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VIRTUAL PRE-INTERSESSIONAL
MEETING

9 NOV 2020
Hong Kong SAR, China

The Use of
Mediation
in ISDS



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Proceedings

of

**2020 UNCITRAL Working Group III
Virtual Pre-Intersessional Meeting**

The Use of Mediation in ISDS

ORGANISERS

United Nations Commission on International Trade Law

Department of Justice, The Government of the Hong Kong
Special Administrative Region of the People's Republic of China

Asian Academy of International Law

TABLE OF CONTENTS

INTRODUCTION OF ORGANISERS X

United Nations Commission on International Trade Law
 Department of Justice, The Government of the
 Hong Kong Special Administrative Region
 Asian Academy of International Law

OPENING CEREMONY

Li Yongjie <i>Director-General, Department of Treaty and Law, Ministry of Commerce, People's Republic of China</i>	02
Anna Joubin-Bret <i>The Secretary, United Nations Commission on International Trade Law</i>	04

SESSION I: OVERCOMING CHALLENGES TO THE USE OF MEDIATION IN ISDS

Background Paper by

Adrian Lai <i>Deputy Secretary General, Asian Academy of International Law</i>	10
Matthew Suen <i>Regional Representative, The Greater China Region, Moot Alumni Association, Willem C. Vis International Commercial Arbitration Moot</i>	11

Moderator:

Shane Spelliscy <i>Chair, UNCITRAL Working Group III General Counsel and Director, Investment and Services Law, Global Affairs Canada</i>	76
--	----

Panellists:

Justin D'Agostino 77
CEO, Herbert Smith Freehills

Meg Kinnear 88
Secretary-General, International Centre for Settlement of Investment Disputes

Jaemin Lee 102
Representative, Korean Delegation
Professor, School of Law, Seoul National University, Korea

Mairée Uran Bidegain 113
Head, Program for the Defense of the State in International Investment Arbitration, Vice-Ministry of Trade, Ministry of Foreign Affairs, Chile

SESSION II: MULTI-TIERED DISPUTE RESOLUTION PROCESS (MEDIATION PROTOCOL)

Background Paper by

Iu Ting-kwok MH 128
Founder, Asia Conflict Resolution Institute

Andy Kwok 129
Accredited General Mediator, Hong Kong Mediation Accreditation Association Limited

Moderator:

Anthony Neoh QC SC JP 168
Chairman, Asian Academy of International Law

Panellists:

Wolf von Kumberg 169
International Mediator and Arbitrator

Jack J. Coe Jr. 180
Professor of Law, Caruso School of Law, Pepperdine University, USA

Ronald Sum 204
Head of Dispute Resolution (Asia), Addleshaw Goddard LLP

SESSION III: HYBRID MODELS FOR RESOLVING INTERNATIONAL INVESTMENT DISPUTES

Background Paper by

- Dini Sejko 234
*Research Associate, Centre for Comparative and Transnational Law,
Faculty of Law, The Chinese University of Hong Kong*

Moderator:

- Natalie Morris-Sharma 258
*Rapporteur, UNCITRAL Working Group III
Government Legal Counsel, Attorney-General's Chambers, Singapore*

Panellists:

- Barton Legum 259
Partner, Global Co-Chair, Litigation and Dispute Resolution, Dentons
- Francis Xavier SC 267
President, Chartered Institute of Arbitrators
- Cao Lijun 277
Partner, Zhong Lun Law Firm
- Blanca Salas-Ferrer 294
Legal Officer, Directorate-General for Trade of the European Commission
- Hi-Taek Shin 305
*Professor of Law (Emeritus), School of Law, Seoul National University,
Korea*

SESSION IV: THE WAY FORWARD FOR MEDIATION AS A REFORM OPTION FOR ISDS

Background Paper by

- David Ng 318
*Senior Government Counsel (Treaties & Law), Department of Justice of
the Hong Kong Special Administrative Region of the People's Republic of China*

Moderator:

Anna Joubin-Bret 382
The Secretary, United Nations Commission on International Trade Law

Panellists:

Alejandro Carballo-Leyda 383
General Counsel and Head of Conflict Resolution Centre, International Energy Charter

Charlie Garnjana-Goonchorn 390
Counsellor, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand

Dinay Reetoo 400
Acting Assistant Parliamentary Counsel, Attorney-General's Office, Mauritius

CLOSING REMARKS

Teresa Cheng GBS SC JP 424
Secretary for Justice, Hong Kong Special Administrative Region of the People's Republic of China

EVENT PROGRAMME 432

ORGANISERS



United Nations
UNCITRAL

United Nations Commission on International Trade Law

<https://uncitral.un.org/>

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. A legal body specialising in commercial law reform worldwide for over 50 years, UNCITRAL is dedicated to the modernisation and harmonisation of rules on international business. Amongst its various working groups, UNCITRAL Working Group III currently focuses on investor-State dispute settlement (ISDS) reform and is tasked with identifying concerns and considering recommendations to enhance the ISDS mechanisms.



Department of Justice
The Government of the Hong Kong
Special Administrative Region

Department of Justice

**The Government of the Hong Kong Special Administrative
Region of the People's Republic of China**

<https://www.doj.gov.hk>

The Department of Justice's vision is to advance the rule of law and access to justice, through effective, efficient and equitable administration of justice and strategic legal policy, for inclusive and sustainable development. As its mission, the Department of Justice has pledged to: strengthen the community's understanding and practice of the rule of law; act as a guardian of public interest; adhere to its independent role of conducting criminal prosecutions free from any interference; provide independent and professional legal

advice to the Government; prepare clear, intelligible and accessible legislation; as well as enhance and promote the Hong Kong SAR's status as an international legal hub for legal, deal-making and dispute resolution services. Since 2017, the representatives of the Department of Justice have, pursuant to the 'One Country, Two Systems' policy and the Basic Law, participated in the work of UNCITRAL Working Group III as members of the Chinese delegation.



Asian Academy of International Law

<https://aail.org>

The Asian Academy of International Law (the Academy) is an independent and registered charitable body set up in Hong Kong to further the studies, research and development of international law in Asia. By organising seminars, workshops and specialised courses, the Academy aims to enhance and reinforce Asia's role and participation in the formulation of international law and international relations. In addition to promoting capacity building among Asian countries, the Academy also endeavours to facilitate collaboration among practitioners and academics. Since 2018, the Academy has been attending sessions of UNCITRAL Working Group III as an observer.

OPENING REMARKS

Opening Remarks



Li Yongjie

Director-General

Department of Treaty and Law, Ministry of Commerce,
People's Republic of China

Ms Li Yongjie is currently the Director-General of the Department of Treaty and Law of the Ministry of Commerce of China. In this capacity, she is responsible for World Trade Organisation (WTO) dispute settlement, investment agreement negotiations, investor-State dispute settlement, and legislations relating to investment, trade, and international economic cooperation. By representing China, Ms Li has been engaged in bilateral investment agreement negotiations with major trading partners. She also has extensive experience in WTO dispute settlement and has handled a number of investment disputes. Ms Li studied at Beijing Foreign Studies University, University of International Business and Economics, and American University.

Starting from 2017, Member States of the United Nations Commission on International Trade Law (UNCITRAL) initiated discussions on potential reform of the investor-State dispute settlement (ISDS) mechanism. On the one hand, the system plays an important role in protecting the rights of investors and promoting cross-border investments. On the other hand, the system has been criticised on a number of fronts, including even for a lack of legitimacy. During the three years of discussion within the UNCITRAL Working Group, Member States identified certain systemic issues for remediation, such as the lack of a corrective mechanism, the lack of a code of conduct for arbitrators, as well as the problem of widespread unjustified inconsistencies. However, the three-year discussion also showed several diversified and significantly differing views on the priorities and options for reform. In China's view, the main reason for the shortcomings of the system is that the original design of the arbitration mechanism is not purpose-fit since it does not attach to the nature of the said proceedings, which should be related to public international law rather than commercial law. The Chinese government supports structural reform of the ISDS system and submitted its proposal for reform last year. Now, coming to the topic of today, which is mediation.

Mediation is supposed to provide the investor and the host State with a high degree of flexibility and is conducive to achieving a win-win situation that facilitates long-term relations. However, at the same time, we should also take note of the fact that while there are quite a number of international arbitration institutional mechanisms that have detailed mediation procedures, there have been very few cases in practice. So, what is the reason that is preventing parties to a dispute from using mediation as an efficient and effective mechanism to resolve their differences? What are productive ways to address the concerns regarding the use of mediation to resolve disputes, especially in a situation where one party to the dispute is a government entity. All these questions and issues should be carefully examined and discussed. Today's meeting shall provide a unique opportunity to exchange views and ideas.

Opening Remarks



Anna Joubin-Bret

The Secretary

United Nations Commission on International Trade Law

Ms Anna Joubin-Bret is the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) and the Director of the International Trade Law Division in the Office of Legal Affairs of the United Nations, which functions as the substantive secretariat for UNCITRAL. She is the 9th Secretary of the Commission since it was established by the United Nations General Assembly in 1966. Prior to her appointment on 24 November 2017, Ms Joubin-Bret practiced law in Paris, specialising in International Investment Law and Investment Dispute Resolution. She focused on serving as counsel, arbitrator, mediator and conciliator in international investment disputes. She served as arbitrator in several International Centre for Settlement of Investment Disputes (ICSID), UNCITRAL and International Chamber of Commerce (ICC) disputes. Prior to 2011 and for 15 years, Ms Joubin-Bret was the Senior Legal Adviser for the United Nations Conference on Trade and Development (UNCTAD). She edited and authored seminal research and publications on international investment law, notably the Sequels to UNCTAD IIA Series, and co-edited with Jean Kalicki a book titled *Reshaping the Investor-State Dispute Settlement System* in 2015. Ms Joubin-Bret holds a postgraduate degree (DEA) in Private International Law from the University of Paris I Panthéon-Sorbonne, a Master's Degree in International Economic Law from the University of Paris I and in Political Science from Institut d'Etudes Politiques. She was Legal Counsel in the legal department of the Schneider Group, General Counsel of the KIS Group and Director-Export of Pomagalski S.A. She was appointed judge at the Commercial Court in Grenoble (France) and was elected Regional Counsellor of the Rhône-Alpes Region in 1998.

As part of the work on investor-State dispute settlement (ISDS) reform, the United Nations Commission on International Trade Law (UNCITRAL) has hosted intersessional meetings in Korea, in the Dominican Republic and in Guinea over the past couple of years. These meetings were crucial in raising awareness about the issues being considered by UNCITRAL Working Group III and for sharing regional perspectives. As the Working Group entered into the third phase of its work, the objectives of these intersessional meetings hosted by interested States have changed to become more focused on developing reform options being considered by the Working Group. The intersessional meeting on the use of mediation in ISDS hosted by the People's Republic of China in Hong Kong, originally in June 2020, was supposed to be the first of that kind.

Now, as we all know, the current circumstances brought about by the ongoing COVID-19 pandemic has changed our methods of work. We had the first hybrid meeting of Working Group III in October 2020 on a video platform with interpretation provided in the six UN languages. We had numerous webinars on a wide range of reform options on Zoom, hosted with, among others, the Academic Forum. You were all invited to informal consultations on the resource requirements of the Working Group on Teams, and thus we are here together to participate in the first virtual meeting wherever you are around the globe. As the Hong Kong Special Administrative Region of China would like to invite all of you to an in-person intersessional meeting next year, we have decided to call this a pre-intersessional meeting, i.e. a gathering to share our perspectives on investment mediation till we meet again in person in this beautiful harbour, the fragrant harbour of Hong Kong.

As many of you know, the use of mediation in ISDS was discussed during the Working Group session held in October 2020. There was general interest in working on mediation and other forms of alternative dispute resolution (ADR) – ADR here being an alternative to arbitration, with a view to ensure that such mechanisms could be more effectively used in ISDS. It was observed that ADR methods are still largely underutilised in ISDS and that there was a need to address

structural, legislative and policy impediments faced by governments on their use. On the way forward, the Working Group requested the Secretariat to prepare model clauses reflecting best practices on the amicable settlement period to make good use of what is still called a cooling-off period but which should definitely become a period that enables and is conducive to mediation. The Working Group also asked the Secretariat, in doing so, to compile guidelines or recommendations on how to use such a period more effectively. Furthermore, as a matter of information-sharing, capacity-building and awareness-raising, the Secretariat was requested to prepare guidelines and best practices for participants in ISDS mediation, covering matters such as the organisational aspects that States might want to consider at the national level to minimise structural policy impediments, the representation of the public interest in mediation, the setting up of a list or roster of qualified mediators in the field of ISDS. Lastly, the Secretariat was requested to work with interested organisations, such as our colleagues and friends from the International Centre for Settlement of Investment Disputes (ICSID), to develop or adapt rules on mediation in the ISDS context, as well as model clauses that could then be used in investment treaties or in a potential multilateral instrument on ISDS reform that would apply to the existing treaties. So, we do have quite a lot of work ahead of us.

