

INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION

II

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



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**INVESTOR-STATE DISPUTES:
PREVENTION AND ALTERNATIVES TO
ARBITRATION
II**

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

Editors: Susan D. Franck and Anna Joubin-Bret



**UNITED NATIONS
New York and Geneva, 2011**

NOTE

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

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

The following symbols have been used in the tables:

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

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

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

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

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

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

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

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

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

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

UNCTAD/WEB/DIAE/IA/2010/8

Copyright © United Nations, 2011
All rights reserved

PREFACE

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

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

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

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

Supachai Panitchpakdi
Secretary General of UNCTAD

Geneva, June 2011

ACKNOWLEDGEMENTS

This publication is a sequel to a paper on prevention of investor-State disputes and alternatives to arbitration. The editors for the publication were Susan Franck and Anna Joubin-Bret. The study was also prepared by Jan Knörich and Celeste Owens. Hasso Anwer helped finalize the study.

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

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

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

CONTENTS

PREFACE	iii
ACKNOWLEDGEMENTS.....	iv
CONTENTS.....	v
GLOSSARY OF IMPORTANT TERMS	xi
EXECUTIVE SUMMARY	xvii
INTRODUCTION.....	1
THE JOINT SYMPOSIUM—PHASE I— PRE-CONFERENCE RAPPORTEUR REPORTS.....	5
1. Alternative Dispute Resolution (ADR)—Definitions, Types and Feasibility by <i>Gene Hamilton</i>	6
2. Perspectives of Stakeholders by <i>Jenna Perkins</i> and <i>Jacob Stoehr</i>	10
3. Assessing the Current System—Systemic Issues by <i>Caitlin Cottingham</i>	13
4. The Way Forward by <i>Brandon Hasbrouck</i> and <i>Jason Ratigan</i>	17
THE JOINT SYMPOSIUM—PHASE II— CONFERENCE COMMENTARY BY EXPERTS	21
A. Keynote Addresses and Observations	22
1. International Investment Arbitration and ADR: Married but Best Living Apart by <i>W. Michael Reisman</i>	22
2. Synopsis of Remarks by <i>Margrete Stevens</i>	28
3. Synopsis of Closing Remarks by <i>Lucy Reed</i>	30
B. Expert Commentary from Key Participants.....	33
1. Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels by <i>Lisa Blomgren Bingham</i>	33
2. “Why Aren’t More Investor-State Treaty Disputes Settled Amicably?” by <i>Mark A. Clodfelter</i>	38
3. Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress by <i>Professor Jack J. Coe, Jr.</i>	43
4. Investor-State Dispute Prevention Mechanisms: Why Are They so Important for Developing Countries and for the Healthy Evolution of the International Investment Regime? by <i>Roberto Echandi</i>	49
5. From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction by <i>Mariana Hernandez Crespo</i>	55
6. Bridging the Investment Claim Gap Between Sophisticated Investors and Unprepared Host States by <i>Dany Khayat</i>	63

7. Republic of Korea's Development of a Better Investor-State Dispute Resolution System by <i>Jae Hoon Kim</i>	67
8. Making Mediation Mainstream: An Application for Investment Treaty Disputes by <i>Wolf von Kumberg</i>	71
9. Preliminary Legal Assessments of Investor Claims as a Tool to "Fitting the Forum to the Fuss" by <i>Céline Lévesque</i>	77
10. Thailand's First Treaty Arbitration: Gain From Pain by <i>Vilawan Mangklatanakul</i>	81
11. Implementation of Investment Treaty Obligations and Management of International Investment Disputes by <i>José Antonio Rivas</i>	87
12. Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes by <i>Andrea Kupfer Schneider</i>	93
13. An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution by <i>Hi-Taek Shin</i>	97
14. The Role of Dispute Resolution Institutions for ADR Proceedings Involving State Parties by <i>Hannah Tümpel</i>	102
15. Mandatory Mediation and Its Variations by <i>Nancy A. Welsh*</i>	108
C. Commentary on the Conference Proceedings	114
Using Technology to Support an International Conference by <i>Peter Jetton</i>	114
THE JOINT SYMPOSIUM—PHASE III— POST-CONFERENCE RAPPORTEUR REPORTS AND DIRECTION FOR THE FUTURE OF INVESTMENT LAW DISPUTE PREVENTION AND ALTERNATIVE DISPUTE RESOLUTION	117
1. Perspectives of Stakeholders by <i>Jacob Stoehr</i> and <i>Jenna Perkins</i>	118
2. Assessing the Current System—Systemic Issues by <i>Celeste S. Owens</i>	121
3. The Way Forward by <i>Susan Franck</i> and <i>Jason Ratigan</i>	125
CONCLUSIONS	135
REFERENCES	139
ANNEX 1	145
Pathfinder on International Investment Law and Alternative Dispute Resolution: Web Based Resources by <i>Caroline L. Osborne</i>	145

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_6819

