolved to become a formal dispute subject to adjudication through arbitration (i.e. during the dispute itself), Thailand encountered four significant pitfalls.

First, there was a lack of the permanent lead agency to handle a dispute when a conflict crystallized into a formal dispute. This meant there was no administrative entity responsible for evaluating the stakes at issue, preparing the defence case by appreciating the relevant facts and legal arguments, hiring competent lawyers, collecting evidence and relevant information, and looking into the possibility of settlement claim. Nevertheless, the Thailand Cabinet eventually established an *ad-hoc* working group after being served with the notice of intent for arbitration to perform those roles. Given the delay and related issues that developed because of the time constraints, this created new challenges.

Second, the lack of perspective and experience of investment treaty arbitration compromised the effectiveness of handling Thailand’s first treaty claim. Thailand did hire external legal experts to defend the dispute. Yet the delays in the working group formation meant there were challenges in getting officials to comprehend fully what was at stake in a timely manner. It also meant that crafting a dispute resolution strategy, and making decisions about continuing litigation or exploring the desirability of settlement options, was hampered.

Third, the working group experienced the so-called language barrier. The need for translation of legal documents inevitably caused delay, costs and inaccuracy. This, however, is an

administrative obstacle that may be one of the inevitable by-products of choosing a dispute resolution process based upon documents and formal adjudication.

Fourth, there were political costs, and these costs continued to accrue as the case went on. As the government began to understand that success on certain issues was unlikely, it would have been challenging to adopt a settlement. There were domestic concerns that perceptions that the State had made concessions to a foreigner at the expense of taxpayers would mean the State was too weak to protect the interests of the public. This has particular implications for countries such as Thailand.

Thailand also experienced three issues in the post-dispute stage. Each of these presents a learning opportunity for the future.

First, given the political cost of the arbitration “loss” and basic concepts of “loss aversion”, Thailand did not necessarily accept the outcome or perceived loss easily. The government has no choice but to continue to defend the award during the enforcement stage. There have also been efforts to set aside the award before the Central Administrative Court. These efforts fit comfortably within the framework for resolving disputes in accordance with international law and practices in international arbitration.

Second, the State is accountable and answerable to the public and the media. The loss caused the uproar in the public opinion such that the Thai media in one case characterised the compensation the arbitrators awarded an investor as the “cost of stupidity” (“ka ngo thang duan” in Thai). The fact that the Supreme Court eventually refused to enforce such award six years later did not make headlines.

Third, another important factor which adds to the reluctance to easily accept the award is the possible personal liability of officials. The Liability of Officials Act B.E.2539 holds officials liable to their breach of official duties. This may affect how officials pursue their obligations during arbitration and also their willingness to entertain settlement offers. This well-intended law, which is not dissimilar to provisions in other civil law countries, may inadvertently put government officials between “a rock and a hard place” as there are inevitable challenges for anyone who handles investor-State disputes and wishes to explore alternative modes of conflict management.

Fourth, adverse cases may create certain perceptions. Walter Bau by itself should not cast doubt on Thailand’s image as an investor-friendly destination for foreign investment. Nevertheless, a series of actions by the State—whether leading up to the dispute and after the dispute—could send a wrong signal as to its policy towards foreign investments.

Substantive IIA provisions

An older generation of IIAs contains provisions with broad and imprecise terms with no exceptions. This included the Germany-Thailand BIT that was the subject of Walter Bau. The case brought attention to two important points, namely the scope of the application clause and provisions creating other substantive issues.

For the scope of the jurisdiction and application clause of the treaty, Thailand's IIAs usually contain a broad-based asset definition of "investment". However, other IIAs also contain the so-called scope of application clause, which sets out the type of investment that will enjoy the treaty protection and may indicate the requirement that the asset must be "specifically approved in writing by the competent authority". In other words, an admitted investment is not automatically entitled to treaty protection. On this basis, Thailand interpreted the treaty as meaning that Walter Bau's shareholding in DMT was not a covered investment under the treaty because it was not "specifically approved in writing". However, this phrase was too vague to convince the tribunal. Rather than having a narrow textual and literal construction, they interpreted the clause rather liberally and pragmatically.

Other substantive provisions in the Germany-Thailand BIT were typical of the older generation of IIAs which contain vague and imprecise provisions, unlike modern provisions in Thailand's FTAs. For instance, the provisions on "FET" and "indirect expropriation" were vague. This may be contrasted with those provisions in Thailand's FTAs, which are elaborated in footnotes or annexes. Moreover, the dispute settlement provision in the treaty contained a broad submission to arbitration as evidenced by the use of language—without any qualification—that there is jurisdiction over "a dispute arising from investment". This may be contrasted with the more sophisticated and narrower scope of ISDS provisions in FTAs, which usually specify the types of obligations that may be invoked under the ISDS and require additional criteria such as proof of damage or causation.

The vague terms are not without consequence because they usually lead to the over-expansive interpretation. In *Walter Bau*, the tribunal was left with the discretion, without express guidance of interpretation from the Contracting Parties, and with the power to determine the boundaries of international State responsibility. There was also no mechanism in the treaty through which Contracting Parties could offer the tribunal with an interpretation or other guidance. This means, Contracting Parties—namely States—must be careful, lest they inadvertently find themselves to be victims of their own creation.

The ways forward

While *Walter Bau* did not end in favour of Thailand, there is no doubt that Thailand learned immensely from this initial experience with investment treaty conflict management. In this regard, there are three important reflections that might guide us in moving forward as a more mature player in the international investment legal system.

First, it is critical to give attention to dispute prevention and management. In the past years, Thailand has focused on how to produce the best negotiated text possible, and there has been less of a focus on how Thailand implements its treaty obligations. *Walter Bau* made the government realise the importance of effective dispute prevention and management. Various possible proposals may be considered in the future, such as the establishment of a "comprehensive aftercare programme". This may include a designation of a lead agency with clear functions and authority in preventing disputes and facilitating the communication between investors and the relevant State agency. In addition, this programme should promote the training of officials and communication of obligations to State agencies that are prone to liability under investment treaties. Furthermore, this aftercare programme may include the designation of a

dispute resolution unit, which comprises of the relevant agencies who will be in charge of handling an occurred dispute in an effective manner.

Second, it may be necessary to re-engage the home State of the foreign investor and interact directly with the other Contracting Party to the IIA. The purpose of IIAs is to equip foreign investors with the independent standing and rights to claim for themselves from a host State without reliance on the home State. Without advocating the return of “diplomatic protection”, a home State may nevertheless have a vital role to play in facilitating the dispute settlement between a foreign investor and the host State. In an effort to explore alternatives beyond traditional investment treaty arbitration, we might consider the so-called tripartite system, whereby a host State, a foreign investor and its home State are involved to facilitate constructive resolution. This mechanism might be seen as a form of enhanced State-to-State cooperation that may be achieved by including a treaty provision establishing the joint committee which, amongst other functions, serves to facilitate dispute settlement between foreign investors and host States.

In essence, whatever mechanisms will be created to render the dispute prevention and management more effective, one underlying policy objective could reasonably be that an IIA should no longer be perceived as neither “a sword” nor as “a shield.” Rather an IIA should be an instrument of trust, providing a mechanism to facilitate and promote a positive relationship between the host State and foreign investors for the exploration of mutual gains in order to both sustain the relationship and improve it in the future for mutual benefit.

Notes

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¹ Thailand’s IIA network consists of 42 signed BITs (35 of which have entered into force). In addition, Thailand has bilateral FTAs which contain investment chapters with Japan (JTEPA), Australia (TAFTA), New Zealand (TNZCEP); and regional FTAs which include investment chapters: ASEAN Comprehensive Investment Agreement, ASEAN-Australia-New Zealand FTA, ASEAN-China Investment Agreement, and ASEAN-Korea Investment Agreement. Ongoing negotiations to which Thailand is a party include ASEAN-India FTA (which includes an investment chapter) and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC).

² Article 2(2) of the treaty stated: “This Treaty shall apply to investments that have been *specifically approved in writing* by the competent authority, if so required by the laws and regulations of that Contracting Party” (emphasis added). Walter Bau’s share-holding had never been specifically approved in writing, in other words, it had never applied for the certificate of approval for protection procedure, which was required before certain kinds of investment enjoy treaty protection. The following types of investment by virtue of its admission into the country shall enjoy automatic protection: an investment that has been granted a licence by the Minister of Commerce or the Director-General of the Department of Business Development in accordance with the Foreign Business Act B.E.2542 (1999), investments that have

received a Certificate of Promotion from the Board of Investment, investments made under a government concession contract.

³ The measures leading to the breach included: (1) Thailand's refusal to allow an increase in tolls on the bases of the amended concession contract, (2) the reduction of tolls in 2004, (3) the continued improvements to roads which affected the use rate of the toll way, and (4) the total shut-down of the Don Muang airport between 2006-2007, which led to decreased tolls.

11. Implementation of Investment Treaty Obligations and Management of International Investment Disputes

by *José Antonio Rivas**

When considering compliance with an IIA, one might normally think of the enforcement of an arbitral award interpreting a claim related to a treaty. Yet compliance with IIAs is about more than this. Rather compliance is also about implementation of measures to prevent investment treaty violations and to enhance the State's readiness to act in investment treaty arbitrations. The question is whether an implementation and follow-up approach benefits host States, investors and the system of international investment law as a whole.

Implementation of investment treaty obligations and management of international investment disputes refers to those measures and actions that a State undertakes to comply with an IIA, to minimize the chance of international investment arbitration claims and to improve its readiness to face treaty-based claims. IIAs usually do not articulate specific measures to be taken following the signature of the treaty, or after its entry into force. This paper explains that States can choose to implement their IIA obligations, prevent investment disputes and increase their readiness in case investment disputes arise by drafting implementation clauses into IIAs. These clauses may vary and be binding or non-binding depending on the interests of the negotiating States.

Benefits of implementing legislation to prevent, minimize and address investment treaty arbitration

ICSID is a major international arbitration institution that handles IIA disputes amongst other types of claims. Having registered over 200 cases, ICSID's docket may be one of the largest, if not the largest, international adjudicatory forum for finally resolving IIA disputes. The rise of investment disputes has not happened without tension and criticism from certain States. Some States have denounced the ICSID Convention or attempted to limit their consent to arbitrate certain types of disputes at ICSID.

Rather than being a symptom of a crisis in the international investment arbitration system, these challenges show that investor-State arbitration is a living system. This system is made up of around 5,939 IIAs and over 300 known disputes (UNCTAD, 2010c). Meanwhile, there is an active investor-State arbitration community of practitioners, arbitrators, stakeholders and academics. These numbers do not show that the system is about to collapse. They demonstrate that the system: (1) entails a real, and arguably greater, risk of international investment arbitration claims for States than ten years ago, and (2) is continuing to expand such that passive attitudes of parties towards their treaty commitments may be costly in terms of adverse awards, interests and legal fees when there is a failure to observe their obligations and/or the lack of a well-structured defence model. These considerations lead to the key issue of how to best implement and manage investment treaty obligations.

Implementation of IIA provisions, management of international investment disputes and the road ahead

Certain IIAs, like article 817 of the Canada-Colombia FTA or article 817 of the Canada-Peru FTA, already incorporate provisions that create bilateral mechanisms for Parties to consult on issues related to the implementation of their respective IIAs, including investor-State disputes and advisory matters. IIAs could include similar implementation provisions attempting to minimize the risk of investment treaty arbitration and to increase readiness in case investment disputes arise. There is no question that the thousands of existing IIAs are valid and enforceable and may even, in some cases, be self-executing agreements. As a result it may be useful to consider including implementing provisions in IIAs to promote regulatory compliance outside of arbitration while simultaneously increase readiness to face arbitration and making States aware of the implications of their commitments.

This paper argues that States can comply with their obligations more effectively and increase their readiness to face arbitration by implementing one of three different models, namely including provisions in their IIAs such as: (1) a binding commitment to implement an IIA through specific measures and to increase readiness for investment treaty arbitration, (2) a binding commitment to implement an IIA through any measure that the State may find appropriate, and (3) a hortatory undertaking where States make best efforts to prevent investor-State arbitration and prepare officials for related matters.

Option 1: A binding commitment with specific measures

The first effort likely requires an undertaking to create an entity such as a lead State agency (LSA). Such a provision would entail binding and detailed implementation. The text in a model IIA might take the following form:

“Each Party shall establish a lead State agency (“LSA”) which shall, among other tasks:

- 1. promote the training of State officials involved with foreign investment, on the commitments under this Treaty;*
- 2. monitor domestic obstacles to foreign investment as well as potential and current investment disputes;*
- 3. coordinate the communications on behalf of the State with a disputing investor in international investment disputes and arbitrations;*
- 4. coordinate the actions and defence of the State as a disputing party in an international investment arbitration;*
- 5. have the power to collect evidence domestically when the State it represents is a disputing party in an international investment arbitration;*
- 6. have the power and authority to negotiate, on behalf of the State, settlement agreements with disputing investors of the other Party.”*

Each of these six elements are core powers that an LSA would need to fulfil its mandate to focus on investment implementation, conflict prevention and dispute defence. Its powers would focus on the training of State officials, prevention of disputes, the State having a single voice and a recognizable lead agency heading its defence strategy when it faces an international investment dispute, and powers to negotiate a settlement (Pawlak and Rivas, 2008). These powers are further described below.

First, as regards training State officials, various States run training workshops for State officials either directly with their own investor-State arbitration experts or through capacity building programmes of various international organizations, such as UNCTAD, ICSID and others. Training is an ongoing need of States. It offers an opportunity to understand investment disputes and the implications of a breach of an IIA. An LSA in charge of promoting this kind of training may do so by directly hiring experts or other technical cooperation, or perhaps even indirectly through organizing informal communication networks amongst various levels of government officials. As the officials of the LSA are trained or gain direct experience resulting from representing their own State in investment arbitration cases, the training that becomes necessary is that of government officials acting in those domestic economic sectors attracting foreign investment, including officials at sub-federal or provincial levels, and heads of state-owned enterprises. Technical cooperation or trained LSA officials could provide training to other officials.

Second, as regards monitoring domestic obstacles, full prevention of investment arbitration may be impossible once IIAs are in force. Even if the host State has strictly complied with its international commitments, complete protection from frivolous claims cannot be guaranteed as investors have the right to file claims, even if unmeritorious. Yet a policy of prevention of investment disputes should still be pursued both to avoid paying costly negative awards and counsel fees, and to maintain a transparent foreign investment friendly policy consistent with the State's IIAs.

In order to prevent or minimize disputes from becoming formalized, States can monitor investment obstacles by identifying: (1) domestic economic sectors with large amounts of foreign investment, and (2) sectors in which there have been and are recurring issues or obstacles to investment. An information system on obstacles to investment may enable preventing or minimizing investment disputes. In addition to monitoring investment obstacles which may lead to identifying potential investment disputes, following-up actual disputes is an obvious task for an LSA in charge of addressing investment disputes through prevention, negotiations, ENE, arbitration or other settlement forms.

Third, as regards the coordination of communications, the LSA should have one single and consistent voice when an international investment dispute arises. Under public international law and Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the State is a single entity regardless of whether the State's measures and acts are taken by various State agents, including those acts of the executive, legislative and judiciary branches. Thus, in light of public international law it is reasonable, strategic and necessary for a State to have a single posture in an investment dispute, as opposed to different stances from various agencies within the State.

Fourth, as regards communication of activity, in investment treaty arbitration, a significant part of the respondent State's defence depends on its ability to be rigorous and responsive both procedurally and substantively throughout the arbitration. Given the bureaucratic nature of States and the fact that various agencies may be involved in an investment dispute, advancing the State's defence strategy is challenging. There is a higher chance of accomplishing this challenge if an LSA is in charge of coordinating the State's defence and strategy, has its own

budget for investment arbitrations, and is able to transparently and effectively choose the State's defence model. This might include choosing whether to use in-house counsel, external counsel, or a combination of internal LSA lawyers and external counsel.

Coordinating the State's defence and strategy may incorporate consultations with various agencies before a final decision is reached on major issues—such as pursuing settlement discussions, favouring arbitration or receiving comments on key pleadings by relevant agencies. Yet, after the appropriate consultations, the LSA should be able to make timely decisions and submissions to the arbitral tribunal. The consequence of not having clear tasks and powers is poor defence for the State.

Fifth, as regards power to collect evidence, a State party to a dispute is more likely to submit a strong defence in its favour if it is able to internally gather the supporting evidence by ordering that it be provided. Such powers, however, may not be legally assigned to an LSA or to an agency acting on behalf of the State in an international investment arbitration. This constitutes a *lacuna* for the State's defence, i.e. there is a risk that the LSA lacks sufficient powers to defend the State as it will not even be able to gather the necessary evidence.

Sixth, as regards having the power to negotiate settlements, finding negotiated solutions once an investor-State arbitration starts is extremely difficult. One reason relates to whether anyone within the State has the power to engage in settlement discussions and reach a binding agreement. Even if State officials believe a negotiated settlement may be in the best interest of the State and disfavour the risk of an adverse and costly arbitration award, the State may be unable to pursue this route. Unless the power to negotiate and reach settlement agreements is entrusted to a LSA or a special State commission, quite reasonably, public officials are unlikely and should not act *ultra vires*. Creating the possibility for a negotiated solution by empowering a LSA or a special commission to negotiate and reach a settlement would realistically open the door to alternatives to international investment arbitration.

The binding commitment to implement an IIA through specific measures and to increase readiness for investment treaty arbitration is an option for States negotiating an IIA who choose to have as much certainty as possible that implementation will follow after the treaty enters into force. However, certain States may not be interested to include in their IIAs an option that binds them to create an LSA, even if they see the benefits. Option 2 below is submitted for States that may be inclined to make explicit their commitment to implement their IIA without committing to particular measures to prevent and to increase their readiness to face investment treaty arbitration.

Option 2: A binding commitment with deferential implementation model clause

A model clause to implement other commitments in IIAs may read as follows:

“Each Party shall endeavour to increase its ability to prevent or minimize investor-State disputes and its readiness in case of international investment arbitrations.”

This clause still has the binding character of the previous model clause. Yet, the binding and deferential implementation model clause is an alternative for a State that still shares the importance of implementing IIAs in order to prevent investor-State disputes and increase its

readiness when investment arbitration arises. However, such a State may differ on the manner such objectives should be achieved or it may prefer to avoid undertaking additional international obligations. In either case, this provision is deferential to the State and recognizes its right to choose the particular course of action it will follow to minimize or prevent investor-State disputes and to better prepare itself for investment arbitrations.

Certainly no State would be against the objectives of preventing investment treaty disputes or increasing the State's readiness to face arbitration. Yet, they may not be willing to make a binding international commitment to issue measures to attain the above objectives, while still willing to recognize their importance—through Option 3 below.

Option 3: A hortatory undertaking: Implementation of a “soft law” model clause

“Each Party recognizes as important objectives of this Treaty preventing or minimizing investor-State disputes and increasing the readiness of each Party in case of international investment arbitration.”

There is value in using a “soft law” model, where inclusion would textually record in an IIA the desirability for a State to prevent investor-State disputes, to minimize the investor-State disputes and to improve State capacity to respond when confronted with formalized arbitral disputes. This language, if incorporated in an IIA, would create hortatory aspirations rather than creating particularized international obligations. Nevertheless, this model clause could “nudge” desirable behaviour that domestic authorities could aspire towards in domestically crafted measures.

Conclusion

International investment arbitration practitioners, IIA negotiators, public servants defending claims and academics recognize the large volume of IIAs means that—as a practical matter—IIAs will remain a critical feature of international law for the foreseeable future. This means that States—whether acting in investor-State arbitration or attempting to diffuse issues before they reach that stage—have an incentive to address problems that will likely either face them in the future or are facing them today. The options in this paper suggest that there is utility in moving beyond the reactive approach, namely only responding to problems as arbitrations arise. Rather, there is value—and a way forward—for those States wishing to be proactive in addressing IIA problems, conflicts and disputes to prevent unnecessary costs that erode the value of foreign investment to IIA stakeholders. The proposal of having States negotiate express provisions that implement their dispute resolution obligations in a more proactive manner could be useful. It could permit States to regain some policy space—and control in the investment treaty system—by encouraging States to better monitor how they comply with their international legal obligations. This proactivity, which would require training of State officials and the creation of institutions domestically such as an LSA to manage disputes, would be a step forward in improving the governance of agencies and parts of government in sectors related to foreign investment, eliminating unnecessary reference to arbitration, and creating a more efficient investor-State arbitration system by having better prepared States in case of arbitration. This approach has the value of promoting the long-term integrity of the international investment system and preventing investment disputes from derailing the value of international investment.

Notes

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12. Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes

by *Andrea Kupfer Schneider**

States created the current system of investment arbitration to find a better way of resolving disputes between States and their foreign investors. The idea was to move beyond previous methods of gunboat diplomacy or placing investors in the position of needing to exit the State along with their investments. The current system is designed to allow States and investors to resolve disputes peacefully, to maintain relationships, to provide remedies to harmed investors, and to encourage foreign investment in those States complying with their international treaty obligations. However, both States and investors are now raising concerns about the costs, delays, and political challenges associated with relying on the rights-based arbitral process and its outcomes. Commentators and stakeholders thus are now beginning to urge a focus on various measures to prevent disputes and, once disputes arise, greater use of consensual procedures such as mediation. Alternatively, in the context of investment treaty disputes, some commentators criticize mediation as politically or legally unworkable.

A first concern might be that mediation will change the nature of the carefully negotiated arbitration system in terms of State sovereignty and rights. That concern is unfounded. Both the existing arbitration system—as well as any new process like mediation—will maintain the same level of rights for both States and investors compared to the other international economic dispute systems like the WTO. Investment arbitration already provides standing for individuals to bring their own complaint while limiting State control over a specific case outcome. That balance of outsourcing outcome and offering private parties direct access to adjudication with States is different from the standard model in international law, where typically only States have standing to bring disputes. Adding mediation and other non-adjudicative options to the current system for resolving conflict does not change the larger political issues of supremacy, standing, or enforcement. In fact, investors and States will likely find that consensual processes give them more control over the outcome and, particularly for States, could help market this new consensual process to their constituency based on the argument of increased State control and reclaiming of policy space.

As a way of assessing how consensual processes could be brought into investment treaties, we could use DSD. According to DSD theorists, there are six key elements to measure: participation, suitability, accountability, fluidity, sustainability and permeability (Constantino and Merchant, 1996).

The importance of participation in any new DSD is key. Including stakeholders around the table to help design the process ensures buy-in, compliance, understanding, and effectiveness. The recent Joint Symposium was a productive start where States, neutrals, and investors gathered together to contemplate and learn about different process choices. As we move forward, this model should be continued so that key stakeholders design and troubleshoot any system, ensure participation and buy-in, and provide funding and support. This early involvement in all aspects—from what the process should look like, to how to find neutrals, to how to train participants, to how to publicize (or not publicize) the settlements—will all need to be managed

by the stakeholders rather than outsiders. Without this participation at the outset, other elements are irrelevant.

The next element is suitability—here the debate centres on which process or processes should be added to the choices for resolving conflict—and, thus far, has been the focus of most criticism about shifting away from arbitration. Is mediation appropriate? Critics of consensual processes in this context worry that a volunteer process in which a settlement is facilitated, rather than imposed, will not work. One concern involves the political and domestic constraints that are involved in these disputes. It is one thing for a State to be ordered to pay a company damages if the treaty has been violated, but the authority to negotiate a voluntary settlement is often unclear and requires navigating multiple layers of bureaucracy. Several speakers at the Joint Symposium mentioned that there may also be concerns related to whether they even have authority to negotiate. Other contextual issues might relate to cultural approaches to dispute resolution and whether consensual or more adversarial processes are the presumptive national approach to dispute resolution. There may also be political ramifications, including being viewed as “giving in” to a foreign investor.

