

ARE THERE VIABLE ALTERNATIVES TO INTERNATIONAL INVESTMENT ARBITRATION?*

HÁ ALTERNATIVAS PARA ARBITRAGEM DE INVESTIMENTO INTERNACIONAL?

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ABSTRACT: If a state intends to have a credible policy concerning the protection of its outward foreign direct investment without resorting to arbitration, this state is supposed to find ways of settling eventual investment disputes. Hence, the analysis of alternative methods to arbitration, a costly and unpredictable procedure, becomes important. In addition, the investigation of these alternative methods is warranted because UNASUR countries are currently negotiating the creation of a mediation center for settling investment conflicts. Thus, this paper will scrutinize the most common types of alternative methods to international investment disputes. This study will hence demonstrate that these alternative methods may become an interesting option to developing countries that have become exporters of investment and intend to protect this investment.

Keywords: outward foreign direct investment, developing countries, bilateral investment treaties, alternatives to arbitration, Alternative Dispute Resolution, Dispute Prevention Policy, mediation, conciliation.

RESUMO: Se um estado pretende ter uma política credível quanto à proteção de seu investimento direto estrangeiro externo sem recorrer a arbitragem, esse estado deve encontrar formas de resolver eventuais conflitos de investimento. Assim, a análise de métodos alternativos para a arbitragem, um procedimento dispendioso e imprevisível, torna-se importante. Além disso, a investigação desses métodos alternativos é justificada porque os países da UNASUR atualmente estão negociando a criação de um centro de mediação para a resolução de conflitos de investimento. Assim, este documento examinará os tipos mais comuns de métodos alternativos para disputas internacionais de investimento. Este estudo, portanto, demonstrará que esses métodos alternativos podem se tornar uma opção interessante para os países em desenvolvimento que se tornaram exportadores de investimentos e pretendem proteger esse investimento.

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Palavras-chave: investimento estrangeiro direto externo, países em desenvolvimento, tratados bilaterais de investimento, alternativas à arbitragem, resolução alternativa de litígios, política de prevenção de controvérsias, mediação e conciliação.

1. INTRODUCTION

Although there are still a lot of asymmetries between developed and developing countries, especially in both economic and social aspects, many emerging economies have succeeded in increasing their outward foreign direct investment (OFDI). Numerous justifications may attract large exporters' attention in relation to overseas markets: competitiveness enhancement, rise in the scale of production, among others. In this context, bilateral investment treaties (BITs) are normally a useful way of providing legal protection to OFDI.

BITs usually contain compulsory adjudication clauses. Thus, arbitration has been the most traditional way of settling international investment disputes. Yet, arbitration has revealed to be costly and some developing countries have not been satisfied with arbitration results. For instance, Bolivia has decided to leave the International Centre for Settlement of Investment Disputes (ICSID).

Keeping this in mind, the arguments put forward in this paper will be based upon two statements: a) there are feasible alternatives to arbitration concerning international investment disputes, and b) OFDI of developing countries deserves the protection of these viable alternatives.

In order to confirm the aforementioned statements, this paper will analyze ways of settling investment disputes other than through arbitration. These ways can be split into two types: Alternative Dispute Resolution (ADR) and Dispute Prevention Policy (DPP). For the purposes of this text, the basic difference between ADR and DPP is that while in an ADR a third-party helps disputants solve the problem, in a DPP there is no third-party, that is, disputants try to settle the case themselves. It is also important to note that although arbitration is usually

considered a type of ADR, when we refer to an ADR in this text, we exclude arbitration.

Three other concepts worth distinguishing are conflict, dispute and litigation. Conflict is a disagreement between the involved parties taking the form of either a dispute or litigation. In a dispute there is traditionally no judicial or administrative tribunal, i.e., a dispute encompasses arbitration, mediation and conciliation. Still pursuant to a traditional view, in litigation parties resort to a judicial or administrative court.

In the first part of this paper, we will investigate the main types of ADRs: mediation and conciliation. In the second part, the paper will address three instances of DPPs: fostering the employment of ADR by means of BITs, inter-institutional arrangements and clarifying substantive clauses. In the last part, some concluding remarks will be made.

2. MAIN TYPES OF ALTERNATIVE DISPUTE RESOLUTIONS

2.1. MEDIATION AND CONCILIATION

If negotiations fail, parties may need assistance from a third party. For this purpose, mediation and conciliation may be a useful tool to help parties achieve an agreement to the dispute. Nevertheless, doctrine usually does not distinguish clearly between mediation and conciliation, with these terms used interchangeably.

In spite of the lack of a distinction between mediation and conciliation, they should not be treated the same. The main difference between them relates to the approach adopted by the third party.

Regarding mediation, the third party tends to not just look at the legal issues posed by the case but rather looks beyond them and tries to preserve the relationship between the stakeholders. Hence, the mediator has to possess skills in addition to deep knowledge of international investment law. In mediation, the

third party will deal with other people's emotions and feelings. Depending on the conflict escalation, the mediator will have to be very subtle when addressing the perspectives that parties have about the final outcome of the mediation process. Careful listening and discretion are two mandatory requirements for a good mediator as he/she will assist parties in reaching a final agreement. Although mediators are expected to warn stakeholders about the realistic goals of the proceeding, mediators are not supposed to offer a final proposal for agreement. However, if parties wish, mediators may do so.

Conciliation, in turn, tends to focus more on legal issues. Accordingly, it is a procedure subject to the assembling of evidence and a written proposal for an arrangement. It is a much more formal proceeding than mediation. Conciliators frequently 'do not adopt a relationship-building approach to resolving disputes between parties, nor do they seek to eliminate barriers that may obstruct negotiations'.¹ Ultimately, it is possible that a conciliator adopts some approaches that a mediator would be more inclined to employ.

Depending on the legal system, parties may be willing to give the third party more control over the whole situation. For example, in the USA which is a common law-based jurisdiction, stakeholders may grant the mediator/conciliator a great amount of power and give more emphasis to his views and announcements. This is especially so if they chose the third party due to his/her in-depth knowledge, previous experience, impartiality and temperament.²

Another relevant aspect to be borne in mind is the type of mediation/conciliation that the third party adopts. According to some models,

¹ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2010) 27.

² Andrea Schneider & Nancy Welsh, 'Integrating Mediation Into Investor-State Arbitration' (2014) 1 TDM 1, 10 <www.transnational-dispute-management.com/article.asp?key=2080> accessed 16 February 2016.

the third party is likely to encourage disputants to clearly express themselves with a view to grasping their beliefs, objectives and interests. Pursuant to these models, communication is quite important insofar as parties are encouraged to respect each other and act in a good faith. Furthermore, the third party helps disputants present realistic proposals and customize the responses to their own problems.³

In order to carry out the aforementioned competences, the third party may think of convening stakeholders for joint sessions where disputants will have the opportunity to discuss and find out their differences and similarities. Perhaps only one session is not sufficient to solve all the matters. Therefore, additional sessions may be necessary. Although the best way to debate and find solutions is face to face, other means may be employed if disputants are located far from each other; a conference call could be a viable alternative.

