Investor-State Mediation: Observations on the Role of Institutions*

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The remarkable growth of investor-State arbitration has brought added complexity to the process from both a procedural and substantive point of view. This development has prompted a series of calls to consider the wider use of alternative dispute resolution (ADR) mechanisms for investment disputes. The movement in favor of considering new dispute settlement options includes States, representatives of arbitral institutions and other international organizations, as well as counsel and arbitrators. One scholar who also serves as an arbitrator, Professor Jeswald Salacuse, has observed that the “boom” in investor-State arbitrations “has provoked a search for alternative dispute resolution mechanisms.”¹ As concrete evidence of this search, the IBA Subcommittee on Mediation of Investor-State Disputes was launched in October 2007. Its mandate is as follows:

To examine the current use of mediation in relation to investor-State disputes, to determine whether wider use would benefit the investor-State dispute system in general (or discrete types of participants who use it in particular), to identify and assess obstacles to wider use of investor-State mediation, and to propose concrete measures that might be pursued to increase resort to mediation for investor-State disputes should our initial findings make such proposals appropriate.

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The IBA’s Subcommittee’s mandate captures the essence of the inquiry in four parts: the examination of the status quo, the determination of whether mediation would benefit investor-State disputes, the identification and assessment of obstacles to beneficial mediation, and the proposal of solutions and positive measures to increase mediation if appropriate. Notably, the mandate contains no inherently normative propositions about the nature of measures needed to increase the use of investor-State mediation or whether an increase in investor-State mediation is even desirable; it is best-characterized as a call to action.

In the spirit of the IBA Subcommittee’s mandate, this article resists the urge to express a strong conviction about investor-State mediation or how it should be organized. Rather, it aims to explore an area of dispute settlement that deserves a closer look, and in particular, to explore what steps institutions might take to promote and enable the use of mediation in investor-State disputes. Part I of this paper discusses developments in the investor-State dispute field that have prompted a focused consideration of investor-State mediation. Part II examines some of the challenges to alternative dispute resolution in the investor-State context and the role fulfilled by arbitral institutions and other relevant international organizations in administering and promoting investor-State mediation. Part III discusses some potential adaptation measures that the relevant institutions could implement to fulfill a more meaningful role in the development and administration of investor-State mediation.

I. Developments Prompting a Reconsideration of Investor-State Mediation

As the introduction to this article suggests, recent developments, as well as renewed attention to past developments, have sparked a discussion about feasible alternatives to investor-State arbitration for settling investment disputes. Three key developments include: (A) the inclusion of alternative dispute settlement mechanisms in investment treaties; (B) steps taken by States under domestic law to facilitate alternative dispute settlement in investment disputes; and (C) recent proposals by arbitration experts organized under the auspices of the Centre for Effective Dispute Resolution (CEDR) to explore options for promoting settlement procedures that would operate concurrently with formal arbitration proceedings.

A. Investment Treaties
Although international arbitration has by now proved the most prominent method for the settlement of investor-State disputes, investment treaties and free trade agreements (FTAs) have long considered less contentious forms of dispute settlement. The most prolific references to non-arbitral dispute settlement in investment treaties are contained in clauses that provide for a so-called “cooling-off period.” Such clauses generally provide a period of time during which disputing parties are required to consult and negotiate informally before the investor may formally initiate arbitration. A typical cooling-off period clause may be found in the US-Argentina BIT, Article VII of which provides in relevant part:

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

[…]

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

It is notable that cooling-off periods have been subject to inconsistent enforcement by investment treaty tribunals. In any case, due to both the informal nature of the discussions envisioned, and most importantly, the length of time typically envisioned (often as little as three months), such cooling-off periods, even when they are enforced by tribunals, do not generally provide disputing parties with an effective opportunity for an amicable settlement.

The much-discussed 2004 US Model BIT takes the option for pre-arbitral amicable dispute resolution a step further. Article 23 of that instrument envisages a greater role for consultation and negotiation than most BITs, providing that:

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2 J. Coe, Settlement of Investor-State Disputes through Mediation - Preliminary Remarks on Process, Problems and Prospects, supra note 1, at 76 n.16.

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

This provision goes beyond the options provided in most investment treaties and specifically envisions allowing the parties to engage in formal conciliation and negotiation, including the use of “non-binding, third-party procedures,” during the cooling-off period. Although the US Model BIT does not mandate formal amicable dispute resolution procedures, it explicitly notes them as an option, an inclusion that will at least call such an option to the attention of the parties.

As “progressive” as some may deem the 2004 US Model BIT, however, a number of treaties concluded by the Netherlands have long envisioned formal conciliation as an alternative to arbitration. For instance, Article 9 of the 2000 Agreement on encouragement and reciprocal protection of investment between the Republic of Uganda and the Kingdom of the Netherlands (Netherlands - Uganda BIT) provides investors with the option between ICSID arbitration and conciliation in following language:

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor 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

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4 This provision has also been incorporated in the recent Treaty Between The United States of America and The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed November 4, 2005 and entered into force November 1, 2006. A similar provision can now be found in the Acuerdo de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile, que modifica y sustituye el ACE Nº 38, sus anexos, apéndices, protocolos y demás instrumentos que hayan sido suscritos a su amparo (Free Trade Agreement concluded by Chile and Peru), signed August 22, 2006 and entered into force March 1, 2009.


6 See 1993 Netherlands Model Agreement on Encouragement and Reciprocal Protection of Investments, R. Dolzer & M. Stevens, BILATERAL INVESTMENT TREATIES 209 (1995). See also e.g., Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria, signed November 2, 1992 and entered into force February 1, 1994 (Netherlands - Nigeria BIT); Agreement on encouragement and reciprocal protection of investments between the Republic of Slovenia and the Kingdom of the Netherlands, signed September 24, 1996 and entered into force August 1, 1998 (Netherlands - Slovenia BIT); Agreement on encouragement and reciprocal protection of investments between Georgia and the Kingdom of the Netherlands, signed February 3, 1998 and entered into force April 1, 1999 (Netherlands - Georgia BIT).
Nationals of other States, opened for signature at Washington on 18 March 1965. 

Some recent investment treaties have taken the reference to conciliation a step further and require that investors initiate conciliation proceedings before gaining access to investor-State arbitration. In particular, India has negotiated several such clauses in its BITs, an example of which can be found in Article 12 of the India-Australia BIT:

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the Parties to the dispute.

