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ADR in cross-border investment disputes

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New pastures for ADR

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Introduction

This article deals with the prospective development of mediation and ADR in cross-border investment disputes. The focus is on foreign direct investment (FDI) and not on other forms of investment such as portfolio, private equity or hedge funding investment. It examines the topic predominantly from the perspective of developing and emerging economies.

The article first links the theoretical importance of cross-border FDI to current trends in the global political economy. It then examines the nature of investment disputes and the appropriateness of different dispute resolution systems. It introduces two case studies from different developing countries and refers to the 2010 UNCTAD report on ADR in investment disputes. The article concludes with some evaluative analysis of the central hypothesis, namely that mediation and other forms of ADR might be appropriate for certain kinds of international investment disputes.

FDI and economic theory

Under market systems, investment capital is required for new economic ventures, expansion of corporations and consolidation of companies. The scarcity of global capital, exacerbated by the financial and economic crises of 2008–09, creates competition for the scarce resource of investment funds. Bodies which might invest funds globally include banks and financial institutions, private equity bodies, state-owned enterprises and sovereign wealth funds; this list excludes the regional development banks or World Bank which provide loans as opposed to investments and are mandated to do so for 'public interests'.

In the context of international investment law, the interests of 'private' entities tend to be aggregated and represented in some degree by nation states, and competition for investment funds is often depicted as occurring between states. However, as with matters of trade, cross-border investment is mainly concerned with private commercial interests and the state has only secondary interests in the system. This is one of the paradoxes of globalisation: it replaces the nation state with the transnational corporation as the key entity in trade and investment, but retains old habits by evaluating globalisation's successes and failures in terms of the fate of nation states. Investment provides one important exception to the norm, as discussed below.

The discipline of economics deals with maximising efficiency in the competitive circumstances of scarcities in goods, capital and services. Rational choice theory holds that market decisions of independent economic actors will bring supply and demand in goods, capital and services to a point of price equilibrium in perfect

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market conditions. This equilibrium will not emerge where there is state intervention in the supply and demand curves, where there are monopolistic market operators who are price-givers, where one is dealing with public goods, or where there is a lack of information for consumers and other market players. In these circumstances of imperfect competition, there is inadequate signalling of supply and demand propensities, resulting in the sub-optimal allocation of resources and economic inefficiencies.

Investment capital—like oil, vehicles or medical services—is a scarce commodity, and efficiency imperatives dictate that it should gravitate to situations where it will produce the greatest return. Where returns on capital are better elsewhere, and subject to various risk factors, capital should be withdrawn from low-yield situations and reallocated. In domestic economic circumstances, market theory dictates that capital should be able to flow freely to the site of greatest return with minimalist intervention from the state, regulatory agencies or court orders. Dispute resolution systems are part of the regulatory environment which can disturb market equilibrium.

As regards cross-border capital flows, market theory is extrapolated to the global level where it is supported by an additional justificatory theory. The doctrine of comparative advantage holds that states should focus on those economic sectors in which their greatest advantage lies. For example, where a country exploits its comparative advantage in the service sector because of an educated workplace, prominent ICT research policies and infrastructure arrangements, cross-border investment should flow to this sector and not to manufacturing or primary industry. Market theory dictates that scarce capital will be attracted to host countries in their areas of comparative advantage. This paradigm applies nominally to developing countries as well as developed economies. Again, economic theory dictates that economies should not create artificial comparative advantages, as this will result in inefficiencies. In reality, many countries are inclined to embrace industry policies or protect their 'champion' corporations, both of which flout the macro-economic theories.

Unlike cross-border lending and borrowing, FDI is characterised by the retention of control by the foreign investor. All investment is an exercise in risk management and risks can be mitigated by due diligence, insurance, legal certainty and appropriate dispute resolution systems. However, where investment capital crosses state boundaries it is susceptible to alien forces and risk factors. In the cross-border context, the additional risk factors are: changes in state law or government policies affecting the value of investments; expropriation or nationalisation of investment assets; and issues of procedural fairness and absence of bias when foreign investors take legal proceedings, not only in alien courts but frequently also against sovereign states. This last factor is dealt with in greater detail in this article.

Trends in global investment

All investment agreements and dispute resolution systems reflect in some degree power realities, and it is relevant to refer to current trends in cross-border investment flows which inevitably benefit some economies more than others. Trends in this area also indicate where there could be pressure for policy changes.

