

**45<sup>th</sup> Alexander Lecture**  
**“Evolution, Not Revolution”**

***The Search for Order within Chaos***  
***in the Evolution of ISDS***

Ms. Teresa Cheng, GBS, SC, JP\*  
*Secretary for Justice, Hong Kong Special Administrative Region*  
*of the People’s Republic of China*

**Contents**

<b>(I)</b>	<b>Introduction – A Tale of Two Cities for ISDS .....</b>	<b>3</b>
<b>(II)</b>	<b>Reflections on the History of ISDS and the Nature of Investment Arbitration .....</b>	<b>4</b>
<b>(III)</b>	<b>Major Concerns and Criticisms over ISDS – The Prelude to the Chaos ....</b>	<b>7</b>
	(1) The Perceived Inconsistencies in ISDS Awards .....	7
	(2) Impartiality and Diversity of Arbitrators .....	9
	(3) Excessive Cost and Duration.....	11
<b>(IV)</b>	<b>“Chaos” in the Evolution of ISDS .....</b>	<b>12</b>
<b>(V)</b>	<b>Searching for Order within Chaos – A “<i>Double Helix</i>” Approach.....</b>	<b>14</b>
	(1) First Strand of the “Double Helix” Approach - Careful Study on the Standalone ISDS Appellate Mechanism as a Structural Reform Option for Investment Arbitration .....	15
	(i) ISDS Appellate Mechanism – The Conceptual Model .....	15
	(ii) Structure of the ISDS Appellate Mechanism – Centralized or Decentralized .....	17
	(iii) Scope of Review of the ISDS Appellate Mechanism .....	18

---

\* Teresa Cheng, GBS, SC, JP, is the Secretary for Justice of the Hong Kong Special Administrative Region of the People’s Republic of China. Prior to her appointment as the Secretary for Justice, she was a senior counsel in private practice, a chartered engineer, a chartered arbitrator and an accredited mediator. Apart from being a Past Chairperson of the Hong Kong International Arbitration Centre, Ms. Cheng is also a Past President of the Chartered Institute of Arbitrators, Past Vice President of the International Council of Commercial Arbitration and Past Vice President of the ICC International Court of Arbitration. Besides, Ms. Cheng is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators and was a member of the World Bank’s Sanctions Board.

(iv)	ISDS Appellate Mechanism – As of Right or with Leave ..	20
(v)	Status of the Awards Made by the ISDS Appellate Mechanism – A Doctrine of Stare Decisis? .....	21
(vi)	The Adjudicators of the ISDS Appellate Mechanism .....	22
(vii)	Interface of the ISDS Appellate Mechanism with the Existing ISDS Regime .....	23
(viii)	Enforcement of the Awards Made by the ISDS Appellate Mechanism .....	24
(ix)	Institutional Design of the ISDS Appellate Mechanism – A New Permanent Body or Building on Existing Platform? ..	24
(x)	Multilateral Investment Court – A Revolutionary Option? ..	25
(2)	The Second Strand of the “Double Helix” Approach – Promoting the Use of Investment Mediation to Give ISDS a New Life and New Look.....	27
(i)	CEPA Investment Mediation Rules as a Potential Model Protocol .....	28
<b>(VI)</b>	<b>Looking Forward – “Evolution, Not Revolution” Is the Path to Find Order within Chaos .....</b>	<b>32</b>

## **(I) Introduction – A Tale of Two Cities for ISDS**

1. For today's Alexander Lecture, I find no better way to start than by referring to the very famous opening of Charles Dickens' "*A Tale of Two Cities*" – "*It was the best of times, it was the worst of times*".
2. It is the best of times for investor-State dispute settlement ("ISDS"), as evidenced by the high level of attention of the international community on the subject as well as the empirical data: the number of publicly known treaty-based ISDS claims as of 31 July last year had already increased to over 980<sup>1</sup>, with over 70 new cases filed each year in the past three years<sup>2</sup> and no sign showing that the momentum of the upward trend of the number of ISDS cases is slowing.
3. However, paradoxically, it is also the worst of times for ISDS. The arbitration community witnesses that the ISDS is currently facing a challenge to its legitimacy. In its factsheet published in July 2018, the European Commission announced that "[a]nything less ambitious [than the Investment Court System], including coming back to the older Investor-to-State Dispute Settlement, is not acceptable. For the EU ISDS is dead"<sup>3</sup>.
4. ISDS has been relentlessly criticized by the media and the civil societies calling it with names like "*secret corporate courts*"<sup>4</sup> and "*kangaroo courts*"<sup>5</sup>. Some States have lost their faith in ISDS, as shown by the denunciation of Bolivia, Ecuador and Venezuela from the ICSID Convention<sup>6</sup> and the increase in the termination of bilateral investment treaties<sup>7</sup>.

---

<sup>1</sup> UNCTAD, "*Investment Dispute Settlement Navigator – Known Treaty*" (30 September 2019), available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>2</sup> UNCTAD, "*IIA Issues Note – Fact Sheet on Investor-State Dispute Settlement Cases in 2018*" (May 2019), at pp.1 – 2, available at [https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf).

<sup>3</sup> European Commission, "*Fact Sheet on EU-Japan Trade Agreement*" (July 2018), p.6, available at [https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155684.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf).

<sup>4</sup> ISDS Platform, "*Why we must ban secret corporate courts from trade deals*" (2 May 2018), available at <https://isds.bilaterals.org/?why-we-must-ban-secret-corporate>.

<sup>5</sup> The Hill, "*New NAFTA must terminate corporate kangaroo courts*" (9 November 2017), available at <https://thehill.com/blogs/pundits-blog/economy-budget/350094-new-nafta-must-ban-corporate-kangaroo-courts>.

<sup>6</sup> Charles Brower and Sadie Blanchard, "*What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*" (1 December 2014). *Columbia Journal of Transnational Law*, Vol. 52, 2014, 689 – 779, p.692.

<sup>7</sup> Bolivia, Ecuador, Venezuela, South Africa, Indonesia and India have terminated their bilateral

5. It is in this context that I will explore with you the chaos in the landscape of ISDS and attempt to map the way forward in search for order by evolution not revolution.
6. To embark on this voyage in the sea of chaos, let us briefly reflect on the history of ISDS and look at the major concerns as a prelude to the chaos. I will then take you through the diverse attempts of reform made within the chaos, and lastly propose a “*double helix*” approach for the search of order.

## **(II) Reflections on the History of ISDS and the Nature of Investment Arbitration**

7. In the early days, foreign investors could only resort to the domestic courts of host States or appeal to their home States to initiate diplomatic protection under international law<sup>8</sup>.
8. Then there was the “*gunboat diplomacy*”, illustrated literally by the *Don Pacifico* affair involving a British citizen who suffered damages caused by a riotous mob in Greece, which then led to the sending of British military ships into the Aegean Sea to seize Greek property in compensation for the damages<sup>9</sup>.
9. It is against such background that the world saw the need for a peaceful, depoliticized, credible and rule of law-based dispute resolution mechanism, and that is where international arbitration came into the picture of ISDS.
10. It is apt to remind ourselves about the basic features of arbitration. Allow me to summarize them into two main tenets: (i) agreement to arbitrate: which results

---

investment treaties in recent years (See C. L. Lim, Jean Ho and Martins Paparinskis, “*International Investment Law and Arbitration: Commentary, Awards and other Materials*”, (Cambridge University Press), 2018, at p. 491). See also Leon Trakman and David Musayelyan, “*Caveat investors – where do things stand now?*”, in C. L. Lim (ed), “*Alternative Visions of the International Investment Law on Foreign Investment – Essays in Honour of Muthucumaraswamy Sornarajah*” pp.69 – 100, at pp. 96 – 98.

<sup>8</sup> Charles Brower and Shashank P Kumar, “*Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*”, ICSID Review, Vol. 30, No. 1 (2015), pp. 35–55, at p.36. See also Global Arbitration Review, “*There’s ‘no alternative’ to investment arbitration, says Schreuer*” (22 December 2017), and C. L. Lim, Jean Ho and Martins Paparinskis, “*International Investment Law and Arbitration: Commentary, Awards and other Materials*”, (Cambridge University Press), 2018, at pp. 4 – 5.

<sup>9</sup> C. L. Lim, Jean Ho and Martins Paparinskis, “*International Investment Law and Arbitration: Commentary, Awards and other Materials*”, (Cambridge University Press), 2018, at pp. 4 – 5.

from a simple and informal process creating a formal and binding award<sup>10</sup>; and  
(ii) party-appointment of arbitrators<sup>11</sup>.

11. The merits of such basic features of arbitration have been illustrated in the *Alabama Claims Arbitration* under the Treaty of Washington of 1871 between the United States and Great Britain. In particular, this successful arbitration managed to avert an imminent war between the nations caused by Great Britain's failure to use due diligence in the performance of its neutral obligations during the American Civil War. As chronicled in Johnny Veeder's "*The Historical Keystone to International Arbitration*", the success of the *Alabama Claims Arbitration* in resolving the dispute peacefully was very much a result of the party-appointment model under which the five-person arbitral tribunal was formed with one arbitrator nominated by the United States, one nominated by the Great Britain, and three nominated by neutral States.
12. 1959 was a symbolic year for the ISDS regime as we saw the conclusion of the world's very first bilateral investment treaty ("BIT") between Germany and Pakistan<sup>12</sup>. As remarked by Professor Karl-Heinz Böckstiegel, BITs have created a universal system of substantive and procedural investment protection which is a fundamental and a most relevant part of the international legal and economic order<sup>13</sup> – a milestone which has replaced the traditional David-

---

<sup>10</sup> "Chapter 1. An Overview of International Arbitration", in Blackaby Nigel, Constantine Partasides, et al., "*Redfern and Hunter on International Arbitration*", 6th edition (Kluwer Law International; Oxford University Press), 2015, pp. 1 – 70.