The next element, accountability, refers to a check for fairness within the process. Participants will need training and perhaps representation in the mediation process. Mediators also need to be trained in the area of international investment law while ensuring impartiality. Also, much like in arbitration, the issue of repeat players and different levels of knowledge and expertise must be noted and monitored. Multinationals with institutional resources and commercial enterprises around the globe may have more knowledge and experience with the neutrals and the process. Stakeholder participation in design can help ensure process accountability—that the process does not favour one side or the other in disputes. Results accountability—ensuring that the mediated or consensual outcomes are fair—can only be measured once the process is operating.

Fluidity is an element of DSD that is included to ensure that the process continues to adapt to changing circumstances. As part of the system, it needs to adjust to the timing and calendaring as needed by participants. The system of administration will also need to adjust to offering more choices—mediation and perhaps ENE in addition to arbitration.

Sustainability—the ability of the DSD to continue over time effectively—requires a unique set of elements in this particular context. In most DSD, sustainability deals with the issues of training for participants, ensuring quality neutrals, and perhaps financial support for parties engaging in the new DSD. All of these elements of system design will be necessary: However, this situation is more demanding in two ways. First, as country participants pointed out at the conference, for this system to work, a new delegation of settlement responsibilities will be necessary. Many States have established a clear chain of command and methodology for the arbitration process. States, particularly those who have already experienced a claim, understand the process of drafting the appropriate documents in adjudicative proceedings, of making the best arguments possible, of marshalling necessary evidence, and all other requirements for this adversarial process. Even if the State is a civil law system versus common law and follows a more inquisitorial model for domestic trials, its government lawyers have been trained on what is required in the more adversarial international system.

But consensual processes require a different kind of expertise and a different kind of authority. Those lawyers representing States will have to become familiar, if they are not already, with mediation advocacy skills. These skills—writing mediation statements, explaining your position persuasively to the other side, preparing your client to participate in mediation—are very different to the skill sets needed for adjudicative proceedings. Furthermore, the political authority in adversarial versus consensual processes is unique. States might find it relatively easy to review legal briefs and arguments and delegate the authority to advocate versus granting affirmative authority to settle. States might want more control or might worry about the nuances of settlement differently. A final element for true sustainability would be to embed consensual processes directly into the text of IIAs. This would require a new model BIT to be approved in general and then specific countries to negotiate these details as each treaty is signed. In the long term, the old treaties which just offer arbitration will slowly be replaced but, if consensual options become popular, States might want to amend their treaties sooner in order to incorporate additional consensual process options.

A last criterion for DSD is the issue of permeability—how much does the dispute system embed itself in the organization or relationship in other ways? Interestingly, the shift from solely using arbitration to using other consensual processes is an example of permeability in the other direction. Companies, the foreign investors, are quite practiced with commercial mediation and already realize the benefits of process choices. Countries themselves are also increasingly more likely to offer mediation as a process option in their domestic court systems meaning the legal culture is more comfortable and knowledgeable about business mediation. The Joint Symposium demonstrated that it is the clients—the companies and the countries—that are pushing this change and trying to bring in mediation as a process choice in all of their disputes, including investment ones.

If we were to see permeability of consensual processes into the investment system, States have already suggested that this would facilitate information exchanges when there is a dispute and perhaps help negotiated settlements earlier in the process. This would also facilitate administrative review of cases under a more consensual process. The idea of a trade and investment ombudsperson for each country—a person where potential disputes could be discussed before full-blown proceedings are started—also seemed attractive.

On a final note, theories of DSD can also serve as frameworks for evaluating success of any new system. As we move forward, the criteria of transaction costs, party satisfaction, the effect on relationships and the recurrence of disputes would be additional measures for evaluation (Ury *et al.*, 1988). Recognizing the conversation that has already begun, adding consensual processes to the options permitted between companies and countries in dispute would help on all of these criteria. Transaction costs of disputes should drop. Parties should be more satisfied with solutions they have worked out rather than arbitrated decisions. As information exchange and early problem-solving is better instituted, relationships should improve and this would also help reduce the recurrence of disputes.

DSD theory can help move the investment treaty regime to a new level of efficiency and effectiveness. It adds consensual processes to arbitration and provides participating States, and their investors, with process choices that can be more tailored to fit the needs of each dispute.

Notes

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13. An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution

by *Hi-Taek Shin**

In rapidly developing its post-Korean War economy, the Republic of Korea depended heavily on foreign sources of private capital and enacted legislations that would attract FDI and harness the activities of foreign investors in the Republic of Korea in order to maximize their contribution to the nation's economic goals. During the 1960s and 1970s, the Republic of Korea also entered into many IIAs with developed capital-exporting countries—starting with Germany in 1964—to promote inward FDI by offering treaty protection to foreign investors.

Consistent with the progress achieved by the Republic of Korea economy since the early 1960s to when Korea joined the Organisation for Economic Co-operation and Development (OECD) in December 1996, the Republic of Korea legislation on FDI progressed from a control-based model typical of developing countries to an advanced model with a liberal attitude prevalent among OECD member countries, representing the Republic of Korean Government's shift in perspective on FDI. The Republic of Korea Government's perspective on the purpose of IIAs also changed significantly by recognizing the value of IIAs as a tool to expand market access opportunities for the Republic of Korea investors investing abroad and to improve protection of their overseas investments. Accordingly, Republic of Korea trade officials now appreciate that the Republic of Korea and its trade partners can mutually benefit by entering into IIAs. In recent years, the Republic of Korea has aggressively pursued IIAs with both developed and developing countries. As of 2009, the Republic of Korea concluded 92 BITs (of which 81 are currently in effect) and has signed FTAs with Chile, Singapore, EFTA, ASEAN, the United States, EU, and India with future plans to pursue negotiations with other countries. Many of the IIAs that the Republic of Korea has entered into in recent years include investor-to-State arbitration provisions.

The first Republic of Korea legislation on foreign investment (Foreign Capital Inducement Encouragement Law) was enacted in 1960 when the Republic of Korea Government concluded that with public aid decreasing from the international community in the aftermath of the Korean War, it had no other meaningful alternative but to resort to private foreign capital. At the time, the per capita national income of the Republic of Korea was lower than \$80, ranking the Republic of Korea as one of the poorest countries in the world. This first legislation was soon replaced by the Foreign Capital Inducement Law (FCIL) of 1966. While the legislative intent of the FCIL was to attract foreign investment, it nevertheless manifested a high degree of concern that the activities of the foreign investors in the country would need to be controlled and regulated. This legislation lasted for more than thirty years until superseded by a legislation enacted when the Republic of Korea gained accession to the OECD. The Law Concerning the Inducement of Foreign Direct Investment and Foreign Capital of 1997 represented the government's switch to a liberalized FDI regime similar to other OECD countries to make it compatible with the commitment made when joining the OECD.

The 1998 Asian financial crisis put the Republic of Korea in an economically dire situation making it necessary to attract more foreign investments, which the government responded to by enacting the Foreign Investment Promotion Law (FIPL) of 1998. This law,

which is effective to date and repeals the previous legislation, currently offers the most liberalized FDI regime. Article 1 of the FIPL explicitly declares that the purpose of this law is to attract FDI by offering benefits and assistance to foreign investors. A remarkable feature of the FIPL is found in Article 15-2, which establishes an ombudsman for foreign investors to address their complaints and grievances while doing business in the Republic of Korea. The Office of the Foreign Investment Ombudsman (OIO) is set up as a non-profit institution and its mandate is to “address and resolve the difficulties experienced by foreign-invested companies in Korea and to create a more favourable overall investment environment, while upgrading the country’s bureaucratic/administrative system in conformation with the global standards” (Office of the Foreign Investment Ombudsman, Government of the Republic of Korea, 2010).

Presently, the OIO is well-known in the foreign investor community in the Republic of Korea and is recognized as an effective channel that foreign investors or foreign-invested companies doing business in the Republic of Korea could reliably resort to when difficulties arise with Republic of Korea Government agencies. But, in the early years of the OIO, many foreign investors and legal practitioners were sceptical of the effectiveness of the OIO for the two reasons. First, the OIO is not an offshoot of the Republic of Korea Government meaning that inherent limits on the ability of the OIO to effectively coordinate with relevant government agencies to address a particular grievance exist. Secondly, the first ombudsman was a Republic of Korea economics professor who foreign investors feared would not be able to exert meaningful influence on the Republic of Korea bureaucracy; yet, his successor was another academic from a major Republic of Korea university.

In practice, those two supposed flaws of the OIO turned out to be important factors contributing to the success of the OIO. Recognizing that the OIO could be instrumental in making the Republic of Korea as an oft-sought foreign investment destination, the government enhanced foreign investors’ perception of the investment climate in the Republic of Korea and improved the organization of the OIO so that coordination with government agencies would occur effectively. These improvements addressed the first supposed flaw of the OIO. The fact that the OIO was headed by impartial professors independent of the Republic of Korea Government contributed to the success of the OIO because they did not treat the foreign investors’ grievances in a bureaucratic or defensive manner. In fact, the Ombudsmen tended to be sympathetic of the difficulties faced by foreign investors doing business in the Republic of Korea. The civilian character of the staffing of the ombudsman combined with the government’s strong commitment to attract foreign investors by exemplifying that their grievances are addressed improved the overall investment climate of the Republic of Korea.

Similarly, the Republic of Korea Government applied the gradual shift to a liberalized perspective on foreign investments to IIAs as the economy matured and as overseas investments made by Republic of Korea investors increased. By the end of 1996, the total accumulated FDI into the Republic of Korea amounted to \$17.6 billion, while the total accumulated overseas investment by Republic of Korea investors amounted to \$17.4 billion—at this point, it was no longer appropriate for the Republic of Korea to be identified as a capital importing country. In fact, the total FDI flow into the Republic of Korea made in 1996 was \$3.2 billion, but total Republic of Korea investment overseas made in the same year far exceeded this amount by \$1.3 billion. Recent statistics show that this trend (of the Republic of Korea overseas investment

exceeding FDI into the Republic of Korea) has continued to date (except for a few years when the Republic of Korea was affected by the Asian financial crisis).

Since 2000, the Republic of Korea has pursued IIA negotiations with major world economies. Most of those IIAs include provisions that allow a foreign investor to refer disputes with the host country to international arbitration (investor-State arbitration). The Republic of Korea Government had been in the practice of accepting such provisions in numerous IIAs even before entering into FTA negotiations with the United States. But, certain NGOs in the Republic of Korea, opposing the country entering into an FTA with the United States, criticized the inclusion of the investor-State arbitration provisions in the investment sections of the Republic of Korea-United States FTA. They contended that the Republic of Korea Government was making a critical mistake by granting United States investors the option to bring claims against the Republic of Korea before international arbitration tribunals. Republic of Korea trade officials, however, maintained their positive position on the inclusion of the investor-State arbitration mechanism and accepted a meticulous set of investor-State arbitration provisions in the investment chapters of the Republic of Korea-United States FTA. Recognizing the sensitivity of this provision, the Ministry of Justice took care to address this in article 11.6 and annex 11-B of the FTA. The agreement carves out certain exceptions to the definition of expropriation so that certain measures, if to be taken by the Republic of Korea Government for policy reasons, would not be viewed as expropriation.

Within the Republic of Korea Government, the Ministry of Justice has the duty to defend the Republic of Korea should there be any arbitration filing by a foreign investor arising from an IIA. The Ministry of Justice has been very active in enhancing the awareness of the investor-State arbitration mechanism to the Republic of Korea Government agencies as well as local government officials who are seeking foreign investment to their respective regions. They hold regular training seminars and lectures to local officials to have them understand the potential ramifications of a dispute arising from foreign investment. Furthermore, the Ministry of Justice has been involved in raising general awareness within the business, legal, and academic communities by inviting reputable international scholars and legal practitioners to speak at international conferences on the issue of treaty arbitrations.

The efforts of the OIO and the Ministry of Justice are, to a certain extent, helpful in preventing potential investment disputes from escalating to an international arbitration. From the perspective of a Republic of Korea legal counsel to foreign investors doing business in the Republic of Korea, the option of litigating before a Republic of Korea court could be a viable option for ordinary investment disputes involving civil, administrative, or tax issues. As a practitioner, I witnessed numerous cases where foreign investors won cases against Republic of Korea Government agencies in civil, administrative, and tax matters. To date, no treaty arbitration has ever been filed by a foreign investor against the Republic of Korea. Should there be such a case filing in the future, I envision that it would arise from a large infrastructure project involving a local government which had become a victim of heated political controversy (with facts analogous to the Metalclad or Vattenfall cases). From this standpoint, the quality of the local judiciary and the domestic political decision-making process (in particular the ability of the central government to effectively coordinate the activities of local governments) are important factors that may affect the decision of whether a disgruntled foreign investor will resort to international arbitration.

In this aspect, the OIO may function as one agreeable avenue for both the government officials and the foreign investors to explore an ADR while avoiding the bitter legal battle that would ensue if international investor-State arbitration were used, especially in circumstances where the dispute arises out of measures taken by a local province or municipality and the central government was not involved in the decision process. Furthermore, the non-bureaucratic character of the ombudsman in conjunction with the ombudsman's role as a disinterested party can positively promote the benefits of mediation, thus providing a long-term goal that will enhance the investment climate of the country.

A brief discussion of socio-cultural factors relating to ADR in investment treaty dispute resolution context is necessary. Notwithstanding all of the perceived benefits of ADR, whether and to what extent socio-cultural factors are relevant to the ADR context vary by country. Culturally, some communities are more receptive to mediation than litigation. In many western societies, a legal filing can induce the defending party to examine the issues in the complaint. In this regard, the threat of litigation could be an effective strategy for the claimant to push for a favourable settlement, but such a strategy may backfire in a country like the Republic of Korea. While litigation has become a widely accepted way of resolving disputes between individuals and corporate entities, prematurely filing a legal action without putting in a *bona fide* effort to find a mutually acceptable solution is considered distasteful in Korean society. Although someone who complains frequently and pursues legal action may be considered to be assertive in certain cultures, a social stigma would be attached to such an individual from a Korean cultural standpoint. Other Asian jurisdictions may also agree on this point.

From this sense, Koreans generally feel comfortable in resolving disputes through mediation or the good offices of a mutually respected third party (reputable senior member of the community). There is, however, a caveat; in the Republic of Korea, disputes tend to be best resolved out of the court when done in an unassuming manner before litigation is filed and the dispute becomes public. In other words, face-saving is an important aspect of the dispute resolution process in the Republic of Korea. During my years as a practitioner, I have observed from both private parties and government agencies that giving the counterparty a chance to save face is crucial to prevent an adversarial relationship from becoming acrimonious because, without that opportunity, it may be compelled to defend the case to the end (even if the cost of settling would have been rationally preferable to the negative outcome of litigation) for fear of losing face.

The matter may be further complicated when bureaucrats are faced with a formal legal filing arising from a government measure that they were not personally involved. The government official handling such a dispute is faced with the dilemma of whether to proceed with a losing case and shift the blame to (1) the officials responsible for the government measure in question, (2) the incompetent legal counsel defending the case, (3) the devious opposing counsel, or (4) the biased or incompetent tribunal for the poor outcome, or directly receive blame for choosing to settle even though the cost of settlement would have been less than the cost of litigation. Therefore, bureaucrats tend to resolve an issue before litigation is filed to avoid being the target of political criticism. But if the matter is brought before the court and catches the attention of the public, the bureaucrats who have to defend such a case tend to feel that they have no other choice but to fight the case (regardless of the merit of the case) rather than settle for fear

of being put in a political hotspot, which can sometimes even raise breach of duty allegations against those officials.

Lastly, a meaningful ADR process would be difficult to attain when the subject matter of the dispute is related to public policy (e.g., environmental or public health related issues) and the issue is publicized to the point that NGOs and opposition political parties are also further sparking the issue in the domestic political process. This could be a very real threat in many countries including the Republic of Korea. In this respect, while enhanced transparency in arbitration proceedings is important, increased transparency from an ADR perspective could produce negative effects in some jurisdictions.

Notes

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14. The Role of Dispute Resolution Institutions for ADR Proceedings Involving State Parties

by *Hannah Tiimpel**

Introduction

Two questions arise concerning dispute resolution administering institutions' role in the future of ADR, such as mediation, for settling investor-State disputes or disputes involving State parties: First, what do the parties gain from using an institution to administer their ADR procedure? Second, what are the parties' specific needs that institutions need to accommodate?

For years, institutions' place in arbitration proceedings has been discussed, developed and conventionalized (Jolivet, 2005). However, the advantages of institutionally administered ADR have not yet attracted similar attention.

Nevertheless, institutions can have an important impact on the quality of ADR processes. Institutions can raise awareness about the use of ADR and inform parties about the process. They can support parties when they decide to submit a case to ADR by acting as a facilitator when the other side disagrees on the use of ADR or when they need help finding the best third-party neutral for their case and, if need be, by finally appointing the neutral. Institutions can supervise the proceedings to ensure their correct and fair conduct.

Moreover, institutional ADR proceedings present several advantages over *ad hoc* proceedings, especially in the context of complex investor-State disputes. Institutions are independent and must act neutrally. They offer procedural rules governing the conduct of the ADR proceedings. Their prestige is a potential form of leverage for parties who are negotiating whether to submit a case to ADR. They decrease the parties' burden and risks of roadblock by providing administrative support.¹

Current status

Although the use of mediation to resolve commercial disputes has greatly increased in the last couple of years in some parts of the world, and although institutions report a significant increase in the number of (international) commercial mediation cases, this tendency has not yet spread to investor-State disputes (Martin, 2010; CEDR, 2010; UNCTAD, 2010b). Two ADR providers, the ICDR and the London Court of International Arbitration (LCIA) do not report mediation cases in this kind of disputes (Martin, 2010: 12). Further, ICSID has only registered six conciliations to date, which however related to disputes which were not based on investment treaties (ICSID, 2010). Since the ICC ADR Rules came into force in 2001, about 10% of ICC ADR cases involved States or State entities but none were based on investment treaties.² UNCTAD suggests that "30 per cent of all cases registered at ICSID are settled through negotiations, rather than by a binding award of an arbitral tribunal" (UNCTAD, 2010b). However, due to the confidential nature of the settlement agreements, it is not known what processes were used or the factors affecting settlement.

The number of ADR procedures in investor-State disputes shall likely rise, as awareness increases about the added value of attempting settlement through ADR proceedings. Parties' interest in ADR is expected to increase due to the parties' wish to resolve the dispute in a time and cost-efficient way. For example, the average ICC ADR procedure takes just under four months and costs \$20,000-\$40,000 which—in light of the average amount in dispute of over \$17 million—is considerably less than most other dispute resolution procedures, particularly when compared with UNCTAD analyses suggesting parties' legal costs can range from \$4.3-13.2 million with disputes lasting 3-4 years (UNCTAD, 2010b).³ Parties will also realize the economic value of maintaining good relationships and reducing the risks of a negative outcome by using the ADR process to actively influence the outcome.

Starting ADR—getting everyone at the same table

New to the realm of international commercial disputes is the institution's role in convening mediations. Traditionally, institutions' functions were limited to promoting the use of ADR and raising awareness about ADR procedures. However, by helping to get parties at the same table, ADR institutions can increase the use of ADR and promote participation in an ADR procedure on an informed basis.

Often, parties find it more acceptable to discuss the pros and cons of whether to participate in ADR processes with a neutral institution rather than with the other party. Parties may reject counterparties' offers and proposal, even if reasonable, simply because they were made by the other side. Institutions can also bridge informational and cultural differences between parties. Particularly where one party comes from an ADR-sophisticated background and another comes from a different background, it can be easier for parties to raise their questions, doubts and concerns with a neutral institution rather than a counter-party. This will also allow the party to "save its face" instead of admitting the existence of questions to the other party or to expose its inexperience. As Professor Coe explains, institutions play a role of "singular importance" in the creation of good will that facilitates momentum towards settlement and also promoting parties to accept reasonable offers to pursue mediation (Coe, 2009).

In the ICC's experience, the role of its ADR Secretariat in informing the parties about the advantages and disadvantages of an ADR procedure is often crucial for the proper conduct of the procedure—both parties and counsel are often uninformed about the conduct of ADR proceedings, the exact role of the neutral, confidentiality issues and others. During this explanatory phase, the ADR Secretariat is faced not only with different levels of party knowledge about ADR but also different party expectations about the conduct and timing of the proceedings. The institution's intervention raises awareness about each parties' different expectations and allows them to explore common ground as well as considering how and when to set up the ADR proceeding. Some cases filed under the ICC ADR rules only commence (and settle) because the ADR Secretariat was involved at an early stage providing parties with full information about the proceedings.

In cases involving States, the ADR Secretariat often plays an active role in discussing with States whether they wish to participate in ADR. Although identifying the appropriate State officials can be challenging, the ADR Secretariat has worked successfully to encourage States to mediate where appropriate. In one case, the parties' expectations with regard to the timing of the

procedure were greatly different. While the investor was a European-based multinational, hoping to proceed expeditiously with ADR, the State required more time to make procedural decisions due to the internal administrative structures. The ADR Secretariat facilitated an exchange that helped both parties to understand the other's expectations and constraints, which ultimately led to the initiation of an ADR process that led to a settlement.

The appointment of an independent and qualified neutral

The institution's power to appoint the neutral, such as the mediator, can be of vital importance to success. While the parties can jointly agree to a third-party neutral, they often experience challenges reaching agreement on designation. Most parties, even when represented by sophisticated law firms with significant ADR practices, do not have extensive networks of qualified neutrals and lack the opportunity to observe multiple neutrals acting in repeated settings. Consequently, a party's proposal is based on limited information, which increases the risk of inappropriate selection. Further, an adversarial mindset can encourage parties to reject appropriate candidates that were proposed by the counterparty, which results in "burned" candidates and reduces the possible pool of neutrals. Experienced institutions with extensive networks of neutrals can facilitate identification of a useful pool of candidates and aid selection in order to move the ADR process forward.

While most institutions work with closed lists of neutrals—typically including people having passed their internal training programmes—the ICC does not work with a closed list. The ADR Secretariat rather conducts an individualized search taking into account the specific circumstances and all the requirements jointly agreed upon by the parties. The ICC will identify those with suitable characteristics, including a consideration of nationality, language skills, necessary training for the desired settlement technique and, if necessary, appropriate substantive legal or expertise background (for example insurance or intellectual property). The ICC also takes into account the neutral's understanding of the parties' and their representatives' cultural and legal background and requires the neutral to do a conflict check and declaration of independence. In the case of investor-State disputes, other qualities for neutrals are critical. These include: (1) is the neutral experienced in conducting highly complex, high value proceedings involving numerous party representatives on each side, (2) does the neutral understand the cultural and political background of all parties, and (3) is the neutral experienced in working with States and their specific procedural needs?

Since States often request the neutral to have a high ranking political or diplomatic background, institutions will have to be prepared to meet these needs and to be able to call upon sufficiently trained and experienced neutrals. Institutions will play a vital role in increasing the pool of qualified ADR specialists for investor-State disputes. They will need to offer specific training for ADR professionals in investor-State disputes, as well as training for the counsel involved in these proceedings to promote proper representation.⁴

Overcoming procedural differences

Institutions can help parties overcome differences with regard to other procedural matters, such as the place, the language(s) and the timing of the ADR proceeding. By doing so, the institution prevents disagreement about preliminary topics from threatening the consideration of

substantive issues. Article 5 of the ICC ADR rules provides parties with baselines in the case of party disagreement on preliminary procedural aspects but is usually a last resort since the parties often reach agreement with the assistance of the ADR Secretariat.

The institution's and the neutral's independence and neutrality

Institutional independence is necessary to ensure the parties' confidence in the ADR process. When one of the parties is a State, such independence becomes critical. Investors might suspect the State is influencing the institution—through governing structures or financial backing, particularly if the institution is located within the State's territory. Institutional independence can also affect the utility of an institution's role in the appointment process. Should a party distrust the institution's independence, it may not have confidence in the appointed neutral and the ADR proceedings will likely fail. As much as it is the neutral's responsibility to create rapport, gain and keep parties' trust; the fact that (s)he is endorsed by an independent institution, boosts perceived reliability. Further, institutions' continued monitoring of the neutral's conduct provides evidence of quality control.