2. Any such dispute which has not been amicably settled may, if both Parties agree, be submitted;

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or

(b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

3. Should the Parties fail to agree on a dispute settlement procedure provided under paragraph 2 of this article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(a) if the Contracting Party of the investor and the other Contracting Party are both Parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, and both Parties to the dispute consent in writing to submit the dispute to the International Centre for Settlement of Investment Disputes such a dispute shall be referred to the Centre;

(b) if both Parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or

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(c) to an ad hoc arbitral tribunal by either Party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following provisions… (Emphasis added.)

Notably, this dispute resolution provision clearly favors amicable dispute settlement procedures over arbitration and also favors United Nations Commission on International Trade Law (UNCITRAL) conciliation and arbitration procedures over those offered by ICSID, a preference reinforced by India’s status as a non-signatory to the ICSID Convention. ⁸

To our knowledge, no investment treaty to date has provided for conciliation or mediation exclusively. The investment chapter of the US-Australia FTA famously provides for mere informal consultation with the possibility of arbitration upon subsequent agreement. ⁹ One wonders, however, if either Contracting Party to that agreement would have consented to mandatory conciliation administered by an arbitral institution as a more effective, but nevertheless non-binding, method of resolving investment disputes.

Another approach that investment treaties provide is contained in provisions for the two State parties to fulfill an active role in resolving investor-State disputes through State-to-State consultations. An example of such a treaty is the BIT concluded between China and Botswana, Article 13(c) of which specifically calls for the two contracting parties to meet to resolve

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⁸ Of course, India’s status as a non-signatory to the ICSID Convention, as well as the structure of the dispute resolution clause in the India-Australia BIT, may reflect a broader reluctance by India to not submit itself to binding dispute resolution in the first place.

⁹ See United States-Australia Free Trade Agreement, signed May 18, 2004 and entered into force January 1, 2005, at Ch. 11, Art. 11.16:

1. If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

2. For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party’s law.
investment disputes. Although instances of parties invoking such State-State consultation provisions are rare, State parties are known to consult in the early stages at least in some disputes. This option illustrates that certain States have been amenable to taking a more active role in investment disputes between their nationals and host States.

It is well-known that investors have not frequently resorted to the conciliation options mentioned above, but it is still worthwhile to note the existence of such provisions. That States have in the past consented, and continue to consent, to non-arbitral procedures to resolve investment disputes shows that interest in such options, however uncommon and underutilized, has persisted throughout the investment dispute “boom” of the past decade. Moreover, given the recent precedence given to conciliation in some investment treaties, such as those signed by India, it is safe to conclude that a favorable view of the value of mandatory conciliation in investor-State disputes prevails in certain parts of the world.

B. Steps Taken By Host States Under Domestic Legislation

In addition to providing for cooling-off periods and (sometimes mandatory) conciliation provisions in many investment treaties, some States have created, or are in the process of creating, institutions and processes under their domestic laws that specifically encourage the early negotiation of emerging investor-State disputes. For example, Peru has adopted such an approach by passing Law No. 28,933, which has the object of creating a coordinated response system to investment disputes and to attempt to resolve such disputes by negotiation and mediation whenever possible. Specifically, Law No. 28,933 establishes a Special Commission that includes members of various relevant government agencies to monitor ongoing and potential investment disputes and to represent the State in such disputes with foreign investors.

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11 See e.g., Goetz v. Burundi, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999 ¶¶ 90-93 (in which the Tribunal dismissed some of the Claimant’s claims for a failure to meet the consultation clause in Article 8 of the Belgium/Luxembourg-Burundi BIT, which provides for an “amicable arrangement between the parties to the dispute and, failing that, conciliation between the Contracting Parties through diplomatic channels.” Notably, some of the Claimant’s claims were deemed admissible insofar as the Claimant had attempted to resolve the dispute through diplomatic channels, though it is not evident from the decision that the Contracting Parties ever engaged in a conciliation as envisioned by the BIT.).

12 Peru Law No. 28,933, at Art. 2.

13 Id. at Arts. 4, 7.
Similarly, Colombia is drafting legislation to designate a lead agency charged with facilitating negotiated settlements of investment disputes.\textsuperscript{14} Like the initiative in Peru, Columbia appears to be taking steps to consolidate the handling of investment disputes through a designated agency to coordinate the State’s response to disputes and which is authorized to negotiate disputes and pay settlement amounts.\textsuperscript{15} Other States, such as Korea, have established methods of discussing and negotiating disputes with investors, under the auspices of an ombudsman office.\textsuperscript{16}

Although scattered and only quite recent, these efforts by host States to intervene earlier and more proactively in disputes with foreign investors are a reflection of host State policies providing at least some room for negotiation and amicable settlement, especially in the early stages of a dispute. These developments also show that some States have warmed to the view that time-consuming and costly arbitral proceedings, the outcome of which is uncertain to both parties, should be considered increasingly as a dispute settlement mechanism of last resort. And finally, that host States are beginning to go as far as organizing their own internal affairs to facilitate settlement shows that they are serious about avoiding the potential costs and fallout associated with protracted and expensive arbitration proceedings.

C. Recent Proposals by Leading ADR Organizations

Several international and professional organizations have recently begun initiatives to explore, develop, and even promote amicable alternatives to arbitration. With the launch of initiatives and the holding of conferences to discuss and develop the possibilities for investor-State mediation, these organizations have an important role in identifying issues and posing solutions in the investment disputes field. The IBA Subcommittee on Mediation of Investor-State Disputes, mentioned in the introduction of this article, is certainly one example of such an organizational initiative.\textsuperscript{17} Another venue for discussion of investor-State mediation has been the Fordham Conference on International Arbitration and Mediation, held each of the past five years.

\textsuperscript{14} UNCTAD 2009 Draft Report, \textit{supra} note 1, at 69.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 77.