<sup>11</sup> VV Veeder, "*The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva*" in David Caron, Stephan Schill, et al. (eds), "*Practising Virtue: Inside International Arbitration*" (Oxford University Press) (November 2015), pp. 127 – 149, at p. 148. See also Brigitte Stern, "*To Examine the Desirability (or Undesirability) of Replacing Ad Hoc Arbitrator by Full-Time Judges*", Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 190 – 201, at pp.192, 195 and 196.

<sup>12</sup> C. L. Lim, Jean Ho and Martins Paporinskis, "*International Investment Law and Arbitration: Commentary, Awards and other Materials*", (Cambridge University Press), 2018, at pp.59 – 60. In the Germany – Pakistan BIT, most of the provisions have antecedents in the FCN treaties, with exception of two new substantive provisions on national and MFN treatment with respect to compensation for losses due to armed conflict, revolution or revolt, and the requirement on observing any other obligation it may have entered into with regard to covered investments. It is also noteworthy that the Germany-Pakistan BIT does not contain the fair and equitable treatment provision commonly found in modern international investment agreements (Kenneth J. Vandevelde, "*The liberal vision of the international law on foreign investment*", in C. L. Lim (ed), "*Alternative Visions of the International Investment Law on Foreign Investment – Essays in Honour of Muthucumaraswamy Sornarajah*" pp.43 – 68, at p.55).

<sup>13</sup> Karl-Heinz Böckstiegel, "*The Future of International Investment Law – Substantive Protection and Dispute Settlement*", in Bungenberg, et al. (eds), "*International Investment Law – A Handbook*" (2015) (C.HBECK, Hart and Nomos) pp. 1863 – 1872, at pp.1863 – 1864.

Goliath relationship between foreign investors and host jurisdictions, at least procedurally, by a level playing field<sup>14</sup>.

13. It is worth noting that the Germany-Pakistan BIT only contained the State-to-State dispute settlement mechanism. It was not until the BIT between Italy and Chad of 1969 that BITs began offering investment arbitration between foreign investors and host jurisdictions<sup>15</sup>.
14. And as the story goes, Hong Kong, a city in the East, has somehow played an important part in the rich history of treaty-based ISDS. A Hong Kong-incorporated company and a Sri-Lankan shrimp farm were all it took to trigger the exponential growth in treaty-based ISDS we have witnessed today.
15. In the famous *AAPL v Sri Lanka* case, a Hong Kong incorporated company invoked the UK – Sri Lank BIT, which was extended to Hong Kong back in 1981, with respect to the destruction of a shrimp farm by Sri Lankan Government security forces, culminating in the award in 1990 and the birth of the idea “*Arbitration without Privity*” – where a standing offer to arbitrate is made by a host State in the investment treaty which is subsequently converted into an agreement when a foreign investor “*perfects*” that consent through a request for arbitration<sup>16</sup>.
16. Nevertheless, also as remarked by Jan Paulsson in his seminal piece back in 1995, “[a]rbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash”<sup>17</sup>.
17. Hong Kong somehow may have contributed to the current situation of ISDS. Hong Kong is not a sovereign State, but within the framework of “*one country*,

---

<sup>14</sup> Karl-Heinz Böckstiegel, “Clayton Utz Lecture: *Enterprise v. State: The New David and Goliath?*”, *Arbitration International*, Volume 23, Issue 1, 1 March 2007, pp. 93–104, at p.104.

<sup>15</sup> Rudolf Dolzer and Christoph Schreuer, “*History, Sources, and Nature of International Investment Law*” in “*Principles of International Investment Law*” (2<sup>nd</sup> Edition), (2015), (Oxford University Press), at p.7.

<sup>16</sup> M. Sornarajah, “*Creating jurisdiction beyond consent*”, in “*Resistance and Change in the International Law on Foreign Investment*” (Cambridge University Press) (2015), pp. 136 – 190, at p. 140. See also C. L. Lim, Jean Ho and Martins Paparinskis, “*International Investment Law and Arbitration: Commentary, Awards and other Materials*”, (Cambridge University Press), 2018, at pp.87 – 95.

<sup>17</sup> Jan Paulsson, “*Arbitration without Privity*”, *ICSID Review - Foreign Investment Law Journal*, Volume 10, Issue 2, Fall 1995, pp. 232–257, at p.257.

two systems” and as provided for in the Basic Law, the Central People’s Government has authorized Hong Kong as a special administrative region to enter into 21 Investment Promotion and Protection Agreements (“IPAs”) with foreign economies, one of which being with the United Kingdom concluded back in 1999.

18. All of these IPAs contain the investment arbitration mechanism and one very high profile case is of course the *Philip Morris Asia v Australia* case in which Philip Morris invoked the 1993 IPA between Hong Kong and Australia to challenge the tobacco plain packaging regulation.
19. Cases like *Philip Morris v Australia* which concern important public policies are indeed the types of sensitive cases that might be said to have brought us to the current backlash against ISDS, the growing disenchantment with the investment treaty regime and the skepticism, whether rightly or wrongly, that the regime is heavily skewed towards the benefits of multinational corporations at the grave expense to host States and public interest<sup>18</sup>.

### **(III) Major Concerns and Criticisms over ISDS – The Prelude to the Chaos**

#### **(1) *The Perceived Inconsistencies in ISDS Awards***

20. Inconsistencies may arise when different tribunals come to different conclusions about the same standard in the same treaty<sup>19</sup>. Inconsistencies may also arise when different tribunals organized under different treaties reach different decisions about disputes involving the same facts, related parties and similar investment rights as well as when considering disputes involving similar situations and similar investment rights<sup>20</sup>.
21. No one would deny that there may be some irreconcilable awards such as the two cases related to the Argentina’s economic crisis back in the early 2000s,

---

<sup>18</sup> C. L. Lim, Jean Ho and Martins Paparinskis, “*International Investment Law and Arbitration: Commentary, Awards and other Materials*”, (Cambridge University Press), 2018, at p.73.

<sup>19</sup> Susan Franck, “*The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*”, TDM Journal, June 2005, Vol. 2 – issue 3, at pp. 1545 – 1546.

<sup>20</sup> Susan Franck, “*The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*”, TDM Journal, June 2005, Vol. 2 – issue 3, at pp. 1545 – 1546.

*CMS v Argentina* and *LG&E v Argentina*<sup>21</sup>. However, one would reasonably suspect that the extent of inconsistencies in ISDS awards may have been overstated and exaggerated<sup>22</sup>.

22. Absolute consistency in ISDS is but an illusion, like a desert mirage. Even in the context of the domestic court systems with appeal mechanisms, perfect consistencies do not exist<sup>23</sup> and it is not uncommon to see dissenting views in court judgments slowly evolving to become the law over time. In fact, as said by Johnny Veeder, “*arbitration can benefit from ‘good’ dissenting opinions ... Such dissents are more often (if rationally and courteously expressed) a sign of healthy intellectual rigour within arbitral deliberations*”<sup>24</sup>.
23. As said by Brigitte Stern in an ISDS Reform Conference held in Hong Kong in February last year, “*inconsistency is part of life ... when contradictions stop, it is death*”<sup>25</sup>. Inconsistency is an inevitable part in the development and evolution of any body of law. If we take Emmanuel Gaillard’s Darwinist view on the matter, with the continuous stream of investment jurisprudence and growing doctrinal analysis, the best decisions will emerge as *jurisprudence constante* and prevail over those isolated mishaps<sup>26</sup>.

---

<sup>21</sup> Brigitte Stern, “*The Future of International Investment Law: A Balance between the Protection of Investors and the States’ Capacity to Regulate*” in Jose Alvarz and Karl Sauvant (eds), “*The Evolving International Investment Regime: Expectation, Realities, Options*”, (Oxford University Press) (2011) pp. 174 – 192, at pp. 181 – 186.

<sup>22</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119, at pp. 54 – 58. See also Stanimir A. Alexandrov, “*On the Perceived Inconsistency in Investor-State Jurisprudence*”, in Jose Alvarz and Karl Sauvant (eds), “*The Evolving International Investment Regime: Expectation, Realities, Options*”, (Oxford University Press) (2011) pp. 60 – 69.

<sup>23</sup> Stephen M. Schwebel, “*Keynote Address: In Defence of Bilateral Investment Treaties*”, in Albert Jan Van den Berg (ed), “*Legitimacy: Myths, Realities, Challenges*”, ICCA Congress Series, Volume 18 (ICCA & Kluwer Law International, 2015) pp. 1 – 11, at pp. 8 – 9.

<sup>24</sup> VV Veeder, “*The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva*” in David Caron, Stephan Schill, et al. (eds), “*Practising Virtue: Inside International Arbitration*” (Oxford University Press) (November 2015), pp. 127 – 149, at p. 148.

<sup>25</sup> Brigitte Stern, “*To Examine the Desirability (or Undesirability) of Replacing Ad Hoc Arbitrator by Full-Time Judges*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 190 – 201, at p.200.

<sup>26</sup> Global Arbitration Review, “*Gaillard’s Chaos Theory – Is Harmony in International Arbitration Overrated?*” (2018), available at <https://www.shearman.com/-/media/Files/Perspectives/2018/07/GaillardsChaosTheory.pdf?la=en&hash=35DB6448A2D524822AFECA54409EE985C9199437>.



