Rapporteur Report:
Alternative Dispute Resolution (ADR) —
Definitions, Types and Feasibility
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I. Introduction

The Joint Symposium defines Alternative Dispute Resolution ("ADR") as an approach to the settlement of disputes by means other than binding decisions made by courts or tribunals. As a general matter, ADR is broadly understood as involving the use of negotiation, mediation, conciliation, or arbitration. These techniques are not necessarily mutually exclusive in any particular conflict, but can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes. ADR is typically a consensual process that involves the intervention of a third party neutral to assist parties in resolving their conflict. In the specific context of investment treaty based investor-state disputes, ADR is better understood as an international dispute resolution mechanism that is an alternative to adjudicative mechanisms such as investment treaty arbitration or national court litigation.¹

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

The pre-symposium discussion focused on a variety of topics, including the value of alternatives to investment treaty arbitration, different types of ADR processes, the implications of settlement, the mediation of investment disputes, matching cases with ADR methods, and engaging in systemic dispute systems design. The Joint Symposium on 29 March 2010 will expand on these themes to generate ideas and explore good practices for preventing, managing and resolving investment treaty conflict. We hope to generate a discussion that considers how to facilitate investment and create sustainable dispute resolution systems where investment-related issues are resolved in a way that creates value for all parties.

¹ For the purposes of this Joint Symposium and to focus on more than the application of legal rules to factual circumstances, arbitration and other adjudicative methods of resolving disputes——such as national court litigation——are outside of the scope of ADR.
II. Synthesis of the Pre-Symposium Discussion

In the pre-symposium discussion, experts explored issues related to the use of ADR in investor-state dispute settlement arising under International Investment Agreements (IIAs). There were wide-ranging discussions related to ADR and its feasibility. This report covers both the range of ADR methodologies and key themes that arose repeatedly.

There are a broad range of ADR methods available for resolving investment treaty disputes. The overall objective of these ADR methods is to avoid, prevent or effectively manage disputes. Pre-symposium discussion identified methodologies such as: (1) indirect diplomatic negotiations between states, (2) direct negotiation between investors and states, (3) the use of ombuds or lead government agencies to manage and resolve conflicts at early stages, (4) mediation, that can involve the use of interest-based or adversarial models of mediation, (5) formalized conciliation through institutions such as ICSID, (6) early neutral evaluation by a third-party, (7) formal fact-finding related to the entirety (or a part of) the dispute conducted by a third party neutral. Theoretically, these options could be used in isolation or in combination with each other and/or with adjudication processes. Stakeholders can choose to use these processes in a reactive way, by choosing tools to minimize conflicts once they arise; but stakeholders can also proactively plan to manage and eliminate conflict before it arises through the process of dispute systems design. One ADR method that was not discussed was the role of client counseling in the assessment and adjustment of client to needs, expectations and objectives in relation to perceived investment treaty conflict.

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

A second theme was, assuming that a conflict or dispute exists, parties should consider how to prevent unnecessary escalation in order to conserve resources and preserve relationships. Open questions related to whether different ADR methods enable stakeholders to de-escalate or prevent disputes more effectively than others. Stakeholders should consider the costs associated when any problems arise in the context of an investment relationship. The costs associated with the time spent planning how to prevent disputes from arising could then be weighed against the

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costs of a problem occurring, and potentially turning into a dispute. Part of this consideration may include whether parties wish their relationship to continue into the future, or whether they are simply interested in a one-time transaction. Some suggested the creation of lead government agencies, the exchange of information, or the use of government ombudsmen as a viable option to prevent disputes. By contrast, others suggested dispute prevention is a process in and of itself.

A third theme was that parties can gain value in carefully assessing when, where and how to resolve formal disputes. In certain circumstances, both investors and states could benefit from settling problems through various alternatives to adjudication or perhaps even using adjudicative modalities and non-adjudicative efforts (i.e. ADR) simultaneously. Commentators identified challenges in using ADR settlement strategies. In certain circumstances, there may be incentives not to settle. Where outcomes are uncertain, it may be challenging to "bargain in the shadow of the law". Nevertheless, such uncertainty in outcome could also create incentives for settlement to avoid the potential variation in arbitration outcomes. Other commentators expressed concern that, in some jurisdictions, government officials could face personal liability for reaching a settlement that a state considers at some point to involve a sub-optimal resolution. Such a situation may, even where settlement would be objectively reasonable, decrease the likelihood of settlement as civil servants may be concerned about the scope of risk given factors such as the lack of public baselines, the effect of de facto precedent or general uncertainty about the scope of the law. It may be useful to explore whether setting guidelines or establishing practices related to settlement might be useful in alleviating such concerns.

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

III. Implications for Future Debate and Discussion

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

- What incentives are there to make dispute resolution more effective? How can incentives be used to effectively prevent conflict escalation and promote optimal settlement in the future? How might stakeholders create incentives (i.e. via international law, domestic law, institutions, contractual arrangements, soft law, formal and informal market mechanisms, or some other venue)?

- What circumstances make arbitration more valuable than other potential remedies, such as negotiation or mediation? What types of investors, projects, industrial sectors may be most suitable for particular dispute resolution strategies? How can commercial usages of trade, cultural contexts and local dispute resolution traditions be drawn upon to facilitate effective ADR?

- What is the role of mediation in the settlement of investment treaty disputes? How can different mediation strategies offer the greatest value? When may it be most useful to use an interest-based model of negotiation, which focuses on shared values? When is a distributive-model, which is concerned about allocating scarce resources, of greatest efficacy?

- What is the value in combining different types of dispute resolution strategies in a single IIA? What are ways to maintain the value and flexibility of the dispute resolution process while still providing a degree of certainty related to the process for stakeholders?

- What value is added by having dispute prevention and management strategies in place as part of a host state's basic domestic infrastructure? How can other types of infrastructure, whether in terms of training or capacity building, be most effectively used to facilitate the effective use of ADR?

We welcome an opportunity to explore these and other issues at the Joint Symposium.