The 2010 World Investment Report was published by the United Nations Committee on Trade and Development (UNCTAD), its tenth such publication.[1] It is a comprehensive report covering the global economy, various regions of the world and individual countries. A short time earlier the OECD had issued its 2010 report on investment.[2] This was a selective report which focused mainly on member countries—the 30 largest economies in the world—but included information on those non-members of the OECD who are members of the G20 group of countries. Cumulatively, these reports provide the following contemporary picture of global cross-border investment.

There was a modest recovery in FDI flows in the reporting year, after the drop-offs of previous years. While the recovery was not consistent across economies, a prominent feature was the contribution of emerging countries in relation to both inward and outward FDI. As regards the African region, its increase in inward FDI was greater than the global average. Most African inward FDI comes from developed countries. Of that which emanates from developing countries, China was trumped in 2009 as a source of FDI in Africa by South Africa, challenging some urban legends on the issues, although China's profile is showing dramatic annual increases. Outward FDI from developing economies creates tensions in relation to domestic economic needs and in terms of developing coherent policy frameworks in this area.

These figures reinforce an already present trend in the global political economy as the relative economic, and hence political, strengths of countries and groups of countries fluctuate. In broad terms, China, the four BRIC countries and other emerging economies such as Mexico, Indonesia and South Africa, are providing challenges to previously dominant countries, and the challenges extend to prevailing global norms on trade and investment. A reflection of the changes is found in the new-found status of the G20 group of countries which has to some extent displaced both the G7 and G8 and allowed a greater voice for developing countries in global agendas.

Characteristics of investment disputes

It is not surprising, given the scarcity and competition factors in foreign investment, that this is a conflict prone area, and there is evidence of increasing numbers of disputes between the respective parties. Investment disputes are characterised by allegations from foreign investors that the host country is not in compliance with treaty or contractual obligations. In cases relevant to this article, the obligations are located in bilateral investment treaties (BITs) or in the investment provisions of regional trade agreements. Investment claims are usually brought by investors and not host states[3] and are based on 'expropriations' of investment companies or their assets without compensatory damages. The concept of expropriation in this context is a broad one. It includes obvious interventions such as nationalisation but extends to other 'takings' which have equivalent effects to expropriations proper. Domestic laws, policies and practices could constitute takings in matters such as the environment, industrial relations or affirmative action.

Investment claims are usually brought by investors and not host states and are based on 'expropriations' of investment companies or their assets without compensatory damages. The concept of expropriation in this context is a broad one.

The rejoinders of host countries to these arguments usually centre on the contention that the impact on the investor was a consequence of legitimate domestic policy activities involving matters of state national interest. Where the relevant policy or practice is applied without discrimination to domestic and foreign investors alike, the host country's position is stronger than where there is selective operation against foreign investors alone which could contravene the meta-principle of 'national treatment' in international economic law. Failure to resolve these opposing contentions could lead to high expenditures for both parties in relation to the transaction costs of dispute resolution, and potentially high damages awards against host countries where their local measures are found to be non-compliant with relevant obligations.

A controversial feature of investment disputes concerns the identity of the parties. The broad rubric of international law, of which investment treaties constitute a part, identifies nation states as bearers of rights and obligations. This is based on the notion that international law comprises a delegation of authority to international institutions by sovereign states or the consistent customary practices of sovereign states over a period of time. This paradigm extends to dispute resolution systems such as that of the International Court of Justice (ICJ) and the World Trade Organization (WTO) in which only nation states have the right to bring proceedings or appear as respondents. Investor–state disputes are an exception to this tradition in that complaints are brought not by contracting states but by investing corporations (which could also be state enterprises), despite the lack of privity with the respondent treaty state. Moreover, claims are prosecuted against sovereign states, which can be ordered to pay compensatory damages by private arbitrators as opposed to international institutions or state-based forums. The asymmetry between states, private corporations and freelance arbitrators has been a contributing factor in several states' withdrawal from conventions dealing with investor–state disputes.[4]

The regulation of investor–state disputes occurs through different legal instruments, including contracts, bilateral investment treaties, other international investment agreements and regional trade agreements. In this article, the focus is the rules encountered in bilateral investment treaties and their provision for dispute resolution systems.

Nature and function of bilateral investment treaties (BITs)

Unlike the rule-based system for cross-border trade, foreign investment has no multilateral rule based system.