24. However, it appears that patience may have been lost and some feel that they can no longer wait for the ISDS regime to “*self-correct*” to address the concern over inconsistencies. In the context of investment treaty arbitration, it appears that, as compared with international commercial arbitration which usually concerns contractual transactions between private parties<sup>27</sup>, a higher level of consistency and coherence is expected of the awards when matters of public importance are at stake.

## **(2) *Impartiality and Diversity of Arbitrators***

25. Another criticism closely related to the inconsistencies of ISDS awards is concerned with the decision makers – the arbitrators.
26. Party appointment has become an “*original sin*” these days, with arbitrators being perceived as being influenced by their desire for further appointments instead of only the merits of the case and being biased in favour of multinational corporations<sup>28</sup>. Nevertheless, if one takes an objective view of the empirical evidence, as of July last year, 35.5% of the known treaty-based ISDS cases were decided in favour of the respondent States, as compared with 29.5% in favour of the claimant investors<sup>29</sup>.
27. That said, diversity of arbitrators may be something that can be further improved in the context of ISDS<sup>30</sup>. Diversity is a broad concept covering gender

---

<sup>27</sup> James Crawford, “*The Ideal Arbitrator: Does One Size Fit All*”, 32 Am. U. Int’l L. Rev. 1003 (2017), at p.1005.

<sup>28</sup> Stephen M. Schwebel, “*Keynote Address: In Defence of Bilateral Investment Treaties*”, in Albert Jan Van den Berg (ed), “*Legitimacy: Myths, Realities, Challenges*”, ICCA Congress Series, Volume 18 (ICCA & Kluwer Law International, 2015) pp. 1 – 11, at p. 6.

<sup>29</sup> UNCTAD, “*Investment Dispute Settlement Navigator – Known Treaty*” (30 September 2019), available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>30</sup> UNCITRAL, “*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018)*” (6 November 2018, A/CN.9/964) (available at <https://undocs.org/en/A/CN.9/964>), at paras. 91 – 98.

diversity<sup>31</sup>, age diversity, ethnic diversity and geographical diversity<sup>32</sup>. Enhancing diversity is an aspirational goal to pursue, but one also needs to take into account the reality that ISDS cases often involve very high stakes, both in monetary terms and in terms of public importance, and host jurisdictions should not be blamed for sticking with the “*usual suspects*” – the experienced and well-respected arbitrators with high standing.

28. Enhancing diversity is something that must be grounded in reality and requires long-term and persistent efforts<sup>33</sup>, for example, through capacity building, diversity policy in appointment by arbitral institutions and encouragement of disputing parties to incorporate “*diversity*” into their selection criteria of arbitrators<sup>34</sup>.

---

<sup>31</sup> According to the data in 2017, among the top 25 arbitrators in terms of the number of appointments (which has taken up one third of all arbitral appointments), only two of them are female. In terms of statistics, a detailed study conducted by Susan Franck in 2006 of the then 102 publicly-available awards concluded that 5 out of 145 arbitrators were women (approximately 3%). As of 1 March 2012, based on the 254 “*concluded cases*” from 1972-2012 published on the ICSID website, it was concluded that 43 out of 745 arbitrators were women (5.63%) (See UNCITRAL, “*Note by the Secretariat on arbitrators and decision makers – appointment mechanisms and related issues*” (30 August 2018, A/CN.9/WG.III/WP.152) (available at <https://undocs.org/en/A/CN.9/WG.III/WP.152>)).

<sup>32</sup> According to the data in 2017, among the top 25 arbitrators in terms of the number of appointments (which has taken up one third of all arbitral appointments), with the exception of four arbitrators, all are listed as nationals of Western States. However, even the four exceptions are not particularly representative of the rest of the world, with one from Eastern Europe but residing in the United States for decades, the other three from Latin American States but maintaining their professional practices in the United States or Western Europe, and none from Asia or Africa (See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, “*The Revolving Door in International Investment Arbitration*”, *Journal of International Economic Law*, 2017, 20, 301–331, at pp. 309 – 310). Furthermore, among the “*top 10 nationalities*” (France, United States, United Kingdom, Canada, Switzerland, Spain, Australia, Germany, Italy and Mexico), which have taken up over 50% of the appointments, arbitrators from France, the United States and the United Kingdom have consistently been the three largest group of appointees and have taken up almost 30% of the appointments (See Adrian Lai, “*Appointment of Arbitrators and Related Issues*”, *Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward*, (Asian Academy of International Law) pp. 419 – 463, at pp.450 – 451).

<sup>33</sup> Lucy Reed, “*Keynote address delivered at the 15<sup>th</sup> Annual ITA-ASIL Conference: Diversity and Inclusion in International Arbitration – The Math: Caution + Habit + Bias*”, April 2018, available at <http://itainreview.org/articles/Spring2019/the-math-reed-flores.html>.

<sup>34</sup> See e.g. pp. 48 – 49 of the 2018 Annual Report of the ICSID on the steps taken to enhance gender diversity. In the case of ICSID, there has been constant improvement on gender diversity, with 12.3% of total female arbitrator appointments in 2015 to 24% in 2018 (See Adrian Lai, “*Appointment of Arbitrators and Related Issues*”, *Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward*, (Asian Academy of International Law) pp. 419 – 463, at p.455). Further, according to an analysis for institutional appointments in international arbitration more generally (ISDS and international commercial arbitration), the percentage of female arbitrator appointments has increased from 6% in 2011 to 17% by 2016.

### **(3) Excessive Cost and Duration**

29. The cost and duration of investment arbitration have also been criticized for being excessive, resulting in enormous financial burden on investors and States, and not being inclusive to small and medium enterprises.
30. Existing empirical studies have shown that ISDS does not come cheap, with the average party costs standing at approximately USD 6 million for claimants and approximately USD 4.9 million for respondents<sup>35</sup>. In contrast, the mean ICSID tribunal costs and the mean UNCITRAL tribunal costs were approximately USD 920,000 and USD 1.1 million respectively<sup>36</sup>. The length of investment arbitration has also raised concerns, taking an average duration of almost 4 years for the arbitration proceedings to result in an award<sup>37</sup>.
31. The excessive cost and duration may even render a successful claim in an investment arbitration a hollow victory. In the famous NAFTA case, *Metalclad Corporation v Mexico*, while the claimant company was eventually awarded approximately USD 17 million, the proceedings lasted for approximately 5 years, with costs of approximately USD 4 million<sup>38</sup>. In fact, the former CEO of Metalclad was so dissatisfied with the arbitration experience that he said if he had to do it over, he would not pursue arbitration<sup>39</sup>.
32. States are also concerned with the high cost of ISDS because such cost is paid with public fund. In fact, such high cost may impose a disproportionately heavy burden on developing States with scarce financial and human resources and compete with other urgent developmental needs of those States<sup>40</sup>.

---

<sup>35</sup> Matthew Hodgson and Alastair Campbell, “*Damages and Costs in Investment Treaty Arbitration Revisited*”, Global Arbitration Review (14 December 2017).

<sup>36</sup> Matthew Hodgson and Alastair Campbell, “*Damages and Costs in Investment Treaty Arbitration Revisited*”, Global Arbitration Review (14 December 2017).

<sup>37</sup> Jeffery Commission, “*How Long is Too Long to Wait for an Award*”, Global Arbitration Review (18 February 2016).

<sup>38</sup> Jack J. Coe, Jr, “*Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*”, Journal of Transnational Dispute Management, Vol.4, No.1, February 2007, see p.27.

<sup>39</sup> Jack J. Coe, Jr, “*Should Mediation of Investment Disputes Be Encouraged, and, If So, by Whom and How?*” in Arthur W. Rovine, “*Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)*”, Brill | Nijhoff, 20 May 2010, see pp.339 – 340.

<sup>40</sup> UNCITRAL, “*Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS) – cost and duration*” (31 August 2018, A/CN.9/WG.III/WP.153) (available at

33. Some may dismiss these concerns as not genuine. Nevertheless, the question is no longer whether the concerns over ISDS are real or not. The question is no longer whether ISDS is indeed in a legitimacy crisis. The question is no longer whether ISDS really needs to be reformed. The battle has unfortunately already been lost on those fronts and the debate has long moved past these questions. The criticisms against ISDS and the negative perception resulted from misinformation has apparently become so entrenched that even UNCTAD has concluded that ISDS faced a “*perceived deficit of legitimacy*”<sup>41</sup>.

#### (IV) **“Chaos” in the Evolution of ISDS**

34. In light of the concerns and criticisms, various international organizations such as UNCTAD, UNCITRAL, OECD, ICSID, Energy Charter Conference are simultaneously undertaking projects on ISDS reform with different scopes.
35. Since 2017, UNCITRAL has embarked on probably one of its most ambitious projects in its Working Group III. There were over 400 delegates from around 100 States and 70 observer organizations participating in its latest session in Vienna in October last year.<sup>42</sup> The representatives of the Department of Justice of Hong Kong have also joined as members of the Chinese delegation to participate in the process. Tension was genuinely felt in the room. Every working session was characterized by fierce debates, with constant “*tug of war*” between States that want a complete over-haul of the ISDS regime and those believing that incremental enhancements of ISDS are the way to go.
36. At the same time, there are jurisdictions which apparently want both structural and non-structural reforms of ISDS, whilst some jurisdictions such as Brazil have at the very beginning of the Working Group signaled that they would not go down the path of ISDS. Two years into the project, we have not yet seen the light from the end of the tunnel, with some States continuing to express dissatisfaction with the mandate of the Working Group for being narrowly

---

<https://undocs.org/en/A/CN.9/WG.III/WP.153>), at para. 8.