Other third parties may prefer to make use of pre-mediation work which may encompass documents review and analysis of written submissions from the disputants. These third parties may also wish to make use of *ex parte* meetings in order to discuss sensitive points with each party separately, including the weaknesses of their positions and their consequences, and offering a sympathetic ear.⁴

Another type of mediation/conciliation, termed 'evaluative' or 'directive,' occurs when the third party focuses more on the distribution of outcomes and bargaining.⁵ Pre-mediation work is possible, but the main

³ Ibid, 11.

⁴ Andrea Schneider & Nancy Welsh, 'Integrating Mediation Into Investor-State Arbitration' (2014) 1 TDM 1, 11-12 <www.transnational-dispute-management.com/article.asp?key=2080> accessed 16 February 2016.

⁵ Ibid, 12.

instrument is caucus rather than joint sessions. The third party has a more active position, so he is likely to give his personal advice more incisively.

2.2. INSTITUTIONS STIPULATING RULES ON CONCILIATION

After having analyzed the types of mediation/conciliation and the their challenges faced by them, it is worthwhile to consider the rules stipulated by some renowned institutions concerning conciliation.

2.2.1. THE ICSID RULES ON CONCILIATION

The ICSID is a global source of reference for international investment disputes. It adopted its Rules of Procedure for Conciliation Proceedings (hereinafter ICSID Conciliation Rules) in 1967 simultaneously with its Arbitration Rules.⁶ In addition, the ICSID has a set of rules, the Additional Facility Conciliation Rules,⁷ aimed at settling disputes under two special circumstances: where the conflict does not emerge from an investment in a direct manner or where either one of the disputants does not belong to the ICSID or the investor's home country is not an ICSID member. Although there is publication of decisions on agreed terms,⁸ it is hard to find the publication of settlement agreements, including consent awards.⁹

Under the ICSID Conciliation Rules, interested parties shall proceed to constitute a commission which will act as a sort of board of conciliators. According to Parra, the rules at hand 'are largely devoted to the constitution by the parties of their conciliation commission or arbitral tribunal and to the

⁶ ICSID Convention, Regulations and Rules [2006] ICSID/15.

⁷ ICSID Additional Facility Rules [2006] ICSID/11.

⁸ For instance, *Goetz (Belg.) v. Burundi*, ICSID Case No. ARB/95/3 (Feb. 10, 1999); *Lemire (U.S.) v. Ukraine*, ICSID Case No. ARB(AF)/98/1 (Sept. 18, 2000).

⁹ For example, *Cemex Asia Holdings Ltd. v. Rep. of Indonesia*, ICSID Case No. ARB/04/3 (Feb. 23, 2007) <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/04/3>> accessed 30 July 2016; *WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/97/5 (Dec. 21, 1998) <<http://www.italaw.com/cases/3277>> accessed 28 July 2016.

presentation by the parties of their case'.¹⁰ If stakeholders do not enter into an amicable solution with respect to the composition of the commission, the Chairman of the Administrative Council of the ICSID appoints the president of the commission. Each party is entitled to appoint one conciliator. Nine requests for conciliation were filed by 2015. The conciliation commission issued a report in 75% of these cases. However, when there was a report, only 17% of the cases were settled amicably.¹¹

Unfortunately, the procedure for the establishment of the commission is rather cumbersome. A three-member commission is rather expensive and the deadlines for its composition just delay the whole procedure. In fact, a sole conciliator is enough. This does not mean bypassing the possibility of co-conciliation; in this last situation, a co-conciliator could act as an expert concerning a particular point of the dispute.

Instead of opting to keep in mind the stakeholders' wishes, the specificities of the case and the general objective of a suitable solution, as the IBA rules do, the ICSID set of rules simply stipulate that conciliators may warn the disputants to adhere to particular parts of an accord or suggest that the disputants at issue abstain from action capable of worsening the dispute. In other words: the ICSID does not provide for clear criteria upon which conciliators may formulate suggestions for the parties. Furthermore, recommendations should be made only if stakeholders agree on their formulation. For example: if plaintiff and respondent reach an agreement, conciliators could advise them that it is possible to deny all wrongdoing related to the case.¹²

¹⁰ Antonio Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' (2008) 22[1] ICSID Review – Foreign Investment Law Journal 55, 67.

¹¹ ICSID, The ICSID Caseload – Statistics (Issue 2016-1) [2016] 8, 16.

¹² Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, ICSID Case No. Arb/07/25, Consent Award, 2009.

As for the conciliators' even-handedness, the ICSID Conciliation Rules opt for a formal declaration of the conciliators in which, *grosso modo*, the conciliators state their impartiality and promise to keep confidential all information received in the proceedings. This sacramental declaration is just a statement. The ICSID Conciliation Rules should be more explicit and thus prohibit conciliators from performing as counselors, arbitrators, experts or witnesses in the case.

The ICSID Conciliation Rules also provide for the institution of witnesses and experts and objections to jurisdiction. All these rules simply hinder the conciliation process and may sometimes give the impression that parties are engaged in an arbitration proceeding which is full of detailed rules. Moreover, the non-binding nature of the report issued by the conciliators at the end of the proceedings is frequently mentioned as another factor hampering the use of the ICSID Conciliation Rules.¹³

Regarding fees, each conciliator receives US\$ 3,000 per day of work. If a party wishes to file a conciliation request, he/she must pay a US\$ 25,000 fee. If a conciliator intends to receive higher amounts, the Secretary-General decides.¹⁴

2.2.2. THE UNCITRAL RULES

The UNCITRAL set of rules has two pillars: the UNCITRAL Model Law on International Commercial Conciliation of 2002¹⁵ and the UNCITRAL Conciliation Rules of 1980.¹⁶ Although both laws work together, the UNCITRAL rules do not differentiate between conciliation and mediation, thus giving the wrong impression that the two expressions are synonymous.

¹³ Ucheora Onwuamaegbu, 'The role of ADR in investor-state dispute settlement: the ICSID experience' (2005) 22[2] News from ICSID 12, 13.

¹⁴ ICSID, Schedule of Fees (Effective 1 July 2016).

¹⁵ UNCITRAL, *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (United Nations 2004).

¹⁶ UNCITRAL, *UNCITRAL Conciliation Rules* (United Nations 1980).

Despite the fact that the rules state that 'this law applies to international commercial conciliation', they also encompass investment disputes because they plainly state that the expression 'commercial' should be given a wide interpretation, including, but not limited to, investment and other types of contracts. In this context, it is important to take into account that 'a restrictive application provision in the conciliation rules might create definitional or interpretative difficulties'.¹⁷

In principle, there will be only one conciliator unless the stakeholders stipulate otherwise. The appointment of a sole conciliator is beneficial as the third party will have more leeway to conduct the talks with the parties. The appointment of an uneven number of conciliators (more than one) would only make the whole proceeding more expensive and bureaucratic: there would be more discussions among conciliators and disputants would have to spend more money on conciliators' fees.