\textsuperscript{17} \textit{See} M. Stevens, \textit{Mediation of Investor-State Disputes}, 5(1) IBA MEDIATION NEWSLETTER (2009).
A further example that proves especially relevant for the purposes of this article is a recent initiative of the London-based Centre for Effective Dispute Resolution (CEDR). The CEDR Commission on Settlement in International Arbitration, chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler, was established in 2007 to review current practice regarding the facilitation of settlement by international arbitral tribunals and to make recommendations on how this aspect of the process might be improved and made more consistent. In early 2009, the CEDR Commission put forth a Draft Paper for Consultation, including recommendations and draft rules, that compliments the efforts of host States to strengthen the legal framework for negotiated settlements.  

The Commission has not explicitly limited its work to international commercial disputes and the Commission members include many leading arbitrators and arbitration counsel that have experience in investor-State proceedings. It therefore seems useful to highlight some of the recommendations that have emerged from the work of the CEDR Commission to the extent these proposals appear relevant in the investor-State context.

On the release of the Commission’s recommendations, the CEDR observed that many of the recommendations are already followed in various jurisdictions and that one of the goals of the Commission was to identify “best practice tools” in the area of settlement procedures. These best practices take different forms depending on whether they are directed at arbitrators, parties and their counsel, or arbitral institutions. Importantly, the Commission’s recommendations generally recognize the voluntary nature of settlement discussions and that a lack of commitment from the parties will reduce the value of arbitration rules allowing for settlement.

One of the Commission’s recommendations to arbitrators that may be useful to consider in the investment dispute context is the proposal to remind the parties’ counsel that it reflects best practices for “internal party representatives” to be present at the first procedural conference. This suggestion is designed to ensure that the parties themselves will understand

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18 CEDR Commission on Settlement in International Arbitration, Draft Paper for Consultation (2009). It may be noted that ICSID was one of the arbitral institutions with which the Commission consulted.

19 Id. at Annex 5.


21 CEDR Commission 2009 Draft Paper, supra note 18, at rec. 4.2.2.
the available ADR options clearly. Best practices, according to the Commission, entail a
discussion of the different ADR processes available with parties and their counsel and invites
exchanges on how such processes might fit into the arbitral proceeding (e.g., by creating a
“mediation window”). The Commission further recommends that arbitrators recognize that
there may be various junctions in the arbitral process that provide opportunities to reconsider
renewing the focus on settlement discussions.

Another of the Commission’s recommendations to arbitrators recognizes that, when both
parties agree, it may help to have the tribunal’s preliminary views on the merits of the case. In
addition, if the parties agree, the Commission recommends that one or more of the tribunal
members chair settlement discussions when internal party representatives are present. This
involvement is thought to improve the chances of settlement, and the Commission recommends
that arbitrators prepare to submit proposed settlement terms to the parties if they so request. The
Commission’s recommendations also clarify that, if an arbitrator’s involvement in the facilitation
of settlement leads to any doubt as to that arbitrator’s ability to continue the arbitration in an
impartial or independent manner, the arbitrator must resign.

The CEDR Paper also encourages parties to consider ADR alternatives when drafting
their dispute resolution clauses. The Commission opines that parties should pay attention not
only to rules and possible multi-tier clauses, but also to whether the arbitral institution of choice
will support the ADR approach envisioned in the clause. The Commission also recommends
that parties ensure that settlement opportunities are identified as they arise by, in part, remaining
open to incorporating ADR processes on a parallel track with the arbitration in addition to
engaging in such processes at the start of an arbitration proceeding. The Commission further
recommends that party representatives with authority take an active role in the case to ensure that
“the approach taken by [the party’s] legal counsel is consistent with its own objectives and

22 Id. at rec. 4.2.3.
23 Id. at rec. 4.2.4.
24 Id. at rec. 4.2.5.
25 Id. at rec. 4.2.6.
26 Id. at rec. 4.3.
27 Id. at rec. 4.9.1.
28 Id. at rec. 4.9.2.
interests."  

Consistent with its recommendation to arbitrators, the Commission proposes that parties remain open to settlement discussions, including the possibility of receiving the tribunal’s preliminary view on the merits, and the possible presence of an arbitrator to chair settlement discussions.

With respect to arbitral institutions, the Commission’s recommendations to promote settlement include different forms of training, both to arbitrators and other participants in the arbitration process. They also include a proposal that institutions incorporate the CEDR Settlement Rules into their arbitration rules, and more specifically, that the institution’s arbitration rules provide that a tribunal can and will, with the written consent of all parties, chair settlement meetings and/or provide a provisional view on the merits with a view to facilitating settlement discussion. By way of explanation, the Commission suggests that such a provision can also make clear that “the participation in settlement meetings and the fact of providing a provisional view on the merits given in accordance with the rules shall not be the basis for a challenge to the tribunal or to its arbitral award.”

The CEDR’s recommendations — directed at arbitrators, parties, and institutions alike — constitute a valuable contribution to the conversation currently taking place on how to best formulate a meaningful alternative to investor-State arbitration. It is important to note, however, that some of the CEDR’s recommendations may warrant further consideration to ascertain their feasibility in this particular context. For example, its recommendation that parties agree not to challenge arbitrators (or their awards) as a result of arbitrator involvement in settlement talks would leave parties in a precarious position concerning the legitimate limits of their right to lodge such challenges. Similarly, the recommendation that calls for the resignation of an arbitrator whose independence and impartiality appear to have become compromised as a consequence of participation in settlement negotiations may not be attractive to parties to an

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29 Id. at rec. 4.9.3.
30 Id. at rec. 4.9.5.
31 Id. at rec. 4.6.7.
32 Id. at rec. 4.7.1.
33 Id. at 4.7.2.
34 Id. at proposal accompanying rec. 4.7.2.
investment dispute in which the need to reconstitute the tribunal would likely lead to extensive delays.

In short, some of the CEDR recommendations might well lead to processes that could bring about more efficient and cost-effective outcomes in investment arbitration, but others should probably be approached with caution in the investor-State context. To the extent that it is recognized that arbitrators can only involve themselves in settlement negotiations in a very limited way in investor-State disputes, there may be further reason to explore the role of mediation in these kinds of proceedings. In addition, any institution attempting to implement or promote the CEDR Commission’s recommendations would need to take into account the factors that have kept investor-State mediation from fulfilling a prominent role in investor-State dispute resolution, as well as the experiences of institutions and organizations that have taken an active role in administering and promoting alternative dispute resolution procedures for investment disputes.