<sup>41</sup> UNCTAD, “*IIA Issues Note – Reform of Investor-State Dispute Settlement: In Search of a Roadmap*” (June 2013), available at [https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf)

<sup>42</sup> UNCITRAL, Press Release – “*Successful conclusion of the UNCITRAL meeting in Vienna on the reform of investor-State dispute settlement*” (21 October 2019) (available at <http://www.unis.unvienna.org/unis/en/pressrels/2019/unisl285.html>)

confined to ISDS procedural reform and treaty-based ISDS<sup>43</sup>. In the words of Stephan Schill, Working Group III is like a “*Gordian Knot*” of competing investment dispute settlement designs.<sup>44</sup> ICSID and the Energy Charter Treaty are amending their rules and introducing protocols to address these concerns.

37. States have also taken diverse approaches with respect to their investment treaty practices.
38. On one hand, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) adopts incremental enhancements to the ISDS mechanism<sup>45</sup>. On the other hand, the United States-Mexico-Canada Agreement (“USMCA”) heavily restricts the scope of the ISDS mechanism, as compared with one in NAFTA<sup>46</sup>.
39. In respect of the Regional Comprehensive Economic Partnership Agreement (RCEP)<sup>47</sup>, whilst text-based negotiation has concluded, it remains to be seen whether ISDS provisions are already in the agreed text or have been put in a future work programme to be further negotiated following the entry into force of RCEP<sup>48</sup>.

---

<sup>43</sup> UNCITRAL, “*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017) – Part I*” (19 December 2017, A/CN.9/930/Rev.1) (available at <https://undocs.org/en/A/CN.9/930/Rev.1>), at paras. 20, 27 – 30. See also UNCITRAL, “*Submission from the Government of South Africa on the possible reform of Investor-State Dispute*” (17 July 2019, A/CN.9/WG.III/WP.176), at paras. 19 – 20.

<sup>44</sup> Schill, Stephan, and Geraldo Vidigal, “*Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*”, (2018), available at [https://uncitral.un.org/sites/uncitral.un.org/files/rta\\_exchange\\_-\\_investment\\_dispute\\_settlement\\_-\\_schill\\_and\\_vidigal.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf).

<sup>45</sup> The Investment Chapter of the CPTPP is available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/9.-Investment-Chapter.pdf>. The code of conduct on arbitrator for the CPTPP is available at <https://www.mfat.govt.nz/assets/CPTPP/Code-of-Conduct-for-ISDS.pdf>.

<sup>46</sup> The Investment Chapter of the USMCA is available at <https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/r-cusma-14.pdf>.

<sup>47</sup> Joint Leaders’ Statement on the Regional Comprehensive Economic Partnership (RCEP) (4 November 2019, Bangkok, Thailand), available at <https://asean.org/storage/2019/11/FINAL-RCEP-Joint-Leaders-Statement-for-3rd-RCEP-Summit.pdf>.

<sup>48</sup> The Conversation, “*India’s not joining the latest free-trade deal which limits Australia’s market access*” (4 November 2019), available at <https://theconversation.com/indias-not-joining-the-latest-free-trade-deal-which-limits-australias-market-access-126343>. See also the Conversation, “*Suddenly, the world’s biggest trade agreement won’t allow corporations to sue governments*” (17 September 2019), available at <https://theconversation.com/suddenly-the-worlds-biggest-trade-agreement-wont-allow-corporations-to-sue-governments-123582>.

40. Brazil has completely parted way with ISDS by adopting its own model of Cooperation and Facilitation Investment Agreements (CFIA) which focuses on dispute prevention and the use of ombudsman to resolve disputes.
41. We also see the re-emergence of the “*Calvo Doctrine*”<sup>49</sup>, for example, in the new model BIT of India, which requires exhaustion of local remedies before resorting to ISDS<sup>50</sup>. These approaches were adopted in recent years<sup>51</sup> and attempted to shift the paradigm away from the traditional ISDS.
42. You may call the present landscape of ISDS as one characterized by diversity or you may describe it as chaos.

**(V) Searching for Order within Chaos – A “Double Helix” Approach**

43. Nevertheless, just as contradiction is an essential element of life, chaos is not necessarily a bad thing. In fact, to use the quote of José Saramago, a Portuguese writer and recipient of the 1998 Nobel Prize in Literature, “*Chaos is merely order waiting to be deciphered*”. I started today’s lecture on Charles Dickens’ “*A Tale of Two Cities*”. Now, I would venture to propose a “*A Tale of Two Options*” – a “double helix” approach to decipher the order within the chaos in the evolution of ISDS.

---

<sup>49</sup> The *Calvo Doctrine* emerged during the 1800’s against the background in which Latin American countries experienced diplomatic and military intervention by foreign investors. The doctrine was named after the Argentinian diplomat and jurist, Carlos Calvo, who considered that “*it is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended*”. Calvo felt that recognition of the international law concept would result in allowing “an exorbitant and fatal privilege, especially favourable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners” (See James Baker and Lois Yoder, “*ICSID and the Calvo Clause – A Hindrance to Foreign Direct Investment in LDCs*”, *Journal of Dispute Resolution*, Vol 5:1 (1989), pp. 75 – 95, at p.90). It is of interest to note that the Max Planck Encyclopedias of International Law considers that the *Calvo Doctrine* nowadays seems obsolete because the ISDS mechanism has evolved in such a way as to render it useless (See Patrick Julliard, “*Calvo Doctrine / Calvo Clause*”, (January 2007), Max Planck Encyclopedias of International Law). Professor Christoph Schreuer remarked that we should be weary of the tendencies for the re-emergence of the *Calvo Doctrine* or its variations (See Christoph Schreuer, “*Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*”, (2005), available at [https://www.univie.ac.at/intlaw/pdf/cspubl\\_75.pdf](https://www.univie.ac.at/intlaw/pdf/cspubl_75.pdf))

<sup>50</sup> See Model Text for the Indian Bilateral Investment Treaty (2016), available at [https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

<sup>51</sup> As of December 2019, India has only signed one BIT (India – Belarus BIT (2018)) that is based on its new model. As for Brazil, since the adoption of the CFIA in 2015, only the one with Angola has entered into force.

44. As a start, we need to be clear about what our objective precisely is. The objective should be to restore the confidence in ISDS to overcome the current legitimacy crisis, while preserving the essential attributes of ISDS which make it work in the very first place.
  45. In this regard, the G20 Guiding Principles for Global Investment Policymaking agreed in the G20 Ministerial Meeting in 2016 is particularly instructive on what the essential elements of “*legitimacy*” are. According to the G20 Guiding Principles, the dispute settlement procedures for investment disputes should be fair, open and transparent, with appropriate safeguards to prevent abuse<sup>52</sup>.
  46. It is clear that the ISDS regime should be based on the rule of law and provide legal certainty and access of investors to effective mechanisms for the prevention and settlement of disputes<sup>53</sup>.
  47. With that objective in mind, my proposed “*double helix*” approach will seek to address both structural and non-structural reforms and encourage the complementary use of different types of disputes resolution mechanisms to enrich the practice of ISDS.
- (1) ***First Strand of the “Double Helix” Approach - Careful Study on the Standalone ISDS Appellate Mechanism as a Structural Reform Option for Investment Arbitration***
48. The first strand of the “*double helix*” approach focuses on the structural reform of investment arbitration, in particular on the option of a standalone ISDS appellate mechanism.
- (i) *ISDS Appellate Mechanism – The Conceptual Model*
49. A standalone appellate mechanism is an aspirational concept, but it must be able to cover the two types of investment arbitration, broadly described as ICSID

---

<sup>52</sup> G20 Guiding Principles for Global Investment Policymaking (2016), available at <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>, see Principle III.

<sup>53</sup> G20 Guiding Principles for Global Investment Policymaking (2016), available at <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>, see Principles III and IV.



and non-ICSID<sup>54</sup>.

50. The ICSID Convention provides a self-contained ISDS treaty-based arbitration system with enforcement of ICSID awards being automatic, without the possibility of national courts reviewing the award on the basis of grounds of refusal of enforcement.
51. On the other hand, the non-ICSID arbitration is in principle governed by national arbitration laws, with the ISDS awards subject to the possibility of a setting aside action at the place of arbitration and to an enforcement action under the New York Convention in other jurisdictions<sup>55</sup>.
52. If we are to work on an appellate mechanism, it must be clear that such mechanism is introduced to address the unjustified inconsistencies in the interpretation of the treaty provisions and other principles of international law by arbitral tribunals<sup>56</sup>.
53. While the idea of “*appeal*” may have some tension with the attribute of “*finality*” in arbitration, it is not necessarily an “*enemy*” to investment arbitration which generally involves matters of higher public interest.
54. In fact, in the report of the Departmental Advisory Committee on Arbitration (“DAC”) on the UK Arbitration Bill in 1996, with respect to the suggestion on the abolition of the right of appeal, it was concluded that “*a limited right of appeal [on point of law with sufficient safeguards in place] is consistent with the fact the parties have chosen to arbitrate rather than litigate ... [because it] can be said with force that ... the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do so, it is not reaching the result contemplated by the*

---

<sup>54</sup> According to the statistics on known treaty-based ISDS cases (as of July 2019) available on UNCTAD’s Investment Policy Hub (<https://investmentpolicy.unctad.org/investment-dispute-settlement>), approximately 60% of the 983 known treaty-based ISDS cases were administered under the ICSID Arbitration Rules and the ICSID Additional Facility Rules, with approximately 31% administered under the UNCITRAL Arbitration Rules and approximately 5% administered under the SCC Arbitration Rules.