The rules wisely allow parties to choose the fashion in which the proceeding is conducted. In case of disagreement, the third party is free to choose the conciliation rules. Nevertheless, he/she shall keep in mind not only the stakeholders' wishes but also the peculiarities of the case and the necessity for a quick agreement on the conflict. In this vein, if the claim is settled, the parties can make statements stipulating that the agreement does not imply any liability.¹⁸

With respect to the parties' wishes, the rules clarify that the conciliator has to have the ability to perceive what the parties really want; every now and then, disputants may initially ask more than what they in fact desire in order to bargain. The conciliator then has to bear in mind this 'excess' relating to the

¹⁷ Issak Dore, *Arbitration and Conciliation under the UNCITRAL Rules: a Textual Analysis* (Martinus Nijhoff 1986) 19.

¹⁸ TCW Group, Inc. v. Dominican Republic, Consent Award, 2008 I.I.C. 410 (Perm. Ct. Arb. 2009).

bargain. As for the case peculiarities, it may include weaknesses and strong points of each party. For example: if a party is considerably weaker than the other in terms of counselor representation, the conciliator has to analyze this. With regard to a swift accord, the third party has to pay attention to eventual delays in the whole procedure, especially the delays intentionally caused by one of the disputants; unnecessary meetings and analyses of documents are also included in this last topic. Procrastination will only harm the procedure. Therefore, 'in conciliation, entirely based on the will of the parties to find an amicable settlement of their dispute, proceedings may be terminated if the conciliator, both parties or even one of the parties, does not see any use to continue.'¹⁹

According to the rules, the third party is entitled to make offers so as to settle the claim. Dore notes that 'amicable settlement – the hallmark of any conciliation proceeding – is emphasized by the UNCITRAL Conciliation Rules and itself gives conciliation a wider scope than a judicial or arbitral procedure'.²⁰ The conciliator may present these proposals at any moment of the procedure, but the parties may agree on resolving only part of the controversy. Therefore, the rules should be modified with the aim of clearly allowing the conciliator to make proposals referring to only a part of the dispute. The manner in which the rules were drafted clearly does not contemplate the possibility of partial proposals.

Unlike the ICSID Rules, if the stakeholders reach an accord, the latter is binding and enforceable. This strengthens the conciliation procedure insofar as from the beginning interested parties know a future agreement will not be a waste of time. For instance, if the government of host state changes and the new governor decides that the execution of the arrangement is no longer politically

¹⁹ Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2nd ed. Kluwer 2004) 200.

²⁰ Issak Dore, *Arbitration and Conciliation under the UNCITRAL Rules: a Textual Analysis* (Martinus Nijhoff 1986) 18.

viable, it may wish to abort such an execution. When the agreement is enforceable, this change of position is not allowed at all.

2.2.3. THE IBA RULES ON CONCILIATION

The IBA rules on conciliation, made by the State Mediation Subcommittee of the IBA, were adopted by the IBA Council on 4 October 2012. This Subcommittee worked hard for more than four years to publish the new rules.²¹

The rules at issue apply even if the parties opt for them after the commencement of dispute. It is quite common to insert a clause in contracts providing for the adoption of rules of a prestigious institution so as to settle future disputes. Yet, the parties may opt to not draft such a provision in their contracts; the clause may authorize conciliation/arbitration but may not mention the institution in charge of the proceedings. Therefore, the possibility of the rule applying after a dispute arises is welcome.

In principle, there will be only one mediator. Still, parties may wish to appoint co-mediators. The problem that emerges here is about how decisions are made. When there is an even number of mediators, it is harder to render decisions because mediators may have different points of view. A co-mediator should be appointed by the initial mediator, acting more as an auxiliary member of the initial mediator. Regarding the mediator appointment, the IBA rules introduce a novelty in the form of the mediation management conference in which 'each party shall either identify a representative who is authorized to settle the difference or disputes on its behalf or describe the process necessary for a settlement to be authorized'. In this new scenario, Kalicki observes that:

²¹ Anna Joubin-Bret, 'Les nouvelles règles IBA de médiation entre investisseurs et États: un outil au service du règlement des différends investisseur-État' (2013) 1 Les Cahiers de l'Arbitrage – The Paris Journal of International Arbitration.

In some States, this may be the greatest obstacle to potential settlement through mediation or otherwise, either because investment disputes involve complex issues that range across multiple State agencies, or because political will is lacking. It can be difficult for State officials to take personal ownership (and therefore political "heat" back home) of a decision to recommend settlement or to accept such a recommendation made at a lower level of authority.²²

Taking into account that the mediator shall act keeping in mind the stakeholders' wishes, he/she shall not impose any decision regarding the partial or integral settlement of the dispute unless the parties agree. Mediation should always be regarded as a cooperative proceeding whereby parties act together with a view to obtaining a satisfactory solution to the case. That is why the third party, a neutral one, has to pay attention to the peculiarities of the dispute and also to the duration of the whole procedure. The longer it is, the more time and money parties spend.

The IBA rules have an article that deals specifically with costs and fees. As mediators' fees are likely to be expensive, stakeholders have to agree on such fees before the dispute starts.

2.2.4.MEDIATION/CONCILIATION IN THE UNION OF SOUTH AMERICAN NATIONS

The political will needed to create a tribunal on arbitration and mediation in South America has increased after the flurry of international investment arbitration disputes which the countries in the region have faced. Thus, García-Bolívar notes that 'the time has come to propose permanent

²² Jean Kalicki, 'Mediation of Investor-State Disputes: Revisiting the Prospects' (*Kluwer Arbitration Blog*, 14 June 2013) <<http://kluwerarbitrationblog.com/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>> accessed 6 February 2016.

investment tribunals to be created through international agreements and comprised of judges, not arbitrators'.²³

For its part, Ecuador offered a proposal for the creation of a centre of mediation and arbitration concerning international investment disputes at the Thirty-ninth Session of the General Assembly of the Organization of American States (OAS) in May 2008. After that, the foreign ministers of the UNASUR states met in Guyana in December 2010 and ruled that Quito should be in charge of the working group that would discuss the centre at issue. On this same occasion, Ecuador then suggested a group of rules for the centre.²⁴

The establishment of the centre has three purposes: the creation of a legal support centre on investment matters; a code of conduct for arbitrators and mediators; and a set of rules for maintaining the arbitration center.²⁵

The group of experts in charge of the negotiation on the centre has met several times. When the group met in Quito from 3 to 7 November 2014, the final draft of the centre agreement was neither published with the final act of the meeting nor was it made available to the public.²⁶ On 19 January 2016, the group

²³ Omar García-Bolívar, 'Has the time arrived for permanent investment tribunals?' (2012) International Investment Law 2 <http://works.bepress.com/omar_garcia_bolivar/15> accessed 11 February 2016.

