Exploring Alternatives to Investment Treaty Arbitration and Other Dispute Prevention Policies

- First Draft for Discussion -
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NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through its Division on Investment and Enterprise (DIAE), promotes understanding of key issues, particularly matters related to foreign direct investment and transfer of technology. DIAE also assists developing countries in attracting and benefiting from FDI and in building their productive capacities and international competitiveness. The emphasis is on an integrated policy approach to investment, technological capacity building and enterprise development.

The term “country” as used in this study also refers, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

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;

A blank in a table indicates that the item is not applicable;

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.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

The material contained in this study may be freely quoted with appropriate acknowledgement.
PREFACE

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a programme on international investment arrangements. 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 a new Series on International Investment Policies for Development. It builds on, and expands, UNCTAD's Series on Issues in International Investment Agreements. Like the previous one, this new series is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers.

The Series seeks to provide a balanced analysis of issues that may arise in the context of international approaches to investment rule-making and their impact on development. Its purpose is to contribute to a better understanding of difficult technical issues and their interaction, and of innovative ideas that could contribute to an increase in the development dimension of international investment agreements.

UNCTAD Series on International Investment Policies for Development
The Series is produced by a team led by James Zhan. The members of the team include Bekele Amare, Anna Joubin-Bret, Hamed El-Kady, Jan Knörich, Marie-Estelle Rey, Ileana Tejada, Elisabeth Tuerk and Jörg Weber. Members of the Review Committee are Jack Coe, Susan Franck, Barton Legum, Peter Muchlinski, and Jeswald W. Salacuse and Margrete Stevens.

This paper is based on a manuscript prepared by Anna Joubin-Bret and Jan Knörich. It benefited from comments during a peer forum on "Investor State Dispute Settlement" in July 2009, which took place in Miami and was jointly organized with the University of Miami. Further comments and inputs are expected from a joint conference…

The paper provides a timely stocktaking of the current state of affairs in international investment policy making, as UNCTAD embarks on implementing its renewed mandate in the area of international investment agreements emanating from the Accra Accord (paragraph 151).

Supachai Panitchpakdi
Secretary-General of UNCTAD

Geneva, July 2009
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### ABBREVIATIONS

<table>
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>AALCO</td>
<td>Asian-African Legal Consultative Organization</td>
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<td>ADR</td>
<td>Alternative methods of dispute resolution</td>
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<td>BIT</td>
<td>Bilateral investment treaty</td>
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<td>CRCICA</td>
<td>Cairo Regional Centre for International Commercial Arbitration</td>
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<td>DPP</td>
<td>Dispute Prevention Policy</td>
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<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<td>FDI</td>
<td>Foreign direct investment</td>
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<td>FIPA</td>
<td>Foreign Investment Promotion and Protection Agreement</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
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<td>IPA</td>
<td>Investment Promotion Agency</td>
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<td>ISDS</td>
<td>Investor-State dispute settlement</td>
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<td>IIA</td>
<td>International investment agreement</td>
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<td>KLRCA</td>
<td>Kuala Lumpur Regional Centre for Arbitration</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>OIO</td>
<td>Office of the Foreign Investment Ombudsman</td>
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<tr>
<td>REIA</td>
<td>Regional Economic Integration Agreement</td>
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<tr>
<td>SMC</td>
<td>Singapore Mediation Centre</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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GLOSSARY OF IMPORTANT TERMS

**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 investment arbitration. 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. Typical methods of ADR are mediation and conciliation.
Negotiated Settlement:

Negotiated settlement is the resolution of a dispute outside of courts or trial 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.

Direct Negotiation:

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

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.
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 role of the conciliator is to support the parties of a dispute in finding amicable solutions by identifying alternative options to dispute resolution. While their exact role may vary from dispute to dispute, conciliators usually attempt to shape a more productive process of interaction between the parties of a dispute 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. 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".

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, 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. While mediators assume only some control over the process of settlement, they focus more on 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".

**Third-Party Neutral Assistance:**

Third-Party Neutral Assistance refers to the use of an impartial individual or group of individuals who help in finding a solution to a dispute between an investor and a State. For example, the involvement of conciliators or mediators in a dispute is considered as third-party neutral assistance.

**Dispute Resolution:**

Dispute resolution is the process of finding a settlement to an already existing legal dispute between an investor and the
State. This can be done either through international arbitration, or by use of facilitated ADR.

**Dispute Prevention and Avoidance:**

Dispute prevention and avoidance is the anticipation and handling of potential and real problems or conflicts that may arise or have arisen between investors and the State, but have not yet reached the stage of escalation into a legal dispute. Preventative ADR is an important means to achieve effective dispute prevention and avoidance. 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, the State and various government agencies can identify more easily potential areas where disputes with investors can arise, enabling the State to put in place adequate response mechanisms. Such policies include the establishment of adequate institutional frameworks to deal with potential disputes, such as improved channels for information sharing, institutional cooperation, the establishment of ombuds services, the clear delegation of relevant authority among State agencies, etc. With such institutional mechanisms in place, States are 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 after-care services, ombuds services, or other government agencies with direct responsibility for dealing with foreign investors (e.g. a lead agency).
EXECUTIVE SUMMARY
INTRODUCTION

In addition to litigation or arbitration, national judiciary systems have been testing, offering and in some areas of the law even generalizing the possibility for claimants to go for non-judicial or alternative means of dispute resolution, generally known as ADR and encompassing various methods such as mediation, conciliation and recourse to third party neutral. It should be noted at the outset that the term ADR is often used with different meanings depending on the context to which it is applied. Several of these techniques or methods are available also in the case of disputes arising between a private party and a sovereign State and particularly in disputes opposing a foreign investor and a host State. In disputes involving States and investors, recourse to arbitration itself is already an alternative dispute resolution method, seeking to avoid having to resort to the national courts of the host State or to a State-State mechanism. The use of international arbitration has become the most commonly used method to settle investing disputes and features as the first options investors will go to when they are seeking compensation for a damage caused by the host State to their investment. In the context of investor-State disputes, arbitration is the common approach to settle a dispute. However, although very limited in practice, recourse to ADR (other than international arbitration) is available as well as the possibility to settle the dispute amicably at whatever stage of an arbitration procedure before the award is rendered by the arbitral tribunal entrusted with the case.

This study on alternative methods of treaty-based investor-State resolution is taking a broad approach of the topic and will look not only at alternative dispute resolution
(ADR) and other settlement techniques but also at dispute avoidance policies that States can put in place to avoid problems with investors to arise but also to escalate into a legal dispute. The structure of our study will follow a timing-based approach i.e. look into the various stages where host State policies or international investment agreements can offer different ways to deal with a dispute, other than by ways of recourse to national courts or international arbitration.

On the part of the host State, these stages typically range from avoiding to take any measure or act that constitutes or could be interpreted as a treaty violation, addressing any problem between the investor and authorities at an early stage and possibly solving it, provide credible alternatives and policy responses to foreign investors (e.g. ombudsman or a high-level commission), propose recourse to alternative dispute resolution methods, with a view to avoid escalation into an investor-State arbitration.

The international investment protection system has been built after the Second World War around four pillars of protection for foreign investors and their assets. These pillars are the granting of fair and equitable treatment (or of the minimum standard of treatment), the freedom of transfer, protection against unlawful expropriation and recourse to international arbitration. This fourth pillar is the possibility for foreign investors to have their claim against a host State for the violation of an international commitment heard and settled by an international arbitral tribunal. Together with several multilateral instrument and most specifically the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), signed in
Washington on 18 March 1965 (see ICSID, 2006), this fourth pillar addresses a perceived mistrust on the part of investors of the national courts of the host country and a need to depoliticize the dispute, avoiding recourse to the “gun-boat diplomacy” by allowing the dispute to be settled in a neutral forum and following international rules of procedure.

Host States in their national framework and investment contracts as well as in the international investment agreements they conclude seek to offer predictability to foreign investors by favoring international arbitration as the means for investors to deal with a dispute affecting their investment.

An overwhelming majority of the more than 2650 bilateral investment treaties (BITs) and the free trade agreements (FTAs) containing substantive disciplines on investment are offering international arbitration under ICSID or UNCITRAL rules to foreign investors.

The recent increase of disputes arising under investment laws, contracts and treaties tends to show however that the lack of preventive measures or alternative means to settle investment disputes comes with a high cost for host States but also for investors and is currently one of the main reasons for a perceived backlash against investment arbitration.

In parallel to the increase in investment flows and the proliferation of investment treaties setting rules for international investment, investor-State disputes have also started to pick up since 1994 and a rapid increase after the
NAFTA entered into force, the 43 cases encountered by Argentina after the 2001 economic crisis.

In 2008, at least 30 new investor-State cases were filed under international investment agreements (IIAs), 21 of which were filed with the International Centre for Settlement of Investment Disputes (ICSID), bringing the total cumulative number of known treaty-based cases to 317. At least 77 governments – 47 of them in the developing world, 17 in developed countries and 13 countries with economies in transition – have faced investment treaty arbitration. More than two thirds (70%) of the 317 known claims were filed within the last six years (UNCTAD, 2009). Virtually none of these claims were initiated by Governments. The increase in the number of claims can be attributed to several factors. First, the significant increase in international investment flows in recent years leads to more occasions for disputes, and more occasions for disputes combined with more IIAs are likely to lead to more cases. Second, with a larger network of IIAs in place, more investor-State disputes are likely to involve an alleged violation of a treaty provision and more investor-State dispute settlement provisions will be invoked to settle claims arising from these alleged violations.

In addition to generating a very complex network of investment and investment-related treaties around the world that makes it difficult for States to manage their international commitments, a recent study by UNCTAD (UNCTAD, 2008) shows a great variation in the way various core elements of investment protection and liberalization are dealt with and in the actual wording of clauses themselves. This in turn may generate inconsistencies in the interpretation of these clauses
and lack of predictability in the outcome of investment disputes, both for investors and for the host States.

It can also be argued that with greater transparency in arbitration procedures, e.g. within recent FTAs and with the revised ICSID rules (ICSID, 2006), investor-State disputes have gained greater visibility and appeared on the radar screen of foreign investors and their counsel as an efficient means to sort out disputes with the host State.

This rise in investment disputes poses particular challenges for host States in general but even more so for developing countries. The financial implications of the investor-State dispute-settlement (ISDS) cases can be substantial, from the point of view of the damages to be paid to foreign investors in the case of a violation of a treaty provision. In addition to substantial amounts of awards, the costs for conducting arbitration procedures are extremely high with legal fees amounting for an average of 60% of the costs, (see box 1). In addition to costs, the average timeframe for claims to be settled by a final award and executed is increasing significantly, with parties making use of every possible procedural possibility to avoid execution of awards taken against them. Investor-State cases have become increasingly difficult to manage for the parties and are resulting in a loss of control over the procedure by the State.

Increasingly, divergent interpretations by arbitral tribunals, resulting from unclear or inconsistent treaty language, will lead to unpredictability for both parties.
Box 1. Recent examples of legal fees in ISDS cases

In addition to the financial burden that States face due to the awards made against them in investor-State disputes, the costs of the actual procedures can also be very high. The following recent examples of legal fees and arbitration costs in ISDS cases illustrate this:

- In Plama Consortium v. Bulgaria (ICSID Case No. ARB/03/24), the legal costs to the claimant (related to both the jurisdiction and merits phases of the arbitration), amounted to $4.6 million, while the respondent's legal costs (for both phases) were $13.2 million. The claimant was required to pay all arbitration costs and half of the respondent's legal costs (UNCTAD, 2009).

- In Pey Casado v. Chile (ICSID Case No. ARB/98/2), the claimant's legal costs (relating to the jurisdiction and merits phases) totaled approximately $11 million, while the respondent's legal costs for both phases amounted to $4.3 million. The respondent was ordered to pay 75 percent of the arbitration costs and $2 million in claimant's fees (UNCTAD, 2009).

- In ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary (ICSID Case No. ARB/03/16), the tribunal awarded the burden of the full costs totalling $7.6 million to the defending country that had been found to have breached its legal obligations. This included the investor's legal fees (UNCTAD, 2006a).