<sup>55</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119, at pp.70 – 73.

<sup>56</sup> UNCITRAL, “*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018)*” (6 November 2018, A/CN.9/964) (available at <https://undocs.org/en/A/CN.9/964>), at para. 40.



*arbitration agreement*”<sup>57</sup>.

55. Section 69 of the UK Arbitration Act 1996 is a fine example of providing for a limited right of appeal on point of law<sup>58</sup>, which is a model that we can refer to in designing the ISDS appellate mechanism. Hong Kong’s Arbitration Ordinance has also provided for an opt-in scheme for making an appeal against arbitral award on question of law that is similar to s.69 of the UK Arbitration Act 1996<sup>59</sup>.
56. Conceptually, one can look at the international practice. In respect of international tribunals, only a few feature appellate mechanisms for reviewing decisions of the first instance<sup>60</sup>. Some examples include the Appeals Chambers of the International Criminal Tribunals for the Former Yugoslavia and the International Criminal Tribunals for Rwanda. Of course, in Geneva, one can find the “*Crown Jewel*” of the World Trade Organization – its standing Appellate Body. The standing appellate body may directly address the concerns regarding inconsistencies.

(ii) *Structure of the ISDS Appellate Mechanism – Centralized or Decentralized*

57. First, if the objective is to ensure consistency and coherence in ISDS awards, we are probably looking at a centralized standalone appellate mechanism, one that is based on a multilateral treaty, instead of leaving the appeals to be conducted by bilateral appellate mechanisms formed under individual BITs or domestic courts, which would most likely further aggravate the inconsistencies in ISDS awards as a result of the different approaches and different standards of review adopted in the appellate procedures.

---

<sup>57</sup> The Report of the Departmental Advisory Committee on Arbitration Law on the Arbitration Bill (February 1996), at paras. 284 – 292.

<sup>58</sup> s.69(1) of the UK Arbitration Act 1996 provides that:

*“Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.*

*An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.”*

<sup>59</sup> See ss.5 – 7 of Schedule 2 of the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong).

<sup>60</sup> Chester Brown, “*Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court*”, ICSID Review, Vol. 32, No.3 (2017), pp. 595 – 610, at p.596.

(iii) Scope of Review of the ISDS Appellate Mechanism

58. The next question we will look at is the scope of review of the ISDS appellate mechanism, and a very important question is whether it should only be limited to an error of law but not an error of fact. Appeal is a balancing act between finality and correctness.

59. In this regard, s.69 of the UK Arbitration Act 1996 provides for a limited right of appeal on a point of law. Within this limited scope of review, the English courts have recognized that appeals will not be lightly granted and there will be a degree of deference accorded to the arbitrator's decisions on a question of law<sup>61</sup>. In reviewing if there is an error of law in the arbitral award, the English court will read it in "a *reasonable and commercial way*", without approaching it "*with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, and with the objective of frustrating the process of arbitration*"<sup>62</sup>. While the question of law that is dealt with under s.69 of the UK Arbitration Act 1996 is one of English law, it provides a basic blueprint on which we can build the appellate mechanism for ISDS<sup>63</sup>.

60. If we look at the WTO Appellate Body model, the scope of review is also confined to "*issues of law covered in the panel report and legal interpretations developed by the panel*"<sup>64</sup> and the Appellate Body has no authority to take up the role of "*triers of fact*" to examine new factual evidence or re-examine existing factual evidence upon which the panel report is based<sup>65</sup>.

61. Even if we follow s.69 of the UK Arbitration Act 1996 or the WTO Appellate Body model to confine the scope of review to errors of law, it is inevitable that the ISDS appellate mechanism will have to address difficult questions when the

---

<sup>61</sup> See *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), which has been cited by in *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306 (Comm) and *Seagrain LLC v Glencore Grain BV* [2013] EWHC 1189 (Comm)). See also *Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC* [2019] EWHC 376 (Comm).

<sup>62</sup> See *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd* [2015] EWHC 3405 (Comm).

<sup>63</sup> Robert Merkin, "Arbitration Act 1996" (3<sup>rd</sup> Edition), Informa Law, June 2005, at p.177.

<sup>64</sup> See Article 17.6 of the WTO Dispute Settlement Understanding.

<sup>65</sup> World Trade Organization, "The Stage in a Typical WTO Dispute", in "A Handbook on the WTO Dispute Settlement System" (2<sup>nd</sup> Edition), (Cambridge University Press) (September 2017), pp. 49 – 129, at pp. 105 – 106.

losing party tries to disguise an error of fact as an error of law as well as when the application for appeal involves a mixed question of fact and law.

62. In the context of the UK Arbitration Act 1996, the English courts have been strict in rejecting attempts to dress up erroneous factual findings or procedural errors as an error of law<sup>66</sup> and, with respect to a mixed question of law and fact<sup>67</sup>, adopted a high threshold under which it will interfere only if “*on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion*”<sup>68</sup>.

63. In the context of the WTO, there have been attempts to characterize an error of fact as an error of law. In this regard, the WTO Appellate Body has also reminded in a number of cases that its role is different from that of the panel, which has exclusive jurisdiction over factual assessment, and its scope of review is limited to issues of law covered in the panel report and legal interpretations developed by the panel<sup>69</sup>. Under such mandate, it is considered that even a manifest error of fact should not be reviewable by the Appellate Body<sup>70</sup>.

---

<sup>66</sup> The classic test for distinguishing between question of law and question of fact is set out in *Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis* [1983] 2 All ER 658, which stated that:

“... the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) *The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.* (2) *The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.* (3) *In the light of the facts and the law so ascertained, the arbitrator reaches his decision.*

...

*The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct: for the court is then driven to assume that he did not properly understand the principles which he had stated.”* (emphasis added)

<sup>67</sup> Robert Merkin, “*Arbitration Act 1996*” (3<sup>rd</sup> Edition), Informa Law, June 2005, at p.177.

<sup>68</sup> David Wolfson and Susanna Charlwood, “Chapter 25: Challenges to Arbitration Awards”, in Julian David Mathew Lew, Harris Bor , et al. (eds), “*Arbitration in England, with chapters on Scotland and Ireland*”, (Kluwer Law International 2013) pp. 527 – 562, at pp. 547 – 549.

<sup>69</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 22 December 2000, at paras. 150 – 151.

<sup>70</sup> Rüdiger Wolfrum and Peter-Tobias Stoll (eds), “*Max Planck Commentaries on World Trade Law – Institution and Dispute Settlement*”, Max Planck Institute for Comparative Public Law and International Law, 2006, at p.458.

64. There is of course the complicated question as to whether an egregious error of fact can constitute an error of law. The jurisprudence of s.69 of the UK Arbitration Act 1996 is also uncertain on this point, with some cases holding that factual findings made by the arbitrators which have no basis whatsoever in the evidence amounted to an error of law.<sup>71</sup>
65. Similarly, there are some uncertainties on this tricky issue under the WTO jurisprudence<sup>72</sup>, but such jurisprudence also points to a very high threshold under which the egregious error of fact has to call into question the good faith of a Panel – one that may be described as “*deliberate disregard*” and “*willful distortion*” of facts<sup>73</sup>. The latter may be a better approach to discharge attempts to raise an egregious error of fact.

(iv) ISDS Appellate Mechanism – As of Right or with Leave

66. Another aspect that should be considered is whether an appeal should be as of right or should only be allowed with leave. From the experience of the WTO Appellate Body in which an appeal is essentially as of right<sup>74</sup>, an average of 68% of the panel reports were appealed, with the rate of appeal in some of the years reaching over 80% (2014) or even 100% (1999)<sup>75</sup>.

---

<sup>71</sup> See e.g. *Fence Gate Ltd. v NEL Construction* (2001) 82 Con LR 41. See also Robert Merkin, “*Arbitration Act 1996*” (3<sup>rd</sup> Edition), Informa Law, June 2005, at p.177 and David Wolfson and Susanna Charlwood, “*Chapter 25: Challenges to Arbitration Awards*”, in Julian David Mathew Lew, Harris Bor, et al. (eds), “*Arbitration in England, with chapters on Scotland and Ireland*”, (Kluwer Law International 2013) pp. 527 – 562, at pp. 547 – 548.

<sup>72</sup> A relevant issue is related to the function of WTO Panels under Article 11 of the WTO Dispute Settlement Understanding, which provides that “[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution” (emphasis added).

<sup>73</sup> Rüdiger Wolfrum and Peter-Tobias Stoll (eds), “*Max Planck Commentaries on World Trade Law – Institution and Dispute Settlement*”, Max Planck Institute for Comparative Public Law and International Law, 2006, at p.457.

<sup>74</sup> See Article 17 of the WTO Dispute Settlement Understanding.

<sup>75</sup> Zhang Yuejiao, “*Whether an Appeal Mechanism for ISDS is Desirable and Practicable in the Light of the Experience of the WTO Appellate Body and ICSID*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 129 – 143, at p.146. See also Freya Bartens, “*Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms*”, (2017), Journal of International Dispute Settlement, Volume

67. Given that the stakes in ISDS disputes are generally quite substantial, both the host jurisdictions and the investors would tend to lodge an appeal if they were unsuccessful in the first instance arbitral award. As a result, it would be sensible to model upon s.69 of the UK Arbitration Act 1996 to require the applicant to obtain leave to appeal from the standalone ISDS appellate mechanism to filter out frivolous appeal applications. In the interest of time, I will not go into the test of granting permission as laid down in the case law.