²⁴ Silvia Fiezzoni, 'UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal' (2102) ITN Quarterly <<https://www.iisd.org/itn/2012/01/12/unasur/>> accessed 19 February 2016.

²⁵ Érika Fernandes, 'As propostas da Unasul para a criação de um centro de solução de controvérsias relativas a investimentos estrangeiros' (2013) Acta Científica XXIX Congreso de la Asociación Latinoamericana de Sociología <http://actacientifica.servicioit.cl/biblioteca/gt/GT14/GT14_CapellaFernandes.pdf> accessed 13 February 2016, citing Katia Fach Gómez, 'Are there "regional" approaches to international dispute resolution?' 105 Proceedings of the Annual Meeting – American Society of International Law 447-449.

²⁶ Sarmiento mentions that it took her four months to gain access to the final draft of the agreement. After having communicated with Dr. Mariana Yépez Andrade, former National Prosecutor of Ecuador, she finally found the agreement. She also says that on 11 June 2015 the Secretary-General to the UNASUR, Mr. Ernesto Samper, and Mr. Marco Abuja, an Ecuadorian delegate of the working group, told the press that about 85% of the agreement on the constitution of the centre had been finalized and that the remaining topics under discussion were the centre

met for the last time in Montevideo.²⁷ However, the latest adjustments in the draft agreement still remain a secret.

Pursuant to the draft agreement, both a state and a national of a state having spontaneously agreed to submit a claim to the centre are parties.²⁸ The centre's jurisdiction is rather large, encompassing cases between: a) members of the centre; b) a national from a centre member and another country of UNASUR; c) a state that is not a party of UNASUR and a national of a member of UNASUR; and d) a national of a country that is not a party of UNASUR and a state that is a member of UNASUR.²⁹ Furthermore, the centre has authorization to settle disputes only if parties give their consent.³⁰

Parties are free to decide on the establishment of the commission in charge of the settlement. However, if there is a deadlock, each party indicates one conciliator. Then, the two conciliators can appoint the last conciliator. In case of another impasse, the Secretary-General to the centre appoints the last member of the commission, who cannot be a national of any party involved in the dispute.³¹ The leeway that parties have to resolve about the composition of the commission is commendable in that conciliation, as an ADR procedure, needs flexibility. Nonetheless, as stalemates may render the whole procedure ineffective, it is up to the Secretary-General, supposedly a neutral person, to solve the

seat, the appeal procedure, the roster of arbitrators and conciliators, and the establishment of an ad-hoc commission responsible for analyzing the appeals and the annulments against awards (Maria Gabriela Sarmiento, 'The Centre for the Settlement of Investment Disputes of the UNASUR: Historical Background and Current Status of the Centre' (2015) Social Science Research Network, 11-12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703587> accessed 29 November 2016.

²⁷ ITN Quarterly, 'UNASUR Arbitration Centre one step closer to being established' (29 February 2016) <<http://www.iisd.org/itn/2016/02/29/unasur-arbitration-centre-one-step-closer-to-being-established/>> accessed 3 November 2016.

²⁸ Article 3.3.

²⁹ Article 5.2.

³⁰ Article 15.2 and 3.

³¹ Article 15.4.

deadlock. Moreover, the impossibility of a final conciliator coming from a state in the litigation ensures even-handedness, notably because this conciliator chairs the commission.

Conciliators are entitled to decide about their own competence.³² The text thus enshrines the principle of *Kompetenz-Kompetenz*. German case-law was the first to develop this principle. Adjudicators have the power to hand down a judgment if they have jurisdiction to settle the claim.³³ Originally from judicial proceedings, the principle in question then spread through international arbitration. Institutions such as the International Chamber of Commerce, the London Court of International Arbitration and the ICSID started to adopt the principle in their rules.³⁴

The main obligation of the commission is to shed light on the points that are object of disagreement between the parties.³⁵ The commission shall clarify these points and may propose an amicable solution to the case. The employment of the modal verb 'shall' denotes that the conciliator's role is that of a neutral party in order to obtain the parties' trust even more. Yet, the proposal of an agreement should also be compulsory inasmuch as this proposal could be an important step towards the preservation of a prosperous and long relationship between the stakeholders.

³² Article 16.1.

³³ Adrianna Dulic, 'First Options of Chicago, Inc. v. Kaplan and the Kompetenz- Kompetenz Principle', (2001) 2[1] Pepp. Disp. Resol. L. J. 77, 78 <<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1181&context=drlj>> accessed 28 November 2016.

³⁴ Adrianna Dulic, 'First Options of Chicago, Inc. v. Kaplan and the Kompetenz- Kompetenz Principle', (2001) 2[1] Pepp. Disp. Resol. L. J. 77, 80 <<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1181&context=drlj>> accessed 28 November 2016.

³⁵ Article 17.2.

Another relevant remark is that if conciliators notice that parties are unlikely to come to an agreement, they may finish the proceedings at any time.³⁶ The justification for this authorization seems to be two-fold. Parties may really have very opposite points of view about the problem or one of them may be conducting themselves in bad faith simply to delay the negotiation.

2.2.5. THE PROPOSAL OF THE EUROPEAN COMMISSION FOR THE INVESTMENT CHAPTER OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

Investment is the principle conductor of the EU–USA relationship: intra-company transfers account for one-third of the commerce between Brussels and Washington.³⁷ In this way, in November 2015, the European Commission (EC) made public its proposal for the investment chapter of the TTIP. For several months, the negotiations remained secret and this attracted criticism.³⁸ In the elaboration of the proposal, the EC conducted an informal consultation with the European Parliament and European member states, and the input that resulted from this helped to frame the proposal.³⁹ The proposal includes a mechanism for settlement through amicable means (negotiation, mediation, and consultation) and the creation of a standing appellate body, among other suggestions.

The proposal mentions negotiation but does not provide details about its operationalization. Hence, it seems reasonable to assume that parties are free

³⁶ Article 17.3.

³⁷ Gilberto Gambini, Radoslav Istatkov & Riina Kerner, 'USA – EU – international trade and investment statistics' (2015) <http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics> accessed 30 October 2016.

³⁸ Billy Araujo, *The EU Deep Trade Agenda. Law and Policy* (Oxford 2016) 115.

³⁹ American Chamber of Commerce to the European Union (AmCham EU), 'AmCham EU response to EU proposal for investment protection and Court System for TTIP' (Final Position Papers 26 February 2016) <http://www.amchameu.eu/system/files/position_papers/amcham_eu_response_to_eu_proposal_for_investment_protection_and_court_system_for_ttip_-_26.02.2016.pdf> , accessed 3 March 2016.

to negotiate the way or where they want and that there is no third-party interference. Informality is omnipresent here.