Institution's procedural rules

Established dispute resolution providers have procedural rules that govern the ADR process. For example, the ICC ADR Rules are the product of regular study and refinement that are supplemented with case management. The rules create a framework for stable, fair and independent settlement facilitation. By setting an appropriate normative baseline—with confidentiality, structures for appointment of neutrals, requirement of independence and provisions for the main step of the processes—the rules offer guidance, clarity and expectation management. Further, the rules set out principles for the institution, the neutral and the parties' roles in the process (Jones, 2005).

Confidence in the quality of the procedure can be of crucial importance in the decision to participate in ADR. Parties may be hesitant to participate in a procedure with which they are unfamiliar, particularly when the potential outcome is uncertain. Pre-defined procedural rules and administrative practices can take away these fears and also permit parties to get the most out of the *ad hoc* nature of the process to adapt the procedures to their unique individual concerns and situations.

The institution's administrative support

Finally, institutions provide critical administrative support. Institutions determine and collect the neutral's fees, reimburse possible expenses and facilitate the communication between the parties. Some institutions offer more practical help, such as providing facilities for the conduct of the actual meetings. Like institutionally administered arbitration, parties in institutionally administered ADR will not need to negotiate, collect or distribute the fees of the neutral. This is no small matter as a problem related to the fees of the third-party neutral can generate its own conflict and disrupt the ADR process. In a recent ICC case, a State party did not pay its share of deposit. While the investor assumed there was bad faith, the State explained the delay was due to internal regulations requiring a slight time extension before payment

completion. With this in mind, ICC communicated with the other party who offered to substitute payment for the State to facilitate commencement of the proceedings.

Other critical assistance involves case management to oversee the whole process. Case managers follow cases and ensure that status conferences, correspondence and notices move forward properly. This support is vital at the beginning of the case, when the parties might not yet directly communicate with each other. It is also key during the proceedings to ensure that the matter is conducted in an efficient way by the neutral, according to the parties' wishes.

Institutional prestige

One of the greatest challenges facing the use of ADR in investor-State disputes is the State's reluctance to amicably settle a case. UNCTAD has observed that States face a unique political risk (UNCTAD, 2010b: 38). For some civil servants, it is legally and politically dangerous to settle, and it may become less personally burdensome to "have an arbitral tribunal make a binding decision on a dispute between a foreign investor and a government" (Martin, 2010: 12). This underlying "responsibility" problem must be addressed, but perhaps the association with established international dispute resolution providers can in part alleviate States' concerns and provide a sense of procedural integrity. This may, in turn, help representatives convince stakeholders of the utility of settlement and facilitate the long-term success of the procedure.

Conclusion

The approach to ISDS is facing a period of renovation. It is important to discuss how to enhance the application of interest-based processes that can support and complement international arbitration. In that context, existing international ADR institutions can foster the use of ADR procedures in investor-State disputes, using their experience, procedural framework, prestige, practice and case management tools to set up efficient ADR proceedings for complex, high value cases.

Notes

* The author is the manager of ICC Dispute Resolution Services, ADR – Expertise – Dispute Boards – DOCDEX. She thanks Ms. Ximena Bustamente Vázquez, ICC Dispute Resolution Services intern, for her valuable help in drafting this article. The views expressed in this article are those of the author and do not necessarily reflect the views of the ICC or the UNCTAD Secretariat.

¹ The ICC administered arbitration and conciliation proceedings since 1922. The ICC's rules were revised numerous times, with the latest version of the ICC Rules for Arbitration dating from 2000 and the ICC ADR Rules dating from 2001. In ICC's experience, the most commonly used ADR procedure is mediation. In 2009, about 90% of the cases filed under the ICC ADR Rules were mediation cases; and the number of ADR cases in 2009 almost tripled the numbers from 2008.

² See statistics of ICC Dispute Resolution Services, published annually in the ICC Bulletin.

³ In contrast, an investor-State arbitration can be costly “with legal fees amounting to an average of 60% of the total costs of the case (...) In addition to legal fees, there are arbitrator’s fees, administration fees of arbitration centres and additional costs for the involvement of experts and witnesses” (UNCTAD, 2010b: 17)

⁴ ICC both offers trainings for mediators and counsel, as well as education for the next generation of ADR professionals, by organizing and hosting the annual ICC International Commercial Mediation Competition.

15. Mandatory Mediation and Its Variations

by *Nancy A. Welsh**

The use of arbitration to resolve international investment disputes clearly represents an improvement over “gunboat diplomacy” and its implicit threat of violent confrontation. Nonetheless, investors, States and other stakeholders have begun to express dissatisfaction with some elements of arbitration in the international investment treaty context. First, arbitration proceedings can be quite lengthy, and their transaction costs seem to be increasing. Second, parties’ compliance is not guaranteed. Some States suggest they may refuse to abide by arbitral awards. Third, the process focuses parties on their legal rights when non-legal issues may be equally important and useful to achieve resolution. Fourth, arbitration can sometimes marginalize parties’ unique socio-cultural characteristics and inhibit parties from identifying and building upon their mutual interests. Last, losing parties (and even some of those who have won) are unlikely to perceive arbitration as providing them with a meaningful opportunity to exercise self-determination in the resolution of their disputes.

As a result of these concerns, some stakeholders—investors, States and interested international bodies—have begun to express interest in the consensual process of mediation. The term, “mediation,” however, is used quite loosely at this point, and there is no single definition or model of the process. Rather, there are several variations, and each is likely to serve certain objectives better than others. Each is also likely to be more appropriate at certain points in the life of a dispute. This essay will describe these variations and their suitability in different contexts. It will also examine the advantages and disadvantages of making participation—or at least consideration of the mediation process—mandatory. IIAs could, for example, require the use of mediation whenever a dispute arises between parties. Such agreements could even condition parties’ submission to arbitration upon documented proof of a previous attempt to reach agreement through mediation. There are significant concerns about mandatory mediation, however. This essay will examine those concerns and describe important and potentially useful variations that permit parties to tailor the scope of what will come within a mandatory mediation requirement.

This essay’s intent is simultaneously modest and ambitious: (1) to provide stakeholders with important information regarding the key variations of mediation that are available in the United States; (2) to provide stakeholders with important information regarding their options in defining the scope of a mandatory requirement; (3) to enable stakeholders to avoid a premature focus upon only the most obvious and controversial of those variations; and (4) to provide stakeholders with some examples of creative adaptation that may inspire further creativity and thoughtful adaptation to the international investment context.

Variations of mediation

What exactly is the process called “mediation?” Based on the definitions contained in various influential documents such as the Uniform Mediation Act and Model Standards of Conduct for Mediators, we can say with some certainty that mediation in the United States will possess the following characteristics: the presence of a third party (called the mediator); communication and negotiation between the parties; and *voluntary* decision-making or agreement

by the parties. Mediators' ability to meet separately with the parties—i.e., “caucusing” or engaging in *ex parte* communications or “shuttle diplomacy”—also tends to distinguish mediation from judicial or arbitral settlement conferences.

Beyond this, however, mediation in the United States takes many different forms. There are several models that share a focus on drawing out the disputing parties, understanding their values and underlying interests, helping them to communicate fully, respectfully and productively with each other, and fostering their ability to develop their own, customized solutions (Riskin and Welsh, 2008; Welsh, 2001a). These models are called “facilitative”, “elicitive”, “understanding-focused”, “therapeutic”, or “transformative”. On the other hand, mediation can be implemented in a manner that is “evaluative”, “directive”, and focused on “bargaining”. This second set of models presents a rather different picture, in which the mediator plays the central role, hopefully beginning by listening to the disputing parties but quickly shifting the focus to the provision of advice to the parties and their lawyers, to help them to be realistic regarding their options (usually in civil litigation or administrative adjudication) and to guide them toward a resolution generally consistent with those options.

The available research generally suggests that the most effective mediations (and mediators) are likely to combine elements of all of these models: thoroughly preparing themselves and facilitating the preparation of the disputants and their lawyers; probing for important interests; listening carefully and effectively; asking parties to explore or justify their assumptions and predictions regarding legal outcomes; challenging unrealistic assumptions; and assisting disputants and lawyers to develop responsive, realistic solutions (Riskin and Welsh, 2008; Welsh, 2004a; American Bar Association, 2008).

A wealth of research and theory affirms the importance of providing a mediation process that the parties will perceive as fair (Welsh, 2007; Welsh, 2001b; Lind and Tyler, 1982) – also described as one that offers the parties “an experience of justice” (Welsh, 2001b: 791-792). To achieve this experience, the parties need: the opportunity to be fully heard; to know that what they have said has been considered (ideally, by both the mediator and the other party); and to feel treated in an even-handed and respectful manner (again, ideally, by both the mediator and the other party). All of these procedural characteristics are consistent with the idea of drawing out the parties and affirming their centrality to the dispute and its resolution. Importantly, they are *not inconsistent* with a process that also involves the mediator ultimately playing a central role in educating and guiding the parties toward resolution.

The goals of those using—or requiring the use of—the mediation process will guide the decision about the most appropriate mediation model. If the aim of mediation in the investment context is to enhance the parties' ability to communicate and negotiate directly with each other—which may be particularly important when there will be an ongoing relationship, a need to collaborate in the implementation of any agreement, or volatile emotions or political situations that must somehow be acknowledged to permit people to move toward an embrace of good (though not their preferred) solutions—it appears important for the process to foster parties' ability to engage in “mutual consideration” (Welsh, 2004a). In other words, the parties need sufficient opportunity to speak and be heard, but they also need the opportunity to *listen* to each other, to reflect upon what was said and to *demonstrate* that they have listened to each other.

Certain courts and agencies have affirmatively selected this model and have implemented monitoring and evaluation systems to ensure its use.

For a variety of reasons, however, the achievement of mutual consideration can be a significant challenge, and parties are not always motivated to act in a manner that will be most beneficial to their relationship. Meanwhile, continued conflict may not be acceptable. Resolution may not just be desirable, but necessary. In response to these sorts of needs, many court-connected and agency-connected mediators begin with facilitative interventions and then play an increasingly central and even directive role to encourage the parties to settle. Of course, these mediators should never become coercive or engage in “muscle mediation”. Such an approach is wholly inconsistent with respecting the parties’ ability to engage in voluntary decision-making and resolution. Research also suggests that if mediators make specific recommendations for settlement, non-settling parties are likely to express dissatisfaction with the process. The line between directive and coercive mediation, however, can be difficult to draw. In response, a few courts provide that settlements developed in mediation will be binding only after a cooling-off period has elapsed (Welsh, 2001a).

Variations regarding the scope of mandatory requirements

Many courts in the United States have also adopted *mandatory* mediation programmes. In general, such adoptions occurred after courts realized that purely voluntary programmes were receiving little usage. Federal agencies have also adopted variations of mandatory mediation. In a different context, commercial contracts may now include tiered dispute resolution clauses that mandate the use of mediation prior to arbitration or litigation. But what precisely is mandatory in these contexts?

Mandating mediation can mean very different things in different courts (McAdoo and Welsh, 2004). Some courts order *all* cases into mediation. Others use a substantive screen for their mandatory programmes, identifying *only particular types* of lawsuits—usually those that seem most likely to include important non-legal issues—to go to mediation. In contrast, other courts may require all civil lawsuits to go to mediation, but then will *exempt* particular types of cases. All of these represent “categorical” referrals to mediation. Other courts provide their judges or court administrators with the discretion to order mediation on an *ad hoc* basis. These are described as “discretionary” referrals (Sander *et al.*, 1996).

Courts in the United States also have experimented with the scope of the mandatory obligation. In some courts, parties are required only to *consider* the use of mediation and submit a document to the court that responds to the court’s questions regarding the appropriateness of the process. Other courts require parties to attend a case conference at which mediation will be discussed. Sometimes, these conferences transform into initial mediation sessions. Other courts explicitly require the parties to attend *an initial* orientation or mediation session. After the parties have completed this obligation and thus have had the opportunity to develop their perceptions of the mediation process and the particular mediator’s capacities, they may determine whether they wish to continue with the process. Last, of course, many courts in the United States require the parties to participate in an entire mediation process. In general, though, courts do not specify how long the mediation must last or how many sessions the parties must attend. The mediation, therefore, will last only as long as the parties wish to continue. Some courts impose an obligation

upon the parties to participate in good faith in mediation, but most courts have interpreted this to require only attendance and submission of required pre-mediation documents. (In some other countries that do not mandate the parties' participation in mediation, courts may nonetheless refuse to shift litigation-related costs if they judge that a party was unreasonable in its refusal to mediate.)

Even when courts have adopted a straightforward mandatory mediation programme, the parties often play a role in determining whether or not the mediation will take place. As previously noted, some courts require only that the parties consider the use of mediation and submit a document. An individual judge or court administrator may then review the submission to determine whether this particular case should be ordered into mediation. The judge or court administrator is likely to defer to the parties if all of them agree that mediation is not likely to be useful. On the other hand, the court is much less likely to defer to one party's reluctance if another party expresses interest in mediation. Even if a court has ordered the parties' participation in mediation, the court also may permit the parties to "opt out". Some courts grant such opt-outs on a very liberal basis. Others require the party requesting the opt-out to make certain showings to demonstrate why the mediation would be duplicative of earlier efforts, unlikely to be productive or might even cause harm.

As a last point, and particularly in situations characterized by power imbalance, some agencies and corporations have provided that if the less powerful party to a dispute requests mediation, the other party must participate. In other words, the mediation process is voluntary for the less-powerful party, but mandatory for the more-powerful party. The United States Postal Service (USPS), for example, offers a mediation programme to resolve workplace disputes. If an employee requests mediation to address a dispute with her supervisor, the USPS requires the supervisor to participate. Similarly, some school districts in the United States provide that if a parent requests mediation to resolve a special education dispute, the school officials must participate.

Some commentators have urged that courts and other institutions should never make mediation mandatory because this represents a violation of the parties' self-determination and may have the effect of coercing settlements and reducing actual or perceived access to the courts. Other commentators are less categorical, expressing support for a time-limited mandatory mediation programme in order to force lawyers and other repeat players to learn how to participate in the process (Sander *et al.*, 1996; Welsh, 2004b). Research has demonstrated that lawyers who have experienced mediation are likely to recommend its use on a voluntary basis. After this period of "coerced education", courts may then convert to voluntary programmes or provide for easy opt-outs.

Potential application to investment treaty disputes

In this brief essay, it is possible only to begin to consider the model of mediation that could be most appropriate for international investment treaty disputes, as well as the most appropriate mechanisms for a mandatory structure. Much depends upon whether the dispute arising under an IIA is more likely to resemble a private commercial dispute or a public policy dispute. In the former type of dispute, the issues and parties are more likely to be relatively well-defined, with a relatively straightforward allocation of decision-making and implementation

authority. In the latter type of dispute, however, it can be quite challenging to define the issues and the parties whose participation is required for decision-making and compliance.

Particularly for those IIA disputes with dynamics that are similar to those of public policy disputes, it is likely to be especially important to use a model of mediation that will enhance the parties' ability to communicate with each other (and important constituents) and represent an "experience of justice" for all. If the investor and State come to a mutually-understood solution that truly represents an exercise of their informed and inclusive self-determination, they are more likely to support and implement that solution. At the same time, the challenges of this situation suggest the value of having an experienced and legally and politically-savvy mediator who can, at the appropriate points, assist the parties in being realistic regarding their options and their consequences. In other words, the most appropriate model of mediation for IIA disputes is likely to be a hybrid. Given the research that exists, however, an IIA might particularly preclude a mediator from providing the parties with her own recommended resolution, unless such a recommendation is requested in writing by all parties.

Meanwhile, in this context, preparation of the parties for the consensual process of mediation—as distinct from the adjudicative process of arbitration—is absolutely essential. Such preparation is more likely if the IIA requires it. This may be accomplished by requiring the parties and their attorneys to make pre-mediation submissions to the mediator as a prerequisite to mandatory mediation. These submissions could require responses regarding the party's definition of the issues in dispute, perceived obstacles to reaching resolution, procedural adaptations that would be likely to improve the likelihood of reaching resolution, the responding party's underlying needs and concerns, identification of other parties whose participation would be needed to ensure implementation of any agreement (or avoid the likelihood that someone will serve as a spoiler), the presence of externally-imposed deadlines, etc. Mediators regularly gather this sort of information when they serve a convening function in public policy disputes. Even some court-connected programmes seek responses to similar questions in order to customize their mediation sessions in complex matters (Riskin and Welsh, 2008). Requiring the parties to engage in this sort of analysis will make it more likely that the parties are prepared, the mediation process is structured appropriately, and the mediation ultimately will enable the parties to make progress toward resolution. Meanwhile, in some instances, the obstacles identified by one or more of the parties in the pre-mediation submissions may persuade the mediator that requiring mediation would be fruitless. Perhaps the mediator could be permitted to find that the parties had fulfilled the mandatory mediation requirement simply by making their pre-mediation submissions. In other words, the IIA could establish the basis for a principled opt-out.

Conclusion

Mediation can take many forms. The only constants are the presence of a mediator; communication and negotiation between the parties; and voluntary decision-making or agreement by the parties. Similarly, the mechanisms to implement mandatory mediation can take many forms. Some mandatory mediation programmes or clauses are broader and more automatic than others. Though such variations can be confusing, their existence also offers tremendous opportunities to the stakeholders in the investment treaty context to specify the mediation process and programme structure that is most likely to offer a responsive, useful and clearly alternative

complement to the arbitration process. This essay has proposed one, very preliminary approach to the institutionalization of mandatory mediation. Hopefully, this suggestion will encourage others.

Notes

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C. Commentary on the Conference Proceedings

Using Technology to Support an International Conference

by *Peter Jetton* *

The recent Washington and Lee University and UNCTAD Joint Symposium on International Investment and ADR has set a new standard for the use of technology in international investment conferences. It has set the stage for the use of future “flat world” platforms to promote integrated and collaborative use of technologies to explore core concepts of international investment law and promote broad stakeholder participation (Friedman, 2005). By the close of the Joint Symposium, the following technologies had been applied: a database-driven website, video podcasts, a password-protected blog supporting both text and audio and visual posts, RSS feeds, email digests of blog activity formatted in HTML, video conferencing, live web streams, and the social media tools Skype, Twitter, and Facebook.

The Joint Symposium was certainly not the first conference to make use of such technologies, and it probably was not the first to make use of all of them in combination. Nevertheless, much like how the discovery of fire was just as important to the 4,000th person as it was for the 4th, today’s communications technologies continue to have great impact and influence as they spread to new arenas for their application. Another key aspect—and more important than the fact that many of these technologies and their actual use were new to many of the investment law practitioners, scholars, and government officials who work in this area—is that every new arena brings some new challenge to the technology, asks it to do something it was not really built for or in a way not previously conceived.

For the Joint Symposium, the chief example of this was the need for privacy and discretion of stakeholders, especially for those participants representing companies or governments, while simultaneously balancing the need for meaningful public dialogue. In order for the conversations surrounding the Symposium to be robust and meaningful, certain stakeholders needed to speak with candour, but they could only do so if they knew their identities were protected. It is a bit counterintuitive, perhaps, to try to apply technologies built around the notion of “social” to this necessity for security. Nevertheless, as organizers, participants and other stakeholders were spread around the globe, using such a technological platform for real-time communication across time-zones is one of the only real solutions.

Conference organizers began discussing the Joint Symposium and the supporting technology nearly a year in advance of the in-person conference in Lexington. The organizers had a strong sense of what they wanted, starting with a website that could serve as a research resource before, during, and after the Joint Symposium. In many ways, this was the easiest part of the project. We were able to create a separate custom web content management system under the auspices of the Washington and Lee School of Law within a matter of hours. Meanwhile, the support of dedicated students, including Jason Ratigan, was critical in populating the site with enough content prior to the launch of the electronic portal during fall 2009.

Initial discussions about insuring sufficient public content, while balancing this against the need to generate initial content in a more confidential context, morphed into a discussion of how the site itself might more directly facilitate conversations and pre-conference planning among various stakeholders. This naturally led us to consider a collaboration blog, which could both introduce participants to each other and also help them define and discuss mutual areas of concern that would become the core topics addressed at the Lexington conference. There are, of course, many highly functional blogging platforms available at no cost. However, the need for preliminary confidentiality suggested a customized approach, one that allowed us to fully integrate a simple blog application into our secure website and user registration system. This also enabled us to control the layout and behaviour of the blog at a more granular level than would have been possible with one of the more popular open-source solutions.

This control proved to be key throughout the life of the project as we regularly received suggestions from stakeholders to modify and improve the blog's performance; and conference organizers were able to seamlessly receive, incorporate and address these recommendations. For example, we were able to provide secure access to the biographical information of all blog participants while creating a linked index of their contributions to the blog. Likewise, at the recommendation of a stakeholder, to help drive participation and disseminate information amongst blog participants, students created weekly blog digests with links back to the blog, and we were able to automate the distribution of those digests via HTML-rich emails. We also realized that the creation of sanitized versions of blog content would help disseminate content to the public and other stakeholders in order to add critical ideas and information to the public discourse without jeopardizing the confidentiality considerations.

Another particular challenge for the collaboration blog was the use of video posts, which were primarily used during the initial phase of the blog. Participants submitted video posts in a wide variety of formats using everything from studio cameras to webcams. Meanwhile, Professor Franck also used a laptop to record video contributions when she was in a position to meet with stakeholders at various international conferences. It was time-consuming to normalize those presentations for delivery in a consistent web-friendly format, but it was well worth it for the impact those posts had on building relationships amongst blog participants.

As the date of the Lexington conference approached, we began to consider other social media platforms that could help generate interest in the Joint Symposium but also help develop conversations and relationships surrounding it. With the assistance of Elizabeth Stinson, Professor Franck established a Facebook presence for the Joint Symposium, which quickly gathered over 100 followers. We also began to explore the popular micro-blogging tool Twitter and established a "hashtag" that Twitter users could employ to attach their commentary to a dynamic feed on the conference web page. Both of these services were important momentum builders for the Lexington conference, as participants began to use them immediately to share and discuss news stories related to international investment disputes.

Facebook and Twitter took on even greater significance on the day of the event. W&L law students vied for the title of "best blogger" while reporting on the Lexington conference as it unfolded. Participants physically present in Lexington and those spread across the globe watching the live web stream posted comments on Facebook or Twitter—sometimes both. The panel moderators, all of whom were new to these social media tools and were trained on how to

use them by W&L personnel, monitored the virtual discussion and selected questions and observations posted online to highlight alongside questions and exchanges from the in-person participants. This last point was one of the most gratifying outcomes of the entire project. Although many of the participants were aware of these technologies and their theoretical applications, they were completely new to their use and were not used to using many of these tools as part of their personal IT repertoire. Nevertheless, it was impressive to see them not only embrace and master these methods so quickly and enthusiastically, but also to watch them become true believers in the power of social media to help expand and transform their work, and their world.

One critical moment occurred when a commentator from another country who watched the live online stream of the conference made an observation on Twitter. This point was immediately picked up by a panel moderator and discussed on the floor of the conference by panellists and audience members in Lexington. That commentary was then fed back into the blogosphere where it was further discussed, which thereby created a seamless loop of communication between participants physically in the same room and those linked through the internet. The implications of this are both simple and profound. It means that if government officials in countries in Asia and Africa had been interested in participating—but might have been unable to do so because of scheduling issues, cost concerns or a desire to minimize their carbon footprint—the IT platform the Joint Symposium offered would have permitted them to do so while still facilitating robust stakeholder participation throughout the developed and developing world. All that is necessary is stable IT infrastructure to support the communication, a computer, an internet connection and a regular power supply.

No one can doubt the capacity of information technology and social networking tools to create very real—and very meaningful—interactions that can have a real-life impact. This impact of virtual communication on critical issues with a global impact certainly now applies to international investment law. Perhaps the use of technology in this context, which was an innovation for the world of international investment law, helps exemplify the promise of what social media can do for a world as geographically, culturally and politically diverse as the world of international investment and ADR—a world where relationships and trust are of critical importance. As everyday social media becomes more ubiquitous and accessible, the model and scope of technological interactions made available during the Joint Symposium will serve as a model for international educational collaborations throughout the world.

