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REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP

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Key messages:

- Challenges posed by today's investor-State dispute settlement (ISDS) regime create momentum for its reform.
- Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.
- This note outlines five main reform paths.
    - Promoting alternative dispute resolution;
    - Tailoring the existing system through individual IIAs;
    - Limiting investor access to ISDS;
    - Introducing an appeals facility;
    - Creating a standing international investment court.
- Each of the five reform options comes with its specific advantages and disadvantages and responds to the main concerns in a distinctive way.
- Some of the options can be implemented through actions by individual governments and others require joint action by a larger group.
- The options that require collective action from a larger number of States would go further in addressing the existing problems, but would also face more difficulties in implementation.
- Collective efforts at the multilateral level can help to develop a consensus about the preferred course for reform and ways to put it into action.

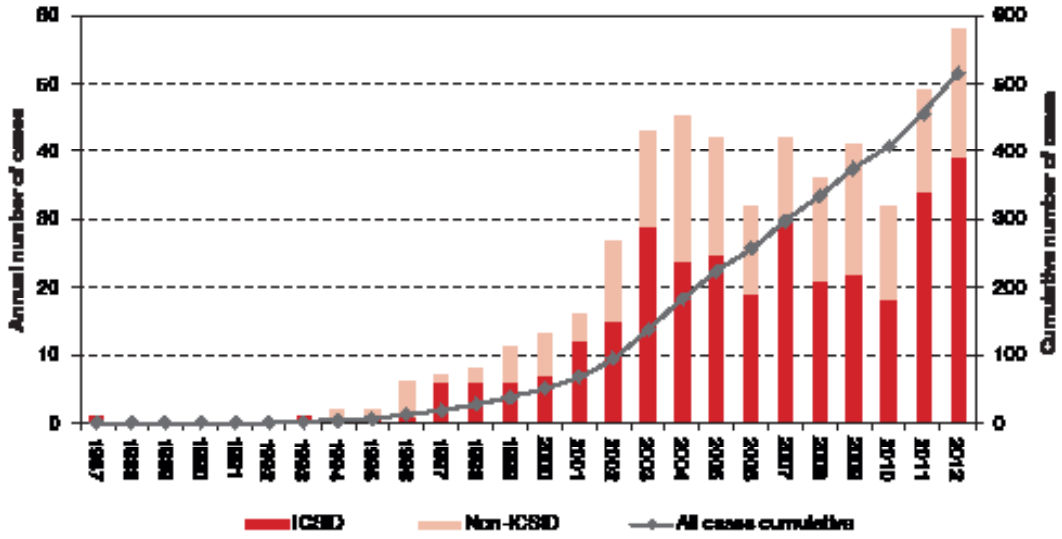
The proliferation of ISDS under international investment agreements (IIAs) shows the importance this mechanism has gained. But it also increasingly reveals that there are a number of problems. This note summarizes the main concerns relating to the current ISDS regime, and sketches out the main possible avenues for reform. The note rests upon UNCTAD's *Investment Policy Framework for Sustainable Development (IPFSD)*[2] which places the objectives of inclusive growth and sustainable development at the core of national and international investment policies.

[2] UNCTAD (2012), *Investment Policy Framework for Sustainable Development*, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

I.Main concerns about the current ISDS regime

As documented by UNCTAD's annual update, ISDS cases have proliferated in the past 10-15 years, with the overall number of known treaty-based arbitrations reaching 514 by the end of 2012 (see figure 1). Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.[2]

Figure 1. Known ISDS cases, as of end 2012



Source: UNCTAD.

In light of the increasing number of ISDS cases, the debate about the pros and cons of the ISDS mechanism has been gaining momentum, especially in those countries and regions where ISDS is on the agenda of IIA negotiations and/or which have faced investor claims that have attracted public attention.

The ISDS mechanism was designed for depoliticizing investment disputes and creating a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap, and flexible process, over which disputing parties would have considerable control.[3]

Given that investor complaints relate to the conduct of sovereign States, taking these disputes out of the domestic sphere of the State concerned was seen as providing aggrieved investors with an important guarantee that their claims will be adjudicated in an independent and impartial manner.

However, the actual functioning of ISDS under investment treaties has led to concerns about systemic deficiencies in the regime. They have been well documented in literature and need only be summarized here.[4]

[2] UNCTAD (2013), *Recent Developments in Investor-State Dispute Settlement*, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

[3] For a discussion of the key features of ISDS, see also, UNCTAD, *Investor-State Dispute Settlement: A Sequel,* UNCTAD Series on Issues in IIAs II (forthcoming).