- In Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), the tribunal found that the claimants were entitled to uncover from Egypt the sum of US$ 6 million in effect of the legal costs, expert witnesses and other expenses.

Source: UNCTAD, 2009; UNCTAD, 2006
International arbitration of a dispute between an investor and a State will almost in all cases result in a severance of the links between the two parties, which is of course exactly the opposite of what States are seeking when embarking in the promotion of long term foreign investment into their economy. Huge disputes have resulted from privatization schemes or concession contracts for public utilities or exploration and exploitation of natural resources, raising political debate inside and outside the State and resulting in a growing dissatisfaction with the system.

Lastly, and this could come first, active investment promotion strategies are seeking to establish a long-term relationship and a meaningful contribution to the host State's economic development. Investors generally come with a genuine interest in a good return on their investment that may also require several years of undisturbed operation. An investor-State dispute inevitably severs this relationship and creates bad precedent for State and investor.

This paper will briefly analyze in Section I, the specificities of investor-State disputes and the advantages and disadvantages of investor-State dispute settlement through international arbitration, in order to introduce the quest for alternative approaches. Section II will then highlight the possible challenges and obstacles to alternative approaches or settlement methods. The available alternative options available in international investment agreements will be discussed in section III, followed by a review of existing rules and fora that support the use of alternative methods in such agreements. Section IV will lay-out various approaches following a timeframe approach and explore policies ranging from dispute
avoidance through efficient information sharing practices, early alert, and preventive settlement through to the settlement during the arbitration procedure itself. It will show examples of policy options applied by various countries, taking a "good-practices" point of view. Finally, the concluding section will be devoted to some recommendations and lay out possible ways forward.

The paper will not look into the most obvious way to sort a dispute against the State or what could be called in practice an alternative to international arbitration i.e. the recourse to national courts of the host country to hear and decide upon the claim of an investor against the host State itself. The recourse to local remedies has given rise to numerous decisions by international courts and to doctrine. The mistrust of investors in national courts and their ability to make a fair and quick decision, the perception of bias and/or lack of competence in issues of international economic law should be looked at with a fresh view and could be addressed after over 50 years of generalizing international arbitration as the safest avenue for foreigners. It is however not the purpose of this paper and will therefore not be further analyzed.
I. DISPUTE RESOLUTION THROUGH INTERNATIONAL ARBITRATION

A. Specificity of investor-State dispute settlement

Investor-State disputes arising under international investment treaties are not ordinary legal disputes. They are of a special nature for several reasons ranging from the nature of one of the parties involved, the nature of the measures or acts being challenged, the applicable law and the available options to settle these disputes.

- The nature of one of the parties involved: An investor-State dispute will involve a sovereign as the defendant, either the central government itself or sub-national entities of the State acting in their sovereign capacity and not in a commercial capacity (Sornarajah, 2004). The dispute can arise from measures or acts from lower levels of government or State agencies that are not signatories to the IIAs but have to abide by its provisions. This can generate inter-institutional issues inside the government, making it difficult for the State to react timely to the problem but also for the investor to identify the appropriate interlocutor within the government.

- The nature of the measures or acts being challenged: The foreign investor will challenge acts and measures (or the lack of appropriate action) taken by the sovereign State or a sub-entity thereof in their sovereign capacity. The dispute will often involve public policy issues and the States ability to regulate in the public interest that may hurt individual interest, particularly a foreign entity. Recent
trends in IIAs and ISDS rules towards more transparency will make it easier for civil society and other constituencies to scrutinize the case. It can easily turn into a political issue within the State but also internationally, for example when environmental measures or emergency measures to tackle a financial crisis are being challenged. And the more so when the amounts of public funds at stake are high.

- The nature of applicable law: the dispute is governed by international law and based on the violation of an international instrument, moreover one of the sources of international law, i.e., an investment treaty. The dispute can also arise from the violation of a contract by the State and will follow the provisions of the contract as far as applicable law and dispute settlement are concerned.

- The nature of the available remedies: Contrary to the principle of international law when a dispute involves a sovereign State and contrary also to ordinary legal disputes, the system established to settle investor-State disputes is based on international arbitration as the main option for the aggrieved foreign investor. A vast majority of IIAs offers as a central protection element for the foreign investor, the possibility to resort to international arbitration under ICSID or ad-hoc arbitration using UNCITRAL rules. Sometimes, the IIAs do not even provide for the recourse to the national courts of the host country. Similar types of dispute settlement provisions can also be found in concession contracts, privatization schemes, stabilization agreements or ordinary State
contracts, whereby an alleged violation will not be heard by the national courts but by an international tribunal.

**B. Advantages and disadvantages of international arbitration**

The system established by IIAs allowing investment disputes to be settled through international arbitration comes with numerous advantages.

- One of the main purposes and also advantages was for negotiators of early day IIAs, to depoliticize the dispute arising between the host State and the investor from another State and allow for a legal settlement departing from the "gun-boat" strategy that had been used in earlier days. A small State could be interested in having a case against a powerful investor from a powerful home country to be heard in a neutral forum within a set framework of rules.

- Another obvious advantage is to allow the investor to have his claim heard by an independent tribunal. This advantage is particularly clear when investors do not trust the independence of the domestic courts or when the judiciary of the host State has not been exposed to hearing many cases under international law. Finally, independence can also benefit from the seat of arbitration and hearings being located outside of the host country.
• The choice for international arbitration as opposed to the establishment of an international court to hear investor-State cases was motivated mainly by the perception that arbitration is swifter, cheaper, more flexible, more familiar for economic operators. International arbitration is generally perceived by foreign investors as providing an expeditious way of settling a dispute arising with the host State, thereby avoiding the dispute to linger, the costs to escalate and allowing a better control over the procedure, since it can be adapted to the request of the parties at any time. Another advantage stems from the fact that the parties in dispute can appoint arbitrators of their choice who are usually experts in their field, as well as the possibility that the arbitration can be held in a neutral country and be conducted in a language familiar to all parties (Salacuse, 2007).

• In order to render recourse to arbitration efficient, it is necessary to ensure that the award will be enforceable against the other party that is generally a sovereign. IIAs and specifically multilateral conventions relating to investment disputes provide for the final and binding character of an arbitral award. The ICSID Convention with its self-contained execution mechanism has proven successful in achieving the enforcement of arbitral awards. Until the end of 2008, no State member of ICSID has willingly not abided by an arbitral award. A similar rate of enforcement can be found for awards rendered under the auspices of various arbitration centres or ad-hoc, using the Uncitral arbitration rules and where the New York
Recent evolution of investor State disputes, the increase in amounts involved, the challenges to public policy acts and some shortcomings in the international arbitration system itself have raised concerns on the part of States, whether developed or developing, and of civil society at large. Voices of dissatisfaction about the system can also be heard among practitioners in developed and developing countries alike, whether representing investors or defending sovereign States in these cases. Attempts at amending some of the shortcomings have been made to the ICSID rules in 2006 (ICSID, 2006) and are currently being discussed as far as Uncitral rules are concerned. These amendments significantly address the issue of transparency with a possibility for the public to have access to hearings and the documents and for amicus curiae to participate in the arbitration procedure. The amendments follow closely significant amendments made to ISDS provisions of investment treaties by several States.2

In the last months, several conferences and seminars have addressed the backlash that the system is currently experiencing, having resulted in some spectacular positions taken by Bolivia, Venezuela and Ecuador limiting the access to international arbitration in sensitive sectors of the economy and in the case of Bolivia a denunciation of the ICSID Convention under article 71, dated 2 May 2007.

The reasons behind this dissatisfaction are inherent to the system of international investment arbitration itself but also to recent practice and experience with cases.
Contrary to the expectations, it turns out that in an increasing number of cases, the procedure is neither fast nor does it come cheap. The average for a case to be heard and finally settled varies from 3 to 4 years, which does not make the average track record of domestic jurisdictions, for example administrative or commercial courts, look totally outside of the league. In recent years, the average duration of cases has increased significantly with parties resorting to annulment and other set aside procedures, with an almost systematic recourse to bifurcation (separating jurisdiction from the merits) on the part of States and recourse to provisional measures. Costs involved in investor-State arbitration have skyrocketed in recent years, whether amount of legal fees, arbitrators and administration fees by arbitration centres and additional costs due to the involvement of numerous experts and witnesses in highly contentious cases. The discovery procedure used by law firms from the Western Hemisphere in international arbitration involves important fact finding and document producing costs that have to be borne by the disputing parties directly or paid to their counsel.

The increase in Nafta cases against the United States, Mexico and Canada have also triggered fears about frivolous and vexatious claims that could inhibit legitimate regulatory action by governments.

Concerns have arisen in different circles about the legitimacy of the ISDS system and have given rise to discussions in various fora. The triggers for these concerns
come from a perception of inconsistency among arbitral awards in the interpretation of core elements of protection but also from the mere fact that an arbitral tribunal composed of three individuals, however highly competent and respected, is looking into a national law or measure and interpreting it, in last resort. The issue of a possible appeal mechanism has been discussed after the introduction in recent FTAs concluded by the United States of follow-up negotiations relating to an appeal mechanism. There is a continuing debate over whether it is appropriate to use arbitral tribunals to rule on public policy issues without having the same levels of safeguards for accountability and transparency as are typically required from the domestic judiciary.

- Divergent opinions relating to a possible case law or and equivalent of "jurisprudence constante" (Bjorklund, 2008; Kaufmann-Kohler, 2007) emerging from consistent arbitral awards, thereby contributing to clarifying the content of principles of international law.

These potential or perceived disadvantages could be addressed to some extent through the development of alternative approaches to disputes arising between an investor and the State, particularly by taking preventive measures, avoiding disputes from arising and then from escalating, putting in place internal mediation or settlement facilities (Section III below) or proposing recourse to alternative means of dispute settlement for example ADR within the existing international framework for investment established by multilateral instruments on investment dispute settlement and BITs.
Notes

1 Asian Agricultural Products Ltd. (AAPL) vs. Republic of Sri Lanka, ICSID Case No. ARB/87/3.
2 Examples can be found in the United States model BIT of 2004 and the Canada model Foreign Investment Promotion and Protection Agreement (FIPA), also of 2004.
II. ALTERNATIVE METHODS OF DISPUTE RESOLUTION

Over the last three decades, ADR has evolved in many countries to settle a wide variety of disputes, including business disputes and investment disputes. It involves the intervention of a third party to assist the disputants in negotiating a settlement of their conflict. Usually, the initiation of an ADR process requires the prior consent of the disputants. The basic approach of ADR is to remove the barriers to a negotiated solution. Such barriers can have many sources, including the way in which parties communicate with each other, the tactics employed in dealing with the respective other party, and a general inability or unwillingness to consider new solutions to their problem. Throughout the process of ADR, the disputants retain control and preserve their right to approve or refuse a proposed settlement or even to withdraw from the ADR process entirely.

The concept of ADR is broader than that of arbitration, and it varies more in its practical application. How specifically a third party intervenes to facilitate the settlement of a dispute varies widely depending on the nature of a dispute in question, the interests and needs of the disputants, and the mandate, talents and resources of the intervener. As a result, ADR does not offer a single "magic formula" to settle a dispute.

The following section will discuss the nature and process of ADR in further detail. This will be followed by a section which seeks to identify challenges and potential obstacles to ADR as a tool to be used in investor-State disputes.
A. Procedures followed in alternative approaches for dispute resolution

ADR is a process that goes beyond simple negotiations among the parties of a dispute. It is often referred to as "facilitated negotiation", as it requires the assistance of a third party also called third party neutral to facilitate the negotiations between the disputants.

The essential key to alternative approaches lies in the consent required from both parties in what is essentially a voluntary process. The cooperation of both parties is required, with different degrees of involvement, but throughout the ADR process. This makes for an important difference with international arbitration where the consent can be given in advance, without focus on a particular situation or dispute and can not be withdrawn unilaterally. In the ADR process, the consent is not given in advance and is required throughout the process up to the actual enforcement or compliance with the negotiated solution.