Notes

* The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

**THE JOINT SYMPOSIUM—PHASE III—
POST-CONFERENCE RAPPORTEUR REPORTS AND DIRECTION FOR THE
FUTURE OF INVESTMENT LAW DISPUTE PREVENTION AND ALTERNATIVE
DISPUTE RESOLUTION**

After the Phase I “diablogue” and the Phase II conference in Lexington, the efforts of the Joint Symposium continued. During Phase III, conference participants, experts and other stakeholders continued to evaluate the inputs from the Joint Symposium and consider the way forward for the future of IIAs, dispute resolution and development objectives. The objective of this process was to take the inputs, ideas and considerations in order to develop a programme that permits stakeholders to craft effective and efficient dispute resolution processes. In aid of that objective, Washington and Lee students constructed post-conference rapporteur reports to synthesize Phase II conversations, to identify issues to be addressed in the future, and to raise areas of future development in order to aid the evolution of the IIA and ISDS systems.

1. Perspectives of Stakeholders

by *Jacob Stoehr* and *Jenna Perkins**

Introduction

The power of international investment law to drive the global economy and impact individual countries makes the role of the investment dispute resolution process critical. Given the transformative role of international investment law, its value in facilitating foreign investment and its impact on development, stakeholders at the Joint Symposium on International Investment and ADR focused their analysis on the current investment treaty dispute resolution system. Particularly during the first panel at the Lexington conference, stakeholders were able to express their perspectives and experiences about the resolution of investment treaty disputes. They recognized the successes of the arbitration system embraced by IIAs but also noted that the system has room for improvement. In particular, the lack of speed, the high cost of investment treaty arbitrations and the challenges with States' ability to manage investment disputes were cited as existing difficulties. The role of ADR emerged to address these problems by posing potentially promising alternatives to investment treaty arbitration.

During the conference in Lexington, there were State representatives from both developed and developing countries, as well as practitioners, investors, arbitrators, international organizations and representatives from arbitral institutions. These stakeholders embodied the broad notion of stakeholder announced in the stakeholder rapporteur report published before the Lexington conference (the pre-conference report, *see above*) and provided a wide range of perspectives on the investment treaty dispute resolution process. The diversity of perspectives—of those attending in-person and interacting through online mediums—created a robust discussion about how to improve the prevention, management and resolution of investment treaty disputes.

Synthesis of conference discussion

Given the public aspects of investor-State treaty disputes, speakers agreed that democratic institutions, transparency, and government accountability create unique challenges for the use of ADR. These issues were not viewed as barriers to ADR, but rather issues that needed to be managed when creating ways to use ADR in investor-State disputes. IIAs highlight the dynamic nature of State activity and the multiplicity of State roles in a globalized economy—as a commercial actor, a domestic regulator and an international sovereign power. As one practitioner explained, a State that loses an investment treaty arbitration faces not only the payment of tangible costs associated with counsel fees, arbitration fees and the award, but also the reputational costs that a State suffers, and which may hinder future investment. This impact, on multiple levels, arguably affects a State's economy both directly and indirectly. One State representative cautioned that a government official handling an investment dispute may be held personally liable if a case is settled. With these realities in mind, the Lexington conference endeavoured to address both the ability of States to prevent investment disputes and the more efficient use of mediation, conciliation and other third-party procedures to resolve conflict.

Even with its complexities, arbitration marks a dramatic improvement over gun-boat diplomacy. With the proliferation of IIAs, however, States face some specific problems in dealing with investment disputes through arbitration. As State representatives emphasized, these include: (1) inefficiencies in intra-governmental communication and information sharing, (2) challenges in the assessment of dispute resolution risk at an early stage, (3) issues related to the power and authority to settle investment disputes, and (4) the experience and capacity of government lawyers to address investment disputes. For example, one Asian government official explained their country's lack of a dispute-filtering mechanism to help prevent disputes from escalating to arbitration, and the lack of coordination between the agencies responsible for dealing with the disputes, as hurdles to effective dispute resolution. While countries have been quick to sign IIAs, the maintenance of those treaties has been limited in many instances. To address these issues, a Latin American State representative explained that “treaty aftercare” is required for effective management of a State's treaty obligations vis-à-vis its foreign investors. One speaker described Peru's recently implemented law on government response to investor-State disputes, which includes provisions defining empowerment, information sharing between government agencies and local governments, and alert systems to detect potential disputes early.¹

Issues that affect States' ability to manage investment treaty disputes internally also arise when addressing ADR. Recognizing these challenges, conference participants endorsed the idea that mediation could be a viable ADR tool for investor-State disputes and even managing the ongoing relationship between an investor and the State to preserve the original investment link. While conference participants agreed that mediation should not replace arbitration, mediation's role was viewed as a useful tool for better dispute management. As one investor stated, mediation is an essential aspect of resolving disputes when there is an ongoing relationship with the State. The investor also explained that mediation efforts, even if unsuccessful, mimic other efforts required during the arbitration process and can truncate the need for further dispute resolution. One commentator suggested that mediation could be implemented in parallel with arbitration. As the perspectives of parties' assessment of risks and losses change during the arbitration process, mediation could serve as a forum to increase the rate of settlement. An academic also explained that mediation functions best behind closed doors, but that a State's transparency requirements mandate an open process that could undercut the effectiveness of mediation. In response, an African commentator explained the feasibility of modifying mediation to be more transparent in the investor-State context. One academic also stressed the importance of timing in the use of mediation in the life cycle of conflict. To implement mediation, treaties would need to contemplate mediation as a dispute resolution step, or the parties would need to agree to mediate a dispute. Short of adopting mediation, arbitrations could focus on addressing similar goals—namely drawing out the real issue in dispute between the parties. Building from the process of mediation, one practitioner recommended that arbitrators should find ways for early case evaluation to provide preliminary assessment of a case to the parties. A government representative noted that preliminary assessments concerning the strength of a claimant's case would require claimants providing more developed and detailed information in support of their claims. This would streamline the arbitration process and could also facilitate more settlements. Despite the unique challenges of investor-State disputes, stakeholders agreed that investment treaty disputes are candidates for ADR and that their dispute management would benefit from the increased use of ADR.

Implications for the future

While participants suggested the current investment treaty dispute resolution process is not necessarily in crisis, the conference identified three areas where ADR could improve the current system to address stakeholder interests.

First, undertaking systemic treaty aftercare and increasing the use of mediation could result in the more effective management of investment treaty disputes. Further research should assess why some cases settle and why others proceed to arbitration. Knowing the factors that render a case “settle-able” will help both investors and States settle disputes, ultimately resulting in an increased number of amicable settlements and presumably more efficient conflict management. Similarly, the conference encouraged research that would identify what makes a case a potential candidate for ADR, particularly mediation. Second, stakeholders need to create and identify a competent body of mediators to handle investment treaty disputes. As practitioners and academics noted, these mediators would need to understand the investment process and investment law. They would further need to be able to offer predictive statements analyzing the legal merits of a case, as well as offer other facilitative dispute resolution skills. Third, investors, States and their legal counsel need to develop capacity related to ADR. More particularly, States will need to address the problems of capacity, information sharing and transparency unique to their domestic systems.

The combination of the host State improvements to treaty aftercare and increased consideration of investor-State ADR will result in benefits for all stakeholders to investment treaty disputes. Taking the time today to address and implement ADR in investment treaty disputes will yield benefits for tomorrow and beyond.

Notes

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¹ See, e.g., Peruvian Law No. 28933, Ley que Establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión (Law Establishing the System of Coordination and Response of the State in International Investment Disputes), *El Peruano*, Normas Legales 334635 (Dec. 16, 2006). Available at: <http://www.congreso.gob.pe/ntley/imagenes/leyes/28933.pdf>.

2. Assessing the Current System—Systemic Issues

by *Celeste S. Owens**

Introduction

International investment law is in a period of introspection that is assessing the functionality of dispute resolution procedures and leading towards a potential paradigm shift. Recognizing that many IIAs provide for arbitration of treaty related disputes and that many stakeholders have relied upon arbitration as the primary dispute resolution mechanism, the Joint Symposium on International Investment and ADR offered stakeholders the opportunity to discuss their experiences and consider alternative approaches and existing innovations.

Particularly during the second panel on “exploring innovations for preventing and managing investment treaty disputes”, conference participants observed that arbitration is a costly, rights-based process that can leave stakeholders dissatisfied with both the process and outcome in a way that undermines the contribution of foreign investment to development, both of which are lynchpins in the global economy. To preserve both resources and relationships, conference participants emphasized the importance of prevention of disputes and early management of conflict. They advocated for systemic change, starting with the re-conceptualization of treaty designs and dispute resolution as a whole with an increased focus on DPPs and interest-based approaches to dispute resolution such as mediation. Although it focuses primarily on themes developed in the second panel, this report also summarizes the stakeholders' suggested solutions to the critical issues identified during both the pre-conference discussions as well as at the Lexington conference.

Synthesis of conference discussion

A. The need for an alternative

Referring to recent data from ICSID and the scholarship of Professor Franck, the conference participants discussed the increasing number of treaty claims and the increasing interest in using ADR to finally resolve treaty claims. Stakeholders expressed that mediation serves as an attractive alternative that can aid in the preservation of invaluable investor-State relationships and foster commercial investment objectives and State development goals. There were various reasons why there is a need for alternatives to arbitration in certain cases, including concerns related to cost, an over-emphasis on legal rights and an under-emphasis on parties' mutual needs, and greater self-determination related to the outcome. While some disputes may be best resolved by arbitration, other conflicts may be more effectively resolved through alternative methods.

One critical issue was that stakeholders expressed that arbitration is often too expensive and may also have other unexpected costs. Certain States expressed that the fiscal cost of arbitration can particularly impact the economies of developing countries which either cannot afford to pay or might better spend their resources pursuing other objectives that promote development goals. One conference participant suggested that it may be appropriate to ensure that IIAs contain express processes to prevent or de-escalate conflict. Similarly, arbitration costs

might also lead to the re-politicization of disputes as overly high fiscal costs can lead to government shortfalls that are either passed onto or financed by taxpayers.

Others suggested that, while rights-based adjudications are a fundamental baseline from which other processes can be measured, there may be circumstances where a focus on international legal rights may not necessarily address actual stakeholder needs. One participant observed there may be times, for example, when arbitral tribunals' focus on rights in abstraction and may not address considerations related to States' unique socio-cultural history. Acknowledging that such a focus during arbitration “detracts from negotiability” of competing policies and objectives, the commentator suggested that the process of implementing policy space is negotiable and those non-adjudicative forums—such as mediation—may provide an opportunity to focus on mutual needs and interests.

Other participants, including those from both investors and States, praised the self-determination aspect of mediation and other non-adjudicative processes. Participants emphasized that mediation permits parties' to retain control of the process itself and the ultimate outcome. Implementing mediation or early neutral evaluation at an early stage in the dispute resolution process would theoretically permit parties to assess the strengths and weaknesses of their cases and set the stage for more informed and productive settlement negotiations.

B. Treaty design, capacity building and stakeholder dialogue

In light of the interest in dispute prevention and ADR methods such as mediation, commentators observed that current treaty language is not conducive towards facilitating their use; and discussion suggested that there may be benefits in exploring textual provisions that create an incentive for implementing DPPs and ADR methods. Recognizing that parties often prefer processes that are familiar and established, one investor suggested requiring good faith participation in mediation proceedings prior to the commencement of arbitration. This creates incentives for parties to evaluate their cases early in the dispute management process and save time, money, and a critical business-State relationship.

Contributors also advocated language that empowers the State to be better prepared to prevent and manage conflicts effectively. One commentator stressed the importance of training government officials at both national and sub-national levels to permit them to be aware of their legal obligations and understand how regulatory activities may subject States to risk. Such an approach has the benefit of permitting States to exercise their legitimate regulatory powers without inadvertently damaging investors and subjecting the State to unnecessary liability. Capacity building can help to avoid the passage of laws that conflict with international treaties. One example offered was the Canada-Colombia FTA that establishes a Committee on Investment which “should promote cooperation and joint initiatives”, expressly including key objectives like capacity building.¹

Beyond training and capacity building, participants also considered what procedural mechanisms would enable the State to conduct an early and efficient assessment about the scope of potential liability. Part of this may require treaty language or other regulatory protocols that permits a State to investigate and to collect evidence to permit such assessments. Likewise, investor “aftercare”, whereby a State has a mandate or a regulatory agency dedicated to

preventing disputes and facilitating ongoing communication with investors in the post-investment stage, resonated with many of the State participants at the conference. Such “aftercare” essentially entails fostering a long-term relationship in which regular, consistent communication aids in the identification and de-escalation of issues before any dispute is crystallized between the parties. One aspect to consider in the creation of an “aftercare” programme—whether in the context of an ombuds office, an investment promotion agency or a lead government agency—may also involve ensuring that such provisions in the text of treaties are implemented properly. As one commentator observed, to the extent that some IIAs require implementation, it may be necessary to find alternative methods to empower States to implement preventative measures so that they can comply with their legal obligations.

C. A new lens for viewing treaty conflict

Beyond the need to revise treaty language, participants also explored ways to think about investment treaty conflict through a new lens. The objective of such a new perspective would be to help parties understand conflict management and dispute resolution better in order to decrease the number of disputes, to channel disputes into appropriate conflict management processes and to promote ways to save the fiscal resources of both investors and States.

One theme in the conference was the distinction between “misunderstandings”, “conflicts” and “disputes”—the latter of which is the most formalized and the former of which is the least serious. The critical insight was this: disputes get resolved, conflicts get managed, and misunderstandings, which are neither, allow the parties to prevent and de-escalate the parties' concerns. In defining the different approaches to systemic “dispute resolution”, one commentator noted that there are three key paradigms to invoke: a reconciliatory, interest-based approach; an adjudicative, rights-based approach; and a power-based approach. Recognizing that the focus on arbitration necessarily means parties focus on a “rights-based” system that is not typically about creating win-win scenarios, it was suggested that parties may feel like they get “closure” about the meaning of their legal rights but this may not aid the prevention or de-escalation of conflicts. For this reason and to avoid the by-gone days of gunboat diplomacy, commentators encouraged consideration of an interest-based system of dispute resolution in certain circumstances. A common theme was the suggestion that mediation may be the best option for interest-based dispute resolution as it is about value creation in which parties generate options based upon their interest; and as such, parties may be more likely to cooperate with the process and to comply with the outcome. Other situations, however, may require other processes to create final resolutions.

Despite the availability of different paradigms for viewing issues that arise under investment treaties and managing that conflict, it may not be that a single approach (whether rights-based or interest-based) is appropriate in all cases. Rather, the key moving forward is to make a choice between different models based upon the unique needs of the situation and the parties, the stage the problem has reached and the legal framework underlying the conflict. To this end empirical data about what paradigms are most effective would provide useful guidance to parties and their lawyers when making these critical decisions. This could take the form of a joint pilot research project by UNCTAD and ICSID to monitor what criteria promote settlement and affect the feasibility of using particular ADR methods.

Implications for the future

The Joint Symposium usefully highlighted the value of arbitration. Nevertheless, it was also clear that the system will need to evolve beyond a place where there is exclusive reliance on arbitration for various reasons. Conference participants expressed an interest in exploring and developing innovations, processes and other solutions for managing investment treaty disputes. While there was some divergence on the preferred baseline, there was clear interest in mediation and policies to promote dispute prevention and early management.

Given the interest of conference participants and other stakeholders during the pre-conference phase, it seems reasonable that certain steps should be considered in the future to aid in finding innovations for dispute resolution that make the system more efficient by further addressing the needs of stakeholders. This might include, for example:

- Training and capacity building for State officials at the various levels of government;
- Programmes to promote treaty “aftercare” for investors that facilitates ongoing communication as well as early identification and de-escalation of potential conflicts;
- Development of mediation programmes that can be implemented either before or during arbitration proceedings;
- Education for various stakeholders to permit them to understand the value of DPPs and ADR so that problems can be addressed effectively; and
- Creation of research and pilot projects to understand what types of DPPs and ADR methods are most likely to help stakeholders who need to take definitive action.

Ultimately, the objective of these projects would be to create dispute prevention and management systems to address the stakeholder needs. The hope is that the long-term integrity of the international investment system can be promoted by considering alternatives and innovations while finding solutions that fit with parties' needs in a specific context.

Notes

* The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

¹ Canada-Colombia FTA, Article 817(3)(a), 2008. Available at: <http://www.international.gc.ca/trade-agreements-accordscommerciaux/assets/pdfs/En%2008%20Colombia%20FTA.pdf>.

3. The Way Forward

by *Susan Franck* and *Jason Ratigan**

Introduction and summary overview

The rapporteur reports published in advance of the Lexington conference (the pre-conference reports, *see above*) suggested that stakeholders believe that the current system of international investment dispute resolution is in need of attention and improvement. While many methods of dispute resolution are available, given the typical default to arbitration, the systemic integration and effective utilization of other processes presents challenges. Concerns expressed at Lexington, particularly during the third panel on “creative options for the future”, centred on practice and politics rather than theory or values. One theme that recurred was how the process of preventing and managing disputes can be formulated whereby stakeholders can participate in the process and stand by the results. Against this backdrop, the Lexington conference began to explore opportunities for institutionalizing ADR.

The conference in Lexington offered a forum for integrating stakeholders' collective experience to explore different types of dispute resolution and prevention mechanisms and consider how they might be utilized effectively in the future. Understanding the viewpoint of practitioners, States, investors, academics and others provided vital information necessary for diagnosing possible conflicts and finding useful remedies for investor-State treaty cases. Few were hostile to the concept of ADR in international investment treaty disputes. Although there was a degree of healthy scepticism, such cautious optimism offers a useful catalyst for systemic evolution and the creation of future value for stakeholders.

Synthesis of existing Joint Symposium commentary

Pre-conference reports highlighted the need for stakeholders to gain experience with ADR processes, to establish comfort with ADR methods, and to create the requisite capacity to facilitate effective implementation. Capacity covers a wide range of issues. It may involve the capacity of individuals to function as effective third-party neutrals, whether as mediators, conciliators or those providing an ENE. It may also involve the capacity of parties to a dispute, particularly investors and State officials, to understand the value of appropriate settlement opportunities and make informed, reasonable decisions. It may also involve the capacity building of other stakeholders, including the public, to understand what is an appropriate settlement and help parties educate their own constituency or stakeholders that settlement is sound given its formulation through an appropriate process or a trusted and respected person.

Capacity also involves the parties' advocates and representatives. Conference participants expressed concerns that attorneys may have a predisposition towards litigious dispute resolution processes and more formal, adjudicative processes. Such an instinctive approach can potentially escalate disputes, fail to consider opportunities for dispute prevention and undermine the potential value to be gained from ADR methods. Thus, some suggested that a critical way forward is to integrate ADR into the mainstream curriculum of legal training. Others posited that the problem is not that attorneys are involved, but perhaps with the immediate parties to the dispute and their approach to dispute resolution.

Another narrative suggests that the issue is not the presence of lawyers per se, but rather what type of lawyering strategy and advocacy approach lawyers use. In any event, if ADR methods can truly yield cost effective (and perhaps value creating) results, it would be useful to provide lawyers and their clients with a broad range of capacity building opportunities, including education about ADR theory and practice as well as practical, hands-on experience. This may in turn create an opportunity for States to design, to establish and to implement DPPs in advance of formal disputes and being in a position to utilize ADR effectively at appropriate junctures to remedy the situation.

Discussions during the Lexington conference revealed specific challenges in creating and using effective dispute resolution processes, including:

- (1) Incentives to settle or resolve disputes early;
- (2) Personal liability for those involved in non-adjudicatory dispute resolution; and
- (3) Internal checks and balances to inhibit the possibility of inadvertent violations of IIAs.

The first aspect applies to both investors and States. Investors have an incentive to conserve scarce resources, be responsible to their shareholders and use their internal resources for developing commercial innovations rather than focusing on time (and resource) consuming dispute resolution. Likewise, States have a similar incentive to conserve taxpayer dollars, be responsible to their citizens and ensure that resources are used properly to develop the welfare of their people in line with their objectives for investment attraction. This issue may be particularly sensitive for developing countries with budgetary restrictions. Early settlement and dispute prevention should permit both investors and States to add value by resolving conflict without expending unnecessary large resources and perhaps even finding value by focusing on non-monetary settlement possibilities.

The second aspect is peculiar to States and acts as a disincentive to resolve disputes outside of adjudication. Making sure settlements occur properly and without corruption is a serious issue. Yet these concerns must be balanced against the need to promote effective dispute settlement that conserves scarce resources. It is therefore vital when formulating ADR methods and developing settlement capacity to create responses to corruption or threats of corruption that do not counteract the underlying model.

The Lexington conference also explored how IIAs create dispute resolution mechanisms, and how IIAs themselves may become subjects of possible reform. Speakers considered a variety of issues. One speaker discussed the need for coordination between States, especially for developing countries. Another speaker discussed how IIAs should articulate, even if only a general outline, options for how parties can use ADR methods.

Others identified “soft law” opportunities for facilitating ADR. Some commentators observed that there may be benefits in building a support network among States that allows those with less experience or infrastructure to learn from the practices and experiences of others; this could be as simple as a reference for a law firm or legal aid of some kind or more in-depth guidance on how to deal with investment disputes. Such an approach accomplishes the dual goal of providing accessible support networks (through developed and experienced nations) and

facilitating potentially cheaper methods of dispute resolution (which is important for developing nations).

Another concern related to the effectiveness of both arbitration and ADR is the degree of uncertainty in the legal doctrine. Several commentators opined on the lack of clarity—and sometimes contradictory awards—on fundamental issues such as the meaning of regulatory expropriation, FET, and MFN treatment. Recognizing that negotiation and various ADR efforts require parties to “bargain in the shadow of the law”, when the law casts a long and unclear shadow because of its uncertain application, this creates challenges for using ADR. Without predictability, parties have decreased incentives to settle because it is uncertain whether the benefit is worth the cost, particularly in light of the uncertainties related to cost-shifting; but paradoxically, that lack of certainty may also create unique opportunities to settle, avoid the quagmire of uncertainty and tailor-make a resolution that the parties control. Many commentators expressed that, in order for ADR to move forward effectively, stakeholders will want to be able to predict adjudicatory outcomes to create incentives (or understand disincentives) for ADR.

The Lexington conference also explored the available models of ADR. With arbitration, negotiation, mediation, conciliation, ombuds systems and hybridization of all of those models, there are ample possibilities to meet the need of almost any dispute. The discussions in Lexington highlighted that a critical issue is what method to choose and why to choose it. Part of the attraction of arbitration—and the concern about ADR—is that it simplifies the process by providing one clear track rather than providing an endless menu of options. Similarly, there may be certain disputes, such as those inextricably intertwined with politics or public policy, that are most amenable to adjudicative options such as arbitration. Nevertheless, it is this freedom to choose among useful options, perhaps with guidance about effective permutations, that can enhance decision-making and the design of effective dispute resolution systems.

Finally, participants explored issues related to the importance of ongoing relationships and the enforceability of certain dispute resolution processes. The way forward, according to some participants, should include interest-based dispute resolution that formulates creative outcomes that create value for the parties and maintain positive relationships. As one speaker noted, the current state of private international relations is such that there is substantial risk that investments will require the compliance of the same State with which the investor is in conflict. It was also suggested that, irrespective of maintaining positive relationships between States and investors through ADR, the use of interest-based dispute settlement and dispute prevention might tap into unknown value. Investors or States may consider approaching conflict as a problem to solve rather than a fight to win. Such a positive approach could enhance the reputation of States as a productive jurisdiction in which to invest and create an institutional shift likely to foster business and government cultures that facilitate settlement, create value and foster development objectives.

The way forward: Future discussions and debates

The Joint Symposium confirmed that there is an interest in—and need for—exploration of alternatives to arbitration for the management of investment treaty conflict. As anticipated, the Joint Symposium explored the existing approaches of stakeholders and the theoretical opportunities to develop new possibilities and alternative modalities for States and investors

when considering how to prevent, to manage and to streamline the resolution of their investment treaty disputes. In light of this, stakeholders could use the ideas and experiences discussed in Lexington to give further and deeper attention to alternative methods of conflict prevention, de-escalation, management and resolution. This could involve a variety of different steps and is not limited to one type of stakeholder. Rather it is about when, where, why and how multiple stakeholders can begin to add value by engaging in alternative approaches to manage investment treaty conflict.