But it is not as if we have to start afresh. Groundwork has already been done. As you know, the Singapore Convention on Mediation entered into force last September. With six State Parties who have ratified the Convention and 53 signatory States, including China, the success achieved thus far is truly extraordinary. And the entry into force of the Convention, which occurred just a little over one year after it opened for signature is also truly remarkable. The growing interest in mediation, fuelled by the Singapore Convention, will no doubt assist in our endeavour to promote mediation in the context of ISDS. In conjunction, the Commission is expected to adopt the revised set of rules on mediation as well as guidance notes for the mediation process at its next session in 2021, which would also be relevant and timely.

Let me conclude by reminding you that the United Nations General Assembly has recognised that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties, and producing savings in the administration of justice for States. Promoting the use of mediation in international trade and investment facilitates the resolution of conflicts without going through formal and sometimes lengthy and costly adjudication procedures. This fits perfectly with all the topics that the panellists will be discussing today. The discussion will not only contribute to the Secretariat's preparatory work on the topic but also pave the way for the discussions to be held at the Working Group and hopefully soon at an intersessional meeting that will be held in person. I look forward to a fruitful exchange of views and I wish you very fruitful deliberations.

SESSION I:

Overcoming Challenges to the
Use of Mediation in ISDS

BACKGROUND PAPER

Writer



Adrian Lai

Deputy Secretary General

Asian Academy of International Law

Adrian is a practising barrister in Hong Kong; he is also a Certified Public Accountant of Hong Kong and holds the specialist qualification in insolvency matters. Adrian maintains a predominantly civil practice and has been engaged as Counsel on matters relating to arbitration, banking, commercial, company, construction, professional accountants/auditors' negligence and professional disciplinary proceedings. Through practice, Adrian has developed a wealth of experience and expertise on arbitration matters. He is on the Panel of Arbitrators of Hong Kong International Arbitration Centre and has been appointed as sole or co-arbitrator on international commercial arbitrations. Apart from sitting as an arbitrator, Adrian has been engaged as Counsel to advise or appear in international or domestic commercial arbitration, investor-State arbitration and State-State arbitration. Insofar as arbitration related litigations are concerned, he appeared as Counsel on important cases such as *FG Hemisphere v Congo*, *Pacific China Holdings v Grand Pacific Holdings*, *Shangdong Hongri v Petrochina Int'l*, *S v B, Re Inigma Technology*, *Gongbenhai v HKIAC* and *TNB v China National Coal*. He is often invited to speak on topical issues of arbitration. Adrian maintains an academic interest in international law. He graduated with a Master's degree in Public International Law and also attended The Hague Academy of International Law.

Writer



Matthew Suen

Regional Representative

The Greater China Region, Moot Alumni Association, Willem C. Vis International Commercial Arbitration Moot

Matthew Suen is pursuing his Master of Laws at Peking University, after having obtained his Bachelor of Laws and Postgraduate Certificate in Laws (Dist.) from The Chinese University of Hong Kong. His academic interest lies in Public and Private International Law, International Arbitration, investor-State dispute settlement (ISDS), Uniform Private Law, International Trade Law, etc. Academics aside, Matthew is also a keen supporter of the Willem C. Vis International Commercial Arbitration Moot. He is now serving as the Regional Representative for the Greater China Region of its Moot Alumni Association (MAA). Matthew is a member of the Asian Academy of International Law and has been invited to participate in research projects of the Academy such as this Background Paper and the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to the Hong Kong SAR.

Background Paper

I. Executive Summary

One can trace the history of mediation back to ancient history, and mediation is seen to be the bedrock of maintaining peace in civilised societies. It, broadly, refers to a process where the disputant parties attempt to reach an amicable settlement of the disputes with the intervention of a third party, who has no power to impose his/her own solution on the parties. Mediation is generally seen to be a less expensive, speedier, flexible and ‘face-saving’ option in which the disputant parties remain in the driver’s seat to determine the terms of resolution of the disputes. With these positive attributes, one would expect mediation should have been an obvious option to parties in the investor-State dispute context, particularly when such disputes usually involve complicated issues of facts and law.

Surprisingly, mediation has been seriously underutilised in the investor-State dispute settlement (ISDS) context and parties have quite often opted for arbitration as their primary means of dispute resolution (if bilateral negotiation fails). Such underutilisation was attributed to various reasons, including lack of familiarity with the process and, more ironically, the fear of adverse consequences falling on the participants if the dispute is settled by mediation! Yet, the increasingly expensive, time-consuming, confrontational and relatively unpredictable elements of the arbitration process have allowed mediation to be re-considered as an additional – if not an alternative – means to resolve investor-State disputes. This change is fuelled by development (or improvement) of the legal frameworks tailor-made for mediation in the ISDS context as well as extensive discussion in academia, the government sector and the private sector, including legal practitioners.

Mediation became a focal point at the recently held 39th session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. A general consensus has been

reached on fostering the use of mediation. The authors have identified some frequently quoted challenges reportedly contributing to the lack of use of mediation in the ISDS context, and they submit that none of these challenges is insurmountable. The authors, further, highlight the actions taken (or should be taken), both at the international and domestic levels, to make mediation a real option for the stakeholders. Amongst them, the authors submit that capacity-building and training is of paramount importance at this initial stage to (1) increase the stakeholders' knowledge and confidence in using mediation as an alternative dispute resolution (ADR) method; and (2) develop a large, strong and diversified pool of mediators.

II. Purpose of This Paper

1. This Background Paper is prepared to facilitate the discussion in the Session on 'Overcoming Challenges to the Use of Mediation in ISDS' at the Virtual Pre-Intersessional Meeting of Working Group III of UNCITRAL held on 9 November 2020.¹ It aims at providing the audience with the relevant information on (1) the phenomenon of the lack of use of mediation in the ISDS context; (2) the possible challenges to the use of mediation; (3) benefits of mediation; and (4) steps that have been, or can be, taken to make mediation a feasible option to ISDS stakeholders.

¹ The proposal for investment mediation being a topic for discussion at this Virtual Pre-Intersessional Meeting was noted by the Working Group at its resumed 38th session: *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eighth Session* (A/CN.9/1004/Add.1), para.136.

III. Mediation – An Awakened Form of Dispute Resolution

A. Mediation: Its Ancient Origin and Recent Revival

2. Mediation as a form of dispute resolution is ‘as ancient as human society itself’ and dates back to ‘the dawn of civilisation’ (as early as about 3000 BC in Egypt).² It has formed an ‘integral part’ of Chinese legal culture some 4,000 years ago, and is in keeping with different Chinese philosophies (such as Confucian values which stress ‘harmony’ and ‘conflict avoidance’).³ In modern times, these cultural values underpinning mediation being the preferred mode of conflict management still bear considerable significance in China’s legal system.⁴

3. Mediation is not unique to the Eastern world. For instance, mediation can be traced back to the 11th century or even earlier and it was very common in England. There, it appears that the Church instructed all Christians to avoid litigation and threatened those who did not agree to mediate with excommunication (an early form of mandatory mediation!). Legislation at the time of Henry I (1100–1135 AD) encouraged mediation, or ‘settlement by love’ as it was referred to, at least in relation to partnership disputes, and medieval English judges often adjourned cases to allow parties to mediate out their disputes.⁵

² Jack J. Coe Jr., ‘Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch’, *Journal of Transnational Dispute Management*, 4(1) (2007), p.8; Jeswald W. Salacuse, ‘Is There a Better Way? Alternative Method of Treaty-Based, Investor-State Dispute Resolution’, *Fordham International Law Journal*, 31(1) (2007) p.138, p.157; Jacob Bercovitch, ‘Introduction: Putting Mediation in Context’, in Jacob Bercovitch (ed.) *Studies in International Mediation: Essays in Honor of Jeffrey Z. Rubin* (New York, Palgrave Macmillan, 2002), p.4; Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (2nd ed.) (Kluwer Law International, 2006), p.177.

³ Fan Kun, *Arbitration in China: A Legal and Cultural Analysis* (Oxford/Portland, Hart Publishing, 2013), pp.194–203. Gabrielle Kaufmann-Kohler and Fan Kun, ‘Integrating Mediation into Arbitration: Why It Works in China’, *Journal of International Arbitration*, 25(4) (2008), p.479, p.480.

⁴ Wang Guiguo and He Xiaoli, ‘Mediation and International Investment: A Chinese Perspective’, *Maine Law Review*, 65(1) (2012), p.216, pp.221–225.

⁵ Lord Neuberger, ‘Keynote Address: A View from on High’, delivered at the Civil Mediation Conference 2015 on 12 May 2015, para.3.
Available at <https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf>

4. Moreover, the use of ‘non-adversarial amicable, and peaceful’ means of dispute resolution (closely connected to modern ‘mediation’) presided over ‘by chiefs, queen mothers, clan heads, family elders and communal leaders’, has ‘deep roots’ in African States and societies.⁶ While the question of whether Asian cultures may be (more) favourably disposed to mediation (as opposed to other adversarial procedures) may be a subject of positive analysis, there is scholarly opinion that mediation may actually find ‘cultural resonance’ across different legal traditions because it is, in fact, available in many parts of the world.⁷

5. That said, it may not be correct to assume that mediation has maintained a predominant role throughout history. For some reason, mediation at some point went into a ‘Rip van Winkle-like hibernation’ or ‘Sleeping Beauty-like sleep’ for centuries,⁸ and it is only in recent years that governments across the world have begun to embrace mediation as a viable alternative to domestic litigation.

B. Modern Mediation

6. *Mediation* can be defined as a method of dispute resolution in which a neutral third party (the mediator) assists the disputant parties in negotiating a settlement of their dispute, and agreeing upon the terms of such settlement.⁹ In the United Nations Convention on International Settlement Agreements Resulting from Mediation (the **United Nations Mediation Settlement Convention**),¹⁰ mediation refers to ‘a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the mediator) lacking the authority to impose a solution upon the parties to the dispute.’

⁶ Jacqueline Nolan-Haley, ‘Mediation and Access to Justice in Africa: Perspectives from Ghana’, *Harvard Negotiation Law Review*, 21 (2015), pp.61–62, p.97.

⁷ Christine Sim, ‘Conciliation of Investor-State Disputes’, *UNCITRAL Emergence Conference: Asian Perspectives on the Harmonisation and Convergence of Business Laws* (Conference Paper, 25 July 2018) pp.8–9.

⁸ Above n.5, Lord Neuberger, para.3.

⁹ Above n.2, Coe, p.15; Salacuse, p.154, p.173. Welsh and Schneider, ‘Becoming “Investor-State Mediation”’, *Penn State Journal of Law & International Affairs*, 1(1) (2012), p.86, p.89.

¹⁰ Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf

7. Thus, in essence, mediation is a ‘facilitated negotiation’.¹¹ On the one hand, it is similar to adjudicative methods in that mediation requires intervention by a third party (i.e. the mediator); on the other hand, it is distinctively different in that the mediator has no authority to impose his/her own solution on the parties. The hallmark of mediation is a voluntary, ‘collaborative process’,¹² in which the disputant parties ‘retain control of the outcome’ by reserving to themselves ‘their right to agree to or refuse a proposed settlement’.¹³

8. It is common usage to treat ‘conciliation’ and ‘mediation’ as interchangeable terms,¹⁴ not merely out of ‘convenience’ but because it is difficult to ‘discern an authentic distinction between the two in practice’.¹⁵ Scholarly writing has criticised the ‘lack of clarity’ in such a distinction.¹⁶ However, should ‘mediation’ be given a broad definition as set out in Paragraph 6 above, ‘conciliation’ should clearly be categorised as mediation.¹⁷

¹¹ Above n.2, Coe, p.14.

¹² Above n.2, Coe, p.15.

¹³ Above n.2, Salacuse, p.157.

¹⁴ In some scholarly writings the distinction between ‘mediation’ (narrowly defined) and other similar methods of dispute resolution (e.g. conciliation and good offices) is still maintained. The difference between these methods usually lies in the extent to which the disinterested third party (be it ‘mediator’ or ‘conciliator’) takes ‘active steps’ in securing a mutually agreeable compromise solution, see, for example, John G. Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (New York, Oxford University Press, 1999), p.27, p.29.