68. As one may observe, s.69 of the UK Arbitration Act 1996 demonstrates a fine balance between finality and ensuring correctness in the application of law through a permission system<sup>76</sup> to filter out frivolous appeal applications.

(v) *Status of the Awards Made by the ISDS Appellate Mechanism – A Doctrine of Stare Decisis?*

69. The doctrine of *stare decisis* is a common law concept that may not be applicable in the context of international law. It functions well within a sovereign State where the constitution provides for a judicial approach that protects and respects that. This concept has no bearing on international law, yet previous decisions always have referential values.

70. To take the words of Christopher Thomas, “*a simple priority in time does not create a priority in law*”<sup>77</sup>, and one should not assume that the precedent originating from an earlier decision of the ISDS appellate mechanism will necessarily be good law.

71. In the practice of the WTO Appellate Body, there is not a formal doctrine of

---

8, Issue 3, 1 September 2017, pp. 432–459, at p.438.

<sup>76</sup> According to the statistics of the English Commercial Court, from the period from 2015 to early 2018, there were 162 applications for leave to appeal under s.69 of the UK Arbitration Act, with only 30 cases (approximately 18.5%) in which leave to appeal was granted and 5 successful appeals (approximately 3%) (See Judiciary of the England and Wales, “*Commercial Court Users’ Group Meeting Report – March 2018*” (3 May 2018), available at <https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf>). The statistics indicate that the threshold for granting leave to appeal under s.69 of the UK Arbitration Act is high.

<sup>77</sup> John Christopher Thomas, “*The Evolution of the ICSID System as an Indication of What the Future Might Hold*”, in Albert Jan Van den Berg (ed), “*International Arbitration: The Coming of a New Age?*”, ICCA Congress Series, Volume 17 (ICCA & Kluwer Law International 2013) pp. 563 – 606, at pp. 602 – 603.

*stare decisis*. Rather it operates in a *de facto* form of precedent under which the panel would not depart from the reports of the Appellate Body absent cogent reasons, especially when the same legal question is at issue<sup>78</sup>.

(vi) *The Adjudicators of the ISDS Appellate Mechanism*

72. A very important question in respect of ISDS appellate mechanism is what gives the decisions of the appellate tribunal a higher authority and a higher quality than those of the first instance arbitral tribunal. To quote from Sir Eli Lauterpacht in his seminal *“Aspects of the Administration of International Justice”*, “[t]he mere fact that one person has been set in a position to pass judgment on the verdict of another does not give the second decision a greater quality than the first ... the concept of appeal ... reflects [an] unarticulated assumption ... that those to whom appeal lies are as judges in some way better than, or superior to, those whose judgment is being reviewed. If that element of superiority is lacking, appeal ... is merely the substitution of one person’s view of the situation for that of another”. And this brings us to the very important question of who will be the adjudicators for this standalone appellate mechanism and how they will be selected.

73. An important lesson from the WTO is concerned with the current paralysis of the Appellate Body when only one member remains in the 7-member Appellate Body<sup>79</sup>. This is mostly a result of the WTO’s consensus-based procedural practice<sup>80</sup> and the United States’ blockage on the appointment of Appellate Body Members<sup>81</sup>.

---

<sup>78</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008), at para 160.

<sup>79</sup> Reuters, “U.S. files appeal into WTO system it has broken” (19 December 2019), available at <https://www.reuters.com/article/us-usa-trade-wto/wto-chief-sees-no-end-in-sight-to-us-blockage-idUSKCN1QA2IW>. See also WTO, “Appellate Body Members” (2019), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm).

<sup>80</sup> Article 17.2 of the WTO Dispute Settlement Understanding provides that “[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once”. Article 2.4 of the WTO Dispute Settlement Understanding further provides that “[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus”. Specifically, footnote 1 to Article 2.4 provides that “[t]he DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision”.

<sup>81</sup> Geraldo Vidigal, “Addressing the Appellate Body Crisis: A Plurilateral Solution?”, Amsterdam Center for International Law No. 2019-03, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3359555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359555).

74. Then we look at the use of an election to appoint people of high standing and integrity, with knowledge in public international law and experience in handling investment disputes. Nevertheless, the use of an election system should be considered with caution. Speaking from his experience with the International Court of Justice, Sir Christopher Greenwood has, in a lecture held in the Department of Justice in 2018, reminded that while attracting the right sorts of lawyers with the right sorts of knowledge should be the objective in the composition of the adjudicators of the standalone ISDS appellate mechanism, the nationality of a candidate might often, in reality, be the decisive factor if an election system is adopted.
75. An option that is worth considering is to form a pool of adjudicators that is similar to the ICSID Panels of Arbitrators to hear the ISDS appeals. This can, on one hand, ensure diversity of adjudicators, and on the other hand, address the concern over the appellate mechanism being overloaded with cases.

(vii) Interface of the ISDS Appellate Mechanism with the Existing ISDS Regime

76. For ICSID arbitration, while Article 53 of the ICSID Convention provides that the award “*shall not be subject to any appeal*”, the multilateral treaty for the establishment of the appellate mechanism can overcome this by operating as an *inter se* amendment to the ICSID Convention among the relevant Contracting States<sup>82</sup>.
77. For non-ICSID arbitrations, the interface will be more complex. National laws have to cater for different remedies for recourse to arbitration – whether the appeal is as of right as well as the scope of appeal. If the centralized appellate mechanism model is to be adopted, then the national courts will have to surrender their jurisdictions over such non-ICSID arbitration and treaty-based arrangements have to be in place.

---

<sup>82</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119, at pp.75 – 78.

(viii) Enforcement of the Awards Made by the ISDS Appellate Mechanism

78. Of course, an important consideration is the enforcement mechanism for the awards made by the appellate mechanism. While it is open to the multilateral treaty for a new centralized appellate body to provide for its own enforcement mechanism, a more practical option would be to find ways to allow the awards made by the appellate mechanism to be enforceable under the ICSID Convention and New York Convention<sup>83</sup>. However, this will raise a host of complex technical issues, especially for enforcement of such awards in jurisdictions that are not parties to the multilateral treaty for the establishment of the centralized appellate mechanism<sup>84</sup>.

(ix) Institutional Design of the ISDS Appellate Mechanism – A New Permanent Body or Building on Existing Platform?

79. For the establishment of a centralized standalone ISDS appellate mechanism, a fundamental consideration is whether we should set up a completely new permanent body or build on the existing mechanism. The establishment of a new permanent body can potentially be a daunting task as it is necessary to figure out how such body is to be funded, how to set up the secretariat support as well the potentially complex question of deciding which jurisdiction to physically host the appellate mechanism<sup>85</sup>. This will take time.

80. If it is believed that a standalone appellate mechanism can address the “*perceived legitimacy deficit*” of ISDS, a more practical option is to build on the existing platform of ICSID<sup>86</sup>. Given that ICSID is a dedicated and sophisticated

---

<sup>83</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119, at pp.85 – 110.

<sup>84</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119.

<sup>85</sup> Lucy Reed and Christine Sim, “*Potential Investment Treaty Appellate Bodies: Open Questions*”, ICSID Review, Vol. 32, No. 3 (2017), pp. 691–695.

<sup>86</sup> Albert Jan van den Berg, “*Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Convention*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 52 – 119, at pp. 108 – 109. As remarked by Zhang Yuejiao, a former Appellate Body member of the WTO, while it is desirable to establish an appellate mechanism in ISDS, it will be more difficult than establishing the Appellate Body in the WTO. In her view, a reason for the establishment of an ISDS appellate mechanism is to correct manifest legal errors in ISDS arbitral awards. She also considers that it is much less difficult to modify the existing annulment ad hoc committee system within ICSID or create a new Appellate Body within ICSID than establishing a new Appellate Body



platform with demonstrated track-record in handling ISDS disputes<sup>87</sup>, we can model upon the annulment procedure to devise an appellate mechanism which reviews not only the procedural integrity of the arbitration, but also any error of law in the arbitral awards. In fact, the Panel of Arbitrators, from which the Chairman of the Administrative Council appoints the members of the *ad hoc* Committee for the annulment procedure of ICSID<sup>88</sup>, can readily serve as a pool of diversified, experienced and knowledgeable adjudicators for the ISDS appellate mechanism.

(x) Multilateral Investment Court – A Revolutionary Option?

81. In respect of the possible structural reform options for ISDS, the Multilateral Investment Court (“MIC”) proposal has attracted much discussion in the current debate.
82. In the words of Judge Charles Brower, the “MIC” can be monstrous, called “*The Fifteen-Headed Hydra*”<sup>89</sup>. His greatest concern over the “MIC” proposal is that it would take away party appointment and result in re-politicization of international investment disputes<sup>90</sup>, which are the very elements that make ISDS work in the very first place.
83. Party appointment is the second tenet of arbitration and a reflection of the principle of party autonomy in arbitration. As observed by Judge James Crawford, the elimination of party appointment for investors under the “MIC”

---

mechanism from scratch in other international forums. (See Zhang Yuejiao, “*Whether an Appeal Mechanism for ISDS is Desirable and Practicable in the Light of the Experience of the WTO Appellate Body and ICSID*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 129 – 143, at pp.140 – 142).

<sup>87</sup> According to the statistics on known treaty-based ISDS cases (as of July 2019) available on UNCTAD’s Investment Policy Hub (<https://investmentpolicy.unctad.org/investment-dispute-settlement>), 62.6% of the 983 known treaty-based ISDS cases were administered by ICSID.

<sup>88</sup> See Article 52 of the ICSID Convention.

<sup>89</sup> Charles Brower and Jawad Ahmad, “*From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*”, 41 Fordham International Law Journal 791 (2018).