(In both the mid-1990s and the early 2000s, attempts were made to establish multilateral rules but they were unsuccessful on each occasion.[5]) It is hardly affected by the WTO system and derives its legal architecture from various international agreements such as BITs and investment provisions in regional trade agreements. There has been a proliferation in all categories of such treaties in the last 20 years with nearly 6000 agreements currently in existence—about 45 per cent of which are BITs. This comprises a confusing and sometimes conflicting regulatory scheme with parallel dispute resolution procedures available for many disputes.

In broad terms, the standard BIT promotes six principal objectives:

1. Encouragement of reciprocal investment by entities of each treaty state
2. Legal protection in each state for foreign investment from the other treaty state
3. Protection against expropriation of investments or other actions which diminish the value of investments
4. Provision for the repatriation of profits, royalties and dividends to the home state
5. Provision for cross-border investment and adequate compensation in the event that unlawful expropriation takes place
6. Establishment of a dispute resolution system to deal with conflicts between foreign investors and the host state, including the identification of service-providing institutions.

The global BITs regime is currently experiencing pressure as new forces emerge in the global political economy. Historically, the agreements were effectively constructed and imposed by developed countries (the main sources of investment funds) for capital-seeking countries (which were mainly in the developing world). Over time more BITs were ratified between developing countries. These basically followed the conventional template, but in recent times there have been more serious critiques of the old patterns. This is partly a function of the mixed evidence on the significance of BITs as determinants of investment decisions: at best, it can be said that their legalities and protections are only one of many considerations which motivate investor decisions. Brazil is often cited as an economy which has succeeded in attracting considerable foreign investment despite not having, to date, ratified a single investment treaty. There has been disaffection with these agreements not only in South American countries but also in Norway.

One area in which there is a reconsideration of BITs is in relation to the balancing of rights and duties. The conventional BIT created rights for investors, but little in the way of reciprocal rights for host states or counterpoint obligations for investors. An unusual exception is found in the Argentine–US treaty, which refers to workers' rights in the preamble. Moreover, the concepts used in BITs were drawn mainly from US jurisprudence, including a wide conception of expropriation and provision for 'prompt, equitable and adequate' compensation. These factors lead, in some contexts, to even greater liability of host states and awards than was provided for in domestic constitutional systems.

New model BITs focus more on developmental needs, the national interest and domestic policies, and reflect the interests of developing countries. They also involve reconsideration of the provisions regulating how disputes between investors and host states are to be managed.

Management of investor–state disputes

As is the case with many categories of disputes, those of an international investment character are dealt with to a large extent 'under the radar' through informal problem-solving, formal negotiations, diplomacy and withdrawal. The historic form of dispute resolution was through the investor seeking diplomatic protection from its home state, which would use its good offices in relation to the host state. This involved international political overtures and non-legal outcomes where diplomacy conditions were conducive to agreement. While conventions operate in cross-border diplomacy, this was not a rule-based system and 'might' was frequently 'right' in the management of these disputes.

It has always been possible to deal with investor–state disputes through the court systems of host states where matters are justiciable in terms of domestic law, for example where treaty obligations have been incorporated into national law. The same option prevails in respect of contractual breaches. But a state's alleged breach of international obligations per se would not be permissible in domestic courts. However, in the current era, the most prevalent form of dispute resolution occurs through private arbitration.

In some situations, treaties nominate dedicated tribunals for performing the arbitral role; in others, they provide a choice of proceeding through arbitration or domestic courts. The forum of choice for investors is private arbitration through ICSID, UNCITRAL or a service-providing institution such as the ICC.[6] Other arbitrations can be organised on a consensual ad hoc basis by the parties concerned.

Arbitration conducted by one of the above bodies is perceived as a 'neutral' system in that the adjudicators owe no allegiance to the host country as might be alleged of national courts. It is also a 'specialist' system in that arbitrators can be nominated on the basis of their expertise in the area, as opposed to domestic courts which are generalist in nature. Investors and states are involved in the nomination of arbitrators in each system, though there is some recycling of arbitral personnel from a small global pool of experienced practitioners. Arbitral procedures are determined by the service-providing institution but include some capacity for party input into the process.

Arbitral decisions are final and binding on the host state and the investor. Under the ICSID system, there is no basis for appeal or review, and revisions and annulments can only be granted on very limited grounds. Awards either exonerate host countries from treaty violation or find in favour of complainants that there has been a treaty breach and that this has been detrimental to their investment. In the latter case the remedy is always an award of monetary damages, in some cases the quantum being substantial and affecting the national budget of the country concerned. This can lead to termination of what was envisaged as a long-term commercial arrangement; but although there is provision in the rules for non-adjudicative procedures, there tends to be little interest-based negotiation between the parties.