¹⁵ Above n. 2, Coe, p.14, footnote 29.

¹⁶ Edna Sussman, ‘The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes’, *Transnational Dispute Management*, 11(1) (2014), p.3.

¹⁷ Above n. 2. There have been academic attempts to assign different meanings to those terms, see, generally, J. M. Merrills, *International Dispute Settlement* (5th ed.) (Cambridge, Cambridge University Press, 2011), pp.26–40, pp.58–82. An evaluative, predictive approach of mediation (which may be characterised as a form of ‘non-binding arbitration’) has been given the label ‘conciliation’ in literature. See above n. 2, Salacuse, p.173. Further, the term ‘conciliation’ is more frequently used ‘in keeping with’ usages in the context of inter-State disputes, See above n.2, Coe, p.14, footnote 30.

9. While mediation can be pursued in ‘many styles’ and by a mediator ‘playing different roles’,¹⁸ among all styles or approaches, the two styles of mediation which are of greater popularity can be identified as (1) evaluative mediation, and (2) facilitative mediation.¹⁹ The major difference between these two styles lies in the *role* to be played by the mediator. In *evaluative mediation*, a mediator tends to perform ‘predictive’ functions by giving his evaluation or assessment of the rights and obligations of the parties at variance.²⁰ It takes a ‘right-based’ approach; it give the parties ‘a more realistic prediction’ of the eventual outcome of the contentious proceedings.²¹ Evaluative mediation has been said to resemble ‘a kind of non-binding arbitration’ because the mediator focuses ‘almost exclusively’ on the merits of the claim.²² In the context of investor-State conflicts, some arbitral institutions offer evaluative mediation services in the name of ‘conciliation’.²³ The International Centre for Settlement of Investment Disputes (ICSID) even provides a distinct set of rules for conciliation conducted under its auspices.²⁴ Despite the mediator’s authority to make an assessment on the merits and propose a solution, given the very nature of *mediation*, i.e. voluntary settlement, the mediator (conciliator) has no authority to impose his decision on the parties in any event.²⁵

¹⁸ Jack J. Coe Jr., ‘Chapter 4: Settlement of Investor-State Disputes Through Mediation – Preliminary Remarks on Processes, Problems and Prospects’ in R. Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (New York, JurisNet, LLC, 2009), p.86. For the different approaches in mediation, see, generally, Manon Schoneville and Fred Schonevill, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague, Eleven International Publishing, 2014).

¹⁹ Susan D. Franck, ‘Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide’, *ICSID Review*, 29(1) (2014), p.66, p.72. There are other styles of mediation such as ‘transformative’ (keeping the structure of the facilitative style but emphasising the need of each party to recognise the other party’s point of view); and ‘narrative’ style (helping the parties create a new ‘story’ where conflicts are replaced by agreements leading to resolution).

²⁰ Above n.2, Salacuse, p.173.

²¹ Above n.2, Salacuse, p.173.

²² Above n.2, Salacuse, p.173. Above n.2, Coe, p.16.

²³ Above n.2, Salacuse, p.172.

²⁴ ICSID, The Rules of Procedure for Conciliation Proceedings.
Available at <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>

²⁵ Above n.2, Salacuse, p.173.

10. On the other hand, *facilitative mediation* takes an ‘interest-based’ approach.²⁶ It focuses on the parties’ interests and objectives instead of the underlying dispute.²⁷ It is not ‘pleadings-intensive’ or ‘dependant on adducing full proofs’. The mediator’s task is to facilitate the parties’ agreeing on the terms of settlement by a variety of techniques, such as (1) identifying the parties’ common ground and shared objectives, and (2) (re)formulating, exploring the viability of, and thereafter passing-on the proposed solution emanating from a disputant party during ‘caucuses’ (a series of *ex parte* meetings with disputant parties).²⁸ Mediators are often required to eliminate the various barriers – psychological, strategic and structural – to a compromise.²⁹ Mediators often attempt to pursue ‘closeness with the parties’ to establish rapport, build confidence and encourage candour between them.³⁰ In facilitative mediation, it is not the mediator’s duty to give his opinion on the strengths of the parties’ respective cases.³¹

C. Mediation in Revival in Domestic Context

11. Litigation (and arbitration) have gained the floor as the primary means of dispute resolution while mediation is in its dormancy. According to Lord Neuberger, professional mediation – let alone compulsory mediation – was virtually unheard of in United Kingdom civil litigation when he was in private practice, and it only started regaining its long overdue attention in the mid-1990s.³²

12. However, professional mediation has grown up very quickly since its revival. It has been gaining an important role in resolving commercial disputes between private parties, and its use has been extended to other areas of disputes, such as family disputes. Indeed, some countries have mandated parties to attempt mediation before litigants refer their disputes to the Court or threatened to impose cost-based sanctions if a party refuses to mediate.

²⁶ Above n.19, Franck, p.73.

²⁷ Above n.19, Franck, p.73.

²⁸ Above n.2, Coe, p.15, footnote 39.

²⁹ Above n.2, Salacuse, p.173.

³⁰ Above n.18, Coe, p.85.

³¹ Above n.19, Franck, p.74.

³² Above n.5, Lord Neuberger, para.1.

D. Mediation in Inter-State Dispute Context

13. The place of third party intervention (broadly defined ‘mediation’) is well-established in the context of inter-State conflicts.³³ Such intervention is, as a matter of usage, further categorised into ‘conciliation’ (*evaluative mediation*), ‘mediation’ (*facilitative mediation*) and ‘good offices’, according to the form that such intervention takes.³⁴ These approaches to dispute resolution are considered to be interconnected.³⁵

14. At a treaty level, the use of ‘conciliation’ and ‘mediation’ (or like mechanisms) is unequivocally enumerated in the *Charter of the United Nations*. Its Article 33, Paragraph 1 provides that:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, *mediation*, *conciliation*, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.³⁶ (emphasis added)

Interestingly, upon a forensic, semantic analysis of the above sentence, *mediation* and *conciliation* are indeed placed before *arbitration* and *judicial settlement*, both of which are adjudicative methods of dispute resolution.

15. Since as early as 1945, conciliation has ‘retained a place in *bilateral* treaty practice’, albeit its significance may have been reduced in more recent times. On the multilateral treaty front, conciliation has clearly found its favour and become ‘almost a routine feature’ of modern multilateral treaties.³⁷ For instance, conciliation is considered to be the ‘primary method’ for resolving ‘disputes concerning the application or the interpretation’ of the *Vienna Convention on the Law of Treaties* (VCLT).³⁸ Under Article 66 of VCLT, a party to such dispute

³³ Above n.2, Coe, p.13, footnote 26.

³⁴ Above n.17, Merrills, p.26.

³⁵ The reference to good offices, conciliation and mediation in one go in Article 5(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (The WTO Dispute Settlement Understanding (DSU)) ‘visibly highlights’ such nature. See above n.19, Merrills, p.199.

³⁶ Available at <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>

³⁷ See, generally, above n.17, Merrills, pp.69–74.

³⁸ Above n.2, Coe, p.13, footnote 26.

may ‘set in motion the procedure specified in the Annex’. The Annex sets out in some detail how such conciliation is to proceed. The function of the ‘conciliation commission’ constituted thereunder includes, *inter alia*, ‘hear[ing] the parties, examin[ing] the claims and objections, and mak[ing] proposals to the parties with a view to reaching an amicable settlement of the dispute.’³⁹

16. In some particular fields, such as international trade, conciliation is a ‘favoured procedure’ for settling conflicts.⁴⁰ For instance, the *WTO Dispute Settlement Understanding* (DSU)⁴¹ groups ‘good offices, conciliation and mediation’ together in a single article, Article 5(1), as part of its non-mandatory regime for settlement of international trade disputes.⁴²

17. There has been evidently increasing interest in mediation and conciliation as viable means of settling international disputes. Among all the subsequent developments, it is worth pointing out that efforts within the United Nations construct have been made to produce a ‘code of rules’ on this subject. Considering the ‘usefulness in practice’ of conciliation as a method for settling disputes between States, the United Nations General Assembly (UNGA) sponsored the *United Nations Model Rules for the Conciliation of Disputes Between States* at its 50th session in 1995.⁴³

³⁹ Available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

⁴⁰ See above n.17, Merrills, p.70.

⁴¹ Available at https://www.wto.org/english/tratop_c/dispu_c/dsu_c.htm

⁴² There is no publicly available information on the number of cases, whether formal proceedings have been commenced or otherwise, in which mediation has been attempted. Further, these non-adjudicative mechanisms are ‘largely overshadowed by the quasi-judicial procedures’: See Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* (Oxford, Oxford University Press, 2016), p.109. Above n.17, Merrills, p.199.

⁴³ GA Res. A/50/50 (1996). For further developments, see, generally, above n.17, Merrills, pp.74–79.

E. Mediation in Investor-State Dispute Context: A Rarely Seen Animal

18. Despite the prominent place that mediation has gained in the domestic dispute context and in the inter-State dispute context, it is surprising that mediation has for a long period of time been forgotten in the ISDS context and has been described as an ‘animal rarely observed in the wild’.⁴⁴ Mediation ‘has been little used’ in ISDS.⁴⁵

19. To date, ICSID has registered 13 conciliation cases, including two additional facility conciliation cases, with no case under the ICSID Fact-Finding Additional Facility Rules;⁴⁶ the Permanent Court of Arbitration (PCA) has so far not ‘administered mediation proceedings based on a treaty’; neither the Energy Charter Secretariat (ECS) nor the Stockholm Chamber of Commerce (SCC) has ‘administered any investor-State mediation’.⁴⁷ The International Chamber of Commerce (ICC) has so far administered only one treaty-based mediation, which ended unsuccessfully due to the ‘partial participation’ of a party.⁴⁸ It has been reported that the Philippines has agreed to ‘conduct mediation’ with French investors using the International Bar Association (IBA) Rules (defined below) to ‘avoid’ full-blown arbitral proceedings; however, ‘little further is known of this case’.⁴⁹

⁴⁴ Bart Legum, co-chair of the IBA mediation subcommittee. Edward Machin, ‘Investor-State Mediation: BIT by BIT’, *ICLG*, (5 November 2012). Available at <https://iclg.com/cdr/arbitration-and-adr/investor-state-mediation-bit-by-bit>

⁴⁵ Above n.2, Salacuse, p.177.

⁴⁶ ICSID stands ready to provide ‘administrative assistance’ to support the disputing parties’ endeavours ‘to resolve investment disputes through mediation at all stages of a dispute’. Available at <https://icsid.worldbank.org/services/mediation-conciliation/mediation/overview>. However, it was reported in a WG III Working Paper (below n.49, para.43) that ICSID ‘has not provided administrative assistance to parties wishing to resort to mediation’. Presumably, that finding was made on the basis of information in the public domain. The authors are given to understand that there have been instances where ICSID has provided such administrative assistance, details of which are subject to confidentiality, and thus, cannot be published.

⁴⁷ Note by the Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190), para.43.

⁴⁸ *Ibid.* See also Alina Leoveanu and Andrija Erac, ‘ICC Mediation: Paving the Way Forward’ in Titi and Fach Gómez, below n.50, pp.97–98.

⁴⁹ Catherine Kessedjian, Anne van Aaken, Runar Lic, and Loukas Mistelis, ‘Mediation in Future Investor-State Dispute Settlement’, *Academic Forum on ISDS Concept Paper 2020/16* (5 March 2020) (‘Academic Form on ISDS Concept Paper 2020’), p.10, footnote 43.

Available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>; Luke Eric Peterson, ‘In an Apparent First, Investor and Host State Agree to Try Mediation under IRA Rules to Resolve an Investment Treaty Dispute’, *LA Reporter* (14 April 2016). Available at <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/>; Esmé Shirlow, ‘The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction Between Mediation and Arbitration’, *Kluwer Arbitration Blog* (29 September 2016). Available at <http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/>

IV. An Overview of UNCITRAL Working Group III's Consideration of the Use of Investment Mediation

20. Arbitration has long been considered as the 'default mode' of settling investor-State disputes.⁵⁰ The traditional criticisms of the (in)efficiency of arbitration in ISDS has called into question the legitimacy of that mechanism.⁵¹ In light of the distrust ventilated by some governments and other bodies, mediation appears to have 'regained its momentum.'⁵²

21. Thus, having considered the Secretariat's suggestions of possible future work on ISDS,⁵³ at its 15th session, UNCITRAL entrusted its Working Group III, Investor-State Dispute Settlement Reform, (WG III), with a 'broad mandate to work on the possible reform of investor-State dispute settlement', adopting a three-stage approach: first, identify and consider concerns regarding investor-State dispute settlement; second, consider whether reform was desirable in the light of any identified concerns; and third, if WG III were to conclude that reform was desirable, develop any relevant solutions to be recommended to UNCITRAL.⁵⁴

22. In its 34th session in late 2017, WG III considered the question of whether its work should be limited to investment arbitration or should include other types of ISDS mechanisms. While it noted, among other things, that

there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation

⁵⁰ Catharine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism' (Chapter 2) in Catharine Titi and Katia Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes* (Oxford, Oxford University Press, 2019), p.21.