[4] Michael Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality (*Kluwer Law International, 2010); D. Gaukrodger and K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, No. 2012/3; P. Eberhardt and C. Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom" (Corporate Europe Observatory and Transnational Institute, 2012), available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

Legitimacy and transparency

In many cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health). Questions have been raised whether three individuals, appointed on an *ad hoc* basis, can be seen by the public at large as having sufficient legitimacy to assess the validity of States' acts, particularly if the dispute involves sensitive public policy issues.

Host countries have faced ISDS claims of up to $114 billion[5] and awards of up to $1.77 billion.[6] Although in most cases the amounts claimed and awarded are lower than that, they can still exert significant pressures on public finances and create potential disincentives for public-interest regulation, posing obstacles to countries' sustainable economic development.

In addition, even though the transparency of the system has improved since the early 2000s,[7] ISDS proceedings can still be kept fully confidential – if both disputing parties so wish – even in cases where the dispute involves matters of public interest.[8]

Further concerns relate to so-called "nationality planning", whereby investors structure their investments through intermediary countries with the sole purpose of benefitting from IIAs, including their ISDS mechanism.

Arbitral decisions: problems of consistency and erroneous decisions

Those arbitral decisions that have entered into the public domain have exposed recurring episodes of inconsistent findings. These have included divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases.[9]

Erroneous decisions are another concern: arbitrators decide important questions of law without a possibility of effective review. Existing review mechanisms, namely the ICSID annulment process or national-court review at the seat of arbitration (for non-ICSID cases), operate within narrow jurisdictional limits. It is noteworthy that an ICSID annulment committee may find itself unable to annul or correct an award, even after having identified "manifest errors of law".[10] Furthermore, given that annulment committees – like arbitral tribunals – are created on an *ad hoc*

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5 This figure is the aggregate amount of compensation sought by the three claimants constituting the majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against Russia. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation,* PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228.

6 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

7 See for example, the 2006 amendments to the ICSID Arbitration Rules and the 2013 agreement reached by an UNCITRAL Working Group regarding transparency in ISDS proceedings. In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs.

8 This applies to cases brought under arbitration rules other than ICSID (only ICSID keeps a public registry of arbitrations). It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end 2012). Source: the Permanent Court of Arbitration International Bureau. See further UNCTAD, Transparency: A Sequel, Series on Issues in IIAs II (New York and Geneva, 2012), available at http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/International-Investment-Agreements-(IIAs).aspx

9 Sometimes, divergent outcomes can be explained by the differences in wording of a specific IIA applicable in a particular case; however, often they represent the differences in the views of individual arbitrators.

10 See *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the application for annulment, 25 September 2007, paras. 97, 127, 136, 150, 157-159. Article 52(1) of the ICSID Convention enumerates the following grounds for annulment: (a) improper constitution of the arbitral Tribunal; (b) manifest excess of power by the arbitral Tribunal; (c) corruption of a member of the arbitral Tribunal; (d) serious departure from a fundamental rule of procedure; or (e) absence of a statement of reasons in the arbitral award.

basis for the purpose of a single dispute, they may also arrive (and have arrived) at inconsistent conclusions, thus further undermining predictability of international investment law.

Arbitrators: Concerns about party appointments and undue incentives

Arbitrators' independence and impartiality. An increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed. Particular concerns have arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases and their frequent "changing of hats" (serving as arbitrators in some cases and counsel in others) amplify these concerns.[11]

Cost- and time-intensity of arbitrations

Actual ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution. On average, costs, including legal fees (which on average amount to approximately 82% of total costs) and tribunal expenses, have exceeded $8 million per party per case.[12] For any country, but especially for poorer ones, this is a significant burden on public finances. Even if the government wins the case, tribunals have mostly refrained from ordering the claimant investor to pay the respondent's costs. At the same time, high costs are also a concern for investors, especially those with limited resources.

Large law firms, who dominate the field, tend to mobilise a team of attorneys for each case who charge high rates and employ expensive litigation techniques, which include intensive research on each arbitrator candidate, far-reaching and burdensome document discovery and lengthy arguments about minutest case details.[13] The fact that many legal issues remain unsettled contributes to the need to invest extensive resources to develop a legal position by closely studying numerous previous arbitral awards. Some of the same reasons are also responsible for the long duration of arbitrations, most of which take several years to conclude.