Another important element is the degree of flexibility with the legal commitments at hand and the specific facts of the dispute. The recourse to alternative approaches may allow the parties to come up with a solution that is not based on one or the other interpretation of treaty provisions, with identification of the existence of a violation or damage. The focus is on finding an acceptable and workable solution to the dispute even if it requires departing from the legal framework surrounding the facts of the case.
It is possible to differentiate between several types and sub-categories of ADR (Franck, 2007), depending on the purpose and the timing of the intervention in a dispute. A basic distinction to be made is between ADR that has the facilitation of a settlement of an already existing dispute as its objective (facilitated ADR), and ADR that focuses primarily on the prevention of currently still non-existent or emerging disputes from evolving and escalating (preventative ADR). Furthermore, ADR may concentrate on a fact-finding exercise, in order to narrow down the actual extent of the dispute, be of an advisory nature, or involve both of these elements. Dispute boards, as for example established in international contracts according to rules of the International Chamber of Commerce (ICC), also constitute a promising approach towards ADR.

There is also a possibility to define ADR through the process that is being used to settle the dispute, i.e. through conciliation or mediation.

The literature on ADR does not provide for a clear distinction between the terms "conciliation" and "mediation", and both of them are frequently used interchangeably. This paper will suggest some criteria that allow for a distinction between the two.

A first difference between conciliation and mediation lies in the degree of control the parties keep over the process of settlement of their dispute. Typically, in a negotiated settlement both parties to the dispute come to an agreement entirely among themselves and work out the settlement without any outside intervention. The solution to the dispute is the result of this direct negotiation. Mediation involves a third-
party neutral (the mediator) who will intervene in the dispute and at the request of the two parties, help them to work out a solution. His role can vary from helping the parties to establish a dialogue to effectively propose and arrange a workable settlement to the dispute. Although he is being called into the dispute by the parties, he will take over to a certain degree the process of the settlement and thereby remove it from the control of the parties. The solution to the dispute will be the result of his intervention.

In conciliation, the parties will give to the conciliator (or to the panel of conciliators) an even greater control over the dispute and over the process in entrusting him with finding and proposing the actual solution that the parties will then follow. The solution will be his contribution and the parties will have given up a yet greater level of control over the dispute. Figure 1 illustrates.

**Figure 1. Forms of dispute resolution and parties' control**

Source: Salacuse, 2007
Another key difference between conciliation and mediation lies in the *degree of formality of the process*. Conciliation, which has its historical roots in public international law, tends to provide for a relatively structured process that is replete with formal rules related to jurisdictional objections, potential pleadings, the gathering of evidence, and issuing written recommendations for settlement (Salacuse, 2007; O'Connell 2003; Merrills 2005; Reif 1991). Therefore, conciliation has been described by some as a kind of non-binding arbitration (Onwuamaegbu 2005; Rubins 2006). On the contrary, mediation is a rather informal process, in which mediators tend to focus on identifying interests, reframing representations and canvassing a range of possible solutions to move the parties towards an agreement (Salacuse, 2007; Franck 2007). Mediation is hence often identified as "assisted negotiation" (Onwuamaegbu, 2005). One could suggest that mediation focuses on maintaining the relationship between the investor and the host State whereas conciliation is more result oriented and seeks to work out a concrete solution to the dispute.

Moreover, conciliators usually do not adopt a relationship-building approach to resolving disputes between parties, nor do they seek to eliminate various barriers that may obstruct negotiations. They tend to focus mostly on substance and avoid seeking solutions that go beyond the concrete issues at stake. Conciliators usually propose concrete solutions which parties may use as a basis of a negotiated settlement. Having engaged with both parties of a dispute, they draw up terms of an agreement that, in their view, represent a just compromise to a dispute (Onwuamaegbu, 2005; Redfern and Hunter, 2004). By contrast, mediators frequently go beyond the
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substance of the issue, focusing also on the nature of the negotiation process and on effective communication between the disputants. The role of the mediator is to bring the parties of a dispute together and assist them in compromising and reaching a settlement (Onwuamaegbu, 2005; Redfern and Hunter, 2004). Overall, there may be no clear border-line between conciliation and mediation, as some conciliators may nevertheless, in the interest of achieving compromise, decide to apply some of the techniques that are more typical to the activity of mediation, provided that such a step is within their mandate and supports the achievement of compromise.

The basic task of the mediator or conciliator who intervenes in the dispute is to help the parties overcome these barriers to agreement. The way in which this is accomplished may differ depending on the nature of the dispute, the history of relations between the disputants, and the individual skills and resources of the conciliator or mediator. No two conciliators or mediators are alike; rather, they may vary substantially in the roles, strategies and procedures that they adopt (Moore, 2003).

Detailed studies are available on the many forms processes of mediation and conciliation can take, the techniques that can be used, the various stages they can go through, the degree of departure from the legal issues at stake, the degree of flexibility to come up with various types of solutions (Coe, 2005; Kolb 1983), and the paper will therefore not go into further detail.
Box No. 2. The Mediation and Conciliation Process: Key Features

- Role of the mediator/conciliation: assist, facilitate, propose, re-formulate, convince, finalize; some may be more interventionist, some may be asked to focus on procedural arrangements, others may concentrate more on the solution, on the deal.
- Various skills important
- Personal background: lawyer, businessman, technical expert. Importance of clout, respected by both parties,
- Role of the lawyers in assisting parties
- Venue of the conciliation/mediation: facilities
- Techniques: caucusing individually, bridge communication gaps, facilitate understanding, narrow down the dispute to the essential problem, remove personality clashes and resentment, reframing the issues in a manner satisfactory to both parties, work on a step-by-step approach of agreed agendas, build on small and relatively easier successes to broker a deal on the bigger issues or alternatively concentrate on the difficult issues, narrow them down and work on them as a priority.

Source: UNCTAD, based on Coe, 2005

B. Challenges and obstacles to alternative approaches

Recourse to alternative approaches comes with advantages and disadvantages that should be looked at with some scrutiny, especially when one of the parties to the dispute is a sovereign State. Although national judiciaries have generalized recourse to ADR for matters as different as family conflicts or labour conflicts, it is one thing for national judiciary systems to promote ADR as a means to dealing with overflowing dockets, it is quite another for the State to use
ADR in conflicts where it is a measure or act of the State itself that is being challenged. In order to present a viable and credible alternative to investor-State arbitration, where the recourse to international arbitration is already an exception to international law principles, alternative approaches must present at least some elements addressing the disadvantages of arbitration but at the same time not have too many inherent disadvantages themselves.

There are obvious advantages on the part of a host State to take preventive policy measures to avoid a dispute from arising. Examples of such measures will be discussed in further detail in chapter IV below. Those preventive measures aim at avoiding a dispute by refraining from taking any measures or acts that could harm the foreign investors' interests or create an allegation of a violation of the treaty or the contract. In addition to fostering self-discipline and institutional coordination, preventive policies may encourage coherence between investment promotion policies and other economic development policies as well as coherence between national and international commitments by the State vis-à-vis foreign economic operators. Dealing with a problem as early as possible when it arises and before it escalates into a legal dispute has also net advantages in terms of avoiding unnecessary commitment of public funds and of course avoiding damaging the relationship with the foreign investor.

- One of the first advantages of alternative approaches can be found in the flexibility both on procedural aspects and on the substantive results of content of a direct or facilitated settlement. Whereas arbitrators are bound by the arbitration rules referred to by the parties and with
relatively little flexibility (almost none under ICSID rules, slightly more under UNCITRAL rules), a third-party neutral has more space for taking a creative approach. The parties themselves can also be more creative in the outcome in order to work on a win-win type of settlement (Salacuse, 2007). This comes in contrast to a judge or an arbitrator that has to decide on the claim based on the treaty language and with a limited choice of remedies (Waelde, 2006). Where an arbitral tribunal has to decide whether a particular measure or act by the State amounts to an expropriation, follows the requirements for an expropriation to be lawful, opens the right to monetary compensation, a negotiated settlement can be more flexible in preserving the interests of both parties to the dispute. It can focus more on the objective of the relationship between the parties than on the actual language of the agreement negotiated between them at time when none of them thought about potential problems. To take some concrete examples, the parties can among themselves or with the help of a third party neutral come up with a compensation for the denial of a permit or licence to operate a particular project with another location or another project for the investor to invest in. The terms of a concession project can be re-negotiated, the return of a project can be re-evaluated and additional guarantees or sources of revenue can be proposed. This approach is however not applicable in cases of laws or policies of general application, but in some cases, it can produce positive effects, particularly on the on-going relationship between the host State and the foreign investor.
Another possible advantage of alternative approaches is to provide for a faster and less costly settlement, the more so when the problem is tackled at an early stage and with the specific goal of avoiding escalation. According to an estimate in Waelde 2004 also cited by Salacuse 2007, mediation should cost only about 15-25 per cent of total litigation or arbitration costs. Alternative approaches will save on hours of intensive fact-finding, expert contributions, witness interrogation, sessions and document exchange.

Another potential advantage of alternative means is that they can be without prejudice to the right of the parties to resort to other forms of dispute resolution and can be conducted alongside an investor-State arbitration. The resulting settlement agreement could ultimately be incorporated into an award of the arbitration tribunal – a possibility expressly foreseen in ICSID Arbitration Rule 43(2). For instance, in one ICSID case, the President of the Tribunal at the request of the parties acted as mediator for a few months to assist the parties in negotiations. The parties eventually agreed on some issues and asked the Tribunal to decide on the other matters (Onwuamaegbu, 2005).

Furthermore, foreign investors and host countries avoid the risk of an arbitral award that might set an unsatisfactory precedent for the future, and might encourage other foreign investors to challenge the same type of governmental measure or regulation. One of the advantages of alternative approaches is to allow for privacy and confidentiality,
which may seem contradictory at first sight. However, it is understandable that numerous or lingering cases, with various challenges, annulments and other dilatory procedures can have a negative impact on the host country's investment climate.

On the other hand, alternative approaches whether through direct or facilitated settlement presents numerous challenges.

- The first and most important one is that the result of a negotiation, a mediation or a conciliation is not binding on the parties and not enforceable through any binding international rule.

- The second disadvantage that is linked to the first is that it can result in a waste of time and funds and an actual escalation of the dispute to embark on alternative approaches to dispute settlement only to have to start an arbitration procedure at a later stage when it becomes clear that one of the parties is not making good-faith commitments or willing to find a negotiated outcome.

- Negotiated settlement and other alternative approaches are not suitable for any type of investment dispute. It is for example possible for a sovereign State to negotiate the application or the effects of a set of rules or laws of general application and to make exceptions as far as foreign investors are concerned. More generally, the possibility to take alternative routes is very case and fact specific. Some cases involving long term investments for example may
lead themselves to alternative approaches to ensure that the project can continue while the solution to the dispute is being negotiated.

- Negotiated settlement or recourse to ADR may simply not be possible or be subjected to too many obstacles when a sovereign State is involved. Strategic and tactical barriers can be exacerbated and approaching ADR can be considered as a weakness or be used as a pressure to obtain a settlement, thereby approaching ADR with a "wrong motivation". Political issues, involvement of pressure groups, publicity around ADR can make it impossible for the authorities to embark on a negotiated solution. Of course, the requirement of power or mandate to negotiate, or the lack therefore is a further element. This being in turn exacerbated when several government agencies become involved in the dispute and no single agency is authorized to conduct negotiations on behalf of the government to reach a settlement (Legum, 2006).

- Dispute avoidance or prevention policies may result in the misperception internally that foreign investors enjoy a special treatment and that there is no equality in front of State measures or policies. They can also generate inter-institutional conflicts between conflicting priorities within the State whether the protection of foreign investors or protection of the environment are to take precedence. Such examples can apply to many areas of the States regulatory powers.
In each individual investment dispute, the nature, the degree and amount of these barriers are different. And the fact that one of the parties to the dispute is a sovereign State is a multiplying factor.

- For the host State there is a high political risk at seeking a negotiated settlement and abiding by it without being forced to do so. For example, an early settlement for a case resulting in the upfront payment of a compensation to the foreign investor of X million US$ may or may not be more favourable that the outcome of an arbitral award that is mostly like to be rendered in a couple of years down the line. Issues of empowerment and appropriate authority to embark on alternative approaches will arise. A proposal to settle at an early stage can be seen on the part of the State as admitting a weak position or a lack of internal support.