II. The State of Institutionally-Administered Investor-State Mediation

Given the flurry of activity surrounding the subject of non-arbitral investment dispute settlement, it is natural to ponder the continued role of institutions in what some hope will be a system that promotes less contentious relationships between investors and host States. The question arises whether the solution to formulating an alternative to investor-State arbitration lies in a more open approach to informal negotiations or a more structured approach through existing arbitral institutions and international organizations. In other words, can States and investors, on their own, develop quicker and more efficient methods for resolving investment disputes without the assistance of institutional conciliation and mediation?

Disputing parties may well find an increase in ad hoc negotiation and mediation processes useful, but it would be folly to ignore the value of the resources and institutional memory that major arbitral institutions have stored. For this reason, it is important to consider the experiences of institutions and users of institutions to date in order to determine what

35 G. Kaufmann-Kohler, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, 25(2) ARB. INT’L 187, 202-05 (2009) (acknowledging the inefficiency created by the increasing judicialization of arbitral proceedings and pointing to the role that arbitrators may play in facilitating settlement, but cautioning that “if the parties wish a different settlement mechanism that goes beyond these [proposed] safeguards, then they should resort to separate mediation or other ADR mechanisms and not involve an arbitral tribunal”).

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recommendations might prove useful in developing an alternative to investor-State arbitration. Accepting the notion that institutions have a valuable role to fulfill in developing and providing alternatives to investor-State arbitration, the sections below discuss: (A) the problems and criticisms that institutions seeking to provide meaningful alternatives to investor-State arbitration face; and (B) the mandates and limited experience of the few organizations that have responsibilities in the area of investor-State mediation.

A. Challenges and Criticisms that Institutions Face

Complaints against investor-State arbitration are well-documented. Investors complain about the cost and slow pace of the process; States complain that the process favors investors and has produced an expansive application of bilateral investment treaties; scholars lament the lack of consistency and legal coherency of the jurisprudence; and NGOs criticize the process for lacking transparency and premising the rights of the investor over other important interests. Many of these complaints are leveled at the institutions that administer investor-State arbitrations. Whether such complaints are valid is perhaps less important than that they exist. After all, investors and States are the relevant actors in the system, and scholars, NGOs, and other groups and individuals represent an ancillary (but nonetheless important) constituency. It is no surprise then that alternatives are being explored.

The challenges and criticisms that the institutions already administering investor-State arbitrations may face in providing alternatives to investor-State arbitration marks an important starting point for analysis. It is generally known that institutions like ICSID, the ICC, and the SCC — well-known for their prominence in investor-State arbitration — already have mechanisms for resolving disputes by means other than arbitration, though there are few reports of parties using such mechanisms in investor-State disputes.

In ICSID’s case, that these alternative dispute resolution methods were originally intended to fulfill a more prominent role in investor-State dispute resolution is perhaps a lesser-known fact. Indeed, in the minutes from a 1963 meeting in Addis Ababa, recorded in the History of the ICSID Convention, Aron Broches remarked that “it might well be found when the

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36 For example, Bolivia and Ecuador have registered their complaints against ICSID by withdrawing from the institution altogether and openly lobbying for the closure of ICSID. See President Correa speaks at U.N. event ‘Peoples Rights not Corporate Profits’ available at http://justinvestment.org/2009/07/president-correa-speaks-at-u-n-event-%e2%80%98peoples-rights-not-corporate-profits%e2%80%99-by-melissa-draper/.
Convention came into operation, that conciliation activities under the auspices of the Centre proved more important than arbitral proceedings. Mr. Broches later repeated this observation in remarks he gave in Santiago and Bangkok.

Time has not borne out this prediction, and given Mr. Broches’ track record of insight into the Convention’s future, we are compelled to ask why. One response is that an investor-State mediation mechanism is simply not needed. When investors and States are compelled to settle, they typically do so in ad hoc negotiations outside the auspices of the arbitral institution. While settlement rates at some point appeared slightly higher, Professor Jack Coe has more recently estimated the settlement rate of investor-State disputes at ICSID at approximately thirty percent. With settlement rates in commercial ADR procedures estimated at some eighty percent, however, these numbers hardly merit disregarding opportunities to improve on the rate of investor-State settlements through mediation or other ADR mechanisms.

Many commentators have surmised that the lack of an enforcement mechanism akin to that provided for in the New York or Washington Conventions accounts for the infrequent use of alternatives to investor-State arbitration. As Eric van Ginkel has aptly remarked, “if the settlement were to provide for monetary consideration in favor of the investor, the investor would have no better assurance that the State will recognize and fulfill its obligations under the settlement agreement than it had when the State entered into the investment agreement.” This concern remains valid and has inspired at least one prominent practitioner to remark in confidence about the “pointlessness” of formal investor-State conciliation processes.

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38 History of the ICSID Convention, Vol. II-I 242 (2001). Mr. Broches’ initial optimism about conciliation was probably based on the earlier successes of the World Bank with mediation and conciliation of disputes. See Note by the General Counsel to the Executive Directors, in History of the ICSID Convention, Vol. II-I 7 (2001).

39 Id. at 304, 465.

40 J. Coe, Toward a Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch, supra note 1, at 35.

41 Id. at 18 n. 57.

In addition to enforcement concerns, investors also express reluctance to enter into mediation proceedings because they allegedly distract from the arbitration and result in added time and expense. With investor-State arbitration often lasting anywhere from five to seven years before a final and enforceable award is issued — in some cases including a protracted enforcement period filled with uncertainty — investors naturally resist adding another process that could result in an additional year or two of negotiating a problem without results. In light of this concern, parties might view mediation proceedings as a gamble: if they reach a result, then they have saved years of effort and expense, but if they lose, then they have just prolonged their dispute and increased its cost significantly.

Another obstacle to investor-State mediation arises from the incapacity of States to make settlement decisions because of complicated internal governance structures. In response to Jack Coe’s seminal article on investor-State mediation, Bart Legum placed particular emphasis on the multiplicity of government agencies often needed to agree to a mediated settlement in an investor-State mediation. For example, the government agencies involved in the dispute often require a legislative act or approval from another government agency to either enter into a settlement or make a payment on a settlement. Where an agency has the authority to enter into a settlement, internal struggles over which agency is responsible for the settlement could arise.