A. Identifying stages of possible intervention

Although much of the discussion in Lexington focused on what can be done at the juncture when there is a formalized dispute, other discussions clarified that there can and should be a way forward at the pre-dispute phase. In other words, the future of alternative modalities will need to provide nuanced approaches to conflict management that permit stakeholders to consider multiple phases for strategic intervention. This might include various stages that can occur either in isolation or in combination with each other, including:

- In the **preliminary design phase** of creating dispute resolution systems when States create treaty or other rights related to international investment;
- The **pre-conflict phase** when a problem exists, but it has not been identified or communicated from the investor to the State;
- In the **pre-dispute phase** when an investment-related conflict has been identified but conflict has not yet escalated;
- In the **formalized dispute phase** where an investor has submitted a formal notice of dispute or similar document, such as a request for arbitration;
- **During** the course of **adjudicative proceedings**, such as arbitration, where there may be areas to either narrow the range of issues in dispute or settle aspects (or possibly all) of the ongoing dispute in light of changes over the course of the proceedings; and
- In the **post-award phase** where there may nevertheless be policy space for settlement of outstanding issues.

In each of these phases, there are unique opportunities to create processes that lead to outcomes that improve conflict management and result in solutions that address the mutual needs and interest of stakeholders. Different stakeholders could take responsibility during these different phases to make use of the available opportunities. This will eventually aid in the evolution of international investment dispute resolution.

At the **preliminary design phase**, States could engage in active policy-making on alternative approaches to conflict management. This may require States to construct and negotiate the text of IIAs and their dispute resolution provisions in a more effective, concrete and precise manner. In this respect, States may consider reaching out to various national stakeholders,

including their own investors and other appropriate groups, to gather information about their interests and objectives as regards international investment to garner critical insights to the policy debate. Similarly, it may require States to analyze the scope of their existing international obligations, to conduct an internal diagnostic about their experience with investor-State treaty dispute resolution to date, to explore those sectors that are most susceptible to investment conflict and to identify areas of political and economic sensitivity. In this way States can understand the current state of affairs, begin to understand the scope of their risk, articulate their fundamental needs, and design and implement processes that provide systemic value. This may include, for example, drafting and implementing: (1) more precise references to those government officials or institutions responsible for resolving disputes, (2) specification of timeframes and other obligations, or (3) greater opportunities for State-to-State consultation. The overall objective should be to prevent disputes from arising, to manage conflict that does arise effectively and to offer solutions that address the greatest number of stakeholder concerns possible.

IAs can play a key role in defining a State's approach to dispute prevention and management. IAs could theoretically elaborate precisely what States and investors are obliged and/or encouraged to do in the pre-conflict, conflict, dispute and dispute resolution stages. Instead of only stressing what should be done when a dispute occurs—which is late in the dispute resolution process—IAs could list further options and necessary steps to be taken by the involved State and investor at earlier stages. For example, an IA could include a provision on dispute prevention, listing the various options that investors have to express their grievances and concerns to a government before a conflict or dispute emerges. Similarly, IAs could also identify the government agency in charge at an early stage of a misunderstanding.

Tied to this is the need of the State to link its domestic investment policy framework to these IA provisions. This includes, amongst other issues, the establishment of effective information sharing mechanisms between government agencies, the institution of government entities that investors experiencing problems can approach, and the creation of necessary authority for government officials to manage such conflicts.

The **pre-conflict phase** may actually be one of the most critical phases, as it implies the actual existence of a problem, a grievance or concern by an investor, which may be unknown or unaddressed by responsible State entities. It may however be valuable for a State to be aware of an investor's problem as early as possible, so as to have ample opportunity and time to address matters. Two particular challenges exist in this context: (1) to assure that the investor communicates the problem, and communicates it to the appropriate government entity, so that the State does not remain ignorant of it, and (2) to establish appropriate mechanisms that the State addresses the concerns of the investor. Investors will only communicate their problems if they are aware of the channels for such communication put in place by the host country government. Hence, host country governments may need to consult and inform new investors about these channels, e.g. through investment promotion agencies that are often seen to be in contact with new investors at the initiation stage of their investment. The establishment of mechanisms through which the State can address the complaints of investors can be accomplished through various approaches, such as investor aftercare, ombuds services and the like.

During the **pre-dispute phase**, stakeholders could be engaged in systematic activities to de-escalate the situation in an effort to avoid the crystallization of disputes. Such a strategy offers

stakeholders an opportunity to recall the mutual value derived from international investment, to focus on their respective business and government functions and to minimize the costs expended on unnecessary dispute resolution. This may necessitate training of government officials—whether at the national or local level—about the scope of their potential obligations under IIAs, with the objective to sensitize officials to the possible scope of liability and create incentives for them to act in accordance with their international legal obligations. The design of appropriate information sharing arrangements may also prove useful in this context, such as Peruvian Law No. 28933 (establishing the system of coordination and response of the State in international investment disputes).

States might also follow the lead of countries such as the Dominican Republic and Colombia to create “investment aftercare” initiatives or the Republic of Korea that has an ombuds facility to create opportunities for dialogue with foreign investors. This might include delegations of authority, including budgetary authority to relevant officials and other legal safeguards, who could devote their efforts towards conflict prevention, amicable settlement, conciliation or other relevant settlement techniques. The objective would be: (1) to create programmes that permit harmonious interaction between investors and States, and (2) to provide a venue for investors to express directly their concerns to relevant government entities and frame their concerns in a productive manner. This delegation might extend beyond interactions between a specific State and groups of investors operating within the host State. It may also involve the creation of an international body that could involve groups of States and investors to enhance coordination and distribution of information about international investment law obligations under IIAs, DPPs and offer guidance about capacity building opportunities to promote thoughtful government policy choices and sound investments that promote development.

During the **formalized dispute phase**, even though a conflict has crystallized in the registration of a formal legal dispute, there are nevertheless opportunities for ADR. Irrespective of whether a State has created an agency to act as an ombuds or provide “aftercare” for dispute prevention, entrusting a division or department with the budget, authority and responsibility for the amicable resolution of investment treaty disputes would create a clear chain of communication. This institutionalization would offer a benchmark that conciliation, mediation, ENE or other relevant techniques are appropriate methods to settle disputes. Institutionalization would implicitly communicate to investors that mediation or conciliation are viable alternatives to arbitration and not merely additional bureaucratic hurdles preventing a swift response to a problem. It would also send a positive signal to investors that States are willing to abide by the rule of law; likewise, investors would be expected to abide by their own legal obligations. It may also require the training of parties and their counsel about different dispute resolution methods at an early stage of the arbitration process. Training and technical assistance might, for example, encourage consideration of the different types of mediation approaches—whether evaluative or facilitative—and how to use mediation to promote useful outcomes. Stakeholders might also work in concert to consider the creation of best practices related to settlement—that takes into account the unique variables at play in the context of investor-State treaty dispute resolution—and considers under what circumstances, even after the initiation of a formal claim, which ADR methods might be most appropriate and when. A parallel effort might involve the elaboration of a set of procedural guidelines and practices related to investor-State mediation or other third-party neutral assessment in order to provide a context for using ADR. Presumably, such rules, guidelines and baselines will aid the promotion of efficient dispute resolution.

During the **adjudicative proceedings**, parties and their lawyers can consider how to use ADR at various phases of the case to streamline case management, eliminate aspects of the case or settle the entirety of the claim. For streamlining case management, it may include encouraging parties to decide particularly contentious disputes—such as the amount of disputed damages and methods of calculation—at an early stage in the dispute (possibly before jurisdiction or the merits) in order to provide greater certainty about the scope of fiscal risk. For eliminating issues in a case, parties can use ADR methods to streamline mini-disputes within the arbitration itself, such as those related to disclosure or damage calculations. It may require an ENE or mediation by a third-party neutral to focus the dispute, or it could involve the parties negotiating on a particular set of agreed terms that can be proposed to the arbitral tribunal. Similarly, parties might choose to use—or tribunals may wish to encourage parties to consider—using ADR methods at various points, particularly after dispositive aspects of the case (such as jurisdiction or the merits) have been decided and the scope of the dispute and the related risks can be more readily understood.

This will require particularly active consideration of dispute resolution strategies by investors, States, their counsel and possibly even arbitral tribunals. It is likely to require the creation of capacity and assistance to serve the expanded need for ADR and conflict management. This may mean that government stakeholders, private sector law firms, investors and other individuals may need to gain enhanced competence in mediation skills. Likewise, it may require the identification of a pool of mediators competent to manage investor-State disputes and with the proper background in international investment, development and international law. As the legal community of practitioners sits at the interface between both parties of an investment dispute, advising both investors and States and providing for settlement between the two, their involvement in the process may be of particular significance. Legal practitioners can create awareness among investors and States of the multiple alternatives, especially when both parties are not aware of or have full appreciation for the infrastructure in place to aid them in the resolution of disputes. Practitioners may even consider expanding their services to adapt their expertise in international investment law by adding substantive experience in the use of ADR or developing their skills to serve as a mediator competent to manage investor-State disputes.

During the **post-award phase**, there may also be opportunities to foster settlement that minimize enforcement risk. This might involve creative exploration of whether, even at the end of arbitration, there are opportunities to create value amongst investors and States that fosters mutual interests in light of how international law rights have been adjudicated.

Overall, it is imperative to recognize the broad set of opportunities for DPPs and ADR to create efficiencies in addressing investment treaty conflict and finding ways to promote the development objectives of stakeholders. These various options need not be viewed in isolation but rather as a series of integrated opportunities that require holistic consideration. This consideration will require the focus, attention and efforts of a broad set of stakeholders, including investors, States, their counsel, international institutions and professionals who can serve as effective third-party neutrals.

B. Considering concrete steps for the future

Rather than simply suggesting a variety of theoretical options, the inputs from the conference in Lexington suggested that there are several concrete steps that can and should be addressed in order to move the dialogue into a framework that provides concrete and tangible outputs. The objective of these suggestions is to create opportunities for a broad cross-section of stakeholders to collaborate for mutual gain and promote investment that fosters both sustainable development and sustainable dispute resolution systems.

- First, it will be necessary to conduct high quality empirical research that explores the outcome of investment treaty arbitrations as well as experiences related to settlement. While some empirical research is already being done as regards arbitration outcomes, there is relatively little research as regards settlement outcomes in investor-State treaty claims. There is currently no research that takes a broad-brush approach to the analysis of cases that settle and the factors that influence parties' settlement efforts. As a result, the time has come for a systematic diagnosis of the system to understand why cases do settle, what factors inhibit settlement, and how the system can create opportunities to promote the prospect of settlement that is of mutual advantage to States and investors. Such research might start with a small pilot project and later evolve into a larger project. It should exhibit care when gathering, analyzing and collecting data. It would seem reasonable to suggest that a joint study between UNCTAD and ICSID, analyzing internal data on a preliminary basis and perhaps growing into a larger project, could evaluate variables affecting dispute escalation, dispute continuation and dispute settlement.
- Second, States might create inter-institutional working groups of stakeholders at the national level to consider the proper scope of dispute prevention and conflict management in IIAs or in domestic legislation. It may be useful to support such efforts through international organizations or institutions. The objective of such a working group would be to recommend possible ways to prevent and resolve investment treaty disputes effectively that consider unique national policy priorities. In addition to the design of national policy and frameworks for DPPs, such working groups may also consider researching good practices related to the prevention and management of investment treaty disputes for consideration by both national and international entities.
- Third, States could establish a multinational working group to consider issues of dispute management, prevention and preparedness. Such an international group might involve government officials from various levels, as well as other representative stakeholders and benefit from the support of international organizations and institutions. One possible outcome might involve the creation of collaborative networks for consideration of how to prevent disputes, educate government officials at various levels about their international law obligations, provide incentives to promote settlement opportunities for foreign investors, and coordinate concerns and ideas related to effective use of DPPs and ADR among international stakeholders.
- Fourth, stakeholders could consider establishing rules or guidelines related to DPPs and ADR methods, particularly ENE and mediation, that may provide useful parameters and baselines

for conflict de-escalation and dispute management. This might, for example, involve consideration of the procedures and expectations of parties, their lawyers and mediators in the conduct of pending disputes. It might also usefully involve consideration of the different types of mediation approaches—whether evaluative or facilitative—and how to adopt the mediation process to promote useful outcomes at the pre-dispute, formalized dispute and adjudicative proceedings phase. It may be useful to involve expert international dispute resolution institutions at the outset to explore the standards for when, where and how settlement is appropriate in the context of ISDS. Presumably, such rules, guidelines and baselines will promote simple, nimble and efficient dispute resolution.

- Fifth, stakeholders should create a research consortium to consider the creation of a handbook to offer training, guidance and baselines for policy makers, parties, their lawyers and other interested stakeholders. Such a handbook could explore specific issues and provide direction about critical topics related to: (1) how to conduct a mediation in the investor-State context, (2) how to establish effective information sharing among State entities, (3) how to create an effective investment aftercare or ombuds service, (4) how to effectively manage ADR in parallel to an arbitration, and (5) how to include provisions on ADR or DPPs in IIAs. It might involve tapping into international educational networks to generate ideas from academic institutions with established or developing expertise in dispute resolution and international investment law.
- Sixth, a broad coalition of stakeholders could input into a pilot project aimed at identifying the background and expertise necessary for those individuals who will act as third-party neutrals to facilitate the effective use of ADR in investment disputes. Such a group should seek to identify individuals with a background in dispute resolution and international investment law, with the requisite regional and developmental diversity, who are in a position to act as impartial and independent neutrals to facilitate dispute resolution through formats including conciliation, ENE, mediation and other mixed methods.
- Seventh, stakeholders should create a research consortium to consider the creation of a pilot project that explores how to create awareness and capacity among stakeholders about various ADR options and how they might be applied in practice through real scenarios and simulations. This might, for example, take the form of a training course for parties, lawyers and third parties about how to use mediation effectively. Similarly it might also involve technical assistance or other forms of capacity building to advance the understanding of policy makers, investors, arbitrators and relevant counsel.

C. Moving towards the future

We are at a unique historical moment, namely we now have an opportunity for the world of arbitration, mediation, negotiation and DSD to converge in a manner that provides a chance to create value for stakeholders. This effort to improve one of the fundamental systems for resolving vital issues in international economic law—namely issues arising under the investment treaty system—requires the active participation of States, investors, dispute resolution professionals and their lawyers. It also necessitates a willingness to think about how to achieve improvements in practical terms and the concrete steps required to accomplish such ideas.

We hope that these recommendations, which were generated in response to the issues raised and debated in Lexington, will prove useful to a broad constituency of stakeholders and move the debate forward in how to implement small steps now that will lead to the creation of an improved system for the future.

Notes

* The views expressed in this article are those of the authors and do not necessarily reflect the views of the UNCTAD Secretariat.

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CONCLUSIONS

Throughout the various phases of the Joint Symposium, participants emphasized their appreciation of the unique environment for exchanging views amongst a broad cross-section of stakeholders in an effort to explore possibilities, raise questions, share concerns and evaluate concrete proposals. The various formats and dynamic use of technology allowed representatives from States, investors, institutions, academics and practitioners to explore jointly the possible synergies related to IIAs, ISDS, ADR and DSD in order to identify common interests and explore concrete means for improving international investment law. Starting from the universe of IIAs concluded between States that provide for ISDS, the Joint Symposium offered these stakeholders a forum to assess existing dispute resolution rules and think about improvements to dispute settlement as well as feasible approaches to manage and deal with problems and disputes arising from cross-border investments.

Beyond the mere contact between these different stakeholders, the Joint Symposium also identified concrete proposals to move these discussions one step further and closer to informed and consensual decisions. In this context, three areas are particularly noteworthy:

A first area concerns the preliminary design phase, pre-conflict phase and pre-dispute phase. With respect to these phases, future work should be intensified to explore pro-active dispute avoidance and prevention. This includes consideration of approaches to prevent problems between an investor and the host State from becoming conflicts, and to avoid that conflicts escalate into formal disputes. Unfortunately, consideration of this aspect has been historically underexplored and the lack of research and existing illustrative case studies may be inhibiting policy makers from using dispute avoidance and conflict de-escalation effectively. Nevertheless, States have already begun to recognize the benefits of this type of an approach. As States become increasingly aware of the need to design and implement their international commitments in an informed, careful and consistent manner throughout various layers of the government with clear opportunities for communication and early intervention—this will offer a first step towards effective dispute prevention. While the development of systematic approaches in this area is still in its infancy, the continuation and further development of DPP programmes in various States would add substantial value and build a body of "good practice" examples that could be instructive and useful models for other States. Effective development of capacity and experiences on the effective undertaking of dispute prevention should involve a broad range of stakeholders in order to promote consideration of the needs of States and also provide international investors with assurances related to their continuous and effective protection under international law. To move forward on the issue of dispute prevention, States should maximize their engagement in relevant capacity building programmes, stakeholder seminars, information sharing protocols, and inter-institutional DSD. Cooperation and partnerships with international institutions and organizations, including UNCTAD, will be an important element for achieving effective change and improvement. To address the perspective and concerns of the investors, exchanges of ideas and experiences could also involve considering models such as corporate dispute prevention programmes designed by major transnational corporations—or even States' domestic conflict prevention and avoidance systems—that avoid having to resort to costly adjudicative procedures such as arbitration.

The second area of work concerns in particular the formalized dispute phase, including during the adjudicative proceedings and to a lesser extent also the post-award phase. Here, common understanding of the potential of some ADR methods as possible alternatives to arbitration should be intensified. This includes increasing awareness of the availability of ADR for ISDS and the utility of methods such as ENE and mediation. To increase such awareness, interaction among stakeholders—including experts, academics, practitioners, government officials or investors—should be enhanced. ADR is not a new element in IIAs, as some include the option for conciliation, while others refer to some form of “amicable resolution” or another form of preliminary dispute resolution. Nevertheless, few attempts have been made to resort to ADR techniques and methods, which is perhaps not surprising given the broad nature of the undertaking that may exclude precise obligations tied to this preliminary opportunity for dispute resolution. Having identified this gap, further research and analyses related to the net benefits, challenges, opportunities, and perceived or real obstacles, is critical. Various stakeholders, such as international arbitration institutions, practitioners, and transnational experts in ADR, should contribute their expertise to better understand the complex issues involved in investor-State disputes and to craft possible solutions. In this area of work, further initiatives such as the Joint Symposium would constitute a valuable contribution to an ongoing debate, promoting better and more constructive understanding of the issue among relevant stakeholders, and facilitating the transfer of “good practices”.

Finally, the third area of future work would constitute the drafting of guidelines, rules and terms of reference addressing a few selected issues in order to generate tangible results that could support States and investors in their consideration of alternatives to arbitration and DPPs. These steps forward include, amongst others:

- Creating a set of guidelines outlining effective ways towards dispute prevention, suggesting approaches to the drafting and implementation of DPPs, based on existing “good practices”;
- Devising a set of clear guidelines that could be used by stakeholders to deal with a potential dispute at an early and preventive stage; amongst other issues, these rules could include consideration of ENE at the request of the parties in a conflict or potential dispute, in order to circumscribe the issues and identify more focused solutions; and
- Identifying a set of criteria or terms of reference for mediators, conciliators, and ombuds persons for their involvement in investment disputes where the choice was made to apply ADR methods.

Various institutions should cooperate in discussing, drafting and devising such guidelines, rules or terms of reference to consider how to most usefully offer guidance to stakeholders for their consideration. The IBA State Mediation Committee is working actively on the last two proposals, and similar initiatives are being discussed in other professional organizations and institutions such as the American Bar Association (ABA) or the ICC. The latter already has experience in this area through its effective programme on ADR available to States. The overall hope is that—by using collaborative opportunities and building upon ideas in this volume—stakeholders will ultimately be in a better position to assess the net value of the IIA system, understand the scope of treaty obligations, permit informed choices that give investors an opportunity and States a chance to promote their development objectives in an environment that provides sufficient policy space. The ultimate objective is to build on the synergies among the

related areas of IIAs, ISDS and ADR in order to encourage the development of a better system that effectuates the broader goals of the IIA network and to foster sustainable development.

In all efforts that follow, it is essential that the foundation for work and discussion on these aspects is as broad as possible to ensure the involvement of all stakeholders in international investment. Both States and investors are interested in protecting investment to ensure an environment that promotes development; and they are also interested in avoiding disputes and, when necessary, resolving them as smoothly and effectively as possible. Disputes are not in the economic interest of investors, and they work against the objectives of States to achieve economic development, sustainable growth and welfare for all people. Yet there is value in considering how to use ADR to add, rather than detract, to the system of incentivising constructive foreign investment and promoting development objectives. Enhanced and joint efforts towards prevention and effective resolution of investor-State disputes are hence of critical importance as the system of IIAs moves towards the future.

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ANNEX 1

Pathfinder on International Investment Law and Alternative Dispute Resolution: Web Based Resources

by *Caroline L. Osborne**

This pathfinder is intended to assist government officials, investors, practitioners, arbitrators, scholars, and other stakeholders in locating literature on the dialogue of international investment law and dispute resolution. This document covers online resources useful in promoting collaborative relationships among experts in international investment law and dispute resolution.

Primary international investment law materials include multinational and bilateral investment and trade agreements, as well as domestic laws and regulations of foreign investments made in other countries. Traditional topics of interest under international investment law include tax, antitrust, securities, corporate, environmental, and labor laws.

Arbitration is a dispute resolution process typically conducted in a non-judicial setting. As a general concept alternative dispute resolution is broadly construed to include negotiation, mediation, conciliation, and arbitration. These techniques are not considered to be mutually exclusive and one or more techniques may be used in sequence or as part of a combination. The process is simple and traditionally governed by the rules of a neutral arbitration organization selected by the parties or an agreement administered by a panel of arbitrators agreed upon by the parties. Confidentiality requirements are often included. The presence of confidentiality requirements can limit access to information. The large number of dispute resolution institutions adds a complexity to locating information on awards.

This paper presents selected resources in the areas of international investment law and dispute resolution, in the categories of: locating literature and resources; organizations, associations, societies, and institutions; arbitration; rules; news services, discussion lists and blogs; resources regarding conventions, treaties, cases and awards; other web resources; specialized journals; resource guides, pathfinders, and annotated bibliographies; and UNCTAD. Resources available solely in print and resources the scope of which is limited solely to an individual nation are excluded as beyond the scope of this document.

I. Locating literature and resources

A. Online library catalogs

Titles addressing the multiple and complex aspects of international investment and dispute resolution are available from libraries around the world. A library's online catalog is the optimal tool for identifying and locating books, periodicals, conference proceedings, and other materials written by practitioners and scholars. These resources have multiple access points within an online library catalog. Title, keyword, author, series, and subject are common access points. Online catalogs for most libraries are easy to locate with a simple Google or internet

search using the name of the library in quotes—for example, “Washington & Lee Law Library”. Catalog access is customarily featured on the initial page of a library site.

Basic strategies for searching online catalogs include:

- (1) Author searches that use the name or names of individuals or organizations. Multiple variations of an author’s name may result in a null result set if the appropriate variation is not used. To avoid a null set, try the author’s last name only or last name and initial of the first name. If this results in a null set, try a keyword search using the author’s last name.
- (2) Title searches usually require exact titles. Failure to enter the title exactly as it appears in the catalog often results in a “no records” or null result set. If the title search retrieves a null result set, try a keyword search.
- (3) Keyword searches are the most flexible form of searching. They permit the researcher to combine terms from the title, subject, author, and publisher fields in a single search. The downside of a keyword search is a result set too large to be useful.
- (4) Many catalogs offer LC Classification searches. These searches are subject searches based on Library of Congress Subject Headings. More detailed information on LC Classification headings is found at: <http://www.loc.gov/catdir/cpsolcco/>. Use of Library of Congress Subject Headings is often an excellent way to locate a variety of materials on a particular subject and a way to simulate browsing a library’s collection on a particular subject. Differences in American and British spellings often result in differing results sets.