C. ADR as an Alternative to International Arbitration and Investor-State Disputes

Having discussed the advantages of both international arbitration and ADR with respect to investment disputes, some brief comments regarding the choice between the two may be of value. There are some general advantages in ADR over international arbitration. One of them is the voluntary nature of the ADR process, which implies that a dispute does not end without agreement of both parties to the terms of settlement. Even more importantly, the terms of settlement tend to evolve out of the active participation of the disputants in the collaborative process. The disputants have control over the
outcome of the dispute, and in many ways also over the ADR process. They may decide to shed consideration of legal issues and facts in order to devise lasting solutions that go beyond the simple delegation of rights and duties. Shared interests, compromises and the avoidance of zero-sum outcomes can feature strongly on the agenda of an ADR process, with the result that a legal dispute may turn into a renewed mutual relationship between the parties involved (Coe, 2005). Mediation is potentially also the faster and cheaper procedure compared to arbitration, as it does not have to be pleadings-intensive or may not require substantive evidence. The dynamism of an ADR process, jointly with innovative approaches, can lead to a quick settlement of disputes (Coe conversation by email).

In addition, parties of a dispute may also be motivated to aspire for a negotiated settlement with the support of a third party due to the uncertainty regarding the outcome of an arbitration procedure (Coe, 2005). This may be particularly the case with regard to investor-State disputes, where several inconsistent decisions by arbitral tribunals have raised uncertainty within the international investment law community.

Note

1  This possibility is expressly foreseen in ICSID Arbitration Rule 43(2).
III. ALTERNATIVES TO ARBITRATION IN THE INTERNATIONAL INVESTMENT FRAMEWORK

The previous section reviewed available ADR methods and their possible use as alternatives to international arbitration in the context of investment disputes. Their availability has to be looked at in the context of the existing international investment framework. This section will therefore look into the availability of alternative approaches under the dispute settlement provisions of IIAs such as BITs, FTAs and other investment protection instruments. It will then look into international rules and fora available under the international investment framework such as the ICSID Convention, the UNCITRAL rules and other available rules.

The following discussion will consider whether and how existing IIAs make recourse to ADR available as an option for investors and to what extent these provisions are conducive to the use of alternative means.

A. Available means in IIAs

Recourse to means that constitute an alternative to international arbitration is frequently enshrined in IIAs. The approach is to require that parties to a dispute first seek amicable settlement through negotiations and consultations conducted seriously and in good faith, and only when such negotiations and consultations fail should international arbitration be considered as the next step. For this purpose, most IIAs include a clause that encourages or even obliges the
parties involved in a dispute to engage in consultations and negotiations. The traditional formulation is that in the event of an investor-State dispute, “[…] the parties shall initially seek to resolve the dispute by consultations and negotiations” (e.g. Australia-Viet Nam BIT of 1991, Article 12(1)), or “[…] the dispute shall as far as possible be settled amicably through negotiations between the parties” (China-Singapore BIT of 1986), or “[…] the dispute shall as much as possible be settled amicably between the parties […]” (France-Panama BIT of 1982). Unfortunately, due to the confidentiality usually surrounding such amicable settlements, accurate and comprehensive statistics on negotiated settlements of investor-States disputes are unavailable. However, it is very likely that amicable settlements substantially outnumber the amount of known investor-State treaty arbitration cases.

IIAs usually specify a time frame for such recourse to amicable settlement, between three and six months. It is likely that such a "cooling-off period" is included in IIA provisions to make the involved parties seriously consider the feasibility of international arbitration, rather than encourage them to consider the use of specific ADR techniques that go beyond simple consultations and negotiations. Moreover, the "cooling-off period" must be considered as generally too short to allow for effective ADR to take place within that time. The mere fact that this three-to-six months period is called a "cooling-off period" rather than a negotiation period speaks for itself and has to be considered in the light of the objective of BITs to provide access to international arbitration for the investor without undue delay but also in the light of the specific wording of the provisions.
Few ISDS cases have looked into the absence of an attempt to reach an amicable settlement as a pre-condition for initiating a claim on the part of the investor. However, the example of two recent cases that have investigated this illustrates that decisions made on this issue can differ from case to case. In Western NIS Enterprise Fund vs. Ukraine, the tribunal issued an order stating that "proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations" (ICSID Case No. ARB/04/2, paragraph 5). Hence, the proceedings were suspended to require the investor to adhere to the appropriate proceedings by giving proper advance notice to the State. The case was later discontinued (Polasek, 2006). On the contrary, a different approach was taken by the tribunal in Occidental Petroleum Corporation / Occidental Exploration and Production Company (OEPC) vs. Ecuador (ICSID Case No. ARB/06/11). The case concerned a contract that had granted the investor specific rights to explore and drill in a particular area, where the investor had pursued arbitration only two days after revocation of the contract, despite the encouragement to use ADR and a six-month "waiting-period" provided for in Article VI, paragraphs 2 and 3 of the relevant Ecuador-US BIT. The tribunal ruled in favour of the investor, reasoning that "the caducidad [contract revocation] procedure at issue in this arbitration was in fact initiated in 2004. As noted earlier, for some 18 months or so prior to the issuance of the actual Caducidad Decree on 15 May 2006, OEPC made a number of submissions seeking to rebut the allegations on the basis of which the caducidad procedure was initiated, but to no avail." It was added that "albeit without prejudging the merits, that attempts at reaching a negotiated solution were
indeed futile in the circumstances” (ICSID Case No. ARB/06/11).

An explicit mention in IIAs of the possibility to use more sophisticated ADR techniques such as mediation or conciliation to settle disputes is rare. Only a few IIAs specifically authorize or recognize the use of such techniques in investment disputes. They usually contain specific language allowing the use of alternative resolution techniques as part of the negotiation and consultation process. For example, Article 23 of the United States Model BIT (2004) states the following:

"In the event of an investment dispute the claimant and the respondent shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third party procedures." (emphases added)

Earlier BITs concluded by the United States already incorporated respective provisions, as exemplified in the Poland-United States BIT of 1990. Similarly, the Turkey-United States BIT of 1985 also allows for ADR, but only after attempted negotiations have been unsuccessful:

"Article VI(2)

[...] if negotiations are unsuccessful, [...] the dispute may be settled through the use of non-binding, third party procedures mutually agreed upon."
More common in IIAs is the simple reference to conciliation next to or as an alternative to arbitration, and consistently mentioned prior to arbitration in various treaty texts. One example is the China-Japan BIT of 1988, which states:

"If a dispute concerning the amount of compensation […] cannot be settled within six months from the date either party requested consultation for the settlement, such dispute shall, at the request of such national or company, be submitted to a conciliation board or an arbitration board, […]. Any dispute concerning other matters […] may be submitted by mutual agreement, to a conciliation board or an arbitration board as stated above." (emphases added)

The BIT between Georgia and the Netherlands of 1998 similarly mentions conciliation next to arbitration:

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965." (emphasis added).
A more recent example can be found in the investment chapter of the Economic Partnership Agreement (EPA) between Japan and the Republic of Indonesia of 2007. Chapter five, article 69 on investor-State dispute settlement includes very detailed provisions on the use of conciliation or arbitration:

"4. If the investment dispute cannot be settled through consultation or negotiation [...], the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations:

(a) conciliation or arbitration in accordance with the Convention on the Settlement of Investment Dispute between States and Nationals of Other States [...]

(b) conciliation or arbitration under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes […]

[...]

Only very few treaties suggest conciliation procedures as a precondition for the investor’s right to submit the dispute to international arbitration. One example is Article 9 of the BIT between India and Sweden of 2000, which states the following:

"2. If such a dispute has not been amicably settled within a period of six months the Investor that is a party to the dispute may submit the
dispute for resolution according to the following provisions:

(a) to the courts or administrative tribunals of the Contracting Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

c) to international conciliation under the Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL").

3. Should the investor fail to exercise the options in paragraph 2(a) and (b) of this Article or where the conciliation proceedings under Article 2 (c) of the paragraph are terminated other than by the signing of a settlement agreement, the dispute shall be referred to binding international arbitration according to the following provisions [...]" (emphasis added).

Although ADR beyond the aspect of negotiations and consultations is rarely mentioned explicitly in IIAs, it is worth considering that IIAs also do not prohibit its use. Moreover, since treaty provisions do not specify how these consultations and negotiations are to be conducted, they also do not prevent the disputing parties from seeking the assistance of third persons to help them resolve their quarrel. On the other hand, more specific language encouraging or authorizing the use of ADR beyond consultations and negotiations would be an additional signal to both parties that this kind of ADR is a
viable option worth much consideration. It is generally not clear to what extent the failure to expressly provide for such ADR in IIAs has inhibited a more frequent usage of such techniques.

In addition to the lack of elaborate provisions expressly allowing ADR in contemporary IIAs, there are several other explanations why ADR is not used in the context of investor-State dispute settlement.

A significant reason is that investors and States both lack knowledge of ADR and have little experience in using these techniques. Moreover, existing provisions that encourage negotiation and consultation tend to specify a time frame that does not allow for effective ADR. Frequently, States will need a substantial amount of time to discern the source of the breach and responsible institutions among a myriad of government agencies (Legum, 2006). The few months of "cooling off" would often be too short to sufficiently assess the problem. A third difficulty in using ADR may be related to the nature of the provision in an IIA on the basis of which the dispute emerged. Issues that allow for more flexibility in decision-making, such as the amount of "adequate" compensation to be paid, can be effectively addressed through ADR. But other issues, such as whether expropriation has taken place or not, can only be approved or disapproved with little or no opportunity for compromise. In other words, ADR is only a viable way to resolve a dispute if the relevant IIA provisions allow for some discretion in their application.

In recent years, the fact that many countries have experienced a rising number of investment disputes triggered
governments to think of various innovations in IIA content, which eventually led to the development of a new generation of IIAs. In light of previous interpretations of arbitral tribunals, some governments introduced new provisions and language into their IIAs in order to address the problems that emerged in these investment disputes (UNCTAD, 2007). On the one hand, such changes may reduce the flexibility that, as mentioned above, would be necessary to make the use of ADR feasible. But on the other hand, the new trend towards including novel and innovative provisions in IIAs constitutes an opportunity for negotiating partners to include more detailed provisions on ADR into IIAs.

Negotiators of IIAs can, in various ways, enhance the role of ADR in the treaties they negotiate. First of all, they may consider inclusion of a provision that explicitly encourages disputants to employ ADR techniques. While the reference to consultations and negotiations enshrined in most IIAs may implicitly include the option to use more advanced types of ADR such as conciliation or mediation, more clarity and detail in this respect might make parties to a dispute more aware of this option and encourage them to consider using it. A related problem is that tribunals at times allowed the parties to proceed to international arbitration even though the preconditions with respect to amicable settlement were hardly sufficiently met (Franck, 2007). Hence, the use of more specific language in IIA provisions on what is expected from the parties when seeking an amicable solution might be an approach to avoiding too rapid resort to international arbitration.
IIAs could also use more conducive language to encourage or even require the disputing parties to seek a resolution with the help of a mediator or conciliator. Such a provision would be further strengthened by specifying a time frame within which the disputing parties should engage in ADR. If the dispute cannot be resolved through these techniques, it could then eventually be submitted to binding arbitration. Similarly, an IIA could also stipulate that either party can initiate ADR parallel to formal arbitration.

A further possibility of introducing alternatives to investment treaty arbitration in IIAs is by enhancing the role of State-State cooperation in the prevention and handling of disputes. Renewed interest in State-State procedures can be discerned from several more recent IIAs. The general approach would be to communicate and share information between the governments of the investor and the country where the investment has taken place on emerging and existing investment disputes, with the goal of resolving such disputes and avoiding costly arbitration procedures through investor-State dispute settlement. In other words, a potentially larger role of the home State may be thought of in the context of the settlement of investment disputes, and respective provisions could be incorporated more frequently in future IIAs.