States also have public relations concerns that may inhibit settlement of disputes with investors. One concern pertains to the perception of settlement by the national public, who may have strong sentiments about the issue giving rise to the dispute. That mediation proceedings typically enjoy more confidentiality than arbitration proceedings, especially in the investor-State context, only amplifies the possibility (or likelihood) of public discontent with a State’s decision to settle with an investor on a controversial issue. Internal regulatory laws, including those designed to address corruption, may also be at play in some investor-State disputes, another fact that increases the potential of a public relations quagmire. In addition, with arbitration, at least States have a third party, namely the arbitral tribunal, to blame for their obligation to compensate

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investors. Judge Schwebel has made the point that “— it may be in the nature of bureaucracies, governmental and corporate, to prefer to shift rather to assume responsibility.”

Another type of public relations concern arises out of the message that a settlement may send to other similarly situated investors. After all, States do not want to foreshadow their willingness to settle with investors over otherwise legitimate regulatory acts. This concern arises a fortiori when there are multiple investors with ostensibly similar disputes. An added complication could arise if there are national investors that are similarly situated to the foreign investor involved in the mediation. The national investor may very well question why the government voluntarily provides a foreign investor with more favorable settlement terms while leaving the national investor without access to a similar process.

There are surely many other perceived deficiencies to investor-State mediation proceedings, but the ones expressed above are some of the most common. Fortunately, arbitral institutions and certain other international organizations closely involved with investor-State dispute resolution are uniquely positioned to address, and at least contribute to solving, a number of these problems. If these institutions are up for the challenge of presenting a viable alternative to investor-State arbitration, they already have a place reserved at the table as the primary handlers of investor-State disputes. Before venturing into potential solutions, however, it seems appropriate to identify and discuss some international organizations that are currently vested with responsibilities in the area of non-arbitral investor-State dispute settlement.

B. A Closer Look at Organizations With Experience in Investor-State Conciliation/Mediation

Certain arbitral institutions and international organizations are well-positioned to contribute to and benefit from the growing interest in alternatives to investor-State arbitration. At least three of these organizations — UNCTAD, MIGA, and ICSID — have an established and unique history in investor-State alternative dispute settlement that merits closer attention. An examination of these three organizations’ distinct mandates and experience with settling investor-State disputes by means other than arbitration could prove especially useful to

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fashioning new solutions and recommendations for institutional participation in the mediation of investment disputes.

1. UNCTAD

The United Nations Conference for Trade and Development (UNCTAD), serves as the United Nations’ focal point for all matters related to international investment agreements, including research, policy analysis, and work on technical assistance and capacity building. UNCTAD has a wide mandate, and engages with countries in all regions of the world in numerous areas relating to investment, including dispute settlement. It is in large measure UNCTAD’s work on dispute-prevention policies and alternative dispute settlement mechanisms in developing countries that has prompted the reevaluation of existing procedures and facilitated a review of whether the time has come to move away from settling investment disputes by arbitration exclusively.

As part of this work, UNCTAD has recently embarked on efforts to explore alternatives to arbitration of investor-State disputes. This initiative is in part based on the concern that the absence of access to alternative means of dispute settlement comes at considerable cost to both States and investors, straining the investment arbitration system as we know it today. In its 2009 Draft Report, UNCTAD observes that, while ADR is rarely referred to in investment agreements outside the context of negotiations contemplated in cooling-off periods, investment agreements do not rule out the use of such mechanisms. UNCTAD suggests that States may consider assigning ADR processes a more prominent role in future treaties, insofar as a more detailed framework would draw attention to such alternative techniques and encourage parties to use them.

UNCTAD’s Draft Report also includes various procedural possibilities for giving ADR mechanisms a more prominent role in investor-State disputes. First, UNCTAD suggests requiring disputing parties to pursue ADR with a mediator or conciliator before proceeding to binding arbitration. A second suggestion consists of giving either disputing party the right to

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46 Id. at 40.
47 Id. at 42.
initiate ADR on a parallel track with a formal arbitration proceeding.\textsuperscript{48} Third, UNCTAD’s Draft Report also points to the potential role of some level of State collaboration on dispute prevention. Noting that aggrieved investors frequently rely on some form of intervention in the early stages of a dispute by the home State’s diplomatic representatives, UNCTAD considers the idea that States might adopt procedures for joint committees to more effectively monitor the implementation of a treaty, including any emerging disputes involving investors protected by investment treaties.\textsuperscript{49}

UNCTAD’s work in this area of dispute settlement, the purpose of which is to improve the dispute settlement processes available under future investment treaties, is policy-oriented, and therefore directed primarily at States. But the implementation of UNCTAD’s various proposals also requires continued dialogue between States and institutions, with input from both users of the systems and arbitrators, to construct an alternative to arbitration that is both desirable and practicable in light of institutional experience with investor-State dispute settlement. As it further develops its advisory work in this area, UNCTAD will no doubt take into consideration the experiences of two other international organizations with significant experience in dispute resolution involving investors, namely MIGA and ICSID.

2. MIGA

MIGA, which, like ICSID, is part of the World Bank Group, has perhaps the most extensive experience mediating investment disputes on record. MIGA’s activities are based on the obligation under the MIGA Convention that the institution endeavor “to encourage the amicable settlement of disputes between investors and host states.”\textsuperscript{50} On the basis of this mandate, MIGA has developed a mediation service which today has engaged in at least twenty-two cases involving at least nineteen different respondent countries.\textsuperscript{51}

\textsuperscript{48} Id.

\textsuperscript{49} Id.