Suggested subject headings for searching collections for materials on international investment and dispute resolution are:

- Arbitration and award International Periodicals
- Arbitration and award, International
- Arbitration and award, International Cases
- Arbitration and award, Latin America
- Arbitration and award, Pacific Area
- Arbitration International
- Conflict of Laws Arbitration and award
- Developing countries
- Dispute resolution (Law) International aspects
- Foreign Trade
- Foreign trade regulations
- Free Trade – Mexico
- Free Trade – United States
- Free Trade – Canada
- International Trade
- Investments Foreign
- Tariff – law and legislation

In addition to the Library of Congress catalog (available at: <http://catalog.loc.gov/>), listed below are other catalogs of potential interest.

- **WorldCat** at: <http://www.worldcat.org/>
WorldCat is a network of library content and services which permits the researcher to search the collections of member libraries. WorldCat makes the cataloged collections of libraries around the world available for online searching.
- **The Peace Palace Library Online Catalog** at: <http://www.ppl.nl/>
The Peace Palace Library at The Hague maintains a significant collection of materials on international law.
- **LibDex** at: <http://www.libdex.com/country.html>
LibDex maintains collection of links to online library catalogs by geographic arrangement.

B. Periodical indexes

Periodical indexes provide access to articles containing dialogue on topics of interest as published in journals, law reviews, and legal newspapers. Articles are often sources for current theories and innovative approaches on topics of interest, “hot topics” and recent developments. Selected periodicals of interest are described below in Section VII.

- **Index to Legal Periodicals and Books (ILP)** at: <http://www.hwwilson.com/Databases/legal.cfm>
The ILP is a bibliographic index that covers over 1,025 legal journals, law reviews, yearbooks, and other publications from the United States and other common law jurisdictions. Coverage is in all areas of jurisprudence. ILP is accessible in print and online. Online access is available through Westlaw and Lexis and many libraries provide direct online access to the database. Online coverage begins in 1981; however, print coverage commenced in 1908.
- **The Index to Foreign Legal Periodicals (IFLP)** is produced by the American Association of Law Librarians and is housed by the Berkeley Law Library. It is the leading multilingual and multinational index to articles and book reviews providing in-depth coverage of public and private international law, and comparative and foreign law. IFLP is published in print and is available electronically via Ovid Technologies. The Ovid platform provides coverage commencing with 1985. IFLP is also available on Westlaw in the IFLP database. Availability of the IFLP database on Westlaw is subject to a negotiated subscription agreement.
- **Current Law Index** is an extensive index to legal articles. Legal articles about international investment are indexed under the subjects of foreign investments, international trade, and dispute resolution of international law. The electronic version of Current Law Index with coverage from 1980 forward is available on Westlaw in the CLIP database and Lexis under “Legal Resource Index” tab.
- **Ingenta** at: <http://www.ingentaconnect.com>
Ingenta is a subscription based service that permits the researcher to search for articles from over 13,500 multidisciplinary journals.

- **University Law Review Project** at: <http://www.lawreview.org/>
University Law Review Project provides full-text search of law journals available on the web.

C. Google, Google Books, Google Scholar, and the web

The web is an excellent resource for locating articles, publications and news items of interest. Many sources are freely accessible using internet search engines such as Google. The web is often the sole resource for newsletters and other publications published by law firms and other associations on their web sites. Researchers may also use the web to locate faculty biographical pages, forums, and full text articles.

- **Google Books** at: <http://books.google.com/>
Searches of Google Books permit the full text content of books enabling the user to discover new items of interest or relevance. Traditional Google searches include results from Google Books; however, searchers can limit their results to simply books by using Google Books. This type of targeted searching produces results sets more likely to provide useful information. A Google Book result permits the user to select from various preview options. Full view is available for books out of copyright or for which the publisher or rights holder has granted permission for use. Bibliographic information is available for those books subject to copyright and for which no permission has been granted. Limited preview and snippet view permit limited access to the book based on the agreement between the rights holder and Google. The search results are limited by the parameters of the database.
- **Google Scholar** at: <http://scholar.google.com/>
Google Scholar is a free and simple method of conducting broad searches for scholarly literature. Features include cross disciplinary searches of peer-reviewed papers, theses, books, abstracts, court opinions and articles from academic and professional publishers, societies, repositories, universities, and other organizations.

D. Westlaw¹ and Lexis

Lexis and Westlaw are subscription databases which provide access to large selections of international resources including: case law, statutes, regulations, agency decisions, information relating to licensing of intellectual property, payment of taxes, dispute resolution, and investment and banking at the international level.

To locate databases of interest in Lexis, use the “find a source” feature for the Lexis directory of online resources at: <http://www.nexis.com/sources/>. Click on the “i”, to locate descriptions regarding depth of coverage, currency and sources covered by the database. Lexis also provides extensive coverage of international law topics under “area of law by topic” feature. Of note are ASIL publications, International Arbitration, and the International Dispute Resolution Directory available under the “international” link.

Westlaw also provides a “find a database” feature on the legal research page. Use the “search for a database” or “view database directory” features available on the basic research

page. Suggested search terms include “international law”, “international commercial arbitration”, “international trade forum”, “international trade finance”, and “laws of international trade”.

II. Organizations, associations, societies, and institutions

Numerous organizations, associations, societies, and institutions play roles in the areas of international investment and dispute resolution. Often, the web site associated with such body is the most valuable source of information. Such sites provide a variety of information from basic to detailed sources of information on the organization, dispute resolution process, rules, procedures, and awards. This section provides information on many of the organizations, associations, societies, and institutions recognized in the disciplines of international investment and dispute resolution.

A. *Dispute resolution international institutions*

This category includes neutral bodies whose purpose is to promote dispute resolution as a means of settling conflicts involving transnational business matters. *Ad hoc* and institutional arbitration are two common forms. *Ad hoc* arbitration involves interested parties as the planners and organizers of their own proceedings. The framework of arbitration is usually specified in an arbitration agreement and includes provisions regarding selection of the arbitrators, designation of law and rules, and powers of the arbitrators.

Institutional arbitrations typically involve an arbitral institution which provides the rules of procedure for the arbitration, mediation, conciliation, or other form of dispute resolution. The institution also performs supervisory and administrative functions. Multilingual versions of an institution’s rules, general procedures, procedures in addition to model arbitration clauses and potential arbitrators are available on the web pages of such institutions. Institutions can be found on both the national and international level.

Common international institutions for arbitration or dispute resolution are described below:

- American Arbitration Association (**AAA**) and its International Centre for Dispute Resolution (**ICDR**) at: <http://adr.org>
The AAA and the ICDR provide administrative services that include education and training on dispute resolution and the appointment of mediators. The ICDR focuses on dispute resolution in an international setting. They draw on their international expertise and multilingual staff to facilitate matters. Additionally, the site provides access to general information as well as rules, forms, and mediators.
- Swiss Arbitration Association (**ASA**) at: <http://www.arbitration-ch.org/>
ASA (Association Suisse de l'Arbitrage) is a non-profit association comprised of individuals, practitioners, and academics interested in domestic and international arbitration. The site provides information on various workshops, news, and publications in the area of arbitration.

- Institute for Transnational Arbitration (**CAILAW**) at: <http://www.cailaw.org> or <http://www.cailaw.org/ita/>
A division of The Center for American and International Law (**CAILAW**), the Institute serves as an important forum for education in the area of transnational arbitration. The site is an excellent resource for news and information on transnational arbitration treaties.
- Centre for Effective Dispute Resolution (**CEDR**) at: <http://www.cedr.co.uk>
CEDR is an independent and neutral organization with expertise in dispute resolution, conflict management, and civil justice systems. It serves as an impartial third party to facilitate negotiations in complex and sensitive multi-party conflict and dialogue.
- China International Economic and Trade Arbitration Commission (**CIETAC**) at: <http://www.cietac.org/index.cms>
Formerly known as the Foreign Trade Arbitration Commission, CIETAC was established in 1956 as a part of the China Council for the Promotion of International Trade. CIETAC utilizes arbitration and conciliation to resolve economic and trade disputes. The site provides model contract provisions, rules, convention, fee schedules, case analysis, and description of the processes.
- Cairo Regional Centre for International Commercial Arbitration (**CRCICA**) at: <http://www.crcica.org.eg/history.html>
An independent non-profit international organization, CRCICA works to enrich the progress of economic development in Asian and African countries. As a part of such work, it offers services to help settle trade and investment disputes through various arbitration processes and alternative dispute resolution techniques. The website provides news, statistics, rules, and arbitrators.
- European Court of Arbitration at: <http://cour-europe-arbitrage.org>
The European Court of Arbitration is a private institution with its headquarters in Strasbourg and national and local departments throughout Europe. Their site provides model arbitration clauses, news, documents, information on tariffs and rules.
- Inter-American Commercial Arbitration Commission (**IACAC**) at: <http://www.sice.oas.org>
The IACAC establishes, administers, and maintains a system for settlement of international commercial disputes through arbitration or conciliation in the Western Hemisphere. The site is an excellent resource for information on trade policy and news.
- International Chamber of Commerce (**ICC**) at: <http://www.iccwbo.org>
ICC is an international arbitral institution with worldwide membership. The ICC acts with a global business view in a vast number of areas including arbitration, dispute resolution, open trade, market economics. The site provides information on arbitration under the rules of the ICC and other matters of business in the global world.
- International Centre for Settlement of Investment Disputes (**ICSID**) at: icsid.worldbank.org
ICSID is an autonomous international institution established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It

provides facilities for conciliation and arbitration of investment disputes. The site provides information on the Convention on the settlement of investment disputes, documents, cases, rules, and news.

- Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) at: <http://www.rcakl.org.my/>
The KLRCA provides a forum for dispute settlement in the Asia-Pacific region in the areas of trade, commerce, and investment using arbitration. The site provides resources on conciliation and mediation in addition to arbitration. Model clauses and information on arbitration rules are also provided.
- The London Court of International Arbitration (**LCIA**) at: <http://www.lcia.org/>
The LCIA is an international institution with expertise in commercial dispute resolution. The site maintains information on the court which is composed of up to thirty-five members from around the world and is the final authority for the application of the LCIA Rules. The LCIA site provides information on the LCIA Court, arbitrators and rules.
- The Permanent Court of Arbitration (**PCA**) at: <http://www.pca-cpa.org/>
The PCA is an intergovernmental organization established to facilitate methods of dispute resolution among States. It is a multi-faceted arbitral institution developing to meet the needs of the international community. The site is a resource for cases, documents, UNCITRAL, and news.
- Singapore International Arbitration Centre (**SIAC**) at: <http://www.siac.org.sg/>
SIAC is an independent organization established to meet stated international business demands for a neutral and reliable dispute resolution institution in Asia. The site supplies information about code of practice, resources, rules, model clauses, and individual arbitrators.
- United Nations Commission on International Trade Law (**UNCITRAL**) at: <http://www.uncitral.org>
UNCITRAL's mission as established by UN Resolution 2205 recognizes the differences among nations in the governance of international trade as the basis of obstacles to the free flow of trade. The UNCITRAL is intended as a vehicle to reduce and eliminate obstacles to trade. The site provides information on news, documents, working groups, UNCITRAL texts, UNCITRAL arbitration and conciliation rules, and case law.
- World Association of Investment Promotion Agencies (**WAIPA**) at: <http://www.waipa.org/>
Established in 1995 and based in Geneva, WAIPA is a forum for investment promotion agencies. The forum provides networking opportunities and facilitates the exchange of ideas and best practices, capacity building, and investment promotion. The site provides access to tools and publications of interest.

B. National dispute resolution institutions

There are many national dispute resolution institutions beyond the scope of this document. For information on such dispute resolution institutions, Juris International Arbitration and Mediation Centres (at: <http://www.jurisint.org/en/ctr/index.html>) maintains a geographic

directory of resources on the topics of arbitration, mediation, conciliation and other alternative dispute topics. In addition, Juris International provides multilingual information on international legal instruments and model contract provisions.

C. Other international organizations and societies

- American Bar Association (**ABA**) at: <http://www.abanet.org>
The ABA is a voluntary professional association whose stated mission is serving the profession and public by defending liberty and delivering justice as the national representative of the legal profession. The ABA website provides a wealth of information on a variety of topics. Of particular interest are the sections on dispute resolution (at: <http://www.abanet.org/dispute/>) and international law (at: <http://www.abanet.org/intlaw/>).
- American Society of International Law (**ASIL**) at: <http://www.asil.org>
ASIL's stated mission is to encourage the study of international law and promote international relations based on principles of law and justice. The ASIL Insights section (at: <http://www.asil.org/insights.cfm>) is highlighted for providing information to the media, public, and policy makers.
- Chartered Institute of Arbitrators (**CIArb**) at: <http://www.ciarb.org>
CIArb's purpose is to encourage, facilitate and promote development of various forms of private dispute resolution and maximize the contribution of dispute resolution practitioners. The site provides information on methods of dispute resolution.
- International Institute for Conflict Prevention and Resolution (**CPR**) at: <http://cpradr.org>
Founded as the Center for Public Resources, CPR is dedicated to encouraging innovation and excellence in public and private dispute resolution methods and issues. It also serves as a multinational resource for resolution of business disputes. Their site includes a section on international alternative dispute resolution, listing of neutrals, procedures and clauses.
- International Bar Association (**IBA**) at: <http://www.ibanet.org>
The IBA is influential in the area of international law reform. Much of its work is done through its committee structure. Committees of particular interest are the Arbitration Committee, the Investment Treaty Arbitration Subcommittee, Mediation Committee and State Mediation Subcommittee. Committee information is accessed under the "committee" tab on the home page.
- International Council for Commercial Arbitration (**ICCA**) at: <http://www.arbitration-icca.org>
ICCA is devoted to promoting and improving arbitration, conciliation and other forms of international commercial dispute resolution. ICCA works with the Permanent Court of Arbitration in The Hague to produce the *Yearbook Commercial Arbitration* and the *International Handbook on Commercial Arbitration*. They are a co-sponsor with Kluwer of KluwerArbitration Online. KluwerArbitration Online is a subscription based database in the area of international commercial arbitration.

- International Law Association (**ILA**) at: <http://www.ila-hq.org>
Established in 1873 to study and assist the development of international law, the ILA recruits a worldwide membership. Representative members come from private practice, academia, government, the judiciary, and other non-lawyer members with expertise in industrial and financial sectors, arbitration organizations and chambers of commerce. The institution retains a number of standing committees. Information on such committees is accessible from the association's home page.
- The Institute for Transnational Arbitration (**ITA**) at: <http://www.cailaw.org/ita/>
A division of the Center for American and International Law, the ITA concentrates on educating professionals about arbitration as a means of transnational business dispute resolution. The publications section includes the quarterly issue of ITA's newsletter News & Notes and a Scoreboard of Adherence to Transnational Arbitration Treaties in chart form.
- Multilateral Investment Guarantee Agency (**MIGA**) at: <http://miga.org/>
MIGA is a member of the World Bank Group. The sections on foreign investment and dispute resolution are of particular interest.
- Organization for Economic Co-operation and Development (**OECD**) at: <http://www.oecd.org>
The OECD works to aggregate governments committed to market economies. One of its stated goals is to contribute to the growth of world trade. The OECD site is an excellent source of data and statistics as well as news.
- The United Nations Conference on Trade and Development (**UNCTAD**) at: www.unctad.org
UNCTAD promotes the development-friendly integration of developing countries into the world economy. UNCTAD's work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development. The organization's work programme on international investment agreements (at: www.unctad.org/ia) seeks to help developing countries to participate as effectively as possible in international rule-setting for investment. The site is an excellent source for texts of IIAs and ISDS cases.
- The World Bank Group at: <http://www.worldbank.org>
The World Bank site is an excellent resource for financial and technical assistance for developing countries. Their site discusses the organization of the World Bank, its projects, members, partners and publications.

D. Directories of arbitrators

The ability to consider experience, expertise, and other qualifications of the members or potential members of an arbitration panel is an advantage of arbitration as a method of dispute resolution. There are no standard qualifications for arbitrators. Parties selecting arbitration, however, are often invested in technical or other specialized qualifications. Most dispute resolution institutions similar to those listed in section II above provide lists and qualifications of prospective arbitrators. Other directories of interest are described below:

- Dispute Resolution Directory at: <http://dispute.martindale.com/index.php>
The Dispute Resolution Directory database is maintained by LexisNexis' Martindale-Hubble and is the authoritative resource for locating professionals specializing in dispute resolution. The directory database also provides links to alternative dispute resolution associations, ethics, conventions, and UNCITRAL model laws. The Dispute Resolution Directory is also available on Lexis.
- ICC International Centre for Expertise at:
<http://www.iccwbo.org/court/expertise/id4595/index.html>
The Centre's website provides information on experts as the appointment of experts in the administration of proceedings. Also available are the Centre's Rules for Expertise.
- Positively Neutral at: <http://cpr.positivelyneutral.com/>
Positively Neutral seeks to provide information about reputation. This information is key to the selection process for finding the best mediators, arbitrators, or expert witnesses.
- Who's Who Legal at: <http://www.whoswholegal.com/practiceareas/20/commercial-arbitration>
The Who's Who Legal database identifies the foremost legal practitioners in 100 countries in 31 practice areas of business law including commercial arbitration. The commercial arbitration section provides articles of interest and profiles of members.

As mentioned in the introduction to this section, arbitral institutions are also excellent sources of information. Two illustrative examples are the International Arbitration Institute and Arbitral Women.

- The International Arbitration Institute (IAI) at: <http://www.iaiparis.com/>
The IAI provides a directory of members (at: http://www.iaiparis.com/drm_search.asp). The search feature permits searching by nationality, language, and expertise.
- Arbitral Women at: <http://www.arbitralwomen.org/>
Arbitral Women provides features such as "Find a practitioner" and "Directory of members". The "Find a practitioner" feature allows searching based on nationality, language, expertise, and practice area.

III. Arbitration rules

Dispute resolution institutions such as those listed in section II above generally promulgate their own procedural rules governing the conduct of arbitration proceedings. Arbitration agreements traditionally specify the rules to govern the proceedings. Such rules are customarily available via a link on the homepage of the institution's web site. Both [KluwerArbitration.com](http://www.kluwerarbitration.com) and Westlaw provide useful compilations of such rules.

- **KluwerArbitration.com** at:
<http://www.kluwerarbitration.com/organizations.aspx?text-type=rules>
KluwerArbitration.com is a subscription-based service that provides an extensive database on materials in the field of international commercial arbitration. The database includes primary and secondary materials. Free links are provided to some external documents and websites.
- Westlaw has two arbitration rules databases of particular note. The ICA-Rules contains the International Commercial Arbitration Rules as presently in effect. The ICAR-HRules is a historical database containing prior versions of rules of International Commercial Arbitration.

Other resources of interest include:

- **International Dispute Resolution Procedures, American Arbitration Association (AAA)** at:
<http://www.adr.org/icdr>
This source provides rules for mediation and arbitration in multiple languages.
- **Commercial Arbitration and Mediation Center for the Americas (CAMCA)** at:
<http://www.adr.org/sp.asp?id=22092>
This source provides rules associated with the dispute resolution processes of the institution.
- **IACAC** at: http://www.sice.oas.org/DISPUTE/comarb/iacac/rop_e.asp
Provides Rules of Procedure of the Inter-American Arbitration Commission, as amended and in effect on 1 July 1988.
- **ICC - International Court of Arbitration** at:
<http://www.iccwbo.org/court/arbitration/id4424/index.html>
The Task Force on the Revision of the ICC Rules of Arbitration was created in October 2008. Information on the task force is available at:
<http://www.iccwbo.org/policy/arbitration/id28796/index.html>
- **ICC - Pre-arbitral referee rules** at: <http://www.iccwbo.org/court/arbitration/id4427/index.html>
The rules established for this procedure allow parties to apply to a "referee" for urgent provisional measures in relation to a dispute.
Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings in force as of 1 January 2004 at:
http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_appointing_english.pdf
- **ICSID Rules** at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>
These rules include: Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Arbitration Proceedings (Arbitration Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules). ICSID Additional Facility Rules authorize the ICSID Secretariat to administer selected types of proceedings between States and foreign nationals that fall outside the scope of the Convention (<http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>).

- New London Court of International Arbitration (**LCIA**) Rules at: <http://www.lcia.org/Default.aspx>
See rules featured under quick links menu or use the search feature to locate specific rules.
- Permanent Court of Arbitration Rules of Procedure (The Hague) at: http://www.pca-cpa.org/showpage.asp?pag_id=1188
This source includes rules of Permanent Court of Arbitration: Optional Rules for Arbitrating Disputes between Two States (1992); Optional Rules for Arbitrating Disputes between Two Parties of which only one is a State (1993); Optional Rules for Arbitration Involving International Organizations and States (1996); Optional Rules for Arbitration between International Organizations and Private Parties (1996); Optional Conciliation Rules (1996); Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment (2001); Optional Rules of Procedure for Fact-finding Commissions of Inquiry (1997); and Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts.
- Tribunal Rules of Procedure (Islamic Republic of Iran-United States Claims Tribunal) at: <http://www.iusct.org/index-english.html>
- **UNCITRAL** Arbitration Rules at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html
UNCITRAL provides a comprehensive set of procedural rules available for *ad hoc* administration of arbitral proceedings. The rules cover all aspects of the proceeding including model arbitration clauses, procedural rules involving appointment of the arbitrator and conduct of the proceedings and the award. Arbitration rules adopted in 2010, as revised in 2010, 1980 UNCITRAL Conciliation Rules and 1976 UNCITRAL Arbitration Rules are available. The Procedures for Cases under the UNCITRAL Arbitration Rules as amended and effective on 15 September 2005 are available at: <http://www.adr.org/sp.asp?id=39169>.

IV. News services, discussion lists, and blogs

News services, websites, blogs, and discussion lists all provide interested parties with current information regarding the dialogue on IIAs and the dispute resolution process.

A. News services

The following are web resources that provide news and matters of current interest:

- Bilaterals.org at: <http://www.bilaterals.org/>
This site is a resource for news and analysis on bilateral trade and investment agreements.
- European Arbitration at: <http://interarb.com/>
This is an electronic newsletter covering current events in the area of arbitration.
- FTA Watch-India at: <http://fta.icrindia.org/>
This is a news source regarding FTA negotiations.

- International Institute for Sustainable Development News – IISD Publications Centre at: <http://www.iisd.org/publications/pub.aspx?id=463>
A quarterly publication designed to provide news, information and stories about the International Institute for Sustainable Development.
- International Litigation & Arbitration Alert (IL&A Alert) at: <http://www.bakermckenzie.com/64/disputeresolution/internationalarbitration/publications/>
A bimonthly newsletter from Baker & McKenzie’s North American Litigation Practice Group summarizing recent developments of interest in international litigation and arbitration.
- Investment Treaty News at: <http://www.investmenttreatynews.org/>
This is a news resource for information, news, analysis, and opinions on international investment law and its implications for sustainable development.
- Mediate.com at: <http://mediate.com>
This site is a news source providing information on all varieties of mediation.
- Mediation Channel at: <http://mediationchannel.com>
This is a source providing news and suggestions about mediation, negotiation, and dispute resolution.
- News from ICSID at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ViewNewsLetters>
This is a newsletter published on a bi-annual basis by ICSID.
- UNCTAD’s IIA Issues Notes (previously IIA Monitors) at: <http://www.unctad.org/templates/Page.asp?intItemID=5519&lang=1>
This is an electronic publication providing new cutting edge policy research and analysis on IIAs and their development dimension.

B. Blogs

A blog is a journal or weblog where individual authors post entries. Blogs are frequently updated and intended for general public consumption. They are useful for following current events and policy discussions in a designated field. Listed below are selected blogs providing commentary, news, information, and discussion in the fields of dispute resolution and international investment.

- ADR Prof Blog at: www.indisputably.org
This blog is devoted to insightful commentary about developments in alternative dispute resolution.
- International Economic Law and Policy Blog at: <http://worldtradelaw.typepad.com/>
This blog is sponsored by WorldTradeLaw.net. The blog provides commentary on current developments and scholarship on trade, economic and policy issues.