Several examples from recent IIA practice that could resemble such an approach are worth further consideration. While these provisions refer to State-State cooperation in a more general sense, expansion and clarification of these provisions to incorporate the handling of investment disputes could be a way forward in the future. Chinese BITs for
instance frequently include the following type of provision, as exemplified in article 13 of the BIT between China and Latvia of 2004:

"1. The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of:
   (a) reviewing the implementation of this agreement
   (b) exchanging legal information and investment opportunities
   (c) resolving disputes arising out of investments
   […]

2. Where either Contracting Party requests consultation on any matter of Paragraph 1 of this Article, the other Contracting Party shall give prompt response […](emphases added)"

The establishment of a "joint committee" or "sub-committee" on investment, as is found in investment chapters of Japanese EPAs, also constitutes a viable approach. Examples of such provisions are chapter 7, article 93 of the EPA between Japan and Malaysia of 2005, and chapter 8, article 88 of the EPA between Japan and Singapore. These committees are composed of representatives of both governments of the agreement and meet on mutually agreed occasions. They are assigned various functions, including the exchange of information, the monitoring of appropriate implementation of the agreement, the review of possibilities to co-operate in investment promotion and facilitation efforts, and other responsibilities as required. Such joint commissions may also, especially if further specified in future agreements,
fulfil the function of enhancing State-State cooperation in the area of dispute management and avoidance.

Similarly, Regional Economic Integration Agreements (REIAs) also provide for the establishment of Committees to supervise and handle various matters relevant to the agreement. For example, the North American Free Trade Agreement (NAFTA) of 1992 provides for the establishment of the Free Trade Commission in its article 2001 which, among other things, is responsible for supervising the implementation of NAFTA, resolving disputes arising from the interpretation or application of the agreement and considering other issues relevant to the operation of the agreement. The Commission meets at least once per year. It also supervises the work of all sub-committees and working groups that are being implemented under the NAFTA. The handling of matters related to investment disputes could potentially fall under the responsibility of such a committee or one of the sub-committees within the NAFTA agreement or other similar REIAs.

More generally, a two-stage approach could be followed for using State-State procedures more effectively in matters of investment treaty arbitration. As a first step, IIAs could mandate the creation of joint commissions, comprised of members of all signatory States of the respective IIA, that meet solely for the purpose of handling or preventing investment disputes. What would follow as a second step is the use of these commissions to create State-State procedures for the avoidance or even settlement of investment disputes. Such an approach may be a less costly and more effective way of resolving disputes between investors and States.
An example of such a two-step approach and of an REIA that has more concretely addressed the issue of dispute settlement involving private entities at the State-to-State level can be found in The Olivos Protocol for the Settlement of Disputes in Mercosur of 2002. Chapter XI, articles 39 to 44 of the agreement, dealing with claims by private persons, includes the following content:

"Article 39. Scope of application

The procedure established in this Chapter shall apply to claims filed by private persons (individuals or corporations) in connection with the adoption or application, by any of the State Parties, of legal or administrative measures having a restrictive, discriminatory or unfair competition effect [...].

Article 40. Initiation of actions

1. The private persons concerned shall file their claims with the National Chapter of the Common Market Group of the State Party where they have their usual residence or place of business.
2. [...]

Article 41. Procedure

1. [...] the National Chapter of the Common Market Group that has admitted the claim pursuant to Article 40 of this Chapter shall engage in consultations with the National Chapter of the
Common Market Group of the State Party charged with the violation, with the aim of finding an immediate solution to the matter raised. [...]  
2. If consultations end without reaching a solution, the National Chapter of the Common Market Group shall forward the claim directly to the Common Market Group.

**Article 42. Intervention of the Common Market Group**

[...]  
2. Should the Common Market Group not reject the claim, the claim will be deemed accepted. In this case, the Common Market Group shall immediately call upon a group of experts [...]

**Article 43. Group of Experts**

1. The Group of experts referred to in Article 42.2 shall be formed by three (3) members designated by the Common Market Group [...]

**Article 44. Opinion of the group of experts**

1. The group of experts shall submit its op to the Common Market Group.
   i) If a [sic] unanimous opinion were to declare the admissibility of the claim filed against a State Party, any other State Party may request the adoption of corrective measures or annulment by reverse [sic] the challenged measures. If this
request is not complied within fifteen (15) days, the claiming State Party may resort directly to the arbitration procedure, as provided for in Chapter VI of this Protocol.” (translation from Spanish)

Interesting in these provisions is the procedure of transferring a claim by a private entity such as an investor into a State-State procedure. After a first requirement for consultations with the goal of encouraging quick solutions to a dispute, the Common Market Group has to review the admissibility of the claim from a procedural point of view, before appointing a group of experts comprised of individuals with expertise in the subject area of the dispute. This group then decides on the admissibility of the subject matter before referring it to the State-State arbitration procedure. This approach resembles the two-stage process outlined earlier, requiring in a first stage of consultations and reviews that may already put an end to the dispute. If this is without success, then State-State procedures will be initiated.

What all the above approaches have in common is that problems should be addressed upfront and attempts be made to solve them before the investor goes to the ISDS procedure available under a treaty. ISDS mechanisms have been put in place to avoid diplomatic protection for one side or pressure on the other. In practice, when a dispute is looming affecting one of his nationals, the ambassador of the home State of the investor will generally knock at the door of the authorities and seek a withdrawal of the measure affecting the investor or at least to have the matter looked in detail.
B. Available international rules and facilities

Similar to arbitration, rules or guidance to the parties and the third party neutral for ADR to be conducted smoothly and effectively are necessary, to allow the initiating party to make an informed choice and to guarantee predictability around the process, the more so when a sovereign State is involved in the dispute. The international investment framework includes at least three sets of rules that can be referred to or used to conduct any of the aforementioned alternative methods of dispute resolution, the rules set up under the ICSID Convention, the UNCITRAL conciliation rules and the ICC conciliation rules. The first part of this section will look into these rules and their use in investor-State disputes. In addition to rules that deal with the ADR process itself, this section will look at the availability of an institutional framework that provides the necessary support and services to investors and States willing to engage in ADR. Several institutions offer services such as propose a neutral third party for the purpose of conciliation, or make a venue available where relevant meetings among the disputing parties can take place. In addition to the ICSID secretariat and the ICC, several other arbitration institutions or centres, whether regional or national have embarked on providing such services.

The International Centre for Settlement of Investment Disputes

The ICSID Convention contains the main body of rules referred to by IIAs and used by parties involved in investor-State disputes. These include the Rules of Procedure for...
Arbitration Proceedings (Arbitration Rules), providing the procedural framework for the commonly used investor-State dispute settlement by arbitration, and also the Rules of Procedure for Conciliation Proceedings (Conciliation Rules) that include rules on how to undertake conciliation (ICSID, 2006a). The ICSID Conciliation Rules were adopted as early as 1967, together with the ICSID Arbitration Rules, to be used to solve disputes involving ICSID member States themselves and investors from ICSID member States. In 1978, the ICSID Conciliation (Additional Facility) Rules were adopted for use in cases where either party to the dispute is not a member of ICSID or where the issue at stake is not entirely related to investment (Onwuamaegbu, 2005). ICSID has also recently considered promoting mediation, although this approach seems to have been abandoned recently, probably under the pressure of the increase in arbitration cases on human and financial resources of the Centre.

The Executive Directors of the World Bank, in their 1965 Report on the ICSID Convention, refer to the basic distinction between “the process of conciliation which seeks to bring parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.”

Although focused on dispute settlement through arbitration, the ICSID Arbitration Rules nevertheless provide for a possibility to consider amicable settlement as an alternative to arbitration. They include an option available to the parties to request the convening of a pre-hearing conference between the Tribunal and the parties. This provision has for instance been made use of by Malaysia. Chapter III, rule 21 of the arbitration rules states:
"[...] 
(2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement."

Focused entirely on conciliation, the ICSID Conciliation Rules specify how the parties involved in a dispute shall select the conciliators and explain in detail how the Conciliation Commission should be formed. The rules further regulate how the Commission, which is comprised of the conciliators, shall operate and fulfil its mandate. They finally outline various procedures to be followed by the commission and the parties involved during the conciliation process, and specify how the proceedings shall be terminated (cite Rules of Procedure for Conciliation Proceedings). The ICSID Conciliation Rules hence provide for a relatively formal set of procedures, and a substantial amount of powers is given to the Conciliation Commission. For example, The Conciliation Commission has certain powers under which it can: (1) at any time, "recommend that the parties accept specific terms of settlement or that they refrain [...] from specific acts that might aggravate the dispute [and] point out to the parties the arguments in favor of its recommendations", (2) request written statements from the parties, (3) rule on its own jurisdiction, (4) rule on requests to disqualify conciliators, (5) hold hearings and take evidence in the form of documents or witness testimony and (6) issue a Report at the closure of the proceedings. ICSID's current conciliation rules resemble a
process of non-binding arbitration which may actually be one of the factors for the lack of attractiveness to conciliation under ICSID for parties that will be looked at in more detail below.

Finally, ICSID also maintains a set of Fact-finding Rules (Schedule A) under its Additional Facility Rules. These fact-finding rules are set up for the purpose of preventing disputes, as the result of a fact-finding procedure would provide the disputing sides with an impartial assessment of an issue (Onwuamaegbu, 2005). These proceedings require the setting up of a Committee for the investigation, and, upon conclusion of the proceedings, a report on the outcome will be issued (ICSID, 2006b).

*The United Nations Commission on International Trade Law*

A similar example of a codified approach towards conciliation can be found in the UNCITRAL Model Law on International Commercial Conciliation of 2002 (UNCITRAL, 2004) as well as in the UNCITRAL Conciliation Rules of 1980 (UNCITRAL, 1980). While the former set of rules is limited to commercial relationships and thus does not necessarily include investor-State disputes, the latter set of rules is more open to any kind of legal dispute. The UNCITRAL Conciliation Rules contain provisions on how the conciliation proceedings shall be initiated, including the appointment of conciliators. They specify the nature of interaction and communication among the disputing parties and conciliators, and define the role and mandate of the conciliators. Furthermore, the UNCITRAL Conciliation Rules discuss issues related to confidentiality and disclosure of
information, the coverage of expenses and, finally, the procedure involved in settlement of the dispute and termination of the conciliation proceedings.

An example of a codified approach towards conciliation can be found in the UNCITRAL Model Law on International Commercial Conciliation of 2002 (UNCITRAL 2004). Many arbitration institutions, such as ICSID and the International Chamber of Commerce, also have their own conciliation rules on the basis of which they offer this service. The procedure is — in brief terms — as follows:

A party to a dispute addresses a request for conciliation to the institution offering conciliation services. If the institution concerned secures the agreement of the other disputant, it will appoint a conciliator. While conciliators have broad discretion to conduct the process, they will invite both sides to state their views on the dispute, and will then make a report proposing a settlement. The parties may accept or reject this proposal; in the latter case, the foreign investor may proceed to arbitration. The disputing parties may also use the conciliator's proposal as the basis for further negotiations between them. The conciliation process is confidential and voluntary. Either party may withdraw from conciliation at any time.

*The International Chamber of Commerce*

The International Chamber of Commerce (ICC) also provides a set of rules on ADR which are applicable to all business disputes (ICC, 2001). The extent to which these *ADR Rules* can be applied to investor-State disputes however still
needs to be determined. In addition to its rules on ADR, the ICC also supports the establishment of so-called "dispute boards" which are set up at the time when a medium- to long-term contract between two parties is being concluded. These dispute boards then remain in existence throughout the contract's duration and can be approached by either party in case a dispute emerges. Dispute boards usually comprise of one to three people who are very familiar with the contract at hand. Their mandate is to help the parties in resolving disputes that emerge in the course of the fulfilment of the contract, making recommendations or even advocating specific decisions. As with rules on conciliation, the ICC has published a set of Dispute Board Rules that specify how a dispute board has to function. The ICC also supports the setting up of such dispute boards through its Dispute Board Center. As with conciliation, the dispute board rules do specify that formal arbitration can follow an unsuccessful attempt at dispute resolution through the dispute board (ICC, 2004). In terms of timing, such a dispute board can be understood as an attempt to anticipate potential disputes already when contracts come into existence. The advantage may be that contracting parties agreeing on the establishment of a dispute board are relatively aware of the fact that disagreements may emerge, and are prepared to first attempt resolution through alternative methods, potentially avoiding arbitration entirely. Given such potential advantages, it is worth further exploring the applicability of dispute boards to the investor-State scenario and maybe even the formal inclusion of respective provisions in IIAs.
Other Available Rules

Another leading institution in the area of ADR is the American Arbitration Association (AAA). Its *Commercial Mediation Procedures* are similar to the conciliation rules of the institutions outlined earlier and cover the same kind of issues, such as initiation of mediation, appointment and duties of a mediator, confidentiality, termination of the mediation, and coverage of expenses. Again, these rules primarily refer to commercial disputes and their applicability to ISDS needs to be explored (AAA, 2007). But there are likely to be many interested bodies beyond the realm of commercial disputes that would consider using these rules.