\textsuperscript{51} See S. Perera, Arbitration under the Convention Establishing the Multilateral Investment Guarantee Agency and Its Mediation Services, ARBITRATION AND MEDIATION IN THE ACP-EU RELATIONS 103, 112 (Association for International Arbitration ed., 2008).
The added-value that MIGA provides in its mediation services is aptly put by its Chief Counsel, Srilal Perera, who observes that, because of MIGA’s interest in the affairs of both developed and developing countries, “MIGA is able to mediate [disputes] from a technical rather than from a political or biased position.”\(^5^2\) Likewise, the late Ibrahim Shihata, former Vice-President and General Counsel of the World Bank and former Secretary-General of ICSID, drew attention to MIGA’s mandate to settle disputes on an objective, legal basis rather than a political one, due to its need to satisfy its constituency of both capital-exporting and capital-importing countries.\(^5^3\)

Given its position as an international organization with the interests of its member States in mind, regardless of the political context, MIGA may also offer certain advantages that other institutions cannot. According to Mr. Shihata, MIGA can be more objective than host countries not only because of its apolitical mandate, but also because of its greater flexibility in achieving compromise through mechanisms not typically offered by arbitral institutions, including: (1) facilitating payment in other currency terms or through debt instruments; (2) persuading the investor to accept installments; and (3) agreeing to pay the difference between settlement offers.\(^5^4\)

But MIGA is not a guaranteed option for all aggrieved investors. Even if the objective requirements for submitting a dispute to MIGA are met, MIGA has discretion to decline mediation requests and its exercise of that discretion is not subject to any review — it cannot be appealed or subjected to further consideration.\(^5^5\) MIGA’s in-house counsel carries out mediation under the MIGA Convention, and therefore, budget and personnel constraints are factors that seriously affect access to and operation of MIGA’s mediation services.

Despite some shortcomings in MIGA’s ability or willingness to handle mediations on a large scale, MIGA’s experience might nevertheless prove useful to consider in future collaborative efforts between institutions and international organizations. The results MIGA has had in investor-State mediation may be attributed to its practice of early intervention, great

\(^{52}\) Id. at 112.


\(^{54}\) Id. at 23-24.

\(^{55}\) See S. Perera, *supra* note 51, at 112.
flexibility in orchestrating settlements on an *ad hoc* basis, and a strong commitment to maintaining a depoliticized context. It follows that MIGA’s experience could contribute to promoting an agenda that examines not only the needs of users, but also current institutional capacity and expertise, perceived institutional shortcomings, and possible alternatives to the status quo.

3. **ICSID**

Under the ICSID Convention, the Centre is required to provide facilities for the conciliation and arbitration of investment disputes between Contracting States and Nationals of other Contracting States. To date, the Centre has registered 298 cases. Only six of those have been conciliation cases, in spite of the fact that Aron Broches, as mentioned above, had at one point proffered that investors might make more use of ICSID’s conciliation rules than the arbitration rules.

ICSID itself has acknowledged and shown in the past that it was minded to fulfill a more active role in promoting amicable settlements. Since 1984, the Arbitration Rules of the Centre have included a procedure under which parties may seek amicable settlements. Under Arbitration Rule 21(2), a pre-hearing conference between the arbitrators and the parties may, if the parties so desire, be held “to consider the issues in dispute with a view to reaching an amicable settlement.” At the 1985 AAA/ICC/ICSID Colloquium, Ibrahim Shihata explained that the new procedure in the form of a “prehearing conference,” could be called by either the Secretary-General or the presiding arbitrator and that “the purpose of such a conference [was] to expedite the proceedings by permitting early identification of undisputed facts, thereby limiting

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56 *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Article 1(2).


58 *See* SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar, ICSID Case No. CONC/82/1; Tesoro Petroleum Corporation v. Trinidad and Tobago, ICSID Case No. CONC/83/1; SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar, ICSID Case No. CONC/94/1; TG World Petroleum Limited v. Republic of Niger, ICSID Case No. CONC/03/1; Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/1; Shareholders of SESAM v. Central African Republic, ICSID Case No. CONC/07/1. *See also* L. Nurick and S. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1 ICSID REV.-FILJ 340 (1986).
the proceedings to the real areas of contention.”\footnote{See I. Shihata, Obstacles Facing ICSID’s Proceedings and International Law in General, 3(1) NEWS FROM ICSID 8, 10 (1986).} Under Rule 21(2), the parties also have the right to convene such a conference.

In 1995, a decade later, Mr. Shihata addressed the apparent tension in the notion that an arbitration institution would promote amicable settlements to the detriment of its own caseload. Mr. Shihata dismissed any conflict between promoting settlement and administering arbitration and observed that the Centre was perhaps fulfilling its broad mandate in the most optimum way when it helped bring about agreed settlements because such settlements invited mutual confidence “conducive to increasing the flow of international investment.”\footnote{See I. Shihata, ICSID’s Role in the Resolution of Investment Disputes, THE WORLD BANK IN A CHANGING WORLD 425, 449 (1995)}

Some ten years later, the Centre announced efforts to promote its Conciliation Rules, but these developments came to an early standstill.\footnote{See ICSID Annual Report (2004) and (2005), supra note 1.} One reason for abandoning its efforts to promote a broader set of ADR mechanisms may have been that the surge in the volume of investment arbitration cases seem to have left less capacity for ICSID to address the “other side” of its dispute settlement responsibilities. Put differently, the success of the ICSID arbitration mechanism may have prevented the Centre from taking a more balanced approach to dispute resolution despite its own best intentions to do so.

Outside the scope of its Arbitration and Conciliation Rules, ICSID has in the past — through the good offices of its Secretary-General — facilitated negotiated settlements of disputes submitted to the Centre.\footnote{See I. Shihata, supra note 60, at 449.} The Secretary-General has also acted as appointing authority in the context of the constitution of a permanent review board for carrying out an infrastructure project and as appointing authority in a purely \textit{ad hoc} mediation.\footnote{See ICSID Annual Report (1997) and (2001).}

One of the reasons why mediation has not been used more generally in investor-State disputes may be because lawyers are not familiar with the process.\footnote{Salacuse, supra note 1. See also N. Rubins, Comments to Jack C. Coe Jr.’s Article on Conciliation, 21(4) MEALEY’S INT’L ARB. REP. 21, 23 (2006).} In the ICSID context, an additional factor may have been that the ICSID Panels of Arbitrators and Conciliators for the
most part consist of individuals known for their arbitration skills. It is however, widely recognized that the skills required by conciliators and mediators are different than what is sought from arbitrators. Failure to incorporate different skill sets in the Panel of Conciliators may therefore have contributed to the preference for arbitration.