II. Mapping five broad paths towards reform

These challenges have prompted a discourse about the challenges and opportunities of ISDS. This discourse has been developing through relevant literature, academic/practitioner conferences and the advocacy work of civil society organisations. It has also been carried forward under the auspices of UNCTAD's Investment Commission and Expert Meetings, its multi-stakeholder World Investment Forum (WIF)[14] and a series of informal conversations it has organized,[15] as well as the OECD's Freedom-of-Investment Roundtables.[16]

Five broad paths for reform have emerged from these discussions:

1. Promoting alternative dispute resolution
2. Tailoring the existing system through individual IIAs
3. Limiting investor access to ISDS
4. Introducing an appeals facility
5. Creating a standing international investment court

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[11] For further details, see Gaukrodger and Gordon (2012 : 43-51).

[12] Ibid., p. 19.

[13] Lawyers' fees may reach $1,000 per hour for senior partners in top-tier law firms. Ibid., pp. 19-21.

[14] http://unctad-worldinvestmentforum.org/

[15] During 2010 and 2011 seven informal conversations were organized or co-organized by UNCTAD, taking the form of small-group, informal discussions among various stakeholders about possible improvements to the ISDS system. These conversations were oriented towards generating concrete outputs on possible improvements to the ISDS system.

[16] See e.g., OECD, "Government perspectives on investor-state dispute settlement: a progress report", Freedom of Investment Roundtable, 14 December 2012, available at: http://www.oecd.org/daf/inv/investment-policy/foi.htm.

1. Promoting alternative dispute resolution

This approach advocates for increasing resort to so-called alternative dispute resolution (ADR) methods and dispute prevention policies (DPPs), both of which have formed part of UNCTAD's technical assistance and advisory services on IIAs. ADR can be either enshrined in IIAs or implemented at the domestic level, without specific references in the IIA.

Compared to arbitration, non-binding ADR methods, such as conciliation and mediation,[17] place less emphasis on legal rights and obligations. They involve a neutral third party whose main objective is not the strict application of the law but finding a solution that would be recognized as fair by the disputing parties. ADR methods can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties. However, there is no guarantee that an ADR procedure will lead to resolution of the dispute; an unsuccessful procedure would simply increase the costs involved. Also, depending on the nature of a State act challenged by an investor (e.g., a law of general application), ADR may not always be acceptable to the government.

ADR could go hand in hand with the strengthening of dispute prevention and management policies at the national level. Such policies aim to create effective channels of communication and improve institutional arrangements between investors and respective agencies (for example, investment aftercare policies) and between different ministries dealing with investment-related issues. An investment ombudsman office, or a specifically assigned agency that takes the lead should a conflict with an investor arise, can help resolve investment disputes early on, as well as assess the prospects of, and, if necessary, prepare for international arbitration.[18]

In terms of implementation, this approach is relatively straightforward, and much has already been done by some countries. Importantly, given that most ADR and DPP efforts are implemented at the national level, individual countries can proceed without the need for their treaty partners to agree. However, ADR and DPPs do not solve key ISDS-related challenges. The most they can do is to reduce the number of fully-fledged legal disputes, which would render this reform path a complementary rather than standalone avenue for ISDS reform.

2. Tailoring the existing system

This option implies that the main features of the existing system would be preserved and that individual countries would apply tailored modifications to selected aspects of the ISDS system in their new IIAs. A number of countries have already embarked on this course of action.[19] Procedural innovations, many of which also appear in UNCTAD's IPFSD, have included:[20]

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[17] Mediation is an informal and flexible procedure: a mediator's role can vary from shaping a productive process of interaction between the parties to effectively proposing and arranging a workable settlement to the dispute. It is often referred to as "assisted negotiations". Conciliation procedures follow formal rules. At the end of the procedure, conciliators usually draw up terms of an agreement that, in their view, represent a just compromise to a dispute (non-binding to the parties involved). Because of its higher level of formality, some call conciliation a "non-binding arbitration".

[18] See further UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations, New York and Geneva, 2010); UNCTAD, *How to Prevent and Manage Investor-State Disputes: Lessons from Peru,* Best Practices in Investment for Development Series (United Nations, New York and Geneva, 2011).

[19] In particular, Canada, Colombia, Mexico, the United States and some others. Reportedly, the European Union is also considering this approach. See N. Bernasconi-Osterwalder, "Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements", Investment Treaty News, 19 July 2012, available at: http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/.

[20] Policy options for individual ISDS elements are further analyzed in UNCTAD, Investor-State Dispute Settlement: A Sequel– (forthcoming).