The World Intellectual Property Organization (WIPO) also maintains rules on arbitration and mediation. Similar to the previously introduced conciliation or mediation rules, the *WIPO Mediation Rules* (effective from 1 October 2002) incorporate guidelines on the appointment and role of the mediator, the representation and participation of the parties in the process, the actual process of mediation, confidentiality, financial issues and termination of the mediation process. The WIPO rules are particularly relevant to commercial arbitration on issues related to intellectual property at a cross-border level (WIPO, 2006).

Facilities

In addition to the provision of rules guiding the procedures for conciliation and mediation, many institutions also provide the necessary facilities for the disputing parties to utilize while engaging in the conciliation or mediation process,
hence assuming the role of a Secretariat in the proceedings. The reason why these institutions provide such facilities is to offer organizational, administrative and logistical support to the disputing parties and third party neutral throughout the conciliation or mediation process, and offer a neutral forum and space for the proceedings to go forward effectively. For example, the parties of a dispute may be offered relevant information, such as a list of accredited conciliators and mediators, or will be allowed to use the Secretariat's facilities while conducting the conciliation or mediation procedures. Meeting rooms and venues may also be made available to the disputants by the Secretariat.

A wide range of such institutions currently exist, so that no exhaustive list but only a few examples can be mentioned here. Among the aforementioned institutions, ICSID, ICC, AAA and WIPO provide such facilities and support to parties involved in conciliation or mediation. In addition, various regional and national centres currently also assume this function. For example, several regional arbitration centres were established under the Asian-African Legal Consultative Organization (AALCO), an intergovernmental organization established, among other things, for the purpose of advising member states on various matters in international law. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) are both among these centres established under AALCO. Both provide rules and facilities on conciliation and mediation. The KLRCA offers facilities and assistance in conciliation and mediation procedures, while the CRCICA provides administrative support. A further institution with more of a national scope is
the Singapore Mediation Centre (SMC), a non-profit organization that specializes on mediation and other types of ADR.\(^2\)

**Utilization of Conciliation Rules in investor-State Disputes**

Despite the simultaneous conclusions of arbitration and conciliation rules in 1967, the practice at ICSID to date is strongly tilted towards use of the arbitration rules. As of 2007, only six conciliation cases out of more than 200 cases have been registered at ICSID.

None of them has been registered under the Additional Facility Rules. No cases have been brought to the ICSID Centre under the Fact-Finding Rules, after nearly thirty years of their being in existence.

Although the aim of conciliation is agreement, the non-binding nature of the Report upon conclusion of proceedings has often been cited as one of the reasons why parties have tended to shy away from ICSID conciliation, especially, since the process could involve as much time and, possibly, comparable expense as an arbitral proceeding which would conclude with a binding award.

Furthermore, it is felt that the conciliation rules do not differ significantly from the arbitration rules and do not have the incentive of being simple and swift. In addition, absence of transparency, the confidentiality and privacy of a non-binding process that can result in the voluntary payment of huge amounts can also be seen as a deterrent.
Another reason that has been cited for the limited use made of ICSID conciliation is that potential users are not aware of its existence.

The ICSID Centre has at times tried to address this lack of interest for either conciliation or fact-finding rules. It has further looked into the possibility to propose a mediation mechanism and in a joint effort with MIGA, several disputes involving MIGA as the political risk insurer, have been solved through recourse of mediation or settlement. Recently however, these efforts have not been pursued. Similarly, from 1988 to 1993, the International Chamber of Commerce (ICC) dealt with more than 2,000 arbitration cases, but only with 54 requests for conciliation. Out of that number, conciliation was actually agreed upon in only 16 cases, and only 10 conciliators were appointed, because in the remaining six cases the parties settled the dispute otherwise or the request for conciliation was withdrawn. Of the 10 conciliations, nine had been completed by 1994 – five resulting in complete settlement (Schwartz, 1995). Out of these 10 conciliation cases, none involved a sovereign as one of the parties to the dispute.

In light of this lack of effective use of existing rules on conciliation, even when these rules have been specifically designed to involve a State as one of the parties to the conciliation process, one might conclude that the conciliation mechanism is not suited to cases involving States. This may not necessarily be the case but the rules themselves may be a strong deterrent to their own use for their complexity - almost as complex as arbitration rules- without having the binding effect of an arbitration and without making the process swifter and necessarily less costly.
It has been argued in recent discussions in several forums that a set of simple, basic rules that could be applied by parties wanting to avoid arbitration but at the same time, recognizing the need for an organized process.

Since conciliation is confidential, public information is scant. It seems that it has not yet been widely used in investor-State disputes. For example, the ICSID website reports only six cases for conciliation.

One should not, however, conclude from these figures that conciliation is seldom used in international business and investment disputes. It is possible that third persons – without being formally designated as “conciliators” – have played an important role in helping the disputing parties to solve their conflict.

Notes


3 One of the few published accounts concerns the first conciliation conducted under the auspices of ICSID in which a retired English judge, Lord Wilberforce, successfully acted in 1984-1985 as a conciliator to help resolve a dispute involving the distribution of $143 million in profits between Tesoro Petroleum Corporation and Trinidad and Tobago. The conciliation – which concerned a contract claim – took less than two years and cost a mere $11,000 (Nurick and Schnably, 1986).
These are: (1) SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar (Case No. CONC/82/1), (2) Tesoro Petroleum Corp. v. Trinidad and Tobago (Case No. CONC/83/1), (3) SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar (Case No. CONC/94/1), (4) TG World Petroleum Ltd. v. Niger (Case No. CONC/03/1), (5) Togo Electricité v. Republic of Togo (Case No. CONC/05/1), and (6) Shareholders of SESAM v. Central African Republic (Case No. CONC/07/1).
IV. DISPUTE PREVENTION POLICIES: EXPERIENCES AND BEST-PRACTICE APPROACHES

Despite the importance that such means can have for finding ways to solve existing disputes amicably or with the involvement of a third party neutral, the simple fact that there has been an incidence of an investor-State dispute in the first place could be considered as evidence of failure. In other words, there is an element of false timing when action is taken only after damage has already been done and disputes that are hard to solve have arisen. Rather, States would be better off anticipating possible sources of investor-State disputes in advance and taking necessary action much earlier. In doing so, the difficulties and costs, including political costs, involved by resorting to international arbitration or alternative methods could be avoided entirely.

As noted by Barton Legum, the best chance to resolve a dispute between a foreign investor and a government agency is likely before the investment dispute becomes a dispute under an investment treaty (Legum, 2006). The most fertile ground for dispute avoidance and/or early settlement is when the host State has put in place several policies of information, prevention, institutional cooperation and offering early and/or alternative effective speaking partners to the aggrieved investor. Several countries have started putting in place such preventive measures and policies and this section will look into experiences and "best practices" in several regions. It should be noted that "best practices" does not imply that a State will be totally immune of any disputes but rather that it
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has taken concrete and positive steps towards avoiding disputes from arising.

A. Information sharing

A first set of policies relate to the avoidance of measures, decisions or actions by the State, particularly at sub-national levels or by State agencies that could violate commitments otherwise taken by the State at the international level or create a damage for the foreign investor. A review of recent cases shows that about half relate to decisions taken by municipal or provincial governments or by State agencies in charge of specific sectors of the economy. For instance, most of the cases that have arisen from public utilities concessions or privatization schemes are based on alleged violations by a sub-national entity. Often, these entities will act in total ignorance of the consequences of their decisions or refusal to make a decision in favour of the investor. International investment treaties have long been negotiated by the upper level of government and their content and the level of obligations they entail not made available or communicated to authorities that are in contact with foreign investors. Where governments have made great efforts to inform foreign investors of their commitments towards investment promotion, protection or liberalization through their investment promotion agencies, very little has been done to inform the State actors of the does and don'ts when dealing with foreign investors.

The member countries of the North American Free Trade Agreement (NAFTA) had understood the need for
information at the Federal State or Provincial level and organized meetings to inform stakeholders in States and Provinces of the benefits for economic operators of the commitments to liberalize trade and investment. These information meetings were however not meant originally to brief State or Provincial authorities on the consequences of a violation of treaty provisions and of possible implications of decisions relating to permits, authorizations, investment contracts on investors rights. As ISDS cases against the United States became public knowledge, the lead agency in charge of handling disputes was consulted frequently by government agencies in order to assess possible implications of legislation or regulations.

Since the early NAFTA days, several countries have organized decentralized meetings with various stakeholders at various levels of government in order to inform them about treaty commitments. In addition to the authorities at the central government level that are usually in contact with foreign investors, a specific targeting of those government agencies in charge of specific sectors or potentially taking measures that could infringe the treaty provisions, is recommended. This approach was taken recently by the government of Costa Rica after the conclusion of the DR-CAFTA. Peru has also organized similar information sharing events after the conclusion of the Peru-US FTA.

In order to address similar concerns at the early stage of treaty negotiation, several countries have involved a representative of the attorney general’s chambers or offices in the negotiation team. This is the case for example in Malaysia or in the Philippines. In addition, broad consultations during
the negotiation phase can significantly reduce the risk of agencies and ministries taking measures or acts that can violate treaty provisions at a later stage.

More recently, the Government of Peru has enacted a law and set up a sophisticated information system that is intended to serve two purposes: First, to inform the provincial and municipal authorities as well as the State agencies about the international commitments undertaken by the central government, for example the content of the Free Trade Agreement signed with the United States or bilateral investment treaties. In addition, it is also available for these sub-national levels of government to inform the central government about difficulties or problems with foreign investors and seek their involvement. This system is available through a website put in place and operated by the Ministry of Economy on their homepage. In addition to making available the site and the information, various meetings have been organized at the provincial level. The information system created by Peru has an early alert function to enable the inter-ministerial Commission in charge of State response to get involved at an early stage of a dispute and to take appropriate action.

Peru has experienced its first investor-State dispute in 2003 and has since then been subjected to several claims, either based on investment treaties or contracts concluded between the Peruvian State and investors, such as stabilization contracts of which Peru has concluded over 300 with individual investors. In December 2006, the law No. 28933 was enacted, establishing the "coordination and response system of the State on investment-related disputes". The main
purpose of the law is to optimize the defence of the State with respect to international investment disputes, centralize information on IIAs concluded by Peru, set up an alert mechanism to warn of possibly emerging investment disputes, centralize information on international investment disputes, better coordinate procedures among public entities involved in a dispute, and achieve further standardization of the ISDS provision in Peru's IIAs. The public entities subject to the law include all levels of national, regional and local government as well as state-owned enterprises and other public funds. Hence the law is widely applicable.

The Law establishes the Ministry of Economy and Finance as the Coordinator to which information on IIAs and other relevant agreements must be communicated. Public entities are also required to pass on information they receive about emerging disputes to the Coordinator. The Law further sets up a Special Commission assigned to the Ministry of Economy and Finance to represent the State in ISDS cases. This Commission is chaired by a representative of the Ministry of Economy and Finance, and is further composed of representatives from the Ministry of Foreign Affairs, the Ministry of Justice and Proinversión, the private Investment Promotion Agency (IPA). Up to two non-permanent members also join the Commission depending on the nature of the case. These include a representative of the Public Entity involved in the dispute, with the representative of the Ministry of Foreign Trade and Tourism joining if the dispute arose from an FTA. The Special Commission is, among other things, responsible for strategically assessing possibilities for reaching amicable settlement, obtaining technical reports and information from public entities involved in a dispute, taking part in the
settlement negotiations, proposing the hiring of legal practitioners, designating arbitrators, assisting in the work of outside counsel hired for the "patrocinio" of the State, approving the availability of funds for conciliation or arbitration, and determining the liability of the public entity involved in the dispute for the payment of relevant costs and awards.