As regards enforceability of arbitral awards, Article 54 of the ICSID Convention provides that awards are binding on contracting states and are required to be enforced as though they were court judgments. This has similar implications to the New York Convention[7] in respect of private arbitrations, but unlike the latter there is no provision for arbitrations to be challenged on public interest grounds. For an award to be enforced where there is no compliance by the respondent state, an authenticated copy must be furnished to a competent court which can automatically order execution in terms of domestic law provisions. In practice, awards tend to be self-executing—soft enforcement ensuing through market pressure, and the concern by host country respondents that failure to comply with arbitral outcomes will prejudice future cross-border investments.

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Critiques of investor–state arbitration in cross-border disputes

Criticism of the investor–state arbitration system comes from several quarters, but in particular from developing and emerging countries that have suffered extensive damages awards against them—sometimes for what is perceived as a legitimate expression of domestic policy in planning and environmental matters.

Following are some of the arguments made by these countries in relation to dispute resolution through private arbitration.

- In some jurisdictions, domestic constitutional and legal frameworks are adequate for providing certainty and mitigating risk for foreign investors in the country. Matters such as property protection and compensation for expropriation are firmly entrenched in the constitution, as are guarantees of procedural fairness in judicial and administrative processes. Moreover, it is argued, the standards and procedures in the constitution are nuanced to reflect domestic political and economic realities and are more sensitive to the retention of policy space which is necessary for government in developing societies. These might include controversial affirmative action or indigenisation policies designed to remedy discriminatory systems from a colonial past.
- There are no formal systems of precedent, review and appeal, which raises concern about the directions that future tribunal interpretations of BITs could take. Here the issue is that there are limited constraints on tribunals to deter them from interpreting BITs provisions favourably to investors and to the detriment of economic interests within the host country or to the local political economy as a whole. This concern is fuelled by perceptions of negative outcomes from some individual arbitrations in the past (regardless of overall patterns of outcomes)[8] and the reality that developing countries are the respondents in the majority of ICSID or UNCITRAL dispute resolution processes. This perception is further reinforced by the absence

of cogent evidence on the causal connection between the existence of BITs and the attraction of inward investment to the countries concerned.

- Emerging economies are often members of regional organisations, such as the Southern African Development Community (SADC), which have their own dispute resolution systems. The SADC has a human rights tribunal, based in Namibia, which has the potential to develop jurisprudence in relation to host–investor disputes where they have human rights implications and to do so in light of regional imperatives. The SADC tribunal has been used in one case involving foreign investors affected by land dispossessions in Zimbabwe, referred to further below. While regional institutions necessarily have their own shortcomings, in particular as regards enforcement matters, they do provide 'local' alternatives to both distant ICSID processes and domestic courts, though necessarily only for members of the organisations concerned.

Some of the critiques of the ICSID arbitration system for investment disputes emanate from comparisons with dispute resolution procedures under the WTO's multilateral rule-based system for global trade. The Table 1 below profiles some features of the two systems on comparable issues.

Table 1

	WTO	ICSID
Structure and organisation	Centralised system operating from one base in Geneva with closed panels of adjudicators working collegially	Decentralised system operating in different localities with intervener individuality
Confidentiality and publicity	Private procedures, with some public access, but reasoned decisions available to member states and the public	Private procedures, with reasoned decisions only made public with both parties' consent
Involvement of third parties and civil society	WTO member states can join as third parties Gradual increase in scope for amicus briefs from NGOs	Rare access by NGOs and civil society to documentation. Generally no third party involvement
Outcomes and remedies	Decisions require offending state to bring measures into compliance with treaty obligations. Damages not awarded, but economic retaliations can be permitted	Arbitral awards to successful complainants sound only in monetary damages. No provision for restoration of investment relationship
Enforceability and finality	Indirect enforcement mechanisms, but decisions can take years to produce compliance	Mainly self-executing, but enforcement possible in domestic courts in terms of ICSID convention rules
Use of negotiation and ADR	Amicable settlement preferred and ADR available but little used, and mainly after decisions made. Draft decisions shown to parties for comment before finalisation	No ADR in arbitration system in practice, though ICSID conciliation system is available. Draft awards not shown to parties for negotiation
Appeal and review	Decisions of WTO panels can be appealed to professional appellate body on questions of law	No system of appeal or review. Very narrow basis for annulment or revision of awards
Support systems	WTO provides organisational support, research facilities, hearing rooms and collegial support	ICSID provides organisational support, but no research and hearing rooms available. Collegial support is limited
Basis of decisions	Extensive use of WTO 'covered agreements', other treaties and prior public decisions	More commercially than public interest focused. Narrow sources of treaty rules and prior decisions
Identity of parties	Only nation states who are also members of the WTO	Nation states as respondents. Complainants are exclusively corporations