If parties do not enter into an amicable solution via negotiation, they may employ mediation. It is important to highlight that the text clearly distinguishes mediation from consultation, a differentiation that some sets of rules do not contemplate. A particular feature of the EC proposal is that interested parties may resort to mediation at any time, even after the commencement of a dispute.⁴⁰ Authorities shall establish a list of six people who are experts at law, trade, industry or finance to be mediators. A mediator shall be appointed by the parties and may be from that list or simply proposed by the parties.⁴¹ In order to maintain the mediator's impartiality, he/she shall not be a national of any disputing party. However, the parties are free to agree otherwise.⁴²

Although mediation is based on informality, the mediation proceeding has to begin in writing. Ten days after the appointment of the mediator, the party who resorted to mediation shall present a written submission explaining the reasons why he/she believes there is a problem. With a view to respecting the due process of law, the other party is entitled to submit a written submission and to make comments on the first submission.⁴³ The idea is to provide the mediator with an introduction about the core of the claim and the parties' main arguments.

The draft text leaves room for the mediator to resolve the dispute provided that he/she brings 'clarity to the measure concerned'. In this way, the mediator can arrange individual or joint meetings with the parties, can look for

⁴⁰ Athina Papaefstratiou, 'The EU Proposal Regarding Investment Protection: The End of Investment Arbitration as We Know It?' (*Kluwer Arbitration Blog*, 29 December 2015) <<http://kluwerarbitrationblog.com/2015/12/29/the-eu-proposal-regarding-investment-protection-the-end-of-investment-arbitration-as-we-know-it/>> accessed 27 November 2016.

⁴¹ Section 3 – article 3.4 and 3.5.

⁴² Section 3, Annex I, article 3.2.

⁴³ Section 3, Annex I, article 4.1.

assistance of experts and stakeholders and can 'provide any additional support requested by the disputing parties'.⁴⁴ When the draft text utilizes the expression 'stakeholders', it does not clarify its meaning. Thus, 'stakeholders' may encompass NGOs, the employees of the companies directly or indirectly involved in the dispute, local authorities and the local population, among others. It is also worth pointing out that the mediator has to contact the parties before having recourse to experts and stakeholders. This measure aims at maintaining the parties' confidence in the mediator and at giving the parties the opportunity to assess the relevance of this assistance and its costs.

The mediator may either offer a solution to the case or advice. Nevertheless, in order to maintain his/her even-handedness, the mediator 'shall not advise or give comments on the consistency of the measure'.⁴⁵ The possibility of either a solution or advice is a consequence of the flexibility that the mediation procedure demands.⁴⁶ Another observation is that when the text refers to the prohibition of advising or giving comments on the consistency of the measure, it encompasses both the possibility of explicitly advising or commenting and the possibility of indirectly doing so.⁴⁷ In this last situation, the mediator should be very careful to not give the impression that he/she is evaluating the consistency of the measure when drafting documents to the parties or arranging joint meetings.

As for where the mediation takes place, the draft text reads that it may take place in the territory of any of the parties concerned or in any other place if

⁴⁴ Section 3, Annex I, article 4.2.

⁴⁵ Section 3, Annex I, article 4.3.

⁴⁶ When an adjudicator tries to heavily interfere on parties' behavior, he/she risks being removed. See, for instance, *Wicketts and Sterndale v. Brine Builders* [2001] C.I.L.L. 1805, para. 52.

⁴⁷ For example, in court hearings, the way adjudicators pose questions may implicitly reveal how they are assessing or judging the case.

both disputants agree otherwise.⁴⁸ The proceedings may also happen by any other means such as a conference call. With regard to a time limit, the proposal establishes a period of 60 days for the conclusion of the procedure. However, interim solutions are also possible.⁴⁹

If the parties request, the mediator has to provide them with a draft factual report which contains a short summary of the measure at hand, the proceedings followed and the solution to the case, if any.⁵⁰ The usefulness of the report seems to be two-fold: the parties can really be sure about the measure in a future dispute and can explain to stakeholders⁵¹ what happened in the proceedings. Before issuing the report, the mediator has to give the parties an opportunity to comment on the draft report, which ensures transparency in the drafting of the report. Nonetheless, the text of the EC proposal is silent as to whether the mediator shall include the parties' comments in the final version of the report.

A final observation about mediation is that a party is prohibited from utilizing it as evidence nor shall adjudicators in future disputes consider positions that a party took in the mediation, advice or proposals offered by the mediator, and the parties' consent to submit the case to mediation.⁵² The aim of this prohibition is to clarify that mediation is an independent procedure from arbitration and that parties and adjudicators act in good faith.⁵³

If mediation turns out to be a useless proceeding, a disputing party may resort to consultation. In this new proceeding, there is no interference by a

⁴⁸ Section 3, Annex I, article 4.4.

⁴⁹ Section 3, Annex I, article 4.5.

⁵⁰ Section 3, Annex I, article 5.3.

⁵¹ For instance: members of parliament or local populace.

⁵² Section 3, Annex I, article 6.1.

⁵³ If parties are wrongdoers, they risk having "forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes" (ICC Case No. 1110 of 1963, para. 23, <<http://www.trans-lex.org/201110/pdf/>> accessed 28 July 2016).

third party. One may then wonder about the difference between consultation and negotiation.⁵⁴ This paper argues that, whilst consultation is submitted to certain rules that are mentioned in eight paragraphs of Section 3, article 4, negotiation seems to have no rules at all. This means that the parties are free to conduct the negotiation as they wish.

The request for consultation shall include the name and address of the claimant; the provisions that the party alleges to have been contravened; both the legal and factual basis for the dispute; the relief alleged and an estimate of damages claimed; and, finally, proof that the plaintiff is an investor of the other party and that he/she owns or controls the investment.⁵⁵ All these conditions show that consultation in the EC proposal is more formal than mediation, thus focusing more on legal issues, especially if we compare the conditions concerned with the fact that, in a mediation proceeding, the party invoking mediation only needs to provide a detailed provision of the problem.⁵⁶

Lastly, there are two conditions showing that consultation is more formalistic than mediation. First, although the parties are free to decide about the venue of the consultation, the text of the proposal does not refer to 'by other means',⁵⁷ hence implying that the parties have to meet personally. Second, the text of the proposal imposes deadlines for the submission of the request for consultation.⁵⁸ In contrast, the parties may resort to mediation at any stage.

2.2.6. THE RULES OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

On 4 February 2016, the trade ministers of twelve Pacific Rim countries signed the Trans-Pacific Partnership (TPP) in Auckland, New Zealand. The World

⁵⁴ Negotiation is mentioned in Section 3, article 2.1.

⁵⁵ Section 3, article 4.2.

⁵⁶ Section 3, Annex I, article 4.1.

⁵⁷ With respect to mediation, the proposal reads that the proceeding may take place by 'any other means' (Section 3, Annex I, article 4.4).

⁵⁸ Section 3, article 4.5.