The Law further provides guidelines for the negotiation of dispute settlement provisions and sets some requirements for provisions to be included in IIAs. Among these are the need for a six month period of amicable settlement, the definition of possibilities for recourse to neutral dispute settlement systems, the specification of how the costs of arbitration and conciliation procedures are distributed among the parties, and the obligation of the investor to notify the Coordinator of the system.

This framework established by Peru for the response to disputes arising from IIAs has two interesting characteristics as far as the early sharing of information is concerned. First of all, the Law provides for an obligation to report and notify to one identified central agency, the conclusion of any agreement with an investor or any IIA that includes an ISDS provision. One purpose of collecting this information in a single place is to consolidate a database of agreements and to keep track of respective commitments made by the State. An additional advantage is that information about these commitments is available to all relevant State entities from one central source. Parallel to that, the law also provides for an early alert system that allows the State of Peru to obtain early information about problems involving foreign investors that may trigger the use
of international arbitration. Early warning on potential disputes to central authorities responsible for handling ISDS cases allows for early and coordinated action to be taken. More time will be available to prepare for the case, and more effective conduct of the amicable settlement phase will be possible in order to seek settlement before arbitration begins.

**Figure 2. Alert system of Peru**

![Diagram of the alert system of Peru](image)

*Source: Government of Peru*

The Peruvian authorities have taken a bold and strong decision when deciding to organize the coordination and defence of cases by means of a Law of mandatory application. The main goal was to ensure that coordinated action is taken and information is available without delay. Budgetary matters and allocation of payments are also better handled within a law. However, a possible structural deficiency in the system is that the collection of information and the handling of disputes are not in the hands of the same agency. Such a collegial coordination among agencies rather than the empowerment of
one single agency may however impede effective decision-making at the negotiation stage and may lead to difficulties in building focused internal capacity for dealing with ISDS cases within one agency.

B. Reinforcing institutions and clean procedures / administrative review

And additional way forward to prevent disputes from escalating is by putting institutional mechanisms in place that allow aggrieved investors to initiate procedures in the host state for the undertaking of an administrative review of the law or measure that the investor considers to be in violation of the treaty. Such an administrative review has the advantage that it may allow for an easy fix of a problem initially not recognized by domestic central or local governments. The host state may recognize and accept the falseness of the measure as a result of the administrative review and may hence decide to reverse it without the necessity of a lengthy arbitration procedure. This approach may thus not always constitute a delay of the proceedings before arbitration can be initiated, but may in many cases substantially shorten the process of finding a solution to the entire problem. Such recourse to an amicable administrative procedure could benefit both the governments and investors involved. Governments could achieve improvements of their legal and administrative framework, while the investor would be content with the speed at which its complaint has been addressed by the host country government.
Some recent IIAs provide for the recourse to domestic administrative review procedures prior to seeking arbitration. For example, the protocol of the BIT between China and Latvia of 2004 requires the following:

"The Republic of Latvia takes note of the statement that the People's Republic of China requires that the investor concerned exhausts the domestic administrative review procedure specified by the laws and regulations of the People's Republic of China, before submission of the dispute to ICSID under Article 9, paragraph 2."

Similar clauses can also be found in the more recent IIAs concluded by Colombia.

C. Implementation of ISDS commitments: access to information, inter-institutional arrangements and authority to settle

Another set of preventive steps can be taken by governments upon the conclusion of investment treaties. In a vast majority of investment protection treaties, States make commitments on ISDS and give the choice to the investor to resort to international arbitration should a dispute arise. Upon signature of the treaty, the State will take steps to eliminate non conforming measures and put laws and regulations into conformity with core investment treaty provisions such as national treatment for example. Similarly, ISDS provisions could be subject to specific implementation measures, in order
to allow the State to be ready and fully prepared to comply with the provisions, should the investor choose to start an arbitration procedure. This approach has an impact on governance, since it increases the predictability for the State entering into investment agreements and enables it to abide by its commitments.

This approach has been taken by the Government of Colombia while beginning to negotiate investment treaties. Colombia has started recently the conclusion of BITs and has negotiated a Free Trade Agreement with the United States and a FIPA with Canada. At the same time, the Ministry of Commerce has launched a program with the support of USAID, aiming at getting prepared to deal with investor-State cases, through the identification of a lead agency and other institutional arrangements to cooperate on fact-finding.

The lead agency constitutes the core of Colombia's institutional arrangements to prepare itself for investor-State arbitration. It is involved in the handling of all issues related to the investor's interaction with the State in the context of investment disputes, including the receipt of notifications about emerging disputes, the coordination of consultations between the investor, the specific agency involved in the dispute at hand and other relevant agencies, and the management of the arbitral proceedings themselves. In other words, the lead agency is the centralized authority to be approached for all matters related to investor-State disputes, and all information regarding such disputes is gathered within this agency. This approach drastically simplifies the authority structure among government agencies, thereby increasing overall transparency.
Figure 3 illustrates the role of the lead agency in further detail, particularly in relation to the investor and the involved agency as the two other most relevant actors. The involved agency is the government authority which is responsible for implementing the measure that triggered the dispute between the investor and the State. The box illustrates three different roles of the lead agency, firstly as a recipient of information about disputes, secondly as a coordinating body during the consultations process, and thirdly as a key agency involved in arbitral proceedings.

The first role of the lead agency, namely as a recipient of information about disputes, addresses the challenge faced by governments in assuring that the right government agencies receive information about existing grievances by investors resulting from breaches of IIA commitments. In many cases, the involved agency - which may often be a local or even remote government authority - will be approached by the investor regarding areas of dissatisfaction. Hence it is important to make it known to the involved agency how to react to complaints it receives by local foreign investors. Designating a lead agency as a focal point and making this known to all agencies that may become involved in investment disputes will guarantee that information about potential disputes will be channelled from the involved agency to the right authorities within the national government via the lead agency. In addition, investors can also be informed directly about the existence of the lead agency, which they may approach in situations when a dispute seems imminent.
During the phase of investor-State consultations, the State is likely to have some interest in settling a dispute before it is being submitted to arbitration. The lead agency can play a role in making this possible by acting as an intermediary between the investor and relevant government authorities. First of all, the lead agency will act as the main body engaging in the consultations with the investor, irrespective of which specific government authority is involved in a particular dispute. Within the lead agency, specifically trained personnel can be designated to engage in all the existing consultations with investors, who will as a result be able to accumulate valuable experience over time on how to handle such consultations most effectively. The lead agency will pool all the information about a dispute received by the involved agency and other agencies of relevance to the particular case and utilize it for the consultations process. Such a pooling of knowledge will increase the effectiveness of government to handle the consultations in an informed and competent manner.

Thirdly, if a case is nevertheless eventually submitted to arbitration, the lead agency will maintain its involvement in the case. It will, on the one hand, further coordinate with the involved and relevant government agencies, while sustaining the dialogue with the investor. It will further provide the information is has collected on the case to the lawyers who support the State's defence.

Colombia has already taken several steps in implementing this system. For example, it made efforts to identify all relevant regulatory authorities that may happen to get involved in a dispute. To facilitate inter-agency...
communication, specific contact people in various agencies were designated to deal with issues related to investment. The lead agency was given clear authority to collect and produce evidence from all relevant sources within the Colombian government.

Figure 3. Getting prepared: the institutional system of Colombia

Source: Government of Colombia

Note: Part I: knowing the investment related dispute - there must be a lead agency centralizing notifications and coordinating any response; part II: consultations investor-State - the lead agency must be in charge of coordinating the rest of governmental agencies involved in the dispute, and it also must be the front desk for contacts between the investor and the administration; part III: arbitral proceedings - even during the arbitration the above stated roles of the lead agency must be maintained and any non-judicial solution must be approved by the Committee.
Guatemala is also considering new institutional approaches in dealing with investment disputes, with the ad-hoc decree No. 128-2009 of 5 May 2009 illuminating this trend. The decree temporarily sets up an institutional mechanism for dealing with two recent cases against the country, by establishing an inter-institutional Commission to handle these two pending cases. The Ministry of Economy was designated by the decree as the coordinating agency.

Although primarily targeted towards preparation to defend the State in ISDS cases, the program has also other functions related directly to dispute prevention and early settlement of investor claims. The identification and empowerment of a lead agency contributes to allowing discussions with the aggrieved investor early on, to secure the required cooperation and support from the government agency or sub-national entity that has taken the aggrieving measure at an early stage, to make it mandatory for this agency or entity to collaborate closely with the lead agency and to be vested with the necessary authority to negotiate and settle a claim when possible. On this particular issue, it should be noted that government officials have generally less authority and flexibility to engage in settlement discussions and to agree to a settlement than executives from the private sector. Particularly when another agency or sub-national entity is involved, it will be difficult to take these steps without having been given the authority upfront and possibly by law.

As implied by Legum (2006), in addition to the identification of a lead agency and the authority and power of attorney to negotiate and possibly settle, the lead agency will
require some form of statutory or specific budgetary authorization before officials can reach into the public coffers.

“While statutory authorization generally exists for paying adverse court judgments against the State, the same is not always true for payments in settlement of claims made outside domestic justice systems. The absence of authorization can mean that specific authorization from the legislature is required before the proposed settlement can be paid. Even mere uncertainty as to whether existing statutes authorize payments in settlement of investment treaty claims can discourage government officials defending the case from seriously considering conciliation.

A related issue is uncertainty as to the agency budget against which any settlement will be charged. Because of the novelty of investment treaty claims for most governments, it may be unclear whether a settlement or adverse award will be charged to the budget of the agency responsible for the underlying acts, the agency responsible for the country’s investment treaty program, the agency defending the claim or to some other account within the government’s books. These are not technical questions. A significant payment can require that an agency cut essential programs for the year in which the budget impact is felt. Uncertainty as to which agency’s budget is at risk will make it difficult for the officials involved to authorize a settlement.”

As noted by Professor Coe: “at an early stage the [newly engaged agencies] ha[ve] too little information with which responsibly to assess the merits” (Coe, 2005). The flow of information at the beginning of a case is slow in most
governments. Requests for information from the lead agency in charge of the defence of the case or vested with the authority to settle the case amicably, must go through an official and mandatory channel. Officials in charge of the case will often face reluctance if not dissimulation of facts and documents on the part of the aggrieving government agency or entity. A lack of cooperation will create tensions and make it impossible to have a clear assessment of the case that would then lead to an amicable settlement or negotiation with the investor.

Inter-institutional arrangements made by law or set-up as a system inside the host government, such as the Commission set up by the Peruvian law or the system organized by Colombia are meant to facilitate early settlement decisions based on early and complete information, appropriate power and budgetary authority. It will also make it easier for an aggrieved investor to identify early on the proper procedure to start an amicable discussion in view of a settlement before the parties have started investing important amounts in preparing their defence thereby avoiding the dispute to escalate. Establishing such a system by law will also enhance transparency and accountability on the part of the government actors.

Several governments in Latin America have recently embarked on comprehensive ISDS implementation policies. The UNCTAD secretariat has assisted the government of Peru in the preparation of a Law and is currently assisting the governments of Guatemala and the Dominican Republic for a similar set-up. Exchange of experience in this field is part of
UNCTAD’s technical assistance and a salient feature of the yearly courses on “Managing Investment Disputes”.

**D. Institutional response: ombuds and mediation services**

In addition to more classic investor after-care services that include the continued assistance by investment promotion agencies of foreign investors once the investment is up and running (UNCTAD, 2007), several host countries are providing an institutional response to problems encountered by investors. Setting up an ombuds office or appointing an ombudsman to serve as a One-Stop-Shop for complaints can bear fruitful results. In its usual definition, an ombud is an "officer appointed by the legislature to handle complaints against administrative and judicial action," serving as a "watchdog" over those actions while exercising independence, expertise, impartiality, accessibility and powers of persuasion rather than control (Wiegand, 1996).