Needless to say, there are counter-arguments to the criticisms outlined above, but policy development on BITs, particularly in transitional societies, is sensitive to local political factors. Moreover, a recent investment treaty between two developing economies, South Africa and Zimbabwe, which was ratified in 2010, incorporates the standard arbitration provisions involving ICSID, UNCITRAL or the ICC. This is arguably a function of South African corporations' concerns over the lack of rule of law protections in Zimbabwe—the converse of South Africa's argument in relation its own legal institutions.

Case studies in cross-border investment dispute resolution

Case study 1

Over several years, foreign investors in commercial agriculture were displaced from their farms by the Zimbabwe government in terms of that country's land reform policies, without any grant of compensation. Crawford Von Abo, a South African citizen who held properties in Zimbabwe, sought the diplomatic protection of the South African government through court order. The thrust of his complaint was that the South African government failed to afford him the diplomatic protection that he was entitled to as a citizen in respect of his investment interests in Zimbabwe. The High Court ordered the government 'to take all necessary steps' to have the violation of his rights by the Zimbabwe government remedied. The Constitutional Court was asked to confirm the order, but held that it need not decide the issue for technical reasons.[9] The High Court decision remained in force. However, while the government committed to pursuing its citizen's interest, there was no impact on the ground.

In the case of *Mike Campbell (Pvt) Ltd and 78 Others v Republic of Zimbabwe*,[10] the Campbells sought relief from the SADC Tribunal in terms of human rights principles in the regional community. The tribunal ruled in favour of Campbell and others, finding Zimbabwe's land reform to be racist and illegal and that they had suffered discrimination by having farms expropriated, entitling them to compensation. The government of Zimbabwe failed to recognise the tribunal decision. The Commercial Farmers Union applied to the Zimbabwe High Court to secure enforcement of the SADC Tribunal's ruling in Zimbabwean law. The High Court held that Zimbabwe was under no obligation to recognise the Tribunal's ruling on the basis that it contravened the Zimbabwean Constitution and was against public policy, namely a land policy designed 'for the greater good'. In the result, Zimbabwe institutions held that the SADC Tribunal's ruling had no force or effect in the jurisdiction in which the investors wanted return of their farms.

In *Ex Parte: Commercial Farmers Union. In re: The Status of Rulings by the SADC Tribunal vis-a-vis the Government of Zimbabwe*, application was made in a South African court to have the ruling of the SADC Tribunal recognised in domestic law on the basis that it was binding on the South Africa government. On this occasion the application was granted, but the recognition of the decision in South African law had no direct consequences in Zimbabwe. In a series of ensuing court applications, the investors succeeded not only in having Zimbabwe joined as defendants, but also in securing orders for execution on Zimbabwe-owned properties in Cape Town. This resulted in some recompense for the investors, but again no return of the farms themselves.

Numerous sources of law were invoked in the different forums: domestic South African and Zimbabwean law, bilateral law affecting the two countries, South African constitutional law, SADC regional law, bilateral law, international law and international customary law. The legal ventures were supplemented by quiet diplomacy and strident publicity among a wide range of individuals, representative bodies, NGOs and government agencies, creating a complex system of multi-party and multiple issue conflict. Ultimately, court orders had some effect but international tribunals were shown to be lacking in teeth. Although this was characterised as a human rights decision, it emanated from an investment relationship between a foreign investor and home state.

At the time, there was no BIT in place between the two countries in question but a treaty was ratified in early 2010. A major point of public contention here was whether the treaty would allow retrospective use of the dispute resolution mechanism in relation to past dispossession of land. Ultimately this political decision was

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resolved in the negative.[11] The BIT, however, ensured that future land expropriations without compensation could be dealt with by arbitration in terms of the treaty. Surprisingly, the dispute resolution system entailed private arbitration in terms of ICSID, UNCITRAL or ICC rules.