Problems with the ICSID Conciliation Rules undoubtedly constitute another reason that ICSID may have not achieved much progress in developing alternatives to arbitration. One charge against the ICSID Conciliation Rules is, of course, the problem of enforceability discussed above. Under Article 34 of the Convention the conciliation commission is required to clarify the issues in dispute between the parties and to bring about agreement between them on mutually acceptable terms. At least one conciliator’s view of his duties make it sound as if the conciliator does little more than write a legal memo for the parties. Even if a recommendation leads to a settlement, the settlement does not benefit from the enforcement mechanism of the ICSID Convention. Like mediation and conciliation proceedings under many other rules, it results in a contractual document that could lead to yet another dispute if breached. While some take the view that the ICSID Conciliation Rules, unlike many of the other mediation rules, do not explicitly permit parties to combine conciliation with arbitration in order to convert the resulting conciliation recommendation or settlement agreement into an agreed award, ICSID’s Model Clauses have since 1968 suggested texts for consenting to ICSID conciliation followed if necessary by arbitration.

65 N. Ziadé, *ICSID Conciliation*, 13(2) NEWS FROM ICSID 3, 6 (1996) (quoting an ICSID conciliator’s views on his mission: “to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement.”).

66 E. van Ginkel, *Toward Mandatory ICSID Conciliation? Reflections on Professor Coe’s Article On Investor-State Conciliation*, 21(4) MEALEY’S INT’L ARB. REP. 1, 2 (2006). (“[U]nder current interpretation of the Convention, how to use the methods of dispute resolution appears to be cast as a choice between instituting conciliation proceedings under Article 28 or arbitration proceedings under Article 36.” (citing UNCTAD Course on Dispute Settlement, Module 2.2, Selecting the Appropriate Forum 13-14 (2003), available at http://www.unctad.org/en/docs/edmmsc232add1_en.pdf (last visited March 21, 2006), which cites SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, 3 ICSID REPORTS 156, in which the Tribunal held that “Once consent has been given ‘to the jurisdiction of the Centre,’ the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings. [emphasis added]).

67 See ICSID’s Website, available at http://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH (last visited October 27, 2009). See also N. Ziadé, *supra* note 65 at 3 (noting that the Convention does not prevent sequential resort to conciliation and then arbitration).
The ICSID Conciliation Rules also provide for a lengthy process, particularly in the beginning. It can take over four months to constitute a conciliation commission under the ICSID Rules, and then another sixty days to have a first session, facts that exacerbate the perception of ICSID Conciliation as a protracted process that does little to create momentum. It is natural, therefore, that parties seeking resolution of their disputes would not opt for a process that is perceived to simply prolong (or prevent) the production of a binding legal document.

In addition, the ICSID Conciliation process is perceived as overly rigid. Unlike the UNCITRAL Conciliation Rules, for instance, it is not clear whether parties conciliating under the ICSID Rules may meet *ex parte* with the conciliator in the process of the conciliation. This apparent failure of the ICSID Rules to accommodate *ad hoc* or spontaneous approaches to mediating disputes is unfortunate since techniques such as caucusing have been cited as effective tools for parties and mediators to employ in the conciliation process.

The ICSID Convention itself contributes to the rigid and protracted nature of ICSID conciliation because it limits the degree to which the ICSID Conciliation Rules may be modified. Indeed, the Convention’s general principle of non-frustration of proceedings yields what it perhaps the most intractable problem of the ICSID Conciliation Rules. While this principle serves to introduce effectiveness and efficiency into arbitral proceedings, one may ask whether the same underlying principle serves its purpose when parties are striving for an amicable settlement, and when the outcome of the process is entirely in the hands of the parties. Forcing a party that has no interest or confidence in a settlement proceeding, to proceed with such efforts, will in all likelihood not produce a favorable outcome. It is notable then that the ICSID

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68 See ICSID Conciliation Rules, Rules 2, 4. See also ICSID Convention, Arts. 29-31.
69 See ICSID Convention, Rule 13.
70 See UNCITRAL Conciliation Rules, Article 9(1) (“The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.”).
71 See e.g., T. Wälde, Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation, 22(2) ARB. INT’L 205, 219 (2006) (discussing the usefulness of caucuses among other informal procedures).
72 See A. Broches, Dispute Resolution in the Asian Pacific Region, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW at 485 ¶46 (1995) (citing Articles 28-31 of the Convention in note 57 and remarking that the ICSID Conciliation Rules, unlike the UNCITRAL Rules, make an agreement to conciliate binding and require that parties cooperate with the Conciliation Commission in good faith).
73 See N. Rubins, supra note 64, at 23.
Conciliation Rules, unlike the UNCITRAL Conciliation Rules, do not allow parties to discontinue conciliation at their own will, although the ICSID Rules do provide that the Commission shall close the proceeding if it appears that there is no likelihood of agreement between the parties.

The recent interest in investor-State mediation and the relative success of MIGA in resolving investment disputes by ADR methods demonstrates that certain disputes might benefit from the availability of ICSID-administered ADR. For the time being, however, ICSID has a product on its shelf that not many customers are buying. Coupled with the acknowledgment that ICSID is the most prominent and experienced provider of investor-State dispute settlement services, this fact indicates that ICSID is perhaps the institution with the greatest need for reform to improve its capacity to provide effective and attractive ADR services.

III. A More Meaningful Role for Institutions in Facilitating Investor-State Mediation

Arbitral institutions and international organizations alike have much important and meaningful work to do in order to fully explore and develop useful alternatives to investor-State arbitration. Below, we propose three lenses through which to view this work. First, institutions must collaborate with States, investors, international organizations, and professional associations to frame an agenda for providing alternative means of settling investment disputes. Second, once (and if) institutions deem a proposed ADR agenda appropriate, they should consider taking internal steps to implement reforms, whether that entails amending conciliation rules or simply changing the institution’s approach and promotion of mediation as a viable option. Third, when implementing a new approach toward resolving investment disputes, institutions and international organizations would need to engage in capacity-building to instruct States, investors, and institutional staff alike on how to employ alternative methods of settling their disputes and using amended or existing conciliation regimes if applicable.

A. Agenda-Setting

One of the most important roles for institutions concerned with investor-State mediation is to use their capacity and access to both information and people to outline the direction for the

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74 UNCITRAL Conciliation Rules, Art. 15(d).
75 ICSID Conciliation Rules, Rule 30(2).
development of alternative methods for settling investment disputes. For instance, UNCTAD’s ongoing technical assistance program on dispute prevention policies would allow it to address structural issues, including whether mediation under treaties should be mandatory and time-limited, and whether it should be institutional, *ad hoc*, or some combination of the two. UNCTAD’s continued efforts in this area, including the dissemination of host State experience once some of these processes have been implemented, would also form a valuable contribution to understanding how non-arbitral dispute settlement procedures might be used.