<sup>90</sup> Charles Brower and Sadie Blanchard, “*What’s in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*” (1 December 2014). Columbia Journal of Transnational Law, Vol. 52, 2014, 689 – 779. See also Brigitte Stern, “*To Examine the Desirability (or Undesirability) of Replacing Ad Hoc Arbitrator by Full-Time Judges*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 190 – 201.

proposal would further limit the pool of adjudicators<sup>91</sup> and aggravate the concern over the lack of diversity of adjudicators<sup>92</sup>. He also seemed to be concerned that the “MIC” proposal will be biased towards States<sup>93</sup>.

84. At the end of the day, investors are practical and business-savvy. In the Alexander Lecture in 2013, Judge Charles Brower coined the term “*investomercial arbitration*” to describe any third-party mechanism, whether contractual or treaty-based, for the settlement of disputes between foreign investors and host States as a “*hybrid*” phenomenon that escapes the strict public-private and domestic-international dichotomies<sup>94</sup>.
85. With the “*investomercial arbitration*” concept in mind, some are concerned that<sup>95</sup> moving to the “MIC” will only leave a gap in the system, resulting in multinational corporations with strong bargaining power opting for entering into investment contracts instead with the host jurisdictions, which contain international arbitration mechanism that is similar to the current ISDS regime<sup>96</sup>, but with less safeguards and less transparency, and SMEs being practically excluded from effective dispute resolution process for investment disputes.

---

<sup>91</sup> James Crawford, “*The Ideal Arbitrator: Does One Size Fit All*”, 32 Am. U. Int’l L. Rev. 1003 (2017), at pp. 1018 - 1022. See also Karl-Heinz Böckstiegel, “*The Future of International Investment Law – Substantive Protection and Dispute Settlement*”, in Bungenberg, et al. (eds), “*International Investment Law – A Handbook*” (2015) (C.HBECK, Hart and Nomos) pp. 1863 – 1872, at p.1870), and Global Arbitration Review, “*Schwebel criticizes EU act of ‘appeasement’*” (24 May 2016) and Global Arbitration Review, “*Fortier on the cola wars*” (18 October 2019).

<sup>92</sup> Brigitte Stern, “*To Examine the Desirability (or Undesirability) of Replacing Ad Hoc Arbitrator by Full-Time Judges*”, Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward, (Asian Academy of International Law) pp. 190 – 201, at p.199.

<sup>93</sup> James Crawford, “*The Ideal Arbitrator: Does One Size Fit All*”, 32 Am. U. Int’l L. Rev. 1003 (2017), at pp. 1018 - 1022.

<sup>94</sup> See Charles Brower and Shashank P Kumar, “*Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It*”, ICSID Review, Vol. 30, No. 1 (2015), pp. 35–55, at p.36.

<sup>95</sup> Charles Brower, “*State Parties in Contract-based Arbitration – Origins, Problems, and Prospects of Private-Public Arbitration*” (2019), available at <https://www.ita-review.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html>. See also Global Arbitration Review, “*Veeder and van den Berg on the future of investment arbitration*” (11 April 2019) and Global Arbitration Review, “*Nassib Ziadé on ‘Do we need a permanent investment court’*” (13 February 2019).

<sup>96</sup> Charles Brower considers that it is an absolute fallacy – a false trichotomy – to consider that there are clean borders separating commercial arbitration, treaty-based investor-state arbitration and inter-state forms of dispute resolution involving foreign investments. In his view, what matters is not the stage on which the dispute is played out, but rather the competing private and public interests at stake (see Charles Brower, “*State Parties in Contract-based Arbitration – Origins, Problems, and Prospects of Private-Public Arbitration*” (2019), available at <https://www.ita-review.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html>).

86. On the one hand, critics are not appeased by the “MIC” proposal<sup>97</sup> and continue to see it as “ISDS in disguise”<sup>98</sup>, while the users of the regime feel that the “MIC” proposal is one that “throws the baby out with the bathwater”<sup>99</sup>. In such circumstances, we may wish to thoroughly consider whether the “MIC” proposal is indeed a revolution at all<sup>100</sup>.

**(2) The Second Strand of the “Double Helix” Approach – Promoting the Use of Investment Mediation to Give ISDS a New Life and New Look**

87. In this regard, we should perhaps “think outside the box”. As the second strand of the “double helix” approach, promoting the greater use of investment mediation can potentially enrich the practice of ISDS by giving it a new look and new life, in particular when investment mediation is already an option that has enjoyed much consensus among States<sup>101</sup>.

---

<sup>97</sup> M. Sornarajah, “An International Investment Court: panacea or purgatory”, August 2016, available at <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf>.

<sup>98</sup> Red Carpet Courts, “Still rolling out the red carpet: The EU’s ISDS push for VIP corporate privileges” (June 2019), available at <http://10isdstories.org/eu-isds-push/>.

<sup>99</sup> Charles Brower and Jawad Ahmad, “From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court”, 41 Fordham International Law Journal 791 (2018) See also Charles Brower and Jawad Ahmad, “Why the ‘Demolition Derby’ That Seeks to Destroy Investor-State Arbitration?”, 91 S. Cal. L. Rev. 1140 (2018), and CIArb, “Evolution not Revolution: CIArb sets out its approach to the question of ISDS reform”, 14 February 2019, available at <https://ciarb.org/news/evolution-not-revolution-ciarb-sets-out-its-approach-to-the-question-of-isds-reform/>.

<sup>100</sup> In fact, the concept of an investment court is not new. During the previous negotiations for the multilateral investment agreement under the OECD, while Norway has put forward a proposal to establish an international investment tribunal, the negotiators did not consider such proposal as a viable alternative to investment arbitration (See Walid Ben Hamida, “The First Arab Investment Court Decision”, Journal of World Investment Trade, 7(5), 699-722, at p.699). One of the rare examples of investment courts is the Arab Investment Court established under the Unified Agreement for the Investment of Arab Capital in the Arab States (“Unified Agreement”). The Arab Investment Court has compulsory jurisdiction over investment disputes between investors and the host States arising under the Unified Agreement. However, such compulsory jurisdiction is secondary in the sense that recourse to the Court is only allowed if disputing parties fail to agree to submit it to conciliation or arbitration, if the conciliator fails to reconcile the parties or if the arbitrator(s) fail to make a ruling within the specified period. (See John Gaffney, “The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court”, (29 August 2016), available at <http://ccsi.columbia.edu/files/2013/10/Perspective-Gaffney-Final-Formatted.pdf>). It should be noted that while the Arab Investment Court was established in 1985, it only became operational in 2003 (See Walid Ben Hamida, “The First Arab Investment Court Decision” Journal of World Investment Trade, 7(5), 699-722, at p.700). It has also been reported that despite the existence of the Arab Investment Court, an Oman investor opted for making an investment arbitration claim against the Republic of Yemen to an ICSID tribunal in 2006 (*Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No.ARB/05/17) (See Ning Hongling and Qi Tong, “A Chinese Perspective on the Investment Court System in the Context of Negotiating EU-China BIT”, 11 Tsinghua China L. Rev. 91 (2018), 91 – 127, at footnote 134).

<sup>101</sup> See e.g. UNCITRAL, “Submission from the Government of China on the possible reform of investor-State dispute settlement” (19 July 2019, A/CN.9/WG.III/WP.177), available at

88. While investment mediation is not a “*panacea*” that can address all the concerns, as compared with investment arbitration, it does offer some unique benefits such as providing host jurisdictions and foreign investors with a high degree of autonomy, flexibility, and creative, forward-looking and consensual settlement arrangements in resolving investment disputes and preserving the long term relationships between the disputing parties<sup>102</sup>. Investment mediation emphasizes harmony and can avoid creating arbitral awards that may be seen by some as politically unacceptable or intrusion into the regulatory sovereignty of host jurisdictions. Given the consensual nature of mediated settlement agreements, the disputing parties will most likely comply with such agreements voluntarily, thus potentially saving the cost and resources required in post-award procedures such as annulment, setting-aside and enforcement proceedings<sup>103</sup>. Certainly, there is ample room for mediation and arbitration to work hand-in-hand as a complementary hybrid procedure such as Med-Arb, Arb-Med-Arb and even concurrent shadow mediators procedure as advocated by experts such as Professor Jack Coe of the Pepperdine Law School<sup>104</sup>.

(i) *CEPA Investment Mediation Rules as a Potential Model Protocol*

89. I would like to share with you the innovation in the Investment Agreement<sup>105</sup>

---

<https://undocs.org/en/A/CN.9/WG.III/WP.177>; “Submission from the Governments of Chile, Israel, Japan, Mexico and Peru” (2 October 2019, A/CN.9/WG.III/WP.182), available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp\\_182\\_chile\\_and\\_others .pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_182_chile_and_others.pdf); “Submission from the European Union and its Member States on the possible reform of investor-State dispute settlement” (24 January 2019, A/CN.9/WG.III/WP.159/Add.1), available at <https://undocs.org/A/CN.9/WG.III/WP.159/Add.1>; “Submission from the Government of Thailand on the possible reform of investor-State dispute settlement” (8 March 2019, A/CN.9/WG.III/WP.162), available at <https://undocs.org/A/CN.9/WG.III/WP.162>; “Submission from the Government of South Africa on the possible reform of investor-State dispute settlement” (17 July 2019, A/CN.9/WG.III/WP.176), available at <https://undocs.org/A/CN.9/WG.III/WP.176>; and “Submission from the Government of Indonesia on the possible reform of investor-State dispute settlement” (9 November 2018, A/CN.9/WG.III/WP.156), available at <https://undocs.org/A/CN.9/WG.III/WP.156>.