Case study 2

A European corporation, Foresti Piero, had invested in the South African mining sector. Subsequent to the investment, South Africa passed mining legislation which implemented the policy of Broad- Based Black Economic Empowerment (BEE) in this sector, a policy permitted by the South African Constitution. The legislation required all mining companies, both domestic and foreign, to convert their 'old-order' mining rights into 'new order' rights by committing to BEE policies in relation to share-holding, employment equity plans, board composition, procurement and other requirements. The policy and requirements were designed to ameliorate the position of formerly disadvantaged citizens in the apartheid past. The investors contended that the requirements involved direct expropriation, indirect expropriation or measures having an effect equivalent to expropriation, as far as the ownership and control of their company was concerned. In terms of the two BITs in question, this could entitle the investors to compensation which was not forthcoming from the South African government.

Two BITs—between South Africa on one hand, and Italy and Belgo–Luxemburg on the other—provided investors with a choice of arbitral tribunal, as is normal practice. The investors elected to bring the complaint under the ICSID arbitral system. As South Africa is not a member of the ICSID convention, its consent was required and was given in terms of the ICSID Additional Facility Rules.[12] The government argued that the relevant legislation was enacted in terms of legitimate domestic social, economic and environmental policies and was not discriminatory in intent or effect. It contended that there was no actual expropriation as the legislative scheme made provision for an alternative form of mining rights which the claimants had not pursued, and had they done so there would have been nothing to compensate.

The dispute then followed the appropriate arbitral procedure, with an unusual exception. This involved an order by the arbitral tribunal that the pleadings in the case should be made available to NGOs, including the Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg, and the ICJ, which were attempting to become involved in the procedure. However, no further involvement was permitted by the tribunal.

The prosecution of the arbitration was accompanied by extensive collateral negotiations among the parties concerned. After a protracted bargaining process behind the scenes there was agreement between government and investor on the grant of new-order mining rights which incorporated some of the requirements referred to above. The investor abandoned the arbitration claim.

An award was rendered by the arbitral panel, but only on the issue of costs.[13] South Africa successfully claimed part of its arbitration expenses on the basis of the investor's abandonment of the claim. Given these circumstances, the merits of the case were not adjudicated upon and the clash between international investment norms and the legitimate exercise of domestic policy was not resolved. However, the case highlighted one of the persistent criticisms of private arbitration system—a total of 10 million euros in costs, a significant burden for both developing countries and private corporations.

Alternatives to private arbitration in investment disputes

There are two main alternatives to private arbitration: one involves the use of domestic courts, the other the establishment of ADR processes instead of, or as conditions precedent to, investor–state arbitration. As regards the first option, there have been movements in certain countries to require complainants to exhaust all the remedies available through domestic courts before instituting arbitral proceedings. This gives deference to national sovereignty and to the Rule of Law at the domestic level. Indeed, BITs do not generally preclude investors from instituting proceedings in domestic courts and this occasionally happens. However, this requirement has the disadvantage (from the perspective of the investor) that they might not enjoy a fair and impartial hearing in domestic courts and a judgment that will be accepted by the host country concerned.

As regards the second option, the perennial question in contemporary dispute resolution concerns the appropriateness, or inappropriateness, of mediation as a potential dispute resolution system in different contexts, here in host-country–foreign-investor disputes. While there is an extensive literature on the topic, there is only limited empirical evidence. The comments that follow are made in awareness of the fact that all dispute resolution processes, particularly those involving cross-border disputes, need to be sensitive to differences of culture among prospective participants and their constituents—something not always acknowledged where a predominantly liberal Western paradigm of dispute resolution is assumed.

There are many well-known variations in mediation principles and practice, different models of mediation, and extensive semantic gymnastics over the differences between mediation and conciliation, terms which carry different connotations across jurisdictions. To avoid the definitional politics, the term mediation is used here to denote a system in which the relevant parties to a dispute are assisted in their negotiations, problem-solving and dispute resolution by third parties who have no capacity to make binding findings or determinations. In value terms, this model is based on the principle of self-determination for parties involved, and is not necessarily associated with the qualities of voluntariness or intervener neutrality traditionally ascribed to mediation.