⁵¹ Above n.2, Coe, pp.8–10.

⁵² Kun Fan, 'Mediation of Investor-State Disputes: A Treaty Survey', *Journal of Dispute Resolution*, 2 (2020), p.328. Available at <https://ssrn.com/abstract=354966153>

⁵³ The Secretariat laid before UNCITRAL several Notes by the Secretariat, including: (1) *Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration* (A/CN.9/915); (2) *Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration* (A/CN.9/916); (3) *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)* (A/CN.9/917); and (4) *Settlement of Commercial Disputes Investor-State Dispute Settlement Framework – Compilation of Comments* (A/CN.9/918).

⁵⁴ *Official records of the General Assembly, 71st session, Supplement No. 17 (A/71/17)*, para.264.

of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration.

23. The potential concerns regarding investment mediation were not made the subject of immediate attention. WG III concluded that concerns arising out of the arbitration aspect of ISDS should first be addressed, with other types of ISDS mechanisms to be considered subsequently as part of the 'holistic approach' of solutions that it shall proceed to develop at the third stage of its mandate. The discussion of investment mediation was accordingly deferred.⁵⁵

24. At the first Intersessional Regional Meeting on ISDS Reform (held in Incheon, Korea on 10 and 11 September 2018), the importance of other means of dispute resolution, including mediation, in the context of ISDS was highlighted. Two things were specifically noted:

- (a) first, the restricted ability for governments to reach settlements for the lack of coordination within various departments, especially on terms of compensation for damages; and
- (b) secondly, the underutilisation of mediation and that 'efforts should be taken to increase their use'.⁵⁶

⁵⁵ *Report of Working Group III on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)* (Part I) (A/CN.9/930/Rev.1), paras.31–33. WG III recognised (at para.52) that 'the States could use tools in their investment treaties to reduce duration and cost proceedings, including using forms of dispute settlement other than arbitration (negotiation, consultations, diplomatic efforts or mediation)'.

⁵⁶ *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea* (A/CN.9/WG.III/WP.154), para.43.

25. At its 36th session, the concern that mediation remained underused in ISDS was renewed.⁵⁷ WG III was called upon to consider ways to enhance its use. The Secretariat noted that ISDS imposed a heavy financial burden on both the respondent States and the claimant investors,⁵⁸ and there were ‘increasing efforts’ to highlight the importance of preventing disputes (or their escalation) by way of mediation.⁵⁹ In addressing the concerns of costs, duration and inefficiency of ISDS, WG III was invited to consider a list of possible measures, including the use of mediation.⁶⁰ It is worth noting that the Chinese delegations interposed an observation in relation to investment mediation and advised that it would ‘share further thoughts’ at the next session in April 2019.⁶¹

26. At its 38th session, WG III heard preliminary proposals of ISDS reform. Those relevant to present discussions include using ‘preventive or pre-emptive approaches’ in dispute resolution and strengthening alternatives to arbitration in ISDS, such as mediation.⁶² It was suggested by the Secretariat that this reform option can be implemented either as a ‘stand alone reform’ or ‘in conjunction with any other reform options’.⁶³

27. The use of mediation was a subject discussed at the 39th session of WG III, at which the following general consensus was reached:

(a) Mediation, amongst other ADR methods, could be promoted and more widely used.

⁵⁷ Note by the Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS)* (A/CN.9/WG.III/WP.149), para.60.

⁵⁸ Note by the Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) — Cost and Duration* (A/CN.9/WG.III/WP.153), paras.7–9.

⁵⁹ *Ibid.*, para.4.

⁶⁰ The promotion of mediation was included as one of the ‘possible reform options’ in the framework of discussions, see above n.57 (A/CN.9/WG.III/WP.149), Annex (in tabular form), p.20.

⁶¹ David Ng, ‘Investment Mediation’ in the *Proceedings of the ISDS Reform Conference 2019: Mapping the Way Forward* (Hong Kong, AAIL, 2019), p.297, para.17.

⁶² *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session (Vienna, 29 October–2 November 2018)* (A/CN.9/964), para.118.

⁶³ *Possible Reform of Investor-State Dispute Settlement (ISDS)* (A/CN.9/WG.III/WP.166), para.42.

(b) Policies as well as a legal framework for encouraging mediation would be necessary to address some of the concerns of government officials in regard to settling disputes via mediation.

(c) The use of mediation was not confined to the pre-arbitration stage. Guidelines should be developed to encourage arbitral tribunals and disputant parties to explore mediation, together with other ADR methods, proactively.

(d) And capacity-building and training of potential mediators and other stakeholders was a key aspect to foster the use of mediation.

V. Challenges to the Use of Mediation in ISDS

28. Scholars have different formulations and their own lists of prerequisites for successful mediation. Broadly speaking, they include: (1) mutually acceptable mediation processes; (2) parties' mutual desire for accord; and (3) the mediator's skills.⁶⁴

A. Ineffective Legal Framework for Mediation under International Investment Agreements (IIAs)

29. Flexibility in mediation does not necessarily breed arbitrariness. In resolving an investor-State dispute, a carefully drafted mediation legal framework is essential to lay down the mediation process that the disputant parties are to follow.

30. In the early days, numerous international investment agreements (IIAs) provided for a 'cooling-off period' in which the disputant parties were directed to attempt to search for an amicable settlement by negotiation, conciliation or mediation. While this presented an opportunity for the investor and the host State 'to avoid arbitration',

⁶⁴ For example, see Richard Haass, *Conflicts Unending: The United States and Regional Disputes* (New Haven, Conn., Yale University Press, 1990).

‘specific and conducive language’ was scarcely used in the IIAs to facilitate that process.⁶⁵ For instance, only very few dispute resolution clauses in the existing IIAs are structured in the way to make mediation a mandatory process prior to arbitration, and to impose a duty of good faith (either by the clause itself or through incorporation of institutions’ mediation rules) on parties to conduct mediation: e.g. Articles 26 and 28 of the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (the COMESA IA).⁶⁶

31. The lack of clarity in mediation clauses under the IIAs has bred a debate on (1) whether such clauses are ‘directory and procedural’ or ‘mandatory and jurisdictional’ in nature, and (2) consequently, whether the non-observance of them gives rise to a mere admissibility issue or more fundamentally a jurisdictional issue if the disputes are subsequently referred to arbitration.⁶⁷

32. The situation became worse when in the early days, mediation rules were largely undeveloped or underdeveloped. Mediation or conciliation processes in the early days were said to be ‘a nineteenth-century, cumbersome fact-finding exercise’,⁶⁸ and parties voted with their feet – in effect, bringing the use of such processes to a virtual standstill.

33. The lack of a well-defined legal framework laying down the foundation and process of mediation undermines the disputant parties’ respect and confidence in using it as a means of ADR in resolving investor-State disputes.

⁶⁵ Anna Joubin-Bret, ‘Chapter 10: Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules’ in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill Nijhoff, 2015), pp.155–156.

⁶⁶ Many institutions have expressly incorporated the duty of good faith in participating in mediation: e.g. Article 18 of the draft ICSID Mediation Rules (*Working Paper 4: Proposals for Amendment of the ICSID Rules*); Article 8 of the IBA Mediation Rules; and CEPA Mediation Rules.

⁶⁷ See *SGS v Pakistan*, Decision on Objections to Jurisdiction, 6 August 2003, 8 ICSID Rep 406, para.184; *Biwater Gauff v Tanzania* (ICSID Case No. Arb/05/22), Award, 24 July 2008. Contrast: *Enron Corporation v Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004; *Murphy Exploration v Ecuador* (ICSID Case No. Arb/08/4), Award on Jurisdiction, 15 December 2010.

⁶⁸ Above n.44, Machin.

B. Unfamiliarity with and Misperception of the Use of Mediation in ISDS

34. Since mediation is ‘little used’ in ISDS, government officials, corporate directors or managers of investing companies, or legal advisors may not be ‘deeply knowledgeable’ about the option of using mediation or have sufficient experience in taking part in a mediation (as opposed to an arbitration or other adversarial forms of dispute resolution).⁶⁹ They may not have knowledge to identify the proper person with adequate experience and credentials to act as a mediator.⁷⁰ Lawyers may be driven by ‘professional inclination’ or ‘self-interest’ and may suggest that mediation is ‘not effective’ and is merely a ‘delaying tactic’.⁷¹

35. Both inadequate research and literature and lack of practical guidelines contribute, in part, to such unfamiliarity. At present, it has been suggested that there ought to be ‘concerted efforts’ to launch an educational campaign on the use of mediation in investor-State disputes, particularly on the questions related to ‘how they arise and evolve, what actions tend to exacerbate conflicts, at which point third parties are best suited to intervene, and what kind of experience, skills and resources are best suited to help resolve particular types of investor-State disputes’.⁷² In view of their unfamiliarity with – and misperception of – mediation, it will remain an unlikely alternative that the disputant parties would choose in order to resolve their investor-State dispute. On this front, some jurisdictions have taken the initiative (if not the lead) to build the capacity of not just government officials but also legal practitioners in the private sector for investment mediation.

⁶⁹ Above n.2, Salacuse, p.178.

⁷⁰ Above n.2, Coe, pp.25–26.

⁷¹ Jeswald W. Salacuse, ‘Mediation in International Business’ in above n.2, Bercovitch, p.222. Above n.2, Salacuse, p.178.

⁷² Above n.2, Salacuse, p.180.

C. Strained Relationship Between the Disputant Parties

36. Some argue that quite often the relationship between the investor and the host State has reached a point beyond repair and that mediation is not going to work in the ISDS context.

37. The authors have no quarrel with the observation that parties' lack of a desire to settle their disputes can be an important factor contributing to the failure of *that* particular mediation. However, it does not explain the glaring underutilisation of mediation in the ISDS context, where a strained relationship is not a rare phenomenon in the commercial dispute context. It is even more so in family disputes, which invariably involves heightened emotional considerations encompassing feelings of hostility, bitterness, resentment, fear and embarrassment. This, however, does not prevent mediation from being developed in those contexts.

38. Also, the problems associated with a strained relationship among the parties can be to some extent ameliorated by skilful mediators, who are able to listen, to understand the parties' respective concerns and interests, to reframe issues, and to intervene at the right moments.

D. Desire to Defer Responsibility for Decision-Making to a Third Party

39. In a report published by the National University of Singapore's (NUS) Centre for International Law in September 2018 (CIL Report), the 'most significant obstacle' to settlement identified is 'the desire to defer responsibility for decision-making to a third-party'.⁷³ A host State's 'affirmative decision to settle a claim' may involve a 'monetary sum' to be paid out of public funds.⁷⁴ This entails the risk of placing the relevant

⁷³ Seraphina Chew, Lucy Reed, and J. Christopher Thomas QC, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes', *NUS Centre for International Law Working Paper 18/01* (September 2018), p.15. Available at <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-state-disputes>

⁷⁴ *Ibid.*, p.16. Above n.2, Coe, p.29.

officials in a politically difficult position if and when they are called upon to justify such use of ‘taxpayers money’.⁷⁵ As such, States often adopt a ‘wait-and-see’ approach to any claims advanced by investors.⁷⁶ A host State’s agreement to a settlement, albeit expressed as ‘without prejudice’ and on the basis of non-admission of liability, may still bear a mark of ‘some wrongdoing’ on the part of the State.⁷⁷ It may be relatively easier to persuade their legislature or Parliament to endorse the State’s course of action on the strength of ‘the need to comply with a binding award’.⁷⁸ Arbitral tribunals are used as ‘scapegoats’ to absolve the State of responsibility for unfavourable outcomes.⁷⁹

40. The host States’ reluctance to conclude settlements is itself a matter into which it is necessary to enquire. The CIL Report further identifies three ‘distinct fears’ on the part of the decision-makers of the host States that may account for the ‘disinclination’ to take responsibility for settlement:⁸⁰

(a) *Risk of allegations of or future prosecution for corruption:* The fear of a government official that the settlement agreement he or she ‘signs off’ on would be ‘audited’ or ‘brought before an investigator or a court’ for scrutiny. The possibility of ‘personal liability’ of the relevant officials poses ‘significant institutional *disincentive*’ (*emphasis* original). One of the sources of such fear may be generated by the lack of legislation or established government policies or practices that ‘specifically authorises’ or encourage the use of mediation over litigious methods in resolving disputes.⁸¹

⁷⁵ *Ibid.*, p.16.