An important parallel task would consist of surveying the legal constraints that might arise for States minded to pursue settlement discussions. Constraints on settlement capacity vary from country to country, but often entail a lack of internal organization or authority to negotiate settlement agreements. Needless to say, such constraints stand in the way of some States’ willingness or ability to pursue this route. That settlement agreements are still concluded with some frequency, however, suggests that internal legal constraints do not pose an insurmountable obstacle for all countries.

Institutions could also take it upon themselves to address the current status of conciliation and mediation in investment treaties. To date, an exhaustive study of mediation and conciliation in investment treaties has yet to be carried out, but with empirical data it would be possible not only to identify the trends in investment treaty rule-making, but also to assess the best methods by which to incorporate conciliation and mediation procedures with arbitration under investment treaties, which as shown, present a variety of different options and possibilities. One area on which this work might focus concerns whether there is scope for developing more constructive processes for using the cooling-off period provided in many treaties.

Institutions such as ICSID might also contribute to the study of investor-State ADR mechanisms by gathering and disseminating empirical data from users of investment arbitration who have ended their disputes on agreed terms. Such data could yield more accurate statistics on the percentage of parties employing formal or informal ADR methods in conjunction with arbitration, the percentage of parties that actually settle, the junctions in the case that provide the most fruitful points for settlement discussions, and other issues that are at present largely informed by anecdotal data and arm-chair conjecture.
Organizations such as CEDR have addressed important issues worth exploring in more depth as well. At the heart of the CEDR recommendations are amendments to arbitral rules and changes to the manner in which current rules are implemented. The CEDR recommendations also address the potential capacity-building role that arbitral institutions can fulfill. Institutions have a continued role in defining and proposing both additional institutional reforms and building capacity for settlement techniques for both the users and the providers of the investment dispute settlement system. These roles are discussed in more detail below.

B. Institutional Reforms with Particular Reference to ICSID

Due to the difficulty likely to arise from implementing institutional reforms that include amending current mediation or conciliation rules, it may be useful for institutions to initially consider what steps they could take without engaging in a lengthy and cumbersome process of revising such rules. In the case of ICSID, for example, there are a number of steps that could be introduced that would not necessarily require drastic changes in the ICSID Conciliation Rules:

- Provide parties and tribunals with information at the first session of the tribunal, as to how Rule 21 of the Arbitration Rules might be used in arbitration proceedings, for example as a “mediation window.”

- Offer the good offices of the Secretary-General as appointing authority in ad hoc mediations, as well as in conciliations conducted under the UNCITRAL Rules.\(^76\)

- Consider designations to the Panel of Conciliators of individuals that, in addition to meeting the requirements under Article 14 of the ICSID Convention, would have demonstrated successful experience in the mediation area.\(^77\)

- Launch consultations with the ICSID Administrative Council and users’ groups as to how the ICSID Conciliation Rules, as well as the panel of

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\(^76\) ICSID has since 2001 administered proceedings conducted under the UNCITRAL Arbitration Rules. See ICSID Annual Reports (2001) - (2009).

\(^77\) Under Article 14(1), “Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.” Conversely, a prominent businessman or politician of international standing, might be considered for the Panel of Conciliators.
Conciliators, could play a greater role in the Centre’s dispute settlement activities.

There are no doubt other steps that could be taken. Initially, however, it would seem prudent to restore some of the practices that once were part of what disputing parties could obtain from ICSID, and to involve users (both States and investors) in a discussion as to how greater efficiency and cost-cutting measures can be achieved in the future. Given the many criticisms of ICSID conciliation as a process, it may be time to consider the elaboration of an entirely new set of rules, but such a step might best be implemented when the conversation about investor-State mediation has progressed to include empirical data and feedback from users as to what changes would serve the system best. One possibility might be to constitute a commission similar to the CEDR Commission that would survey best practices in investor-State mediation and produce a kind of “consultation” document along the lines of what the CEDR Commission undertook in the area of arbitrator-facilitated settlements.

C. Capacity Building

A successful expansion of the investment dispute settlement system to include a non-arbitral option would require more than the mere implementation of institutional reforms such as those suggested above. The users and the providers of these mechanisms would also require training to use such techniques, especially given the lack of familiarity most participants in the investment dispute process have with non-arbitral settlement techniques. In addition to UNCTAD’s capacity building initiatives in the dispute prevention area, training services that institutions could offer to their users include:

- Guidance to States on drafting combined arbitration clauses for bilateral investment treaties and State contracts;
- Training programs for the users of investor-State mediation; and
- Training programs for potential mediators.

79 The ICC, for instance, provides these programs for many of its ADR options.
These are just some of the steps institutions could take toward capacity building. Through agenda-setting and the actual practice of increasingly encouraging mediation of investment disputes, the need for increased capacity building in other areas would inevitably arise.

IV. Conclusions

The growth of investor-State arbitration, along with the added complexity and expense of such proceedings, has prompted a reconsideration of alternatives to arbitration for the resolution of investment disputes. With the 50th anniversary of the investor-State dispute settlement system established under the ICSID Convention just five years away, the time is ripe to take stock of the strengths and weaknesses of the dispute settlement facilities available under the Convention and in investor-State arbitration in general.

Given that many of the criticisms of investor-State arbitration could equally apply investor-State mediation, as well as the fact that investor-State mediation carries its own unique set of issues, the challenges for institutions seeking to provide useful alternatives the arbitral process in investment disputes are numerous. That is not to say that they could not be met. With the cooperation of international organizations, States, investors, arbitrators, and other key members of the investment dispute constituency, an alternative process for settling investment disputes is achievable, though it would require concerted action based on concrete data in addition to the exploration and promotion of alternative dispute resolution methods.

Institutions, with their unique position at the fulcrum of investment disputes, have an important role to fulfill in the process of examining possible alternatives to investor-State arbitration. Their history in investment disputes, as well as the capacity and relationships they have forged in administering investment arbitration proceedings, should prove invaluable to any ADR process that emerges for settling investment disputes. With this in mind, the advent of ICSID’s 50th anniversary offers a unique milestone to honor Aron Broches’ vision for the Convention by embarking on institutional reengagement in the practice of settling disputes by non-adversarial means.