Against this background there are three categories of factors relevant to the appropriateness or inappropriateness of mediation. Within each category an eclectic mix of factors is referred to, with a concise reference to its relevance to mediation and some thoughts on the application of this factor in relation to cross-border investment disputes (Table 2).[14]

Table 2

Factors relating to resources

Factor	Relevance to mediation	Application to investment disputes
Parties' capacity to participate effectively in all aspects of the mediation process	Necessary to uphold the foundation values of party participation and self-determination	Usually not a problem except in extreme situations caused by natural disaster, civil unrest or economic turmoil
The existence of a severe power imbalance between the parties	Leads to mutual economic, resource and political strengths dictating mediation settlement, and not unilateral imposition	Could impact on least developed countries and small foreign investors with high needs and low resources
Basic values, such as constitutional or human rights	Not susceptible to mediation because there is normally little negotiability on these matters in deference to public interest	BITs can invade policy space in relation to human rights issues, rendering mediation less suitable as a resolution method
Absence of authority to settle at the mediation table	Required to achieve sign-off in mediation without being used as a pressure tactic or to occasion excessive delay	Could be problematic in some countries where structural or political arrangements make authority difficult to obtain
Extraneous or ulterior motives on the part of one or more mediating parties	Mediation should not be used by a party wishing to obtain information, gauge the 'opposition' or wear down the other side	Difficult to gauge in advance but investors could intend to 'shake the mediation tree' in the hope of something of value falling out
Need for precedent in an industry, business or other self-defined area of activity	Mediation provides neither binding determinations for the present dispute nor public precedents for the future	Consistency of language in BITs suggests need for uniformity of outcomes and informal precedent system
Deep cultural differences in relation to dispute systems, negotiation, communication, time and resolution	Makes mediation problematic where parties have widely diverging expectations of the system, its procedures and possible outcomes	As investment disputes are by definition cross-cultural in nature, this could be a problem, despite a predominant global investment culture

Factors relating to matters of principle or fundamental value

Factor	Relevance to mediation	Application to investment disputes
Relative costs of other dispute resolution options	Despite claims to speed and cost effectiveness, mediation can be protracted and resource demanding, and even then not result in settlement	Given the 'political' nature of investment matters and the pressures of constituents, expenses and delays in mediation could be significant
Questions of time availability or urgency	Where one or both parties require an urgent resolution, mediation (and arbitration) might not be appropriate	Economic or social (eg environmental) circumstances may require a quick outcome which cannot be guaranteed by mediation
Access to information and other data	Mediation requires some degree of resources in terms of documents, data and information to assist parties with their negotiation strategies	Very extensive information required in investment disputes, on matters of compensation, law and economics

Pragmatic and miscellaneous factors

Factor	Relevance to mediation	Application to investment disputes
Existence of a 'pure legal question'	It is difficult to mediate on a pure legal question, although it is possible to bypass it and reach settlement	Elasticity of treaty language and absence of precedent means few investment disputes revolve around pure questions of law
Disputes of fact or factual complexity	Where parties require resolution of factual differences to reach settlement, mediation alone is not suited and requires supplementary methods	There can be complex factual and economic issues in investment disputes requiring adjudicative procedures for their definitive determination
Need for flexible outcomes	Mediation is adept at fashioning creative outcomes, particularly where there is a long-term relationship between parties	Investment relationships are of long-term duration and lend themselves to factoring future relations into settlement agreements
Number of issues in dispute	It is generally assumed that where there are multiple issues in disputes there is more scope for negotiability, conditional linked bargaining and packaging	Investment disputes often defined in narrow expropriation and compensation terms, but there are potentially multiple issues requiring resolution
Skills and standards of mediators	Whatever the objective indicators of mediation's suitability, much depends on the mediator's skills, techniques, standards and competence	Currently there are few mediators with specialist skills in cross-border investment disputes, no standards and benchmarks for practice and no system of accreditation

Each of these factors would require consideration in the context of specific investment disputes to assess the suitability of mediation. However, a smorgasbord of factors does not itself illuminate the central question of whether mediation is appropriate or inappropriate for investment disputes, either in general or in particular circumstances. Modern systems approaches to the question require an elaborate diagnosis based on the weighting and balancing of factors. In this regard, overall policy development is relatively difficult and the complexity of the situation points to the need for case-by-case appraisal of the circumstances of a host–investor conflict to determine the most suitable dispute resolution system. As is so often said in the social sciences, 'it all depends'.