Bank well-defines the importance of such an arrangement: it “could raise GDP in member countries by an average of 1.1 percent by 2030. It could also increase member countries’ trade by 11 percent by 2030, and represent a boost to regional trade growth.”⁵⁹

The agreement clearly refers to five ways of settling disputes amicably: consultation, negotiation, good offices, conciliation and mediation. If the proceeding is not finished within six months, the claimant may file a claim and ask for arbitration.⁶⁰

Although the agreement mentions some types of alternative methods to arbitration, it does not differentiate between negotiation, good offices, conciliation and mediation. The alternative method that has the most detailed rules is consultation. As was posited a few lines above, parties are entirely free to choose the way negotiation is conducted. As to good offices, conciliation, and mediation, the difference is based upon the level of interference the third party exerts on the dispute. In good offices, the main function of the third party⁶¹ is to try to convince the parties that they should start talking, that is, the beginning of a dialogue is the most important feature of good offices; many times, distrust and resentment prevent stakeholders from initiating a conversation.^{62,63}

⁵⁹ World Bank, ‘Global Economic Prospects’ (2016) 219 <<http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospects-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf>> accessed 26 December 2016.

⁶⁰ Article 9.19.1.

⁶¹ One may think that only natural people may serve as good officers but international institutions may also be appointed as good officers: the UN Security Council, the Organization of African Unity, the Association of South-East Asian Nations, and the European Union have already served as good officers (Andrew Mitchell & Jennifer Beard, *International law in principle* (1st ed., Thomson Reuters 2009) 185-86.

⁶² José Rezek, *Direito internacional público: curso elementar* (4th ed., Saraiva 1994) 345.

⁶³ Concerning the difference between mediation and conciliation, we refer to the first part of this chapter.

The agreement stipulates that the establishment of an alternative procedure to arbitration does not imply that the parties recognize the jurisdiction of the tribunal.⁶⁴ Investment treaties usually contain a clause which gives jurisdiction to international arbitral tribunals and establishes procedures that have different phases. Hence, the agreement is emphatic when it asserts that alternative methods 'shall not be construed as recognition of the jurisdiction of the tribunal'. In this context, it is useful to draw a parallel with BITs:

The structure of a typical BIT is a set of substantive protections by States to investors; typically, there is also a clause granting jurisdiction to international arbitral tribunals to resolve claims that may arise under the treaty (whether considered to be consent, or a mere unilateral offer to consent). Perhaps this fact explains why drafters of ICSID Rules devised a scheme of proceedings that are often bifurcated into separate phases to address the merits and the jurisdiction.⁶⁵

When starting a conciliation procedure, the claimant shall prepare a written submission exposing the justifications for the request, the measure at issue and the legal basis for the claim.⁶⁶ The party that receives the request shall reply in seven days, also in writing.⁶⁷ This deadline may appear short in that, in the TTIP mediation, the respondent may answer the first written submission in twenty working days but is not obliged to do so. Besides, while in the TPP the reply is part of a process where there is no third party (consultation), in the TTIP the reply is given in a procedure that is conducted by a third party (mediation).

Any other party that considers it has a substantial interest in the matter is entitled to join the proceedings. The only prerequisite for the participation is a written notification to the consulting parties 'no later than seven days after the

⁶⁴ Article 9.18.3.

⁶⁵ Ignacio Vincentelly, 'The Uncertain Future of ICSID in Latin America' (2009) 12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348016> accessed 21 February 2016.

⁶⁶ Article 28.5.1.

⁶⁷ Article 28.5.2.

date of circulation of the request for consultations' which explains why it has a substantial interest in the claim.⁶⁸

Although the parties must act in good faith and 'provide sufficient information to enable a full examination of how the actual or proposed measure might affect the operation or application' of the agreement,⁶⁹ this may be hard to reconcile with the parties' right to not adduce evidence against themselves which can be considered a general principle of law. The agreement utilizes the modal verb 'shall' but it also makes use of the adjective 'sufficient'. As 'sufficient' may be a subjective concept, it may then counterbalance and mitigate the effects of the obligation imposed by the modal verb 'shall'. This would not be a surprise if we bear in mind that there were twelve states at the negotiation table and that, at times, diplomats use vague language to reach an agreement.

It is also worthwhile mentioning that these alternative methods to arbitration are deemed to be confidential. The drafters of the agreement were of the view that without this parties might not feel comfortable resorting to these alternatives and that public pressure might undermine the proceedings. Notwithstanding the confidentiality of these alternative methods, parties can insert some conditions into the settlement agreement. Once these conditions have been fulfilled, adjudicators can issue a consent award.⁷⁰

Lastly, it is difficult to ascertain whether the way negotiators drafted the agreement will satisfy national congresses that still have to ratify the accord.

⁶⁸ Article 28.5.3.

⁶⁹ Article 28.5.6.(a).

⁷⁰ *AbitibiBowater Inc. v. the Government of Canada*, ICSID Case No. UNCT/10/1, Consent Award, (Dec. 15, 2010), para. 19, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf>> accessed 26 October 2016.

In any case, pursuant to Trakman, 'ultimately, TPP negotiating parties [had] to make normative choices'⁷¹ - and when you make choices, you assume risks.

3. DISPUTE PREVENTION POLICIES

A DPP relates to mechanisms aimed at minimizing the risks of conflict escalation. Through these, national governments work without the assistance of third parties inasmuch as there is no formal dispute. Praxis indicates that governments have had good experiences on this. Information sharing between the agency initially involved in the case and the other institutions in charge of the country's defence in an eventual arbitration procedure; the attempt at identifying the most sensitive realms usually involved in investment disputes; and ombudsmen with a view to receiving preliminary claims referring to investments are interesting ideas that deal with the concern about resolving investment disputes before they escalate.

There also exists a specific type of DPP: state-state cooperation. In this situation, countries signing BITs improve experiments together. They realize that partnership is a powerful tool in the reduction and prevention of investment litigation. Three examples of the DPP in question will be examined on the grounds that contracting states can insert any of these into their own BITs.

3.1. FOSTERING THE EMPLOYMENT OF ADR VIA BIT

If states decide to incentivize the use of ADR by drafting ADR clauses in their BITs, this could lead to more early settlements of disputes. This ties in with the idea that 'investor-State arbitration rules should actively encourage mediated dialogue so that interests-based settlement prospects can be fully explored in addition to (but not instead of) rights-based outcomes'.⁷²

⁷¹ Leon Trakman, 'The Status of Investor-State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement' (2014) 48[1] *Journal of World Trade* 16.

⁷² Kumberg, W.; J. Lack & M. Leathes. 'Enabling Early Settlement in Investor-State Arbitration', *ICSID Review*, 28(3), 2014, p. 5.