⁷⁶ *Ibid.*, p.12.

⁷⁷ *Ibid.*, p.16.

⁷⁸ *Ibid.*, p.12.

⁷⁹ ‘Mediation of Investor-State Conflicts’, *Harvard Law Review*, 127(8) (2014), p.2543, p.2558.

⁸⁰ Above n.73, Chew, Reed, and Thomas QC, pp.13–14. Above n.2, Coe, p.29.

⁸¹ Barton Legum, ‘The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack J. Coe’s “Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch”’, *Transnational Dispute Management*, 4(1) (2007), p.2. Above n.2, Salacuse, p.178.

(b) *Fear of criticism*: The wish of governments to ‘avoid public criticism’, especially the kind that may cast governments as being ‘weak’, ‘puppets of foreign interest’ or ‘corrupt’.⁸² Investor-State disputes that ‘have political overtones’ usually attract ‘significant media and popular attention’.⁸³ The possibility of incurring the public’s wrath brews unease among government officials, given the prospect of losing elections in democratic systems of government. This makes them ‘even more averse’ to the use of mediation.

(c) *Fear of incentivising other investors to make similar claims or adverse arbitral decisions*: States fear, *whether justified or not*, that a settlement may have a two-fold ‘incentivising effect’. First, States fear that it may set a ‘precedent’ for other investors in an analogous position to advance further claims or threaten to do so. Secondly, whilst a mediated settlement with respect to a previous dispute has no probative value to the content of a separate investor-State dispute, some States still fear that an investor may refer to the settlement as a ‘precedent’ or ‘admission’ with intent to influence the views of the arbitral tribunal (or at least embarrass or pressure the State concerned).

41. It is important not to allow these concerns to grow disproportionately and thereby obstruct the use of investment mediation. Government officials are agents of their States and they owe a fiduciary duty to act in the States’ interest, including the duty to act responsibly in settling a dispute on the appropriate terms and at the appropriate time. They would not be doing their duty if they, out of the said fears, fail to act diligently in participating in the mediation process (and it may perhaps constitute a breach of the duty of good faith).

⁸² Above n.79, p.2558.

⁸³ Above n.2, Salacuse, p.184.

42. In addition to the above, other factors such as divergent treaty interpretation, over-publicity of the dispute and/or difficulties regarding intergovernmental coordination within a short timeframe, are also said to have contributed to underutilisation of mediation to resolve investor-State disputes.⁸⁴

E. Unique Institutional Characteristics of State Actors

43. If no strategy or organised system for internal communication for ‘signalling the existence of disputes’ is in place within a host State, it can take considerable time for States with ‘large and inefficient bureaucracies’ to become aware of an investor-State dispute and have it handled by the appropriate government department.⁸⁵ The ‘unity of the State’ is described in the CIL Report as ‘a fiction in international law’, in that the State in reality consists of various departments, entities, divisions and public bodies, all of which are subject to oversight – judicial or executive. Specifically, *multiple* government agencies involved in a single dispute may differ in their policy objectives and priorities as well as the State’s approach to dealing with the dispute. Such an ‘inter-agency process’ for evaluating and finally approving any settlement solution has been described as ‘typically complex and burdensome.’⁸⁶

44. Budgetary constraint may inhibit the use of mediation in that it makes it practically difficult for the government officials to obtain approval for settlement.⁸⁷ First, the absence of a ‘specific budget allocation’ to finance the use of mediation services may prevent the State from choosing to attempt mediation.⁸⁸ Secondly, the overall government budget may have made provision for payment in satisfaction of arbitral awards or judgments, but not for settlement of (*unproven*) investors’ claims.⁸⁹

⁸⁴ Above n.47, para.44.

⁸⁵ Above n.47, para.36. Above n.81, Legum, p.2.

⁸⁶ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2011) (UNCTAD/WEB/DIAE/IA/2010/8), p.30.

⁸⁷ Above n.2, Salacuse, p.178. Above n.75, Chew, Reed, and Thomas QC, p.19.

⁸⁸ Above n.2, Salacuse, p.178.

⁸⁹ Above n.73, Chew, Reed, and Thomas QC, p.19.

F. Wrong Timing: Momentum of Arbitral Proceedings

45. The disputant parties may feel that once arbitration has commenced, they have made an ‘inflexible commitment’ to arbitration,⁹⁰ particularly by having ‘sunken resources’ into prosecuting or defending those proceedings.⁹¹ This is plainly not the case. For example, the Tribunal in *Achmea BV v Slovakia*⁹² at the close of the hearing even encouraged (albeit rarely) the parties to engage in mediation in parallel with the arbitration proceedings. Occasionally, encouraged by an ‘unrealistic expectation of success’ in their case, the parties may also lack an incentive to negotiate, let alone enter into any form of settlement.⁹³

VI. Benefits of Use of Mediation in ISDS

46. Before discussing strategies to overcome these challenges, it is worth reminding oneself the benefits of mediation, which is said to be ‘well-positioned’ to address the ‘dissatisfaction’ towards arbitration in ISDS.⁹⁴

A. Wider Range of Solutions Open to the Disputant Parties

47. In arbitrations in the ISDS context, arbitrators ‘must sit in a circumscribed universe.’⁹⁵ The legal issues submitted to them for determination are ‘narrow’ (e.g. either there was expropriation or there was not) and the outcomes are ‘limited’ to the ‘legal remedies that can be awarded by arbitral tribunals.’⁹⁶ Therefore, an arbitral award as a solution to an investor-State dispute is more often than not ‘one-dimensional’, involving ‘an award of money damages or an injunction.’⁹⁷ On many occasions, it does not represent the ‘optimal’, ‘workable solution’ which can otherwise be achieved by way of mediation.

⁹⁰ Above n.73, Chew, Reed, and Thomas QC, p.22.

⁹¹ James M. Claxton, ‘Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation’, (draft working paper, 11 September 2020), p.6. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690682

⁹² *Achmea BV v Slovakia*, PCA Case No. 2008-13, Final Award, 7 December 2012, para.60.

⁹³ Above n.73, Chew, Reed, and Thomas QC, p.22.

⁹⁴ James M. Claxton, ‘Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?’, *Pepperdine Dispute Resolution Law Journal*, (20)78 (2020), p.83.

⁹⁵ Above n.16, Sussman, p.7.

⁹⁶ Thomas W. Walde, ‘Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation’, *Arbitration International*, 22(2) (2006), p.205, p.207. Above n.2, Coe, p.23. Above n.16, Sussman, p.7. Above n.61, Ng, p.305.

⁹⁷ Above n.2, Salacuse, p.176. Above n.16, Sussman, p.7.

48. Mediation, on the other hand, can be innovative. It provides an opportunity where parties are to analyse the problems from different perspectives and think out-of-the-box in coming up with a creative solution so as to accommodate the interests of different parties. It is particularly true in that in a far more inclusive and interactive setting which mediation can provide, disputant parties are allowed, under effective management by mediators, to frankly exchange their views and concerns, and through such exchanges common interests may be identified for parties to work on thereafter in pursuit of a win-win solution.

49. Thus, the use of mediation instead of arbitration in ISDS avoids ‘the risk of zero-sum outcomes.’⁹⁸ A mediated settlement adds a degree of flexibility which may better preserve the disputant parties’ interests.⁹⁹ It can further take into account ‘the legitimate concerns of the various stakeholders’, for example ‘what are the new commercial arrangements that can be made to replace the one in dispute’ or ‘how can a project be developed without harm to the environment and in a way that benefits the local community.’¹⁰⁰ The possible range of options available to the parties include ‘(i) grant or renewal of a license or permit; (ii) 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; (iii) the swapping of deals for other types of investment contracts or obligations; (iv) re-negotiation of the terms of a concession project; (v) re-evaluation of the return of a project and provisions of additional guarantees or sources of revenue; and (vi) self-assessments and reappraisals by governments of problematic measures they have enacted.’¹⁰¹ This is illustrated in one of the successful mediation examples discussed below.

50. Even if mediation fails to resolve all the disputes, it offers a way for parties to narrow down their disputes and refer only the unresolved part of their disputes to arbitration.

⁹⁸ Above n.2, Coe, p.15.

⁹⁹ Above n.2, Salacuse, p.176.

¹⁰⁰ Above n.16, Sussman, p.7.

¹⁰¹ Above n.61, Ng, p.305, citing United Nations Conference on Trade and Development (UNCTAD), *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010) (UNCTAD/DIAE/IA/2009/11), pp.32–33.

B. Conducive to Preserving Investor-State Relationship

51. Underlying the investor-State dispute is ‘an intended long-time investment relationship’.¹⁰² To forge a ‘reasonably successful business relationship’ between an investor and the State, it is usual that ‘many initial and consecutive, steps’ are necessary and which are ‘very costly’.¹⁰³ Such a successful, ongoing relationship is of ‘considerable value’, in that even contractually formalised *long-term* arrangements may bring no fruitful results in practical terms if the underlying trust and confidence between the investor and the host State is taken out of the equation.¹⁰⁴ Scholars have drawn attention to the likely adverse effect on these ‘relationship assets’ brought about by adversarial methods of dispute resolution (such as arbitration).¹⁰⁵ Arbitration may, ‘by its process dynamics’, instigate hostility and animosity towards each other on the part of both parties, making it ‘rarely feasible’ to continue any business during or after the process.¹⁰⁶ In all, arbitration is principally a means ‘to liquidate an economic relationship’ and ‘[n]either the aim nor the consequence of arbitration is to repair a broken business relationship’.¹⁰⁷

52. On the other hand, mediation may provide a more appropriate venue for resolving dispute in the ISDS context. Given its ‘less contentious setting’,¹⁰⁸ mediation ‘is more often likely’ to preserve a working, successful relationship between the investor and the host State.¹⁰⁹ The settlements crafted through mediation are, by definition, solutions mutually acceptable to both parties. This permits the originally disputant parties to ‘transform a legal dispute into a restructured relationship’, which is durable and of greater value to both.¹¹⁰ Since any mediated settlement, by its very nature, must have been voluntarily agreed upon by the disputant parties, there is naturally a higher rate of compliance; consequently, the investor would be visited with fewer difficulties in obtaining the fruits of his or her outcome.¹¹¹

¹⁰² Above n.2, Salacuse, p.141.

¹⁰³ Above n.96, Wälde, p.207.

¹⁰⁴ Above n.16, Sussman, p.7. Above n.96, Wälde, p.207.

¹⁰⁵ Above n.96, Wälde, p.207. Such relationship is, as the author puts it, ‘almost inevitably destroyed’.

¹⁰⁶ Above n.96, Wälde, p.207.

¹⁰⁷ Above n.9, Welsh and Schneider, p.87. Above n.2, Salacuse, p.155.

¹⁰⁸ Above n.16, Sussman, p.8.

¹⁰⁹ Above n.2, Salacuse, p.176.

¹¹⁰ Above n.2, Coe, p.15.

¹¹¹ Above n.16, Sussman, p.8.

53. Further, in case it is a local State entity which has violated an investor's rights, by making a claim, an investor has the opportunity of opening up a new communication 'channel' with the (central) government of the host State, to which a claim is usually addressed.¹¹² The use of mediation in this context can 'maximise' the windfall arising from this new communication channel as it demonstrates to the host State the investor's good faith and willingness to compromise.¹¹³

C. Speedier Resolution of Disputes with Lower Costs

54. Arbitration in ISDS has often been criticised for being 'generally a lengthy process' and too slow, extending over several years.¹¹⁴ For instance, in an ICSID arbitration,¹¹⁵ despite the apparent success of the investor's claim (having obtained a favourable arbitral award of about USD 7 million), the investor nevertheless considered the arbitral process to be 'dissatisfying' due to its considerable delay.¹¹⁶ Those proceedings spanned about five years from after the date of the Notice of Intent to the date of the award.¹¹⁷ Reviewing 273 ICSID cases resulting in arbitral awards (up to 30 June 2017), the average duration of ICSID proceedings from the time of registration to rendering of the award was found to be 3.86 years.¹¹⁸ Out of about 20% of cases resulting in an award,¹¹⁹ annulment of that award was sought by one of the disputant parties,¹²⁰ meaning that that duration was further

¹¹² Jan K. Schäfer, 'Alternatives to Investment Arbitration' (Chapter 11(I)) in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch, and Yun-I Kim (eds.), *International Investment Law* (C.H.BECK, Hart Publishing, Nomos, 2015), p.1192, para.20.