- *Setting time limits for bringing claims*; for example, three years from the events giving rise to the claim, in order to limit State exposure and prevent the resurrection of "old" claims;[21]
- *Increasing the contracting parties' role in interpreting the treaty* in order to avoid legal interpretations that go against their intentions; for example, through providing for binding joint party interpretations, requiring tribunals to refer certain issues for determination by the treaty parties and facilitating interventions by the non-disputing contracting parties;[22]
- *Establishing a mechanism for consolidation of related claims,* which can help to deal with the problem of related proceedings, contribute to the uniform application of the law, thereby increasing the coherence and consistency of awards, and help to reduce the cost of proceedings.[23]
- *Providing for more transparency in ISDS*; for example, by granting public access to arbitration documents and arbitral hearings as well as allowing the participation of interested non-disputing parties such as civil society organisations;[24]
- *Including a mechanism for an early discharge of frivolous (unmeritorious) claims*, in order to avoid wasting resources on full-length proceedings.[25]

To these, add changes in the wording of IIAs' substantive provisions, introduced by a number of countries. These innovations seek to clarify the agreements' content and reach, thereby enhancing the certainty of the legal norms and reducing the margin of discretion of arbitrators.[26]

The approach whereby countries provide focused modifications through their IIAs allows for individually tailored solutions and numerous variations. For example, in their IIAs, specific countries may choose to address those issues and concerns that appear most relevant to them. At the same time, this option cannot address all ISDS-related concerns.

Mechanisms that facilitate high-quality legal defense to developing countries at an affordable price can also play a role. This idea stood at the origin of a 2009 initiative when UNCTAD, together with the Academia de Centroamerica, the Organization of American States (OAS) and the Inter-American Development Bank (IADB), were invited to pursue the possibility of establishing an Advisory Facility on International Investment Law and ISDS. This resulted in a series of meetings that addressed technical issues, including what should be the type of services such a Facility should offer, what could be its membership (open to all countries and organizations or limited to specific countries) and how it should be financed.

Implementation of this "tailored modification" option is relatively straightforward given that only two treaty parties (or several – in case of a plurilateral treaty) need to agree. However, the approach is limited in effectiveness: unless the new treaty is a renegotiation of an old one, the modifications are applied only to newly concluded IIAs while the large number of "old" ones remain unaffected. Moreover, one of the

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[21] See e.g., NAFTA Articles 1116(2) and 1117(2); see also Article 15(11) of the China-Japan-Republic of Korea investment agreement.

[22] On various means that can be - and have been - used by States, see UNCTAD, *Interpretation of IIAs: What States Can Do,* IIA Issues Note, No.3, December 2011. Two issues merit attention with respect to such authoritative interpretations. First, the borderline between interpretation and amendment can sometimes be blurred; second, if issued during an ongoing proceeding, a joint party interpretation may raise due-process related concerns.

[23] See e.g., NAFTA Article 1126; see also Article 26 of the Canada-China BIT.

[24] See e.g. Article 28 of the Canada-China BIT; see also NAFTA Article 1137(4) and Annex 1137.4.

[25] See e.g., Article 41(5) ICSID Arbitration Rules (2006); Article 28 United States-Uruguay BIT.

[26] UNCTAD, *World Investment Report 2010*, available at: http://unctad.org/en/Docs/wir2010_en.pdf. See also UNCTAD's Pink Series Sequels on Scope and Definition, MFN, Expropriation, FET and Transparency, available at: http://investmentpolicyhub.unctad.org/Views/Public/IndexPublications.aspx

key advantages of this approach, namely, that countries can choose *whether* and *which* issues to address, is also one of its key disadvantages, as it turns this reform option into a piecemeal approach that stops short of offering a comprehensive and integrated way forward.

3. Limiting investor access to ISDS

This option envisages narrowing down the range of situations in which investors may resort to ISDS. This could be done in numerous ways, including: (i) by reducing the subject-matter scope for ISDS claims; (ii) by restricting the range of investors who qualify to benefit from the treaty, and (iii) by introducing the requirement to exhaust local remedies before resorting to international arbitration. A far-reaching version of this approach would be to abandon ISDS as a means of dispute resolution altogether and returns to State-State arbitration proceedings, as some recent treaties have done.[27]

Some countries have adopted policies of the first kind, for example, by excluding certain types of claims from the scope of arbitral review.[28] In the past, some countries used this approach to limit jurisdiction of arbitral tribunals in a more pronounced way, for example, by allowing ISDS only with respect to expropriation disputes.[29]

To restrict the range of covered investors, one approach is to include additional requirements in the definition of "investor" and/or to use denial-of-benefits provisions.[30] Among other things, this approach can address concerns arising from "nationality planning"/"treaty shopping" by investors and ensure that they have a genuine link to the putative home State.