- Kluwer Arbitration Blog at: <http://kluwerarbitrationblog.com>
This blog is sponsored by and maintained in connection with Kluwer Law International. It provides news and information and facilitates discussion on international arbitration. The focus is on traditional elements and latest developments including significant awards and upcoming events.
- Mediate.com blog at: <http://mediate.com/blogs/>
This blog provides discussion on a variety of mediation issues sponsored by Lipscomb University Institute for Conflict Management and Mediate.com.
- Mediator Blah. . . Blah . . . at: <http://mediatorblahblah.blogspot.com>
This is an excellent place to receive information on an extensive variety of news associated with mediation.
- The National Arbitration Forum Blog at: <http://www.abajournal.com/blawg/national-arbitration-forum-blog/>
This is a blog for recent events, news and information about alternative dispute resolution.

C. Discussion lists

Electronic mailing lists associated with group discussions and information sharing on selected topics of interest are excellent resources for policy and current awareness discussions. A simple Google or internet search using the topic of interest provides information on web links to discussion lists of interest. An example of such a search looking for discussion lists on international investment using Google might be + discussion list + international + investment.

V. Resources pertaining to treaties, conventions, cases, and awards

A. Conventions and treaties

International treaties and conventions play an increasingly important role in the area of trade, investment, and dispute resolution. Transactions continue to increase in complexity. As the level of complexity increases, treaties enter as a method of management and governance within the global forum. Listed in alphabetical order below are web based resources providing links to the text of treaties, agreements and model conventions as well as databases providing access to multiple treaties:

- 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the “New York” Convention at:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html
- Asian Development Bank/OECD Treaty Database at: http://www.oecd.org/document/53/0,3343,en_34982156_34982441_39354805_1_1_1_1,00.html

- Agreement Relating to Application of the European Convention on International Commercial Arbitration at: <http://conventions.coe.int/Treaty/en/Treaties/Word/042.doc>
- Arab Convention on Commercial Arbitration at: <http://www.jurisint.org/en/ins/155.html>
- Australian Department of Foreign Affairs and Trade, listing of FTAs at: <http://www.dfat.gov.au/fta/index.html>
- Canada's Foreign Investment Promotion and Protection Agreements (FIPAs) at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx>
- Central American FTA or CAFTA at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>
- Energy Charter Treaty at: <http://www.encharter.org>
- Geneva Protocol on Arbitration Clauses at: http://interarb.com/vl/g_pr1923
- ICSID's Database of BITs at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main>
- IISD's Model International Agreement on Investment for Sustainable Development at: <http://www.iisd.org/investment/model/>
- McGill Preferential Trade Agreements Database at: <http://ptas.mcgill.ca/>
- North American FTA (NAFTA) at: <http://www.nafta-sec-alena.org/en/view.aspx?x=343>
- Office of the United States Trade Representative at: <http://www.ustr.gov/trade-agreements/free-trade-agreements>
- Panama Convention or Inter-American Convention on International Commercial Arbitration at: <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>
- UNCTAD IIA Investment Instruments Online at: http://www.unctadxi.org/templates/Startpage____718.aspx
- United States BITs at: <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>
- United States Programme on Trade Agreements at: <http://www.ustr.gov/trade-agreements>
- Washington Convention or Convention on the Settlement of Investment Disputes Between States and Nationals of Other States at: <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/doc.html>

B. Treaty compilations

Westlaw, KluwerArbitration.com and *Juris International*, all previously described, contain access to compilations of treaties in the areas of dispute resolution and international investment. The Transnational Arbitration Institute, described above in section II, also provides reports on status and compliance of treaties.

C. Cases and awards

Arbitration awards are sparsely published in large part due to confidentiality requirements customary to the process. KluwerArbitration.com, Westlaw and Lexis are subscription based sources for locating cases and awards in addition to the sites listed below. Additional online sites containing decisions and award information are included below. Researchers should be aware that identifying features of awards including party identity are often omitted in the published versions of decisions and awards. Some of the entries below require subscription or membership for full access.

- CLOUT at: <http://interarb.com/clout/>
- Cross Reference Islamic Republic of Iran-United States Claims Tribunal Reports Awards and Decisions by Diane Valk-Schwab at: <http://www.iusct.org/iusctr-cross-reference.pdf>
- ICSID at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home
- Investment Claims database at: <http://investmentclaims.com/>
- Investment Treaty Arbitration website at: <http://ita.law.uvic.ca>
- Islamic Republic of Iran-United States Claims Tribunal at: <http://www.iusct.org/lists-eng.html>
- Journal de Droit International at: <http://jurisguide.univ-paris1.fr/RD/index.php?view=SSEARCH&action=SHOWFICHE&fid=FR2051>
- NAFTA Claims at: <http://naftaclaims.com>
- NAFTA Government website, Canada at: <http://dfait-maeci.gc.ca/tna-nac/nafta-en.asp>
- NAFTA Government website, Mexico at: http://www.economia.gob.mx/?P=5200_5205_1
- NAFTA Government website, United States at: <http://www.state.gov/s/l/c3439.htm>
- Recent Islamic Republic of Iran-United States Claims Tribunal Awards and Decisions in Intergovernmental Cases at: <http://www.iusct.org/awards-eng.html>

- Stockholm Chamber of Commerce through the *Stockholm International Arbitration Review* available at: http://www.jurispub.com/cart.php?m=product_detail&p=840
A Google search of “Stockholm International Arbitration Review” locates recent issues in .pdf format at no charge.
- Transnational Dispute Management at: <http://www.transnational-dispute-management.com>

VI. Other web based resources

As stated in Section I.C. above, the web is an excellent source of information. The sources below are selected general web resources of note that provide information in the areas of international law, commercial law, and dispute resolution. Simple Google or other internet searches are sufficient to locate these and other similar sources.

Researchers using web based resources should always take steps to evaluate and authenticate information found on the web. Such steps should at a minimum include consideration of the author’s reputation, currency, accuracy and completeness of the material, and any apparent bias.

A. General

- The EISIL database at: <http://www.eisil.org/>
This database is sponsored by the American Society of International Law and links to primary documents such as treaties and other international instruments and secondary resources such as research guides. Information provided includes print citations and dates of relevance.
- HG.org at: <http://www.hg.org/adr.html>
This site provides descriptions of alternative dispute resolution and resources by geographic area.
- International Mediation Institute (IMI) at: <http://www.IMImediation.org>
The IMI’s mission is to generate confidence and understanding regarding the use of mediation to resolve disputes. The IMI site provides information and resources to foster an understanding of mediation.
- International Trade Administration – United States Department of Commerce at: <http://www.ita.doc.gov/>
This site is a resource for information regarding trade and investment, fair trade, compliance, and policy.
- King and Spalding, LLP at: <http://www.kslaw.com>
King and Spalding is a law firm that provides publications of interest. Select “News & Insights” and publications from the pull down menu and “international arbitration” from the pull down menu under “search criteria” and “practices” to access the desired document.

- Lex Mercatoria at: <http://www.jus.uio.no/lm/>
This site is dedicated to providing information on commercial law. Included on the site are links for alternative dispute resolution, national arbitration laws, arbitration rules, international conventions, and intellectual property disputes.
- LLRX.com at: <http://www.llrx.com>
This is an online legal library providing information and bibliographies on a number of legal topics and issues.
- SICE – Foreign Trade Information System at: <http://www.sice.oas.org/>
This site contains information on trade policy, trade agreements and trade discipline. Of particular interest is the listing of BITs by country, listing of national investment laws and list of international trade agreements including FTAs.
- T.M.C. Asser Institute for Private and Public International Law at: <http://www.asser.nl/>
This site provides links to international commercial arbitration conventions and selected rules.
- WWW Virtual Library – Arbitration Database at: <http://interarb.com/vl/>
As a part of the WWW Virtual Library project, the arbitration database is a resource for information on all facets of arbitration, including institutions, process and people.

B. Ethics

- IBA Guidelines on Conflicts of Interests in International Arbitration at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
This site is a source for information on ethics in the context of dispute resolution.

VII. Specialized journals

Journals and periodicals are excellent sources of information for the researcher. They are a source for policy arguments, interpretations of the existing laws, and useful references to other resources. Articles on international investment and dispute resolution can be located in any number of law reviews and journals. See section I.B. above for general information in locating journal articles and titles. Below is a selection of journals that focus on issues of dispute resolution and international investment. Many are available only through subscription databases such as Westlaw, Lexis or Kluwer Law International (at: <http://www.Kluwerlawonline.com>).

- American Review of International Arbitration at: http://www.law.columbia.edu/student-journals/int_arbitration
- Arbitration International at: <http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=4&values=Journals~~Arbitration+International>
- ASA Bulletin at: <http://www.kluwerlawonline.com/toc.php?pubcode=ASAB>

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- Asian International Arbitration Journal at:
<http://www.kluwerlawonline.com/toc.php?pubcode=AIAJ>
 - Dispute Resolution Law Journal at: <http://law.pepperdine.edu/dispute-resolution-law-journal/>
 - ICSID Review: Foreign Investment Law Journal at:
http://www.press.jhu.edu/journals/icsid_review/rate_card.html
 - International Arbitration Law Review available on Westlaw
 - Journal of International Arbitration at:
<http://www.kluwerlawonline.com/toc.php?pubcode=JOIA>
 - The Journal of Dispute Resolution at: <http://www.law.missouri.edu/csdr/journal/>
 - Journal of International Arbitration available through Kluwer Law International
 - Journal of International Dispute Settlement available as of October, 2009 from Oxford Journals, Oxford University Press at: <http://jids.oxfordjournals.org/archive>
 - Journal of World Investment and Trade at: http://www.wernerpubl.com/frame_inves.htm
 - Negotiation Journal at: <http://www.pon.harvard.edu/publications/>
 - Ohio State Journal on Dispute Resolution at: <http://moritzlaw.osu.edu/jdr/>
 - Stockholm International Arbitration Review at:
http://www.jurispub.com/cart.php?m=product_detail&p=840
 - Transnational Corporations Journal at:
<http://www.unctad.org/Templates/Page.asp?intItemID=2926&lang=1>
 - The Vindobona Journal of International Commercial Law and Arbitration at:
<http://vindobonajournal.com>
 - Willamette Journal of International Law and Dispute Resolution available on Westlaw
 - World Arbitration and Mediation Report available with subscription on Arbitration Law Online
 - World Trade and Arbitration Materials at:
<http://www.kluwerlawonline.com/toc.php?pubcode=WTAM>
 - Yearbook of Commercial Arbitration at: <http://www.arbitration-icca.org/publications.html>

VIII. Research guides, pathfinders and annotated bibliographies

Research on dispute resolution and international investment is often challenging. There are a number of publications, guides and annotated bibliographies available to assist a researcher. A selection of such documents follows. In addition to those listed here, others can be found through simple web searches or as included in either the EISIL or LLRX databases.

- ADR & Mediation Research Guide at:
http://www.ll.georgetown.edu/guides/adr_mediation.cfm#
- BITs: Bibliography, ICSID, World Bank Group at:
<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main>
- Consolidated Bibliography of Recent Writings Related to the Work of UNCITRAL at:
http://www.uncitral.org/uncitral/en/publications/bibliography_yearly.html
- Directory of arbitration websites and information on arbitration at: <http://www.arbitration-icca.org/related-links.html>
- Foreign Investment Research Tips at:
http://library.law.columbia.edu/guides/Foreign_Investment_Research_Tips
- Georgetown Law Library's International Investment Law Research Guide at:
<http://www.ll.georgetown.edu/guides/InternationalInvestmentLaw.cfm>
- Gloria Miccioli, A Selective Guide to Online International Arbitration Resources (21 June 2004) at: <http://www.llrx.com/node/479/print>
- ICSID bibliography at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDBibliographyRH&actionVal=ViewArticleAndBooks>
- International Investment Law Guide at: <http://law.wustl.edu/library/index.asp?id=1373>
- Jean M. Wenger, Update to International Commercial Arbitration: Locating the Resources (24 May 2004) at: <http://www.llrx.com/node/1331/print>
- KluwerArbitration.com at: <http://www.kluwarbitration.com/>
- New Aspects of International Investment Law hosted by the Peace Palace Library at:
http://www.ppl.nl/index.php?option=com_wrapper&view=wrapper&Itemid=84
- Research Guide for International Commercial and Investment Arbitration at:
<http://www.ili.org/centers-of-expertise/alternative-dispute-resolution/205-research-guide-for-international-commercial-and-investment-arbitration.html>

- Researching the World Bank at:
http://www.lib.berkeley.edu/doemoff/govinfo/intl/gov_ibrd.html
- Zimmerman's Research Guide on arbitration, mediation, and alternative dispute resolution at:
http://www.lexisnexis.com/infopro/zimmerman/disp.aspx?Z_lisoo

IX. United Nations Conference on Trade and Development

UNCTAD was established to promote the development-friendly integration of developing countries into the world economy. It participates in policy discussion on development with a focus on mutually supporting domestic and international policies for sustainable development. The organization functions as a forum for intergovernmental deliberations, undertakes research, data collection and policy analysis and provides technical assistance to developing countries.

Information about UNCTAD is located at: www.unctad.org

Information on their publications is available at:
<http://www.unctad.org/Templates/Page.asp?intItemID=1932&lang=1>

The website of the work programme on IIAs is located at: www.unctad.org/iia
This website includes information, publications, data and statistics on IIAs and ISDS.

UNCTAD also offers a course on dispute settlement. The course is free of charge and consists of modules available at: <http://www.unctad.org/Templates/Page.asp?intItemID=2102&lang=1>

Other links of interest are:

- UNCTAD's Papers and Presentations at:
<http://www.unctad.org/Templates/Page.asp?intItemID=4744&lang=1>
- UNCTAD's Database of IIAs at: http://www.unctadxi.org/templates/Startpage____718.aspx
- UNCTAD Database of ISDS Cases at: <http://www.unctad.org/iia-dbcases/>

Notes

* Director of the Law Library and Professor of Legal Research, Washington and Lee University School of Law. Many thanks are extended to Gene Hamilton for his diligence and research assistance on the drafting of this paper. Correspondence related to this document should be directed to Caroline Osborne at Osbornecl@wlu.edu. The views expressed are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

¹ All Westlaw features included in this paper refer to Westlaw.com, otherwise known as Westlaw Classic and not WestlawNext.

ANNEX 2

Blog Digests

The Joint Symposium's pre-conference expert collaboration blog generated thought-provoking discussion amongst 88 registered participants. About 40 active bloggers contributed 70 posts, 38 video blogs, 18 video podcasts, and 82 comments. The blog participants included attorneys with experience advising and representing investors and States, investment law scholars, experienced arbitrators, investors, and government representatives. These participants provided perspectives on investment law and policy affecting Africa, Asia, Australia, Europe, the Middle East, North America and South America.

In the password-protected, cyber environment, this diverse group of stakeholders and international investment experts was able to dialogue openly as well as to identify critical issues that arise during dispute prevention, conflict management and ultimate dispute settlement. The discussions fell primarily into various categories of issues including: (1) ADR: definitions, types and feasibility, (2) perspectives of stakeholders, (3) assessing the current system: systemic issues, and (4) the way forward. The objective of this discussion related to ISDS was to explore the implications of IIAs to explore how to maximize the benefits of IIAs to support development objectives. Although the majority of the discussion of this topic was already synthesized in the pre-conference rapporteur reports (*see above*), Annex 2 offers the "blog digests" that reflected the underlying primary materials upon which the rapporteur reports were based. The digests reflect both the primary topics of conversations as well as a variety of comments that involved a dynamic exchange of ideas.

Weekly Digest No. 1 (26 January 2010)

As more articles and podcasts are posted to the International Investment and ADR Conference blog, we would like to highlight notable posts and comments, and invite our participants to join in on the lively dialogue taking place on the website. Thus far, we have had 24 bloggers and contributors introduce themselves, 14 substantive posts, and 18 comments to the posts.

January 25, 2010 – Paper for Comment: Negotiated Settlements of Public Infrastructure Disputes. “The paper considers settlement of disputes relating to public international infrastructure projects, employing the Indonesian experience with private power projects and the Asian financial crisis for an illustration ... [and] cautions that some differences may be too large to bridge by settlement, emphasizes that time, accounting rules and personnel changes affect the prospects for settlement, and offers a number of other practical comments”.

January 25, 2010 – One Institution's Perspective: How to use ADR to Facilitate Development. A blogger shares the perspective of one institution, and that institution's successful resolution, through mediation, of a number of investment disputes.

January 20, 2010 – Matching Cases With Appropriate ADR Methods. One blogger discusses how particular elements of cases such as existing treaty frameworks and the meritorious or unmeritorious nature of claims affect choice of ADR methods, including timing of third party intervention or other third party efforts.

- Multiple comments between the blogger and an academic provide further analysis and highlight key issues related to the merits of claims and issues of capacity.

January 20, 2010 – One Middle Eastern State's Perspective on Alternatives to Arbitration in the International Investment Framework. An informative post details a draft text from a stakeholder in the Middle East discussing its stance on alternative solutions to international arbitration, including common wording found in its bilateral agreements as well as provisions in other agreements that deviate from the common wording.

- Blog comments raise issues related to investor-State and State-State opportunities related to amicable settlement.

January 20, 2010 – Notes on the UNCTAD White Paper, Alternatives to Investment Treaty Arbitration. Check this post out for a summary of notable details and possible points of concern in the UNCTAD white paper on alternatives to investment treaty arbitration, “an extraordinarily comprehensive and potentially game changing document”.

- The post is followed by interesting commentary by a fellow blogger, including criticism of the paper and application of some current examples as they pertain to arguments presented in the paper.

January 20, 2010 – Involving States Earlier in Investment Disputes. From the perspective of an Asian stakeholder, a blogger provides commentary on the role of States in

investment disputes, and what the effect is of States becoming involved earlier in the process, especially as interveners prior to a decision. Also, the post discusses how States should collaborate in providing a forum for dispute resolution for its constituent corporations and investors.

January 14, 2010 – Rule-oriented International Investment System—the Perspective of one Latin American Stakeholder. This post discusses one country's interests in “rule-based” dispute resolution as investment into the country increases. Specific concerns include the role that small and medium-sized enterprises play in the disputes, and the impact of developing rules that govern disputes on such entities.

January 6, 2010 – Investment Treaties: A Global Regime. This post gives a brief but detailed background on the history of investment treaties and the investment regime, and what the current system looks like. A broad question is presented: do investment treaties constitute customary international law, a network of treaties, or a regime? The blogger posits that one can examine investment treaties as a global epistemic regime, and examines how the regime affects the decision making of State actors and rulemaking, given the nature and norms of the investment treaty regime.

January 6, 2010 – Critical Components of Conflict Management Systems Design. This post explores basic principles of dispute systems design and invites participants to consider how these issues apply in the context of international investment disputes. This “nuts and bolts” video is a “must see” which international investment aficionados may find of great interest.

Please look to the comments section of the post for a discussion of the differences between “conflicts” and “disputes” and the implications for inviting different “stakeholders” to the systems design dialogue.

January 4, 2010 – The Limitations of Possible Settlement. A blogger considers the factors affecting settlement and considers the implications for: (1) the liability of government officials, and (2) the creation of baselines for understanding the value of negotiated settlement.

- Commentators explore other factors that complicate the settlement process and consider the best way to move forward in light of those concerns.

December 29, 2009 – Paper for Comment: Exploring Alternatives to Investment Treaty Arbitration. A draft UNCTAD paper “discusses alternatives to arbitration for resolving existing disputes between investors and States, but also introduces good practice approaches and policies used to prevent disputes between investors and States from emerging and escalating”.

- Two comments to the paper provide very detailed analysis and commentary to the paper that is worth a close examination. Please also see the January 20 post Notes on the UNCTAD White Paper.

November 9, 2009 – Dispute Resolution Theory. A blogger discusses how dispute resolution theory can affect how dispute resolution entities develop in the future, and how the dispute resolution system can change so that it makes more sense. The author suggests that since

there is a system for investment dispute resolution where the legal rights are clear, perhaps a mediation framework can emerge.

October 23, 2009 – Barriers to Amicable Settlements. The author of the post presents an overview of the barriers to amicable settlements in investment treaty disputes, and provides an in-depth discussion about divergence in arbitral decisions regarding definitions and application of procedure, jurisdiction, and standards of responsibility and liabilities in treaties.

- The comments to this post raise intriguing questions regarding issues of ambiguity in investment treaties, as well as the impact of arbitral awards as precedential in common law versus civil law jurisdictions.

October 12, 2009 – Evaluating the IIA Dispute Resolution Process. The author presents empirical data that examines the fairness of the investment treaty arbitration system. In particular, variables related to development do not appear related to the fairness and outcome of investment arbitration decisions. However, small sets of cases may be sources of concern, as well as provide lessons for future development of dispute resolution mechanisms.

Weekly Digest No. 2 (3 February 2010)

A total of 69 participants have registered to read, blog and comment on the website. This past week saw four new posts and nine substantive new comments:

February 1, 2010 – Stakeholder Perspectives: Comments from a European Government Official. At a recent dialogue, one academic had a chance to discuss the role of an investor's home State, and how that State might contribute to conflict avoidance and facilitate settlements. The concern is raised, however, that ADR-related assistance on the part of a home State could lead to a re-politicization of dispute resolution.

January 27, 2010 – The Role of Transparency in Investment Arbitration and Mediation. An academic asks the question “to what extent can we tolerate a relative lack of transparency as might be necessary to make the system work?” Since candour and confidentiality are so important to mediation, the blogger wonders whether there should be access during the process, and what safeguards might be necessary. Please check out the thoughtful post for a suggestion about the role and access of non-parties or amicus participants.

January 27, 2010 – One African State's Perspectives on Investment Dispute Resolution. A commentator reflects on one African State's circumstances pertaining to investment dispute resolution, including unique legal frameworks, policy issues that may conflict with standard norms in investment treaties, and the State's most recent investment treaty.

- A comment from a North American stakeholder highlights the importance of domestic political sensitivities to a country's investment policy.

January 27, 2010 – Discussing an Implementation Clause in IIAs. One blogger discusses implementation clauses in international investment agreements, citing in detail an implementation clause in an FTA between two States. In particular, the clause emphasizes capacity building in legal expertise on investor-State dispute settlements and investment negotiations. The blogger uses this to make some general observations about the role implementation clauses might have.

Comments to highlight

January 31, 2010 – In a response to a post discussing an implementation clause in IIAs, a commenter wonders whether investors and States could employ IIA implementation clauses whereby they would provide for both binding options and cooperation options.

January 31, 2010 – A commenter reflects on how the mediation procedures employed by an independent agency of a State might be instructive in examining mediation and existing alternatives in investor-State disputes. The commenter also expresses interest in parallels that the author of the original post might draw between investor-State disputes and public policy dispute resolution.

January 30, 2010 – A Blogger's view on Dispute Resolution Theory. A comment poses some further thoughts on the future role of facilitative processes and cultural differences.

January 29, 2010 and January 26, 2010 – Two commentators posted detailed comments to the post Paper for Comment: Exploring Alternatives to Investment Treaty Arbitration, including thoughts on ADR techniques and the role of domestic law in international arbitration procedures.

January 26, 2010 – The author of a post on Critical Components of Conflict Management Systems Design and an academic engage in conversation about the role of stakeholders in the design of conflict management systems.

January 26, 2010 – In the comments to the post entitled The Limitations and Possibilities of Settlement, an academic points out some human elements that may affect how parties to dispute resolution act, based on available information.

Weekly Digest No. 3 (9 February 2010)

This past week saw five new posts and fourteen substantive new comments:

February 5, 2010 – Stakeholder Perspectives: Observations from Latin America. An academic posts a recent article that considers the role of investor-State dispute resolution given the Multilateral Investment Guarantee Agency's twentieth anniversary. The academic posits, “What does this paper add to our understanding of the backdrop of dispute settlement more generally and specific lessons we could learn in the context of ADR?”

February 4, 2010 – A Perspective from the Republic of Korea. An academic reflects on the changing landscape of foreign investment in the Republic of Korea as that country evolved from one of the poorest countries in the world to a major trading country. The blogger discusses the country's changing policy regarding BITs and FTAs, and its recent establishment of an ombudsman for foreign investors to address their complaints and grievances.