However, in early 2010, UNCTAD reinvigorated the debate on mediation and ADR in its publication on alternatives to arbitration in investor-state disputes.[15] This paper promotes dispute prevention policies through the establishment of mechanisms for information sharing among states. As regards disputes themselves, it advocates a number of options including mediation with its advantages of flexibility, the ability to focus on negotiating long-term resolutions for the future, and the option of operating on a without-prejudice basis in case the dispute does not settle. Mediation has the disadvantage of not being enforceable across state boundaries and of involving difficulties for states in relation to authority to settle. However, investment arbitrations are largely self-enforcing and, until the end of 2009, no state had not complied with an award given against it: this convention could extend to mediated settlements.

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Another consideration is that transnational obligations on host countries might detract from their capacity to make ad hoc deals with investors through mediation. For example, the two standard principles of international economic law—the national treatment and most-favoured nation (MFN) principles—would preclude mediated settlements that undermine these established norms of international economic law. Negotiability is, therefore, potentially limited in these circumstances.

The UNCTAD paper also assesses, rather inconclusively, the suitability of blended, conjoined and serial systems of dispute resolution in which mediation forms only a constituent part of the overall process, as is often found in long-term contracts and industry schemes. The phenomenal growth of med–arb in domestic dispute resolution systems suggests the possibility of its application in investor–state disputes.

Conclusion

Developing and emerging economies are seeking to change norms in international economic law—or at least to modify the agenda through membership of the latest G club: the G20 group of nations. This is driven in part by the growing realisation that unsuccessful FDI can be detrimental to host countries: consider the impacts on domestic competition, the balance of payments, revenue loss through transfer pricing and the impacts on development at large as opposed to small groups of modern-sector workers.[16]

In the new political space available in the global political economy, there are several areas in which these economies are promoting new normative orders. In some countries, there is particular political pressure to preserve policy space for measures designed to redress inequalities and discriminatory practices from the apartheid past, as reflected in many areas of legislation, regulation and codes of practice. It is epitomised in BEE policies which, as the name suggests, are designed to bring formally disadvantaged groups into the mainstream of the domestic economy. These policies are in conflict with standard norms in investment treaties and sometimes frustrate foreign investors. It is argued that resultant disputes should not be dealt with through private arbitration where the policy balances are less well understood.

Another proposal comes from the International Centre for Sustainable Economic Development, which has a model BIT which takes into account the needs of developing countries. At the cost of expanding BITs from the customary dozen clauses to over 50, it offers a wide range of benefits to host countries as well as investors and provides a more balanced set of rights and obligations.

The challenge for the developing countries is to balance the development of legal and economic frameworks for investment (both focusing on economic development) with maintaining policy space for transformation and environmental initiatives.

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Endnotes

1. UNCTAD, World Investment Report 2010: Investing in a Low-Carbon Economy (Geneva, 2010).

2. OECD, *Investment News*, June 2010.

3. Of about 320 cases brought under ICSID rules, only three were initiated by host countries. Apart from other factors, treaty purposes and language, and jurisdictional issues, inhibit such claims. See Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1 *Journal of International Dispute Settlement* 97.

4. For example Bolivia, Ecuador and Venezuela have withdrawn from the International Convention on the Settlement of Investment Disputes in recent years.

5. See Rafael Leal-Arcas, *International Trade and Investment Law* (2010).

6. The International Convention on the Settlement of Investment Disputes, the United Nations Committee on International Trade Law and the International Chamber of Commerce, respectively.

7. Convention on the Recognition and Enforcement of Arbitral Awards, 1958.

8. Despite developing countries' concerns, arbitral awards are not always detrimental for them: see Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 80 *North Carolina Law Review* 1.

9. *Von Abo v President of the Republic of South Africa*, Case CCT 67/08 [2009] ZACC 15.

10. Case No SADC (T) 02/07.

11. The South Africa–Zimbabwe Bilateral Treaty for the Promotion and Protection of Investment, 2010.

12. *Piero Foresti, Laure de Carli & Others v Republic of South Africa*, Case No ADR(AF)/07/1.

13. In the amount of 400,000 euros. Government's legitimate expenses were found to be 5,765,467 euros and the investors 4,374,200 euros.

14. See UNCTAD and Washington and Lee Law School, *International Investment and ADR*, March 2010.

15. UNCTAD, *Exploring Alternatives to Investment Treaty Arbitration and the Prevention of Investor–State Disputes*, Geneva, 2010.

16. See Cara North, 'An Examination of the Indirect Regulation of Foreign Direct Investment in South Africa', unpublished LLM paper, Bond University, 2010.