Requiring investors to exhaust local remedies, or alternatively, to demonstrate the manifest ineffectiveness/bias of domestic courts, would make ISDS an exceptional remedy of last resort. While in general international law, the duty to exhaust local remedies is a mandatory prerequisite for gaining access to international judicial forums,[31] most IIAs dispense with this duty.[32] Instead, they allow foreign investors to resort directly to international arbitration without first going through the domestic judicial system. Some see this as an important positive feature and argue that reinstating the requirement to exhaust domestic remedies could undermine the effectiveness of ISDS.

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[27] Recent examples of IIAs without ISDS provisions are the Japan-Philippines Economic Partnership Agreement (2006), the Australia-United States FTA (2004) and the Australia-Malaysia FTA (2012). In April 2011, the Australian Government issued a trade policy statement announcing that it would stop including ISDS clauses in its future IIAs as doing so imposes significant constraints on Australia's ability to regulate public policy matters: see Gillard Government Trade Policy Statement: *Trading Our Way to More Jobs and Prosperity*, April 2011, available at: http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf.

[28] For example, claims relating to real estate (Cameroon-Turkey BIT); claims concerning financial institutions (Canada-Jordan BIT; claims relating to intellectual property rights and to prudential measures regarding financial services (China-Japan-Republic of Korea investment agreement); claims relating to establishment and acquisition of investments (Japan-Mexico Free Trade Agreement); claims concerning specific treaty obligations such as national treatment and performance requirements (Malaysia-Pakistan Closer Economic Partnership Agreement); and claims arising out of measures to protect national security interests (India-Malaysia Comprehensive Economic Cooperation Agreement). For further analysis, see UNCTAD, *Investor-State Dispute Settlement - A Sequel* (forthcoming).

[29] For example, some BITs concluded in the 1980s and early 1990s, particularly by China and Eastern European countries provided investors access to international arbitration only with respect to disputes relating to the amount of compensation following an investment expropriation (for example, Albania-China (1993), Bulgaria-China (1989), Belgium-Poland BIT (1987)).

[30] Denial of benefits clauses authorize States to deny treaty protection to investors who do not have substantial business activities in their alleged home State and who are owned and/or controlled by nationals or entities of the denying State or of a State who is not a party to the treaty.

[31] Mummery, D. "*The content of the duty to exhaust local judicial remedies*", The American Journal of International Law, Vol. 58. No2 (April 1964).

[32] Some IIAs require investors to pursue local remedies in the host State for a certain period of time (e.g., Belgium/Luxembourg-Botswana BIT and Argentina-Republic of Korea BIT). A small number of agreements require the investor to exhaust the host State's administrative remedies before submitting the dispute to arbitration (e.g., China-Côte d'Ivoire BIT).

These options for limiting investor access to ISDS can help to slow down the proliferation of ISDS proceedings, reduce States' financial liabilities arising from ISDS awards and save resources. Additional benefits may be derived from these options if they are combined with assistance to strengthen the rule of law and domestic legal/judicial systems. To some extent, this approach would be a return to the earlier system, in which investors could lodge their claims only in the domestic courts of the host State, negotiatearbitration clauses in specific investor-State contracts or apply for diplomatic protection by their home State.

In terms of implementation – like the options described earlier – this alternative does not require coordinated action by a large number of countries and can be put in practice by parties to individual treaties. Implementation is straightforward for future IIAs; past treaties would require amendments, renegotiation or unilateral termination.[33] Similar to the "tailored modification" option, however, this alternative results in a piecemeal approach towards reform.

4. Introducing an appeals facility[34]

An appeals facility implies a standing body with a competence to undertake substantive review of awards rendered by arbitral tribunals. It has been proposed as a means to improve consistency among arbitral awards, correct erroneous decisions of first-level tribunals and enhance the predictability of the law.[35] This option has been contemplated by some countries.[36] If constituted of permanent members, appointed by States from a pool of the most reputable jurists, an appeals facility has a potential to become an authoritative body capable of delivering consistent – and balanced – opinions, which would rectify some of the legitimacy concerns about the current ISDS regime.[37]

Authoritative pronouncements by an appeals facility on issues of law would guide both the disputing parties (when assessing the strength of their respective cases) and arbitrators adjudicating disputes. Even if the process for constituting first-level arbitral tribunals remained unchanged, concerns would be alleviated through their effective supervision at the appellate level. In a word, an appeals facility would add direction and order to the existing decentralized, non-hierarchical and *ad hoc* regime.

At the same time, absolute consistency and certainty would not be achievable in a legal system that consists of more than 3,000 legal texts; different outcomes may still be warranted by the language of specific applicable treaties. Also, the introduction of an appellate stage would further add to the time and cost of the proceedings, although that could be controlled by putting in place tight timelines, as has been done for the WTO Appellate Body.[38]