¹¹³ *Ibid.*, p.1192, para.20.

¹¹⁴ Above n.2, Coe, pp.8–9. Above n.16, Sussman, p.6.

¹¹⁵ *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1.

¹¹⁶ Above n.9, Welsh and Schneider, p.87.

¹¹⁷ See also, above n.2, Coe, p.9, footnote 6. The Notice of Intent was dated 30 December 1996, and the Award was rendered on 30 August 2000.

¹¹⁸ Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018), p.194 para.10.32. Jeffrey Commission, 'How Long Is Too Long to Wait for an Award?', *Global Arbitration Review*, (18 February 2016) (for figures up to 31 December 2015). For further empirical studies, see also Academic Forum on ISDS (Working Group 2), *Duration of ISDS Proceedings*. Available at https://www.cids.ch/images/Documents/Academic-Forum/2_Duration_-_WG2.pdf. The same study has been captured in, Holger Hestermeyer (et al.), 'Duration of Investor-State Dispute Settlement Proceedings', *Journal of World Investment & Trade*, 21 (2020), p.300. It was reported that the 'overall duration' (from request for arbitration/registration to final award) is 1913 days (5.2 years), drawing data from all cases in the ICSID or ITA database with awards rendered in selected years (1997, 2002, 2007, 2015 and 2017). For earlier statistical reports, see Anthony Sinclair, 'ICSID Arbitration: How Long Does It Take?', *Global Arbitration Review* (26 October 2009).

¹¹⁹ That percentage was an estimate in 2009 and may no longer be empirically valid. See also above n.18, Coe, p.79.

¹²⁰ Annulment of award is available under Article 52 of the ICSID Convention. Available at <https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf>

prolonged by 1.96 years on average.¹²¹ If an award is annulled, the estimates were that an additional four years of arbitral proceedings should be expected.¹²² On reviewing 84 publicly accessible arbitrations under the UNCITRAL Arbitration Rules (up to 2017), the average duration of proceedings was found to be 3.99 years.¹²³ Further, even if international treaties, such as the New York Convention, have laid down a clear basis for enforcement of arbitral awards, the enforcement process remains largely a matter of domestic legal processes that need to proceed in accordance with the domestic procedural rules of different jurisdictions in which the award is to be enforced. These processes ‘may take several years’, depending on the levels of ‘appellate review stages’ available in a particular legal system.¹²⁴

55. Also, arbitrations in ISDS have been described by academics as ‘inordinately costly’.¹²⁵ The dynamics in arbitration ‘tend to lead to ever-escalating costs’.¹²⁶ Such legal costs may be disproportionate to the amount of compensation eventually awarded by an arbitral tribunal. An investor claimant in arbitration may ‘receive far less than the amount sought, making the resisting party’s efforts justified and the claimant a “winner” only in a diluted sense’.¹²⁷ In the ICSID arbitration referred to earlier, the legal costs (on the claimant’s side alone) associated with the proceedings ran as high as USD 4 million, while the sum recoverable was roughly 20% of the amount assessed by the claimant’s expert.¹²⁸

¹²¹ Above n.118, Commission and Moloo, p.194, para.10.33. See also ICSID Secretariat, *Updated Background Paper on Annulment for the Administrative Council of ICSID* (5 May 2016), p.23. Available at <https://icsid.worldbank.org/sites/default/files/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>

¹²² That duration was an estimate in 2009 and may no longer be empirically valid. See above n.18, Coe, p.79.

¹²³ Above n.118, Commission and Moloo, p.194, para.10.34.

¹²⁴ Academic Forum on ISDS (Working Group 1), *Excessive Costs & Insufficient Recoverability of Cost Awards* (14 March 2019). Available at https://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf. The authors acknowledge that similar point can be made with respect to enforcement of a mediated settlement in that (a) a mediated settlement taking the form of a consent award is no different from an ordinary arbitral award; and (b) there may be recognition and enforcement issue in States which are not parties to the United Nations Mediated Settlement Convention. Yet, this point is made on the assumption the obligee in the mediated settlement is *unwilling* to honour its obligations which it has *voluntarily* accepted in resolving the dispute.

¹²⁵ Above n.16, Sussman, p.6.

¹²⁶ Above n.96, Wälde, p.210.

¹²⁷ Above n.2, Coe, p.15, footnote 38.

¹²⁸ Above n.2, Coe, pp.9–10, footnote 8.

It was reported in 2012 that the costs (including the parties' legal fees and Tribunal expenses) of arbitration in ISDS had already 'exceeded [US]D 8 million per party per case'.¹²⁹ Up to 31 May 2017, with respect to party costs, 'mean claimant-party costs now stand at USD 6 million', and 'mean respondent-party costs at USD 4.9 million'.¹³⁰ With respect to Tribunal costs, ICSID and UNCITRAL tribunal costs are on average USD 920,000 and USD 1,089,000 respectively.¹³¹ All these costs associated with arbitration in ISDS can be 'extremely heavy'¹³² and may impose 'significant burden on public finances',¹³³ in particular for developing countries.¹³⁴ At the enforcement stage, as non-ICSID arbitral awards may be subject to (1) a possible action for 'setting aside at the place of arbitration', and (2) an 'enforcement action under the New York Convention' in *each* of the (*multiple*) jurisdictions in which enforcement is sought,¹³⁵ the costs of pursuing or resisting the enforcement of an arbitral award may multiply.

¹²⁹ David Gaukrodger and Kathryn Gordon 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', *OECD Working Papers on International Investment*, 2012/03 (OECD Publishing, 2012), p.19, footnote 23.

Available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. These figures are quoted in UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment', *IIA Issues Note, No. 2, 2013* (UNCTAD/WEB/DIAE/PCB/2013/4), p.4.

¹³⁰ The figures were compiled on a review of 177 cases for claimants and 169 cases for respondents. See Matthew Hodgson and Alastair Campbell, 'Damages and Costs in Investment Treaty Arbitration Revisited', *Global Arbitration Review* (14 December 2017).

¹³¹ *Ibid.* See also Academic Forum on ISDS (Working Group 1), above n.124.

¹³² Above n.2, Salacuse, p.143.

¹³³ UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment', *IIA Issues Note, No. 2, 2013* (UNCTAD/WEB/DIAE/PCB/2013/4), p.2.

¹³⁴ Above n.2, Salacuse, p.142.

¹³⁵ Albert Jan van den Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions', *ICSID Review*, 1 (2019), p.13. Michael Faure and Ma Wanli, 'Investor-State Arbitration: Economic and Empirical Perspectives', *Michigan Journal of International Law*, 41 (2020), p.1, p.16. The authors repeat the caveat made in n.124 above.

56. The use of mediation provides ‘cheaper and less time-consuming alternative to arbitrations.’¹³⁶ It has been suggested that in the case that mediation is pursued, even ‘very complex’ cases can be resolved in ‘a few sessions’.¹³⁷ Since mediation is, unlike arbitration, not ‘pleadings-intensive or dependent on adducing full proofs,’ it can produce results with greater speed.¹³⁸ On average, the duration of the five concluded conciliations under ICSID was 16 months.¹³⁹ Further, the earlier a compromise is canvassed and reached, the more legal costs which are bound to arise at the later stages of an arbitral proceeding can be avoided.¹⁴⁰ Even if a dispute is not ‘ripe for resolution at an early stage,’ the mediator would still be in a position to ‘assess when to press for settlement’.¹⁴¹

D. Greater Control over Its Outcome

57. Parties to ISDS often have to lower their expectations with regard to ‘outcome predictability’ because similar investor-State cases may produce different outcomes for an array of reasons, typically including that arbitral tribunals are ‘*ad hoc adjudicators*’; factual aspects of a particular case may be hotly contested; and, in turn, affect the applicability of some legal principles which are ‘highly fact dependant’.¹⁴²

¹³⁶ Above n.2, Salacuse, p.176.

¹³⁷ Above n.16, Sussman, p.6.

¹³⁸ Above n.18, Coe, p.86.

¹³⁹ Above n.18, Coe, p.79.

¹⁴⁰ Above n.16, Sussman, p.7.

¹⁴¹ Above n.16, Sussman, p.7.

¹⁴² Above n.2, Coe, p.22.

It has been suggested that disputant parties often unrealistically ‘overestimate their chances of success’,¹⁴³ and the arbitral award they receive may turn out to be a disappointment. Of all the concluded cases, roughly 37% were decided ‘in favour of the host State’, and 29% in favour of investors ‘with monetary compensation’,¹⁴⁴ with the rate of recovery being merely about 32%.¹⁴⁵ While arbitral awards are ‘imposed’ outcomes,¹⁴⁶ in mediation, by definition, the parties ‘preserve their control over the outcome’ and any resultant mediated settlement is ‘voluntary’.¹⁴⁷

E. More Manageable Caseload for Host States

58. If and when the momentum to settle a particular case has been created by the mediator, that case can be concluded and the energies of the host State can be diverted to focus on other disputes.¹⁴⁸ It can consequently divert its resources to defend those proceedings in which it considers its defence to be meritorious and which deserves ‘an adjudicated result’.¹⁴⁹

F. Greater Confidentiality and Avoiding an Unfavourable Precedent

59. Investor-State disputes are ‘political’ and public policy-based in nature.¹⁵⁰ A ‘high profile investor-State arbitration’ may be understood by other investors as a ‘negative reflection on the investment climate’ in the host State.¹⁵¹ For investors, not only may such publicity have an adverse impact on their ‘business reputation’, they may also run the risk of disclosure of their trade secrets.¹⁵² The disclosure or publication of

¹⁴³ Above n.96, Wälde, p.209.

¹⁴⁴ UNCTAD, ‘Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019’, *IIA Issues Note, No. 2, July 2020*, p 5. Available at <https://investmentpolicy.unctad.org/publications/1231/investor-state-dispute-settlement-cases-pass-the-1-000-mark-cases-and-outcomes-in-2019>

¹⁴⁵ Above n.130, Hodgson and Campbell.

¹⁴⁶ Above n.2, Coe, p.29.

¹⁴⁷ Above n.79, p.2549.

¹⁴⁸ Above n.2, Coe, p.23.

¹⁴⁹ Above n.2, Coe, p.23.

¹⁵⁰ Above n.2, Salacuse, p.141.

¹⁵¹ Above n.2, Salacuse, p.146.

¹⁵² Above n.2, Salacuse, p.177. Above n.2, Coe, p.23.

awards or other documents that may be required in investor-State arbitration may draw political or corporate backlash for the host State or investor.¹⁵³ In contrast, one of the assumed benefits (see the discussion in the following paragraph) of using mediation in ISDS is ‘the confidentiality of the proceedings and the outcome’.¹⁵⁴ The broad confidentiality allows the parties to air their respective concerns ‘candidly and openly’ without compromising their positions at subsequent stages of the arbitral proceedings.¹⁵⁵

60. The confidentiality issue is worth a more elaborate discussion. It has been taken for granted that ‘confidentiality’ attached to mediation proceedings is an ‘important feature’ of mediation.¹⁵⁶ However, given the ‘mounting concerns’ for transparency in ISDS, the degree to which – if at all – investor-State mediation should be confidential is not an uncontentious issue.¹⁵⁷ On this issue, it may be of interest to note several salient points reflecting the continuing tension between *confidentiality* and *transparency* (which have been expressed in the literature):

(a) Transparency in ISDS is now considered ‘desirable’, since the ‘involvement’ of a sovereign State in hybrid (if not apparently private) proceedings and its ‘public interest’ are at stake; and transparency measures are intended to ‘enhance public acceptance’ of the ISDS system generally.¹⁵⁸

(b) On the other hand, a ‘full and frank’ discussion is a prerequisite for any successful mediation – the protection of ‘confidentiality’ enables the parties and the mediator to feel ‘able’ and comfortable to discuss all essential issues and reveal their ‘true positions’, if necessary.¹⁵⁹ Increased

¹⁵³ For example, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014). Available at <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

¹⁵⁴ Above n.2, Salacuse, p.177. Above n.16, Sussman, p.7.

¹⁵⁵ Above n.79, p.2556.

¹⁵⁶ Brown and Winch, ‘The Confidentiality and Transparency Debate in Commercial and Investment Mediation’ in Titi and Fach Gómez, above n.50, p.321.