For investors, an ombudsman or ombuds-office provides an institutional interlocutor to turn to and an official channel to address issues and problems at an early stage. It can remain at the informal level but can also constitute a formal approach to the host government and a request to resolve the issue. It can constitute a mandatory channel or be available to the investor as an additional choice. It may be respond to strict procedures or be available in a more flexible manner. In any event, it can constitute a way for the investor to attempt a prompt, early, cheap and amicable resolution of a problem relating to his/her investment.
For host States, an ombudsman or ombuds-office constitutes a first response to a problem encountered by a foreign investor. It can provide early information to the authorities and enable them to assess the problem. It may also facilitate early action, if required, and allow them to correct the problem before it worsens.

The ability of the ombudsman or ombuds-office to take corrective action or to request that correction action is taken by another agency or sub-national authority of the government will depend of its institutional location. In practice, it can be found in investment promotion agency, at the central or regional level, within a Ministry, as a separate entity directly under the Prime Minister or the President. It can take the form of a single authority or by a commission comprising various agencies. It can also be set up under a treaty in the form of a joint commission comprising representatives of the States members of the treaty. For instance, the Commission for Environmental Cooperation helps prevent potential trade and environmental conflicts related to NAFTA and may be adapted to potential investment disputes (Franck, 2007). Joint commissions entrusted with a preventive role can be found in several BITs concluded by China.

A case in point is the approach taken by the Republic of Korea where an ombudsman office has been strategically located within Kotra, the Korean investment promotion agency but is totally independent from the investment agency, accountable solely and directly to the Prime Minister. The Office of the Foreign Investment Ombudsman was established in October 1999 following the passing of the Foreign Investment
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Promotion Act (FIPA) a year earlier. The OIO is nested within the Korea Trade-Investment Promotion Agency (KOTRA) as a non-profit organization. Its main purpose is to support foreign investors facing difficulties in managing their business within Korea, thereby improving the overall investment environment in the country.

Within the OIO there exists an investment aftercare team that consists of so-called "home doctors" who are experts on various industrial sectors in Korea. They provide individualized support to foreign investors in Korea that face grievances of any kind. In addition, an investment service team within the OIO makes sure that the investment environment for foreign investors is generally favorable, by addressing, among other things, the daily concerns of foreign managers and other individuals at a personal level.

The mandate of the OIO is enshrined in Korean law, which requires all relevant agencies within the Korean government to cooperate promptly with the OIO. Article 21-3, Paragraph 3 of the Enforcement Decree of the FIPA specifies:

"The Ombudsman may request the relevant administrative agency or the foreign investment-related agency to cooperate for the purpose of solving problems experienced by foreign capital-invested companies and performing duties related thereto. In this case, the agency thus requested to cooperate shall notify its opinion on the matter under consideration within seven days after the date on which the request has been made."
The OIO is also a member of two agencies within the Korean government that have relevance to investment. These are the Foreign Investment Committee, which is the key responsible authority for policy-making on investment, and the Regulatory Reform Committee that deals with the conducting of regulatory reforms. As a member of these two agencies, the OIO can provide effective advocacy on legal and regulatory issues that affect foreign investors in Korea or the Korean investment environment as a whole.

Existing statistics show that the services of the OIO are used frequently by foreign investors. From the years 2000 to 2007, more than 3200 grievances of foreign investors in Korea were received by the OIO, covering an array of issues pertaining to various industrial sectors. In 2007, 370 grievances were filed, out of which 298 were resolved by the "home doctors", constituting 80.5% of all grievances in that year.

The OIO usually follows two specific procedures in addressing grievances notified to it by foreign investors, depending on the nature of the grievance. On the one hand, the problem may be resolved through general business counseling, involving the provision of advisory and supporting services to the foreign investor on how to handle domestic laws, management difficulties etc., in order to help the investor overcome the problems faced within the Korean investment environment. On the other hand, if the grievance results from inadequate laws or administrative hindrances on the part of the Korean government, then the OIO may venture beyond advising the investor by addressing the relevant Korean government authorities and agencies directly to advocate
improvements in investment policy, administrative procedures or laws and regulations (see KOTRA website).

Figure 4. The Korean Office of the Foreign Investment Ombudsman


Independence, competence and personal values seem to be playing an important role in the success of the Korean experience.

Investment mediation service: A similar approach than above can be taken by the host government by instituting a
mediation service available for foreign investors or designate a mediator whose function will be to hear the complaints, bring the parties together, facilitate the dialogue and possibly resolve the problem before it turns into a dispute that can only be settled by courts or international arbitration. The idea is similar to that of an ombudsperson. An investment mediator would be "above" the dispute (or potential dispute). The functions of a mediation service would be those of a communicator, adviser, facilitator – not those of an administrator or judge – and it can, in theory, respond to requests from governments as well as investors.

In practice, several States have set up an institution to provide internal mediation services or designated official mediators available for foreign investors. Here again, the role can be played by a commission or by an individual. A case at hand is the mediation services made available by the Kingdom of Morocco to investors both at the regional level through the decentralized Regional Investment Centers and at the central government level by a Commission on Investment, chaired once a month by the Prime Minister himself and in which the key ministers are participating or represented. The secretariat for this commission is entrusted to the Directorate of Investment, a government entity in charge of investment projects and investment policies that will bring to the attention of the commission the problems and cases and is then entrusted with the implementation of the decision taken by the commission.

Impartiality, competence and trustworthiness, as well as actual ability to resolve the issues will be a guarantee for the investor and the government.
E. State-State Cooperation in Dispute Prevention

Another way of preventing disputes from emerging and reaching the international arbitration phase is by enhancing State-State cooperation on relevant matters. To a certain extent, communication and interaction among States on issues related to investment agreements and investor-State disputes have constituted common practice in the past, offering important lessons when considering approaches to making such practice more formal. At the same time, new previously non-existent channels of State-State cooperation can be thought of.

It is important to note that not only predominantly capital importing countries have been found to show interest in finding ways of preventing disputes from escalating into international arbitration. Equally, capital exporting countries at times also engage in activities on behalf of their investors to prevent disputes from escalating. Generally, the interest of the investor in having its complaint addressed and grievance removed in a quick and uncomplicated matter is likely to be large, and preferable to costly and time-consuming ISDS procedures.

The current construct of international arbitration to settle investor-State disputes under the ICSID Convention has been set up in order to remove investor-State disputes from political pressure and to settle these cases in a legal framework. However, as mentioned before, common practice among States has been the issuance of complaints by diplomats of the home country towards the government of the
host country on behalf of an aggrieved investor - the "ambassador knocking on the door of the host country government ministry". However, this approach remains largely ad-hoc without any basis in existing law or international agreements. While diplomatic contacts and an engagement by prominent diplomats on behalf of an investor offering "good offices" may have some impact on the host government, this approach is likely to face limitations as it creates a sense of diplomatic pressure exerted on the host country government akin to the politicization and "gun-boat" diplomacy described earlier. Moreover, such diplomatic efforts lack the nature of a more formal institutional process between States where defined channels of action in response to a complaint are specified. Hence, if diplomatic channels are used to address potential disputes between investors and the host State, attention should be paid that this happens through previously agreed-upon procedures that establish a mentality of cooperation rather than confrontation.

Moreover, capital exporting developed countries also advocate in favor of the interests of their investors through means other than diplomatic channels. For example, the German government through its insurance scheme for foreign investors (Hermes) provides respective assistance to all insured German firms investing in host States with which the German government has concluded an IIA. A similar approach is also used by the U.S. government on behalf of OPIC insured investments. Apparently this involves various kinds of advocacy work vis-à-vis the host country government. Unfortunately, accounts of such cases mostly do not enter the public domain, an assessment of their frequency is not possible. However, they are likely not too uncommon.
Possibly more promising is the role of State-State joint commissions or similar kinds of institutions set up for the purpose of handling complaints of investors and channeling them to the right government agencies for further review. As discussed, the purpose and responsibilities of the joint commissions can even be specified in IIAs. Investors could approach the representative of the joint commission in their home country, who would then engage in respective consultations with its counterpart in the host State to attempt an early settlement of the emerging dispute. The whole procedure would hence constitute yet another type of early alert mechanism, in this case not only among domestic institutions but more international in nature.

F. The ability to settle during an arbitration procedure

In view of the confidentiality usually surrounding such settlements, accurate, comprehensive statistics on negotiated settlements of investor-State conflicts are not available. Nevertheless, estimates are that over the last two decades such settlements vastly outnumbered the 259 known investor-State arbitration cases lodged until the end of 2006. Interesting in this regard is the increasing percentage of ICSID cases that are discontinued following settlement. As of November 2005, seven out of the previous 10 arbitration cases concluded at the Centre were concluded in settlement without the need for a tribunal to impose a binding solution on the parties (Onwuamaegbu, 2005). It is believed that thirty percent of all
cases registered at ICSID are settled through negotiations, rather than by a binding award of an arbitral tribunal (Coe, 2005). 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 (Schwartz, 1995).

Negotiations may even continue after arbitration has started. For example, in 2006 an ICSID case brought by the Western NIS Enterprise Fund against the Ukraine was terminated when the two disputants agreed to a settlement whereby Ukraine reimbursed the Fund for certain loans that it had made (ITN, 2006). Several cases against Argentina, Venezuela and Ecuador have been settled during the arbitration procedure, without having recourse to a parallel mediation or conciliation procedure.

Note

1 The Law is complemented by Supreme Decree No. 125-2008-EF further clarifying the exact procedures to be followed in relation to the Law.
V. CONCLUSIONS

- To be completed -

Several issues has been discussed and analysed in this paper, ranging from taking an early or at least timely approach to a problem with an investor to offering and implementing a broader choice for both parties to settle the dispute once it has arisen. Before looking into possible policy options for developing countries negotiators, investment promotion officials or policy makers, it is necessary to emphasize that in this area like in many others when State policies are at stake, there is no "one-size-fits-all" rule. Potential disputes with investors, even within the rather limited scope of investment treaties, can be so different in nature, scope, magnitude and consequences for the investor and for the host State that there is indeed no magic formula that would make alternative approaches the obvious solution. It is therefore important to view the following options in the light of what they are: additional options to increase the chances for an amicable settlement of a problem arising between an investor and the State.

It should also be noted that where most of the options are meant for policy-makers from States and particularly developing States, a couple of suggestions are also made to the international investment law community to address some shortcomings of the current available solutions and make ADR more attractive and more efficient in the context of investor State disputes.

- Preventive policies: Investor-State disputes are not unavoidable collateral damage to foreign investments in a
host State. As highlighted earlier, by signing international investment agreements developing States need not necessarily run into investment disputes whenever they are bringing about changes to their investment framework, in spite of strong commitments to avoid discrimination, regulatory expropriations or any other violations of their treaties. Together with the conclusion of such treaties comes a set of regulatory and institutional measures to inform relevant actors within the government or sub-national entities of the State about such commitments made by the central government but committing all the levels of the State in their actions or lack thereof affecting the rights of a foreign investor.

What is required is to put in place appropriate and efficient information-sharing channels from the centre to the sub-levels of the State to create awareness and responsible behavior on their part. The same communication channel or information-sharing program can also be used to channel information from any State actor, municipal government or other sub-entity of the State to the relevant entity within the central government in order to put in place early and preventive means or actions or trigger necessary reaction to avoid a dispute altogether or at least avoid escalation thereof. These information-sharing programs need not be very resources intensive and can be put in place as part of technical assistance and cooperation from international organizations or other States that have successfully implemented and tested such schemes.

Preventive policies can be put in place as part of the implementation measures or mechanisms of an investment
treaty in a similar way as other legislative or regulatory adjustments or revisions. As far as the implementation of investor-State disputes provisions are concerned, it begins with the design of appropriate State response schemes ranging from the identification of One-Stop-Shop for investment claims, the identification of a lead agency in charge of investment disputes, effective cooperation from other relevant agencies and State entities, budgetary authorizations and other procurement mechanisms. It will also required appropriate awareness-building and capacity-building for government officials, policy-makers, legislators and other authorities, including judges and other representatives of the judiciary to foster a coherent and efficient implementation of these policies.

- Towards a fourth generation of investment promotion or one further step in investment after-care: ombuds and mediation services to avoid investment disputes. As mentioned in an earlier section, investment promotion policies can effectively be complemented by measures and concrete institutional arrangements to avoid problems with investors.

Offering concrete ways of settling a dispute other than recourse to international arbitration or the national courts: …
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