Unfortunately, ADR clauses are not always included in BITs as countries seem reluctant to insert such a clause when signing a treaty. According to the United Nations Conference on Trade and Development (UNCTAD), there are only 39 treaties with compulsory ADR and 327 treaties with voluntary ADR.⁷³ A rare example is the USA-Poland bilateral investment treaty (BIT) which includes the following: 'in the event of an investment dispute ... the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third-party procedures'.⁷⁴

The aforementioned treaty defines neither consultation nor negotiation; it does not include these two terms in its article I, which defines the main concepts of the BIT. Additionally, it does not also provide a definition for third-party procedures; this absence prevents investors from knowing which non-binding, third-party proceedings the treaty in question encompasses: mediation? conciliation? dispute boards? fact-finding? Although the treaty utilizes the expression 'the parties to the dispute shall initially seek to resolve', which could imply that ADRs are compulsory, the operationalization of the expression at issue is uncertain due to its lack of clarity.

The example quoted in the penultimate paragraph could be improved upon. If the treaty language is clear and unambiguous, investors will certainly feel more comfortable resorting to ADR by means of the BIT before resorting to arbitration.

⁷³ UNCTAD, IIA Mapping Project
<<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> accessed 27 July 2016.

⁷⁴ Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations (USA-Poland) (signed 21 March 1990, entered into force 6 August 1994), Article 9 <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/168>> accessed 14 November 2016.

It is also worth pointing out the following example provided by Salacuse:

The Contracting States hereby authorize and encourage the parties in the event of dispute to make maximum resort to negotiation, voluntary third party procedures, and other forms of non-binding alternative dispute resolution to settle their dispute.

It is the intent of the Contracting States that parties to a dispute with regard to the interpretation and application of the present Treaty shall not resort to international arbitration as provided under this Treaty unless they are both convinced that negotiations, voluntary third party procedures, and other forms of non-binding alternative dispute resolution would be unavailing in reaching a settlement of their dispute.⁷⁵

The first paragraph of Salacuse's suggestion proposes is soft law, typical of diplomacy. Although it is exhortative, it does not signify that contracting states will effectively employ ADR. The second paragraph also lacks precision. Despite the fact that it provides for the mandatory use of ADR before arbitration, the absence of exact terms makes its operationalization unlikely. It mentions neither how parties could select ADR nor how long the ADR procedure should last. Hence, the party interested in delaying the whole procedure, usually a state, could take advantage of the text lacunas.

In this paper, it is proposed that negotiation and ADR should be mandatory in BITs. To achieve this, three rules are essential: negotiation should precede ADR; parties should establish specific deadlines for each phase preceding arbitration; and negotiation and each type of ADR that the treaty contains have to be explained in-depth, preferably in the first article of the BIT.

With regard to the the way parties adopt ADR, the treaty could clearly mention the types of ADR that stakeholders could adopt. The interested party,

⁷⁵ Jeswald Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution', (2007) 31[1] Fordham International Law Journal 138, 184.

usually an investor, could then choose one ADR (negotiations included) and initiate the procedure. The contracting states could also opt for the inclusion of only one sort of ADR plus negotiation.

Concerning the deadlines, negotiation should be limited to three months. ADR should also be limited to three months, except dispute boards. The latter usually exists during the whole contract so the treaty should explicitly provide for its existence until the end of the contractual relationship but with a caveat: the deadlines suggested should be applied for every single dispute individually.

As for the definition of both negotiation and ADR, parties could draft their meaning according to the glossary of important terms contained in the following book: UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010).

Lastly, with respect to the drafting of the ADR clause, it is important to stress that article 4 of the WTO Dispute Settlement Understanding which relates to consultations, and the example provided by Malacuse, may be a good source of inspiration. Accordingly, the contracting states could draft the ADR clause to read as follows:

The Contracting States hereby authorize and encourage the parties in the event of dispute to make maximum resort to negotiation, voluntary third party procedures, and other forms of non-binding alternative dispute resolution to settle their dispute.

It is the intent of the Contracting States that parties to a dispute with regard to the interpretation and application of the present Treaty shall not resort to international arbitration as provided under this Treaty unless both negotiations and ... [the ADR or ADRs chosen] fail within the deadlines mentioned in the paragraphs below.

The Contracting States affirm their resolve to strengthen and improve the effectiveness of the negotiation procedures employed by the Contracting Parties.

Each Contracting State undertakes to accord sympathetic consideration to and afford adequate opportunity for negotiation regarding any representations made by any party⁷⁶ concerning measures affecting any investment addressed by the present treaty.

If a request for negotiation is made, the Contracting State to which the request is made shall, unless otherwise mutually acquiesced, reply to the request within 10 days after the date of its receipt and shall enter into negotiation in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the party does not respond within 10 days after the date of receipt of the request, or does not enter into negotiation within a period of no more than 30 days, or a period otherwise mutually acquiesced, after the date of receipt of the request, then the party that requested the holding of negotiation may proceed directly to request arbitration.

Negotiation shall be confidential, and without prejudice to the rights of any party in any further proceedings.

If the negotiations fail to settle a dispute within 60 days after the date of receipt of the request for negotiations, the complaining party may request arbitration. The complaining party may request an arbitral tribunal during the 60-day period if the negotiating parties jointly consider that negotiations have failed to settle the dispute.

The Contracting States affirm their resolve to strengthen and improve the effectiveness of the ... [insert the ADR] procedures employed by the Contracting Parties.

The Contracting States adopt the [add the institution's name in charge of the ADR execution] rules.

If the [insert ADR] proceedings are not over within [insert the deadlines of the institution] and negotiations have failed, the interested party could resort to arbitration.

Arbitration does not prevent parties from continuing using the ADR at issue nor does it prevent parties to resort to [insert ADR] in tandem with arbitration.

3.2. INTER-INSTITUTIONAL ARRANGEMENTS

⁷⁶ The BIT should define investor and clearly state that he/she is a party to an eventual dispute. In addition, the BIT should clarify that contracting parties are the states involved in the drafting of the treaty and that parties are the stakeholders involved in the dispute, that is, claimant and respondent.

When signing BITs, contracting states could try to adopt inter-institutional arrangements with the aim of minimizing the risk of controversies. Governmental agencies could develop programmes to detect possible investment disputes.

An interesting initiative about inter-institutional arrangements has been conducted by Brazil. In 2015, it signed four BITs with Mozambique, Angola, Mexico, and Malawi. These accords do not follow the traditional framework of BITs, that is, they do not have compulsory adjudication clauses.⁷⁷ In the 1990s, Brazil had signed several BITs. However, in the end, it decided to not ratify these treaties because it sensed that they could jeopardize its sovereignty and that its Federal Constitution did not provide for prompt indemnity in case of expropriation, an essential clause in typical BITs.

Nevertheless, the situation has changed and Brazil has become an exporter of capital and investment.⁷⁸ Brazil signed the aforementioned BITs with countries where Brazilian multinationals were heavily investing.⁷⁹ It is worthwhile mentioning that two well-known Brazilian companies, Vale do Rio Doce and Odebrecht, have been executing projects in these countries. Additionally,

⁷⁷ Although one may be pessimistic about these new arrangements (Érika Fernandes & Jete Fiorati, 'Os ACFIs e os BITs assinados pelo Brasil: uma análise comparada', (2015) 208 *Revista de Informação Legislativa* 247, 270), this paper holds that they may be credible owing to their new design.