¹⁵⁷ Shahla F. Ali and Odysseas G. Repousis, ‘Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?’, *Denver Journal of International Law & Policy*, 45 (2017), p.225. For discussion on the rise of transparency in ISDS generally, see pp.241–246. See also above n.158, Brown and Winch, pp.323–328.

¹⁵⁸ Above n.156, Brown and Winch, p.324.

¹⁵⁹ Above n.156, Brown and Winch, pp.328–329.

transparency is said to be antithetical to the utility of the mediation process by undermining the ‘environment’ in which it operates.¹⁶⁰ In the investor-State context, States are susceptible to ‘greater demands for public information’; as such, confidentiality ‘enables’ parties to ‘better manage’ the ‘timing of disclosure’, which may otherwise ‘draw backlash politically’.¹⁶¹

(c) Consequently, it is inappropriate to pose the question of confidentiality as a binary one. Instead, what should be determined is the ‘appropriate level of confidentiality’ which is commensurate with the ISDS context.¹⁶²

(d) A balance is to be struck between these competing considerations and, at the moment, the international community has not yet reached a consensus. It is therefore unsurprising to note that different institutions have formulated their own approaches. For instance, the confidentiality obligation in relation to a mediation conducted under the IBA Rules (defined below) does *not* extend to the existence of the mediation, the settlement reached, and the terms thereof (unless parties have agreed otherwise), and permits disclosure of information or documents under specified circumstances.¹⁶³ On the other hand, the Proposed ICSID Mediation Rules take a different approach in that all information relating to the mediation (including documents generated in or obtained during the process) shall remain confidential, unless parties have waived their confidentiality or disclosure is required by law or such information is already in the public domain. Importantly, the confidentiality obligation extends to the existence of the mediation itself (subject to the parties’ waiver).¹⁶⁴

¹⁶⁰ Above n.156, Brown and Winch, p.329.

¹⁶¹ Above n.80, p.2556.

¹⁶² Above n.156, Brown and Winch, p.329.

¹⁶³ Rule 10 of the IBA Rules.

¹⁶⁴ Above n.66, the draft ICSID Mediation Rules, Rule 10. The disclosure of existence of mediation proposed being made subject to parties’ consent was a result of comments of some States that ‘confidentiality could be a key consideration for parties when deciding whether to mediate’: see Comment 229.

A similar approach is taken under the Mainland-Hong Kong Special Administrative Region (HKSAR) Closer Economic Partnership Arrangement (CEPA) Investment Agreement (IA) (defined below), in that the mediation process shall remain confidential subject to the parties' waiver.¹⁶⁵

61. It is extremely unlikely that the mediation process would become as transparent as the investment arbitration process. For instance, the mediated settlement agreement need not record the rights or wrongs of the parties (and mediation need not deal with those). This is starkly different from an arbitration award in which the tribunal is expected not only to determine the complaints but also state its reasoning for arriving at its determination. For the host State, a published decision resulting from arbitration may have the effect of significantly impeding its ability to regulate.¹⁶⁶ If an arbitral tribunal concludes that an impugned measure is in breach of the relevant IIA, not only would the State be obliged to pay substantial damages to the investor-claimant but that State may be 'named respondent repeatedly' by other investors pursuing further claims challenging the same or similar measure(s).¹⁶⁷ While, strictly speaking, the rule of *stare decisis* (precedent) does not apply, in practice, the awards rendered by other arbitral tribunals are at least influential in international investment law, and counsel often cite and arbitrators often consult the same as authority.¹⁶⁸ On the other hand, in the context of mediation, the host

¹⁶⁵ Rule 3.1 of the Mediation Mechanism for Investment Dispute under the Mainland-Hong Kong SAR CEPA IA. Under the arrangement, an investor, depending whether it is a Mainland investor or a Hong Kong SAR investor, may refer an investment dispute to a designated institution for mediation. Each of the designated institutions has its own rules governing the confidentiality obligation as part of the mediation rules, and parties are bound by them. For instance, where an investment dispute is between a Mainland investor and the Hong Kong SAR Government, the applicable mediation rules (Article 11(4)) provide that the confidentiality obligation does not extend to (a) existence of the mediation, or (b) existence of the mediated settlement reached, unless the parties have agreed otherwise.

¹⁶⁶ Above n.2, Salacuse, p.141.

¹⁶⁷ Above n.2, Salacuse, p.141. Above n.2, Coe, p.22.

¹⁶⁸ Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge, Cambridge University Press, 2016), p 92. A system of 'de facto precedent' does in fact exist, where a 'significant number of investment tribunals tend to justify their interpretation of a treaty provision exclusively or largely by referring to the interpretation of similar-worded provisions adopted in previous awards rendered on the basis of different investment instruments'. This phenomenon is recognised in Pieter Jan Kuijper (et al.), *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 1-Workshop)* (4 September 2014). Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf

State need not run the risk of creating an unsatisfactory and unfavourable precedent,¹⁶⁹ possibly creating the risk of a regulatory chill on legitimate government policy-making.¹⁷⁰

VII. Successful Cases of Mediation in the Context of ISDS

62. There have been two notable successful cases relating to investment disputes in which the use of mediation has brought about a settlement.¹⁷¹

A. *Tesoro Petroleum Corporation v Trinidad and Tobago* (ICSID No. CONC 83/1)

63. This is the first case of ICSID conciliation, completed in late 1985. It involved a dispute over distribution of profits in the amount of USD 143 million between *Tesoro Petroleum Corporation* and *the State of Trinidad and Tobago*. A detailed account of the conciliation proceedings has been provided in an article published by Mr Lester Nurick and Professor Stephen J. Schnably.¹⁷²

(i) Factual Background of the Dispute¹⁷³

64. The parties entered into a Joint Venture, Trinidad-Tesoro Petroleum Company Limited (Trinidad-Tesoro), in 1968 to purchase and develop oil fields in Trinidad and each owned 50% in the shares of the Joint Venture.

¹⁶⁹ Above n.2, Coe, p.22. Above n.2, Salacuse, p.177.

¹⁷⁰ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* (2015), p.128.
Available at https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

¹⁷¹ Gabriele Ruscilla, 'Latest Development in Conciliation and Mediation in Investor-State Disputes' in João Bosco Lee and Flavia Mange (eds.), *Revisita Brasileira de Arbitragem*, 16(63) (2019), p.96, pp.106–109.

¹⁷² Lester Nurick and Stephen J. Schnably, 'The First ICSID Conciliation: *Tesoro Petroleum Corporation v. Trinidad and Tobago*', *ICSID Review – Foreign Investment Law Journal*, 1(2) (1986), p.340.

¹⁷³ *Ibid.*, pp.343–345.

65. The parties executed a number of documents, including (1) the ‘Heads of Agreement’,¹⁷⁴ a document that set out comprehensively the terms of the Joint Venture, and (2) ten ‘Side Letters’ dated the same date as the Heads of Agreement, touching upon a number of matters also dealt with in the Heads of Agreement.

66. On the issue of dividends, the Heads of Agreement provided that no dividends shall be declared by Trinidad-Tesoro for the first five years of its operation. After that five-year period:

Dividends may be declared or recommended to the shareholders by a majority of the Board of Directors of the Joint Company, following a policy of reinvestment of a substantial portion of current earnings each year in viable and attractive projects, primarily in oil and gas development [and] exploratory and processing projects [in Trinidad.]

67. The fourth Side Letter states in its relevant part:

[A]fter the first five years of the operations of the Joint Company, there shall be declared and paid as dividends at the request of either the Government or Tesoro, and to the extent that cash is available 50% of the net earnings after tax as certified by the auditors of the Joint Company.

¹⁷⁴ The Heads of Agreement included the following dispute resolution clause:

The Government and Tesoro hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes all disputes arising out of these Heads of Agreement, or relating to any investment made hereunder, for settlement by conciliation followed, if the dispute remains unresolved after six months following the communication of the report of the Conciliation Commission to the parties, by arbitration, both pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called the “SID Convention”) which has been signed and ratified by the Government of Trinidad and Tobago and by the United States Government. It is hereby stipulated by the parties that Tesoro is a National of the United States of America.

The Government hereby waives its rights to require, pursuant to Article 26 of the SID Convention, the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the SID Convention. The parties agree that any Arbitral Tribunal constituted pursuant to these Heads of Agreement shall have the power to decide a dispute *ex aequo et bono*. Any arbitration proceeding pursuant to these Heads of Agreement shall be conducted in accordance with the Rules of Procedure for Arbitration Proceedings in effect on the date on which the proceeding is instituted. The Government hereby waives any right of sovereign immunity as to it and its property in respect of these Heads of Agreement, both during any conciliation or arbitration proceedings and in respect of the enforcement and execution of any award resulting therefrom.

68. During the first five years of Trinidad-Tesoro's operations, no dividends were declared pursuant to the Heads of Agreement. After that, dividends were paid each year up to fiscal year 1980. In one year during that period, dividends equal to one-third of Trinidad-Tesoro's net after-tax earnings were declared. In the other years, the dividends were about 50% of its net after-tax earnings.

69. From 1981 onwards, a series of events transpired leading to the deteriorated and eventually strained relations between the Government of Trinidad and Tobago and Tesoro:

(a) In response to the second round of Organisation of Petroleum Exporting Countries (OPEC) price increases in 1979, the Government made clear in 1980 that it intended to impose a new petroleum tax, which was thereafter put in place in 1981 and took effect as of January 1980. Tesoro denounced this tax in strong terms.

(b) Significant exploration expenditures that the Government wished Trinidad-Tesoro to make were vetoed by the Tesoro-appointed members of the Board of Directors, and for which a two-thirds majority of the Directors was required to approve large investment expenditures pursuant to a provision in the Articles of Trinidad-Tesoro.

(c) At the same time, the Government refused to approve the declaration of dividends for 1981 and 1982 at the shareholders' meetings in 1982 and 1983.

(d) In August 1982, Tesoro announced its intention to sell its shares in Trinidad-Tesoro. Under the Heads of Agreement, Tesoro was obliged to first offer its shares to the Government. The two parties entered into negotiations over the Government's possible purchase of the shares.

70. In essence, Tesoro's complaint was that it was entitled to dividends equal to 50% of net earnings under the Heads of Agreement, and that the Government was in breach of the parties' agreement by failing to secure its appointees on the Trinidad-Tesoro board to vote in favour of recommending dividends.

(ii) Initiation of the Conciliation Proceedings

71. Tesoro filed a Request for the Initiation of Conciliation Proceedings with the Secretary-General of ICSID on 22 August 1983. The Request contained a brief description of the dispute between the parties and a copy of the Heads of Agreement and the Side Letters was attached. On 26 August 1983, the Secretary-General notified the parties that the Request was registered.¹⁷⁵

(iii) Appointment of the Conciliator ¹⁷⁶

72. The parties agreed to have a *single* conciliator and to negotiate directly between themselves regarding the choice of the conciliator.

73. By mid-December 1983, the parties had decided upon Lord Wilberforce and notified the Secretary-General of their appointment. Lord Wilberforce was a 'highly distinguished and experienced British judge', who had retired as Lord of Appeal in Ordinary in 1982 after having served in the judicial House of Lords for 18 years.

74. Pursuant to Conciliation Rule 5, the Secretary-General notified Lord Wilberforce of the parties' intention to appoint him as sole conciliator and sought his acceptance to the appointment.

75. On 6 January 1984, the Secretary-General notified the parties that Lord Wilberforce had accepted the appointment. With the Secretary-General's appointment of a secretary (to provide assistance to the conciliator in procedural matters), a Conciliation Commission was taken as having been constituted, signifying the beginning of the conciliation proceedings.

¹⁷⁵ Above n.172, Nurick and Schnably, p.345.

¹⁷⁶ *Ibid.*, pp.345–346.

(iv) Procedural Conference¹⁷⁷

76. On 9 March 1984, a meeting was held in London for ‘preliminary procedural consultation’ pursuant to Rule 20 of the Conciliation Rules. The parties agreed upon a number of procedural matters. These included the language of the proceedings, fees of the conciliator, filing of documents and memorials, etc.

77. The procedural timetable for filing Memorials as set by the conciliator was as follows:

(a) Tesoro to file an opening Memorial on 20 April 1984.

(b) The Government to file a Counter-Memorial by 22 June 1984 (within about two months thereafter).

(c) Tesoro to file a Reply Memorial by 16 July 1984 (within about one month thereafter).

(v) Submissions of Memorials

78. It can be readily observed that ‘complex problems’ had been raised by the parties in their Memorials, such as:

(a) The term ‘*cash available*’ had to be interpreted in the context of the needs of Trinidad-Tesoro as well as the financial advisability of investing in petroleum-related or other suitable investment products.