<sup>102</sup> UNCTAD, “*Investor-State Disputes: Prevention and Alternatives to Arbitration*”, (2010). See also E. Sussman, “*The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*”, *Journal of Transnational Dispute Management*, Vol.11, No.1, January 2014.

<sup>103</sup> E. Sussman, “*The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*”, *Journal of Transnational Dispute Management*, Vol.11, No.1, January 2014, at p.8.

<sup>104</sup> See the discussion on the different types of arbitration-mediation hybrid procedure in David Ng, “*Investment Mediation*”, *Proceedings of ISDS Reform Conference 2019 – Mapping the Way Forward*, (Asian Academy of International Law) pp. 290 – 338, at pp. 326 – 332.

<sup>105</sup> The CEPA Investment Agreement is available at

under the framework of the Closer Economic Partnership Arrangement (“CEPA”) concluded between Mainland China and Hong Kong. While the CEPA Investment Agreement is an arrangement within one country, it contains provisions such as fair and equitable treatment and prohibition against illegal expropriation that are commonly found in modern international investment agreements.

90. Investment mediation is the only available detailed mechanism for resolving investment disputes under the CEPA Investment Agreement<sup>106</sup>. Should mediation fail to resolve the dispute, the disputing parties may resort to litigation in courts.
91. The CEPA Hong Kong Investment Mediation Rules<sup>107</sup> set out a basic framework for the disputing parties to work on and leave ample room for them to customize the mediation process in light of their preference and the nature of the dispute<sup>108</sup>. Under such Rules, the disputing parties may, in accordance with the principle of voluntary participation, choose whether to participate in or to withdraw from mediation, and the disputing parties are required to cooperate with the mediators and each other in good faith and to participate in the mediation actively so as to advance the mediation expeditiously and efficiently<sup>109</sup>.
92. A distinguishing feature of the CEPA Hong Kong Investment Mediation Rules is that the default position is for a mediation commission consisting of three mediators<sup>110</sup>, which is similar to the party appointment mechanism in investment arbitration.
93. In this regard, the CEPA Investment Agreement requires that mediators shall have attained the relevant qualifications in mediation, and shall have

---

<https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html>.

<sup>106</sup> See Articles 19 and 20 of the CEPA Investment Agreement.

<sup>107</sup> The texts of the CEPA Mediation Mechanism and the CEPA Hong Kong Investment Mediation Rules are available at <https://www.tid.gov.hk/english/cepa/investment/mediation.html>.

<sup>108</sup> Under Article 1(2) of the CEPA Hong Kong Investment Mediation Rules, it is provided that save for certain fundamental provisions, the disputing parties may agree to exclude or vary any of the Rules.

<sup>109</sup> See Article 3 of the CEPA Hong Kong Investment Mediation Rules.

<sup>110</sup> See Article 5(1) of the CEPA Hong Kong Investment Mediation Rules.

professional knowledge and experience in the fields of cross-border or international trade and investment and law<sup>111</sup>.

94. A sophisticated code of conduct of mediators is provided under the CEPA Hong Kong Investment Mediation Rules<sup>112</sup> to ensure their independence and impartiality.
95. To nurture talents to take up the role of qualified mediators for investment disputes, the Department of Justice has been a pioneer in Asia in partnering up with the Asian Academy of International Law, ICSID, the Centre for Effective Dispute Resolution and Energy Charter Treaty to provide capacity building and professional training.
96. With the three-member mediation commission model and robust qualification requirements on mediators, the CEPA Hong Kong Investment Mediation Rules allow a greater diversity of mediators in terms of linguistics, cultural and technical backgrounds to collaborate in the process<sup>113</sup>, potentially creating a

---

<sup>111</sup> See para. 1.6 of the CEPA Mediation Mechanism.

<sup>112</sup> Article 7(1) of the CEPA Hong Kong Investment Mediation Rules provides that each mediator shall be independent and impartial and shall mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.

Under Article 7(3) of the CEPA Hong Kong Investment Mediation Rules, mediators are required to avoid their performance from being affected by their own financial, business, professional, family or social relationships or responsibilities.

Moreover, according to Article 7(4) of the CEPA Hong Kong Investment Mediation Rules, unless otherwise agreed by the disputing parties, by accepting an appointment as mediator of a dispute under the CEPA Investment Agreement, the mediator is deemed to agree not to act in any other role (including but not limited to counsel, arbitrator, expert or witness) in respect of: (i) any differences or disputes which are the subject of the mediation; or (ii) any other differences or disputes in which a party is involved as a disputant pending the resolution of the dispute in mediation.

Furthermore, Article 7(6) of the CEPA Hong Kong Investment Mediation Rules requires that if the disputing parties are unable to resolve the dispute through mediation, the mediators who were appointed to conduct the mediation shall not be appointed as judge, arbitrator, agent or legal adviser of any disputing party in any subsequent proceedings (including litigation and arbitration proceedings) of the same or related dispute, unless the disputing parties otherwise agree.

Article 7(5) of the CEPA Hong Kong Investment Mediation Rules also requires that, if, during the course of the mediation, a mediator becomes aware of any facts or circumstances that may call into question the mediator's independence or impartiality in the eyes of the parties, the mediator is required under the CEPA Hong Kong Investment Mediation Rules to disclose those facts or circumstances to the parties in writing without delay.

<sup>113</sup> In terms of the mediation process, the CEPA Hong Kong Investment Mediation Rules seek to ensure efficiency by introducing the mechanism of mediation management conference (See Article 9 of the CEPA Hong Kong Investment Mediation Rules).

greater balance in the team and facilitating the “*brain-storming*” of creative settlement arrangements, which may include but are not limited to the grant or renewal of a license and the swapping of deals for other types of investment contracts or obligations<sup>114</sup>.

97. The CEPA Investment Agreement also provides flexibility in the confidentiality obligation to accommodate the needs and policies of host governments on transparency in ISDS and public disclosure for individual cases<sup>115</sup>. In this regard, the default position under the CEPA Hong Kong Investment Mediation Rules provide that the confidentiality obligation shall not extend to the fact that the disputing parties have agreed to mediate or a settlement has been reached from the mediation<sup>116</sup>.
98. Indeed, the CEPA Mediation Rules can serve as a template protocol for incorporation into international investment agreements or even for structuring a multi-tiered dispute resolution process such as “*mediation first, arbitration next*”.
99. The “*mediation first, arbitration next*” structure also echoes with a useful suggestion made in the CIArb’s discussion papers for UNCITRAL Working Group III of mandating disputing parties to attempt mediation before filing a claim in ISDS.

---

<sup>114</sup> According to Article 12(2) of the CEPA Hong Kong Investment Mediation Rules, the solutions under the mediated settlement agreement shall be confined to the following: (i) monetary compensation and any applicable interest; (ii) restitution of property or monetary compensation and any applicable interest in lieu of restitution of property; and (iii) other legitimate means of compensation agreed upon by the Parties. Such legitimate means of compensation may include a wide variety of non-monetary remedies, such as: (i) provision of a different location or project for the investment as an alternative compensation for the denial of a permit or license to operate a particular investment; (ii) re-negotiation of the terms of a concession project; (iii) re-evaluation of the return of a project and provisions of additional guarantees or sources of revenue; and (iv) self-assessments and reappraisals by governments of problematic measures they have enacted (See UNCTAD, “*Investor-State Disputes: Prevention and Alternatives to Arbitration*”, (2010), see p.32).

<sup>115</sup> Jack J. Coe, Jr, “*Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*”, Journal of Transnational Dispute Management, Vol.4, No.1, February 2007, see pp.27 and 40. For example, in the standard contract of the Government of the Hong Kong Special Administrative Region, it is provided that the Government may disclose the outline of any terms of settlement for which a settlement agreement has been reached with the contractor or the outcome of the arbitration or any other means of resolution of dispute to the Public Accounts Committee of the Legislative Council upon its request.

<sup>116</sup> See Article 11(4)(a) of the CEPA Hong Kong Investment Mediation Rules. Pursuant to Article 11(4)(b)(i) of the CEPA Hong Kong Investment Mediation Rules, the confidentiality obligation does not apply where the disclosure of mediation communication is agreed by the disputing parties and the mediation commission, and for such purposes as approved by them.

100. To take the idea a step further, we may even render the initiation of the mediation automatic in order to address the concern over the perception that the making of an invitation to mediation by a disputing party may be interpreted as a sign of weakness<sup>117</sup>.

**(VI) Looking Forward – “Evolution, Not Revolution” Is the Path to Find Order within Chaos**

101. The evolution of ISDS is going to be a long-term and gradual process that requires collaboration and efforts of all the stakeholders.
102. Nevertheless, the key to decipher the order of the current chaotic picture of ISDS reform is always there waiting to be discovered. The key, as revealed by the history of ISDS, has always been the need for a peaceful, depoliticized and rule of law-based dispute resolution mechanism that has the trust of both host jurisdictions and foreign investors in resolving international investment disputes.
103. Evolution along the historical trajectory of ISDS, but not system-overhauling revolution, is the path to find order within chaos.
104. There is a Chinese saying that “*in every crisis, there lies an opportunity*”. The legitimacy crisis faced by the ISDS may present an opportunity to enrich its practice by capitalizing on the strength of investment mediation to synergize with the practice of investment arbitration while exploring the use of a well-balanced ISDS appellate mechanism to achieve the higher standard of legitimacy expected of ISDS.

---

<sup>117</sup> Jack J. Coe, Jr, “*Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*”, Journal of Transnational Dispute Management, Vol.4, No.1, February 2007, at footnote 129.