⁷⁸ Nitish Monebhurrin, 'Reflexão sobre os (futuros) acordos brasileiros relativos à proteção dos investimentos: os acordos de cooperação e de facilitação de investimentos' (2014) 12[2] *Brazilian Journal of International Law* 65, 66.

⁷⁹ Fabio Morosini & Michelle Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (2015) *ITN Quarterly* <<https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>> accessed 28 February 2016.

regarding the BIT with Mexico, the Brazilian National Development Bank (BNDES) was involved in a US\$4 billion operation in an oil project as the largest funder.⁸⁰

Brazil's new BITs rely mostly on two institutions: a joint committee and ombudsmen (or focal points). Their mission is to mitigate the risks of potential conflicts between international investors and host states. The joint committee comprises members of the governments involved and may invite representatives of the private sector and civil society in case of specific problems. In order to help the joint committee perform its duties well, countries may create ad hoc working groups. The focal points, in turn, are in charge of providing governmental support to the investments of the other party in their country. They act under the supervision of the joint committee and are also responsible for the prevention of litigation. With a view to minimizing bureaucracy, each focal point comprises only one body or authority. This is of paramount importance in that the investor knows who he/she needs to talk to in case of a problem. Indeed, Legum highlights that 'the obstacles and challenges [regarding the mediation/conciliation of international investment disputes] do not generally hold for the scenario where only one government agency is interested and involved in the conciliation'.⁸¹

If a dispute arises, the interested party may file a claim to the joint committee which will then present a summary report, including the parties' position as to the problem. Nonetheless, the summary report is not binding and the treaties do not mention how to solve the impasse when the parties maintain their opposite views. The treaties simply state that parties may resort to arbitration to be developed by the joint committee.

⁸⁰ Pedro Martini, 'Brazil's New Investment Treaties: Outside Looking ... Out?' (*Kluwer Arbitration Blog*, 16 June 2015) <<http://kluwerarbitrationblog.com/2015/06/16/brazils-new-investment-treaties-outside-looking-out-2/>> accessed 12 September 2016.

⁸¹ Bart Legum, 'The Difficulties of Conciliation In Investment Treaty Cases: A Comment On Professor Jack C. Coe's 'Toward A Complementary Use Of Conciliation In Investor-State Disputes – A Preliminary Sketch'' (2006) 21[4] MEALEY'S International Arbitration Report 2.

4. CLARIFYING SUBSTANTIVE CLAUSES

Another type of state-to-state cooperation focuses on clarifying substantive clauses in BITs.⁸² Although countries quite often devote a whole article of the BIT to explain the meaning of the most prominent expressions used in the treaty, the operationalization of the BIT may ask for more in-depth explanations of the main terms.

The General Agreement on Tariffs and Trade (GATT) offers examples of how the technique at hand may be useful. Throughout its several agreements, the GATT regularly utilizes either interpretative notes or ad hoc articles on its text.

Another relevant point is that, since the WTO's inception, various divisions of the WTO have issued either decisions or declarations so as to provide a more precise interpretation of the treaties.

One has to keep in mind that the original GATT negotiators or the diplomats dealing with the Uruguay Round could neither predict the exact meaning of many terms nor bypass vague expressions. As a multilateral forum, the GATT/WTO system needed consensus in order to move forward. As a result, the decision of allowing WTO internal divisions to render the treaties' provisions clearer was crucial for the system's credibility.

Another instance alludes to NAFTA chapter 11 which deals with investments. NAFTA law created a joint administrative commission in charge of issuing a binding interpretation of chapter 11 so that the exegesis of this chapter became uniform.⁸³ The trade ministers of the USA, Canada and Mexico are the

⁸² Roberto Echandi, 'Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention' (2011) NCCR Trade Regulation Working Paper No. 2011/46, <http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp2/publications/wp%202011%2046_Echandi.pdf> accessed 8 February 2016.

⁸³ NAFTA article 1131(2).

members of the commission. Accordingly, arbitral tribunals would have to follow the interpretation which the joint commission published.

The role of the joint commission is relevant inasmuch as those dealing with laws need predictability and safety. However, one could think differently as by obliging arbitral courts to be limited by the commission's explanations, NAFTA's operationalization could jeopardize the necessary rapport between the institutions responsible for the integration process:

The Commission's first statements ... raised such concerns, but its later statements suggest that the NAFTA Parties may also see the Commission as a general clearinghouse for joint-statements on the operation of the Chapter, in that they are now issuing mere "recommendations" which clearly could not be binding under NAFTA Article 1131(2).⁸⁴

5. CONCLUDING REMARKS

Many developing states signed BITs in the past but now they seem to regret the ratification of these treaties in that arbitration has been an uncertain and costly procedure. Moreover, some developing countries have become large exporters of investment. Therefore, their OFDI need legal protection. For these reasons, alternative methods to investment arbitration have been studied more frequently. Nonetheless, it is important to highlight that the disputants 'are seldom aware or advised of the wide range of procedural choices they may actually have. Nor are they typically focused on their underlying interests when making procedural choices'.⁸⁵

The alternatives at issue have advantages in relation to traditional arbitration. Generally, they are more informal. Thus, parties may feel more

⁸⁴ Todd Weiler, 'Commission Statements' (NAFTAClaims, 2013) <<http://www.naftalaw.org/commission.html>> accessed 14 February 2016.

⁸⁵ Jeremy Lack, 'Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties' in Arnold Ingen-Housz (ed.), *ADR in Business: Practice and Issues across Countries and Cultures* (vol. II, Kluwer 2011) 340.

comfortable settling disputes. Experience in courts and tribunals has shown that in a formal litigation parties tend to see each other as enemies rather than partners. Another benefit from these alternatives is that they may be less time-consuming than arbitration. A long dispute may cause harmful effects in a relationship between an international investor and a host country. Additionally, the alternatives in question may be less expensive. Developing countries usually have budgetary constraints and arbitration normally takes place in developed countries where arbitration and mediation centres are located.

Even though these alternative techniques have advantages, they also pose challenges. First, they need to receive more attention, that is, developing countries should be aware of them. Second, developing states need to prepare people to become experts at mediation and conciliation. These experts have traditionally come from industrialized countries. Lastly, some alternatives require regulation by national authorities. This process may be cumbersome because there may be a lack of coordination between these authorities.

In spite of the difficulties that these alternatives present, their adequate use and implementation may considerably foster the insertion of OFDI of developing countries into new markets.

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For example, Cemex Asia Holdings Ltd. v. Rep. of Indonesia, ICSID Case No. ARB/04/3 (Feb. 23, 2007) <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/04/3>> accessed 30 July 2016; WRB Enterprises, Inc. v. Grenada, ICSID Case

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