February 3, 2010 – The Way Forward: Exploring Practical Applications of Conflict Management System Design. An academic focuses on the practical application of principles of effective conflict management design. The blogger proposes that the multi-door courthouse (as an effective architectural design) together with consensus building (as a participatory procedural design) can maximize the value creation process for all, if they take place in a framework of learning.

February 3, 2010 – A Mediation and a Mediator's Perspective on ADR in Investment Disputes. A blogger brings 20 years of rich experience with mediation to address its appropriateness as a potential dispute resolution system in host country/foreign investor conflicts. The blogger identifies categories of relevant factors: those relating to matters of principle or fundamental value; those relating to resources; and pragmatic and miscellaneous factors. The blogger stresses that the complexity and particularity of investment disputes constrains stakeholders' ability to escape a case-by-case inquiry into the most suitable DR system for a given dispute. Moreover, transnational obligations detract from States' capacity to effectuate the full potential of mediation.

February 3, 2010 – The Hidden Lessons in Latin America: Discovering the Root Causes of BIT Violations. An academic reflects on BIT violations in Latin America, where arbitration remains the prevailing mode of dispute resolution. The blogger avers that the confounding issue is why countries violate investment treaties when they desperately need foreign investment. The blogger concludes that arbitration is not in the best interest of the regional nations and their foreign investors because a compensatory model fails to address the root causes of disputes. The blogger proposes a system that allows parties to manage conflict *ex ante* rather than one focused on adjudication of crystallized disputes.

Comments to highlight

February 5, 2010 – In response to the post A Perspective from the Republic of Korea, a commentator inquires into the ombudsman for foreign investors and into efforts to enhance awareness of investor-State arbitration mechanism among local government officials.

February 4, 2010 to February 5, 2010 – The author of the post on Critical Components of Conflict Management Systems Design and an academic engage in conversation about the method of selecting stakeholders to collaborate in the design of conflict management systems.

February 3, 2010 – An academic addresses a comment to the post Discussing an Implementation Clause in IIAs, and poses questions regarding the feasibility of such clauses in light of their infrastructural requirements.

February 3, 2010 – In response to a fellow commentator on the post Paper for Comment: Exploring Alternatives to Investment Treaty Arbitration, an academic addresses why ADR is rarely used in investment cases if those who represent parties are familiar with ADR methods.

February 2, 2010 to February 6, 2010 – Five commentators posted detailed comments to the post The Role of Transparency in Investment Arbitration and Mediation, in which an academic wonders whether there should be access during mediation, and what safeguards might be necessary. Among other points, the commentators engaged in conversation regarding the demands for transparency and what might be done to address concerns on the part of State officials that settlement of investment disputes will bring unwelcome scrutiny. As to the former, they discuss the curious situation that transparency expectations are seemingly higher for investor-State dispute settlement than for domestic disputes involving the government and private individuals. As to the latter, they discuss the possibility of introducing ADR into arbitration proceedings in order to focus the dispute and embody agreements in formal awards.

Weekly Digest No. 4 (16 February 2010)

This past week saw four new posts and seven substantive new comments:

February 12, 2010 – Examining the New ICSID Statistics. One academic analyzes the value of the new ICSID statistics, highlighting certain data, particularly as they address issues related to settlement and resolution of claims by means other than final arbitral awards. The post also considers what the statistics do not cover, such as fact-finding proceedings and the limited nature of the data on ICSID conciliation.

Two comments to the post discuss particular statistics that are surprising and talk about potentially interesting areas of analysis regarding statistics concerning case resolution and awards rendered. The ICSID statistics are examined in the context of IIAs, with commentary about the nature of ICSID's caseload, which arise from contracts and national law as well as IIAs and international law.

February 11, 2010 – Stakeholder Perspectives: Observations from a European Stakeholder. Comments are invited in response to an anonymous stakeholder's perspectives on cooling off periods in IIAs and challenges to the negotiations process that can arise between a stakeholder and a private entity. In particular, the stakeholder poses questions regarding possible State perceptions regarding information disclosure at the outset of a claim, and other perceptions, both legally and, factually, that can make negotiations difficult.

February 10, 2010 – One Asian Stakeholder's Perspectives on International Investment Treaty Regimes. An Asian stakeholder shares some detailed thoughts on international investment treaty regimes, through a thoughtfully produced podcast. The stakeholder gives a historical context, and draws conclusions about current trends in the stakeholder's international investment treaties. The stakeholder discusses recent increases in international investment treaty activity. Finally, the stakeholder highlights the development of a model international investment treaty in his country, as well as novel local developments in inter-ministerial cooperation dealing with investment disputes, conferences, and similar educational programs targeting local officials.

A commenter with experience in lead government agency work in investment disputes offers some supportive thoughts and raises some follow-up questions regarding how a State can guide its government officials with regard to education about investment treaty matters and disputes.

February 10, 2010 – Examining Bilateral Investment Treaties. An academic discusses the current empirical data surrounding BITs, and whether they actually work in promoting foreign investment, with a focus on econometric studies. The academic examines the broad question "do BITs work" to promote foreign investment, and the more difficult question of how to statistically address the question, and how the answer might change depending on local or context-specific conditions. Different studies are highlighted, with potentially contradictory conclusions. The podcast raises fascinating questions regarding statistical methodologies and how large sets of information can or should be analysed to draw conclusions about the state of BITs and foreign investment.

Other comments to highlight

February 12, 2010 – A new comment in Notes on the UNCTAD White Paper, Alternatives to Investment Treaty Arbitration muses about mediation and its growth in various systems. In particular, the commenter points out the possible clash between the growth of ADR schemes and the efficiency of existing local processes.

February 10-12, 2010 – Several new discussions regarding best practices and the complicated issues of scale that confront States were posted to One commentator's thoughts on Critical Components of Conflict Management Systems Design. The discussions raise issues ranging from the government's role in coordinating within its own agency, to educating its local officials, to the role of extra-contractual stakeholders.

February 5-6, 2010 – We would like to draw your attention to several comments in The Role of Transparency in Investment Arbitration and Mediation. The commentators draw attention to the basic questions at the core of transparency: who are the public, who represents the public, and should there be different levels of transparency in different contexts? In particular, two comments from February 6, 2010 use detailed stakeholder examples and hypotheticals to address the questions. The first comment from February 6 examines how a particular State entity with a defined public interest goal might be obliged to intervene in mediations for the sake of transparency. The second comment from February 6 poses two detailed hypothetical scenarios to examine how a different measurement of the need of transparency might be located in measuring the interests of third parties in the outcome of the dispute.

Weekly Digest No. 5 (24 February 2010)

Commenting is on the rise, with over 50 made since the blog began, including some significant ongoing conversation in older posts. This past week saw four new posts and seven substantive new comments:

February 23, 2010 – Global Administrative Law? Are there Untapped Opportunities for Rule-making Functions to Minimize the Scope of Disputes and Present Opportunities to Clarify the Extent of State Obligations? An academic examines the scope and definition of “investors” and “investments” in the context of IIAs, and wonders how a global administrative law regime might be applied to international treaty conflicts in a way that would clarify at the outset what stakeholders expect out of IIAs. A couple of ways are proposed to provide interpretive guidance at the front end that go beyond the current practice of delegation of interpretive powers to adjudicative bodies. One proposal is to find value in interpretive notes disseminated by widely respected bodies. Another possible avenue is through an administrative law approach, such as the establishment of an administrative entity dedicated to interpret investment treaties and act as gatekeepers. Please express your thoughts on a topic with broad implications on pre-dispute resolution practices and international investment treaty conflicts.

February 22, 2010 – Investor Misconduct and Access to ADR. In a new post, a blogger starts a “brainstorm session” on allegations of investor corruption or misrepresentation, and the accessibility of ADR to those subject to such allegations. Through the use of a specific example of a particular investor-State dispute that was plagued by allegations of corruption, the blogger wonders how mediation should operate in such a context, if the allegations should have an impact on access to ADR mechanisms, and the proper role of third parties and mediators or arbitrators when allegations or revelations arise regarding corruption or misconduct. We invite you to join in on the brainstorming exercise and look forward to your comments.

February 19, 2010 – Mediation Skills v. Arbitration Skills. A new blogger looks at the differences between arbitration skills and specialised mediation skills that are acquired through training and mediation experience. He encourages examination of a potential mediator’s prior experience and users’ feedback from prior mediations. He also suggests that it would be beneficial in an investment dispute case to be able to search and look for mediators with specialised experience in that particular practice area. The upcoming conference might be a good way to begin compiling a list of such qualified individuals.

A comment from an academic asks how awareness of certain issues might help in building the infrastructure necessary for a robust system of readily available mediators with the skills and experiences necessary to mediate investor-State investment disputes, and additionally, how to make such a system attractive to clients and stakeholders.

The author of the post responds to discuss the issues surrounding a systemic change, and suggests that one possible way to get parties into mediation would be to require it as a precondition to arbitration. The requisite changes to government structures could be beneficial, but there are also costs and potential downsides that would also need to be considered. He also suggests that there is already a body of mediators with the proper training to mediate investment disputes.

February 17, 2010 – Conflict Resolution in Times of Economic Crisis. A blogger poses several questions to the group: how should arbitration-comfortable clients be presented with mediation as an option, especially in cases where mediation may be a more desirable dispute resolution process? Is there a difference between mediation in international commercial disputes versus international investment disputes? And finally, are entities more willing to try new processes in difficult economic times? We look forward to your contributions to the discussion surrounding these questions.

The post's first commenter shares her observations on ADR in difficult economic times, and proposes several approaches to how clients or entities might be encouraged to use ADR in such times. Attractive aspects of ADR in downtimes, when legally available, include elements of increased control compared to arbitration, less third-party involvement in business results, lower costs, and more flexibility. Please join in and share your thoughts on how ADR should be marketed to clients and stakeholders in a tough economic climate.

Other comments to highlight

February 16-22, 2010 – Three bloggers have posted five new comments in Stakeholder Perspectives: Observations from a European Stakeholder. In the original post, a stakeholder posed questions about perceptions that a State might have that could make negotiations difficult.

The first comment addresses several of these possible perceptions, first by using the example of MIGA (Multilateral Investment Guarantee Agency) as an example of how amicable resolutions can be the norm, rather than the exception, and then looking at the worry about frivolous or vexatious claims, and what might really be the underlying causes of such concerns. The response examines whether some issues of concern regarding private sector motivations in bringing investment disputes are actually practiced by private sector actors, and whether they are even a financial incentive to such actors. A third comment looks at one particular scenario, when the investor has decided to exit the host State, and a specific example that arose from the Asian financial crisis, to draw conclusions regarding ongoing investor-State relationships, incentives to remain in good relations, and the existence of "assets at risk" in a jurisdiction.

Next, an academic asks how specific examples can actually be used to make broader generalizations, while still taking into account distinguishing elements of the particular examples, and asks an intriguing question about the psychology of lawyers and clients and how our approach to problem solving can often shape the form that crystallizing problems take and the ultimate resolution of the issues. Finally, the author of the first comment responds with several possible ways to adjust standards in an effort to encourage pre-dispute resolution. These methods include setting out more specific and detailed investment disciplines in BITs, the creation of a Restatement of International Investment Law, and using existing broadly accepted standards to set appropriate benchmarks for individual States.

Weekly Digest No. 6 (2 March 2010)

This past week saw two new posts and twelve new substantive comments:

March 2, 2010 – A new blogger has added a piece on One South American State’s Contemporary Perspectives on Investment Agreements and Investor-State Arbitration. The South American State has a long-standing aversion to investment agreements, based on the internal sentiment that investment agreements do not help attract FDI. There are several aspects of the State’s growing economy and population that have promoted robust FDI, but experts disagree on whether the State’s aversion to investment agreements hurts the amount of FDI. The blog author posits that while there might not be a negative effect, the growing number of domestic corporations that have international investments will result in increased calling for the State to ratify various international agreements in order to protect outbound investment.

An academic inquires about the aspects of the South American State that make it an attractive and expanding market. She wonders whether there are local legal recourses that foreign direct investors can turn to in order to manage their commercial risk, and what lessons can be learned regarding the availability of dispute resolution mechanisms.

February 25, 2010 – Who Should Be the Mediators? If the demand arises for mediators in investor-State disputes, who should be the mediators? This post addresses the question of what skills mediators should have, including whether they should have substantive investment law experience. The author suggests that the answer to whether mediators should have substantive experience is “yes.” Without a deeper substantive knowledge, the mediator might be less able to give evaluative input on the disputes. Additionally, the mediator’s reputation might be a related issue—a mediator with deep experience might be presented by a stakeholder as a reason to settle—the fact that the mediator presents terms of settlement, given the mediator’s experience and reputation, might present the parties with a cover to take settlement.

In the first comment to this thought-provoking post, a commenter looks at the issues of how the experiences of the mediators should be valued, and how much substantive experience would allow the mediator to delve into the issues. Additionally, the commenter examines the idea that mediators can provide contentious parties with “cover” or a reason to settle. Finally, the commenter wonders about hybrid arbitration and mediation concepts, ones that are appearing in family law or labour law, and how they might be extended to investment disputes.

Other comments to highlight

March 1, 2010 – One blogger has added two comments continuing discussion going on in older posts, one on The Limitations and Possibilities of Settlement, and another in Critical Components of Management Systems Design. In the first comment, the contributor weighs the merits of comparative thinking in dispute resolution cases and the need to keep in mind that each case has a unique set of facts and parties that deserve special consideration. In her second comment, she asks a fundamental question with deep implications: how do we define “stakeholder”? Does a broad definition of “stakeholder” and concern for anyone with an interest in the outcome of the dispute risk the marginalization of the initial parties to the dispute? We would like to invite you to respond to her questions.

February 24-28, 2010 – Four bloggers weighed in on the issue of Investor Misconduct and Access to ADR.

The first commenter suggests that in any given case, serious allegations of corruption may make mediation an unrealistic option, but adds the suggestion that on a systemic level, a blanket prohibition of mediation might have undesirable consequences.

An academic then makes a comparison to good-faith requirements in mediation, and how concerns about the opposing party's scrupulous conduct will affect a party's approach to dispute resolution. She posts two links to scholarly work that addresses good faith and illegality issues, and wonders whether the capacity to mediate in an investment treaty might not be fundamental issue for States as they contemplate signing investment agreements.

Another commenter makes a comparison to family law mediations. In that context, there are circumstances that can lead to waiver of obligation to mediate, but with an opt-in choice, having specially trained mediators, and in one circumstance, waving mediator privilege. These are given as examples of how in other contexts, mediators have successfully mixed and matched components.

Finally, a commenter raises the question of how a party raises the issue of misconduct, and what burden of proof a party needs to establish misconduct.

February 24-28, 2010 – In the post Global Administrative Law?... a commenter discusses provisions in a BIT between two South American States, that creates a committee to interpret the treaty. The committee was composed of representatives from both States who would oversee application of the agreements, adopt a code of conduct for arbitrators, and consider other issues that could affect the application of the agreement. She also discusses novel procedures in the BIT that imply the active role of States and the committee to interpret the treaty and involve the committee in possible disputes.

A second commenter points out the overlaps of administrative and adjudicative systems that are present in strong governance systems, due to the need to have an impartial and independent body determine the scope of proper rulemaking and enforcement. Recent international treaties and FTAs have similar protections.

February 27, 2010 – A new comment was posted to a contribution entitled Conflict Resolution in Times of Economic Crisis that wonders about the effects of the identity of mediators, including how mediator identity and character can factor into the decision of an entity to seek mediation.

February 25, 2010 – In response to a post from February, a European official considered how the concerns of a capital exporting State might factor into decisions made in the dispute resolution process. A commenter asks a question about the possible tensions between the goal of an investor-State case to depoliticise disputes, and a company's desire to avoid disputes entirely.

Weekly Digest No. 7 (9 March 2010)

This past week saw three new posts and five substantive new comments:

March 5, 2010 – Additional Factors to be Considered in the Use of ADR in the Context of Investment Arbitration. A blogger poses some issues of concern in the use of ADR in investment treaty disputes. These include the preference in some cultures to pursue mediation and to attach a stigma to litigation, the related issue of “saving face”, the role these issues have when they are faced by a bureaucrat, and the interplay of ADR and public policy-sensitive subject matters.

March 3, 2010 – A Perspective on Africa. A new blogger shares some developments in Africa with regard to IIAs. Among the developments of note, he references an earlier post discussing an African State’s attempts to shield black economic empowerment (BEE) policies from IIAs. But of particular interest to the author is a BIT that two African countries recently started negotiating. He goes on to discuss the economic and social motivations of the States, the possible effects of ratification of a BIT on the States, and the political risks involved in negotiating this particular BIT.

March 3, 2010 – The Role of a Good Investment Policy Framework in Preventing Conflicts Between Foreign Investors and Host Countries. A contributor discusses the debate that arises when people consider how to “protect” host countries from investors, and what might be missed when that consideration is the centre of the debate. Namely, such a mindset could miss how private investment plays an important role in sustainable economic development, a crucial element of economic growth. The author of the post suggests that we should keep in mind the important role that FDI can play in a developing country, but we should not forget that domestic investment is the key to sustainable economic growth. In certain situations, some developing countries may try to attract FDI, but do not create a conducive environment for domestic investors. This has potentially negative ramifications on the operating environment and remedies. The author concludes that the best way to avoid such a situation is to place domestic and foreign investors on equal footing, and also to involve relevant members of the international development community.

Other comments to highlight

March 2-7, 2010 – Three comments, one by the original author, have followed up on an academic’s questions regarding the topic of One Latin American State – Contemporary Perspectives on Investment Agreements and Investor-State Arbitration.

The original author addresses the previous comment, which asked about what makes the Latin American State an attractive market. He first discusses the history of foreign investment and the liberalization of trade in the past two decades. Next, the author talks about how the judicial system has addressed investment-related disputes, and what are seen as areas that require improvement (deficient tax legislation, high interest rates, high levels of violence, lack of infrastructure, corruption, and inefficiency).

A commenter then asks how the Latin American State has used other BITs, and posts a link to an article on point.

Finally, another commenter noted a very recent article about possible changes in the Latin American State's attitudes towards investment treaties. In the article, the author notes a recent shift in that country's attitude towards investment treaties, including negotiations with another Latin American country to protect and promote mutual investments.

March 3, 2010 – One contributor posted two comments, one to the post on Mediation Skills v. Arbitration Skills, and another to the post Who Should be the Mediators?

In his first comment, he suggests that “[t]he greatest obstacle to the use of ADR in sophisticated, high-dollar disputes is not the difficulty in identifying qualified mediators, but the dispute managers’ ignorance of the mediation process and the commercial value to be gained by its use”. We should use ADR as a managerial tool, and figure out what users need and tailoring the service and process to answer that need will make it naturally more attractive to the end-users.

In his second comment, the contributor examines the political sophistication of the mediators, and suggests that the mediator should be a person whose credentials give weight and credibility to both the process and its outcomes.

Weekly Digest No. 8 (25 March 2010)

The International Investment and ADR blog generated 67 posts and 81 comments from 40 bloggers. The past two weeks saw two new posts and six substantive new comments:

March 25, 2010 – An African Stakeholder’s Experience in Investment Dispute Settlement. This detailed and insightful post discusses the African country’s institutions for encouraging FDI, including a ministerial committee for settlement of investment disputes, the establishment of an investment dispute settlement centre within the ministry of the investment, a new model BIT, and an efficient mechanism for aftercare and complaint resolution.

The blogger describes each institution individually. The blogger describes the multi tiered ministerial committee and its successful establishment of a parallel mechanism for dispute settlement in the country, as well as the newly created centre for investment dispute settlement within the ministry of investment. Additionally, she notes the tools that are available within the model BIT for the settlement of investment disputes in a variety of settings, including arbitral tribunals established under ICSID, *ad hoc* tribunals in accordance with UNCITRAL procedures, and regional or international bodies of arbitration. Finally, the blogger discusses the country’s investor complaint response institution, noting its importance in the process of resolving investment disputes.

March 23, 2010 – Concluding Thoughts. After thanking fellow bloggers for their contributions, the commentator asks that they provide input at the Lexington conference in various contexts. In particular, the conference should seek to develop ideas about how to make IIAs more conducive to ADR procedures or how to encourage alternatives. Other areas for exploration include the implementation of IIA commitments, the creation of early warning systems, and related efforts designed to facilitate dispute prevention and consultation. Conference discussions might also explore how existing institutions can provide or support arbitration services and what types of alternative forums might be strengthened or created.

March 14, 2010 – A new blogger discusses his extensive experience in trade law and investment law, and he asks how the two areas of law inform each other. He wonders how State-to-State trade dispute settlements can be adapted to the investor-State context, and how such an adaptation might be employed. In particular, he examines features of WTO dispute settlement regulations requiring consultations, as well as the prospective remedies and settlements.

Commentators offered a variety of perspectives on this pot. One considered the limits of investor-State arbitration and highlighted the attractive parts of mediation. A second focused on differences in consultation requirements, and how consultation might be encouraged or written into treaties. A third commentator suggested that, where required as a pre-condition, consultations could be expensive and time-consuming. The observation was made that consultation periods might best be thought of as a simultaneous process that can sometimes catalyse settlements.

Other comments to highlight

March 23, 2010 – Investor Misconduct and Access to ADR. The author of the original post considers the effects of party misconduct. One of the difficult questions related to factual bases to allegations of misconduct and how to establish such facts in mediation. How do fact-finding procedures factor into mediations? Overall, should misconduct allegations trigger some kind of “alternative” mediation process with more transparency, or is there an alternative to mediation?

March 12, 2010 – Stakeholder Perspectives: Observations from a European Stakeholder. A commenter added thoughts on the role of MIGA in resolving developing investment disputes. He contextualised MIGA in its historical background, described the purpose of MIGA, and discussed why MIGA has been extremely successful. In particular, he discussed MIGA’s leverage in the international community, through its ownership by stakeholders, reputational effects, and association with the World Bank.

March 9, 2010 – One more comment was made regarding the post One Latin American State – Contemporary Perspectives on Investment Agreements and Investor-State Arbitration. The commenter referenced several pertinent articles on investments in other Latin American nations.

March 3, 2010 – A new comment was posted about The Role of a Good Investment Policy Framework in Preventing Conflicts Between Foreign Investors and Host Countries. The commenter highlighted the importance of robust State-to-State cooperation and discussed the critical role of joint committees in issuing notes of interpretation and providing clarity and definition, as well as acting as a forum for mediation between host States and investors. The commenter also wondered how a joint committee may be incorporated into a treaty.

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<http://www.unctad.org/wir/contents/wir01content.en.htm>.

World Investment Report 2000: Cross-border Mergers and Acquisitions and Development. 368 p. Sales No. E.99.II.D.20. \$49. <http://www.unctad.org/wir/contents/wir00content.en.htm>.

Ten Years of World Investment Reports: The Challenges Ahead. Proceedings of an UNCTAD special event on future challenges in the area of FDI. UNCTAD/ITE/Misc.45. <http://www.unctad.org/wir>.

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Investment Policy Monitors

Investment Policy Monitor. A Periodic Report by the UNCTAD Secretariat. No. 5, 5 May 2011.
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IIA Issues Notes and Monitors

IIA Issues Note No. 1 (2011): Latest Developments in Investor–State Dispute Settlement.
http://www.unctad.org/en/docs/webdiaeia20113_en.pdf

IIA Issues Note No. 2 (2010): Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims.
http://www.unctad.org/en/docs/webdiaeia20106_en.pdf

IIA Issues Note No. 1 (2010): Latest Developments in Investor–State Dispute Settlement.
http://www.unctad.org/en/docs/webdiaeia20103_en.pdf

IIA Monitor No. 3 (2009): Recent developments in international investment agreements (2008–June 2009).
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IIA Monitor No. 2 (2009): Selected Recent Developments in IIA Arbitration and Human Rights.
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IIA Monitor No. 3 (2006): The Entry into Force of Bilateral Investment Treaties (BITs).
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QUESTIONNAIRE
Investor-State Disputes: Prevention and Alternatives to Arbitration II

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