(b) What effect should be given to a Shareholders’ Agreement on the declaration of dividends at the time of setting up Trinidad-Tesoro (the Joint Venture Agreement) in view of the power of Directors under Trinidad Company Law to declare dividends.

(c) The *ex aequo et bono* provision in the dispute resolution clause ‘lent further complexity to the legal issues.’¹⁷⁸

¹⁷⁷ *Ibid.*, pp.346–347.

¹⁷⁸ *Ibid.*, p.347, footnote 36.

(vi) Status Conference¹⁷⁹

79. On 23 July 1984, a ‘status conference’ was held in Washington, DC. The primary purpose of the conference was to ‘ascertain where the proceedings stood and whether a hearing or submission of other documents or evidence would be necessary’. The parties had propounded their respective analyses and arguments extensively. As such, Lord Wilberforce decided that no further hearing would be necessary. At the close of the conference, Lord Wilberforce asked the parties ‘to submit to him in confidence their view on what might constitute an acceptable settlement’.

(vii) Conciliator’s Recommendation¹⁸⁰

80. On 5 February 1985, Lord Wilberforce issued a recommendation,¹⁸¹ in which he stated that he:

conceive[d] that his task in these proceedings is to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement.¹⁸²

81. Lord Wilberforce’s recommendation took the form of:

(a) A determination that ICSID had jurisdiction over the dispute on the basis of the dispute resolution clause in the Heads of Agreement, and that the Heads of Agreement and the fourth Side Letter constituted a single agreement;

¹⁷⁹ *Ibid.*, pp.347–348.

¹⁸⁰ *Ibid.*, p.348.

¹⁸¹ It was intended by the drafters of the ICSID Convention that the commission is to be given the flexibility and power to issue recommendations ‘at any stage of the proceedings’ and ‘from time to time’ under Article 34(1): see, Frauke Nitschke, ‘The ICSID Conciliation Rules in Practice’ in Titi and Fach Gómez, above n 50, pp.124, p.131. Thus, to call any (or one) of the commission’s recommendations as ‘the recommendation’ may be a misnomer; the commission may give such recommendations as it sees fit at any time and need not ‘wait until a particular stage of the proceedings’ (e.g. after ‘clarifying the issues in dispute’). See Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge, Cambridge University Press, 2009), p.448, para.20.

¹⁸² The ‘role’ of a commission under the ICSID Conciliation was not ‘intended to be reduced to a legal evaluation’; nevertheless, in that mediation, that was Lord Wilberforce’s understanding. See Nitschke, ‘The ICSID Conciliation Rules in Practice’ in Titi and Fach Gómez, above n.50, p.141.

(b) A detailed analysis of the merits of the parties' arguments; and

(c) A proposed settlement (of a suggested percentage of the amount sought by Tesoro) on the basis of his 'estimates of the parties' chances of success on the issue in dispute'.

(viii) Parties' Further Negotiations – 'Ping-Pong'

82. The parties then proceeded to negotiate amongst themselves and communicated to Lord Wilberforce their respective views on his recommendation. It is worth noting that Lord Wilberforce modified his recommendation following the Government's comment on a particular aspect of his recommendation.¹⁸³

(ix) Settlement and Conclusion of the Proceedings

83. On 15 October 1985, Trinidad-Tesoro published a press release announcing the outcome of the conciliation proceedings, namely the parties' agreement on a 'final settlement' of paying dividends amounting to USD 143 million.¹⁸⁴

(x) Saving Costs and Time

84. *In terms of pecuniary costs*, the total administrative costs (to be borne by the parties in equal shares), inclusive of the fees of Lord Wilberforce, the sole conciliator, were below USD 11,000.¹⁸⁵

85. *In terms of length of time*:

(a) It took less than two years to complete the conciliation (from the constitution of the Conciliation Commission to the issuing of the conciliator's report) in this dispute.¹⁸⁶

¹⁸³ *Ibid.*, p.348.

¹⁸⁴ *Ibid.*, pp.348–349.

¹⁸⁵ *Ibid.*, p.343.

¹⁸⁶ *Ibid.*, p.349, footnote 40. Above n.2, Salacuse, p.174.

(b) It has been observed that the decision to have a *sole* conciliator instead of a commission consisting of three or more conciliators may have ‘significantly expedited the commencement of the proceedings’.¹⁸⁷ At about the period of 1985, it typically took anywhere between five to thirteen months to constitute a tribunal consisting of three arbitrators in ICSID arbitrations.¹⁸⁸ By contrast, in this conciliation, the appointment of the sole conciliator was agreed upon by the parties fairly quickly, in approximately four months, with the Commission duly constituted within a month thereafter.¹⁸⁹

B. *Vattenfall Europe Transmission v Polskie Sieci Elektroenergetyczne (PSE) Operator S.A.*

86. The dispute arose at the end of 2002 between Vattenfall (a Swedish State-owned electricity company) and PSE (Polskie Sieci Elektroenergetyczne), the Polish State integrated electricity company. It arose with regard to a long-term arrangement surrounding a ‘SwePol’ interconnector and a 20-year commitment to purchase electricity. A detailed note has been published in this regard by Professor Thomas W. Wälde.¹⁹⁰ Whilst strictly speaking the dispute is not a typical investor-State one based on an IIA, it provides valuable reference value for it demonstrates the meticulousness and, at the same time, the flexibility in the mediation process. The creative outcome which the parties achieved is also noteworthy.

(i) Factual Background of the Dispute¹⁹¹

87. Vattenfall targeted the Polish market as part of its international expansion strategy of building European Union (EU) market share via acquisitions. PSE was at the time engaged in a restructuring to comply with the EU’s single energy markets requirement. Polish electricity is

¹⁸⁷ Above n.172, Nurick and Schnably, p.346.

¹⁸⁸ *Ibid.*, p.351–353 (Appendix).

¹⁸⁹ *Ibid.*, p.346.

¹⁹⁰ Above n.96, Wälde, p.210.

¹⁹¹ Above n.96, Wälde, pp.218–219.

coal-based with coal mined from the major mining areas of the country. Coal mining involves ‘significant locally concentrated employment’ in Poland. Therefore, trade unions and coal miners had a considerable influence on government policy.

88. In the mid-1990s, the parties decided to establish a ‘SwePol’ submarine interconnector. It consisted of two cables, a main cable and a smaller reverse cable, both of which were at the time ‘technologically very advanced and specialised’. The ‘SwePol’ interconnector connoted a significant improvement in Poland’s energy security and also exemplified the country’s policy of encouraging new investment in independent power producers. It was also consistent with the European Union’s direction to create a single, integrated energy market.

89. The parties entered into a long-term package of arrangements:

(a) Vattenfall was to fund the project with about USD 300 million.

(b) This sum was to be repaid by a commitment on the part of PSE to purchase electricity at a fixed price (oriented at prices of the mid-1990s) for 20 years.

(c) Vattenfall maintained control over the flow of electricity, and a northwards flow into Scandinavia was not envisaged nor was PSE entitled to sell into the Nordpool market.

90. Several dramatic changes in context ensued thereafter. Sweden joined the EU and was subject to its electricity market rules. Poland was about to join the EU. PSE was in the course of detaching itself from the State. Contrary to the parties’ expectation, there was a surplus in energy supply leading to a precipitous decrease in electricity prices. The long-term, fixed-price purchase commitment was said to ‘hurt PSE seriously’ as it paid far above the market price. Thus, at that stage, PSE took the view that the contract was ‘unbalanced’.¹⁹²

¹⁹² Above n.171, Ruscilla, p.107.

(ii) Parties' Unsuccessful Negotiations

91. The parties held amongst themselves several rounds of negotiation which did not result in any settlement. Nevertheless, it has been observed that during those negotiations 'elements pointing towards a constructive solution' were identified:¹⁹³

(a) PSE demanded a change in the terms of the purchase commitment (volume and price) and insisted on the opening-up of the possibility of a northward flow of electricity into Scandinavia.

(b) PSE eventually refused to purchase any electricity, as required under the contract. Vattenfall threatened to bring arbitral proceedings, with the risk of an Award of damages up to the amount of USD 1 billion for breach of the 20-year take-or-pay agreement.

92. At this juncture, the chief negotiators of both parties acceded to the suggestion made by PSE's external legal adviser to consider the use of mediation.¹⁹⁴

(iii) Parties' Search for a Competent Mediator¹⁹⁵

93. In this case, the appointment of a mediator was apparently a very carefully crafted process.

94. The parties drew up a shortlist of companies invited to tender. The list did not include any law firms but exclusively included well-known international engineering/electricity consulting firms, leading business consulting firm and accounting firms. The shortlist drawn up by the parties may have reflected their 'engineering and financial orientation' and 'concern over being dragged into the litigation direction.'¹⁹⁶

¹⁹³ Above n.96, Wälde, p.219.

¹⁹⁴ For an analysis of the strategic considerations of the parties, see above n.96, Wälde, pp.220–222.

¹⁹⁵ *Ibid.*, pp.222–223.

¹⁹⁶ *Ibid.*, p.222.

95. It can be inferred from the tender conditions which the parties drafted and their selection process that:

(a) The qualities of a *competent* mediator expected of him/her by the parties included 'a special track record in the field, familiarity with the energy industries and, perhaps most importantly, a readiness to commit him/herself exclusively to the project for a specified period of time.'

(b) The parties were concerned that they would not benefit from a 'standardised report-writing and presentation-making service'; they required 'an *individual* mediator' rather who may 'focus completely, exclusively and persistently on managing the mediation process with the aim of achieving a reasonable renegotiated deal'.

(c) The parties were desirous of a 'quick deal'; under the contractual arrangement with the mediator, remuneration included a significant 'success fee' element, which hinged upon (1) the conclusion of a deal within a specified time (2) that was capable of being 'tracked back to the mediation process' and 'to the renegotiation proposal to be made by the mediation team'.

96. The mediation team that was finally selected by the parties consisted of one sole mediator (Professor Thomas W. Wälde) and three senior specialists in the areas of electricity regulatory economics, electricity engineering and financial analysis respectively.¹⁹⁷

¹⁹⁷ *Ibid.*, p.223.

(iv) ‘Intelligence Gathering’

97. *As the first step*, the mediator and his team began with a review of the negotiating files and the relevant contractual documents. The parties were subsequently asked to answer a questionnaire of about 30 specific questions. The mediator dissected the way of thinking involved in this part of the mediation process as follows:¹⁹⁸

(a) In adversarial proceedings, the parties ‘strategically’ and selectively submit information which maximises their chance of success. Thus, the arbitral tribunal will ‘receive always and inevitably “doctored” information’. In mediation, the parties ‘willingly submitted relevant negotiating files to the mediator (only)’.

(b) While the mediator accepted that the parties’ answers to the questionnaire might still be partially ‘doctored’, the information submitted to him (in his capacity as mediator) ‘provided a much better view of background and context of the relationship’ than would have been available from any statements in adversarial proceedings.

(c) On a review of the completed questionnaires, the mediator recognised that ‘the parties had been quite close to an agreement several times’, enabling him to identify the blockages to a settlement.

98. *As the second step*, the mediator’s team held meetings primarily in Stockholm and Warsaw, with some consultations with the EU Commission in Brussels. These meetings were conducted in ‘an informal setting’. As the mediator reported:

... participants in the relationship (chief, senior and middle-level executives; senior and technical staff in other companies involved and the two regulatory agencies) were interviewed, often – and preferably – in an informal setting. Lunches, dinners, drinks were the preferred context following more formal, office-based interviews.

¹⁹⁸ *Ibid.*, pp.223–224.

99. The mediator succinctly discerned the salient benefits of these informal meetings and consultations:¹⁹⁹

(a) He described those meetings as very ‘revealing’, and that this stage of ‘intelligence gathering’ proved ‘essential’ for the eventual success of the mediation. Those informal, personal discussions, which are in stark contrast to the ‘most formal, stilted and ritualised’ contact in arbitration, allowed the mediator’s team to understand the parties’ ‘ultimately decisive differences of position and interest’, and their respective hierarchy and modes of decision-making. This process shed light on the ‘substantial error’ of judgment and the entrenched ‘factual misconception of both parties.

(b) It helped the players ‘vent their emotions’ (usually negative ones) towards the other side. The mediator advocated an approach that the parties should generally express their negative emotions to the mediator (only), whose task is to ‘try to change an exclusively negatively charged emotional situation towards a more balanced one’. In Professor Wälde’s experience, ‘mediation cannot succeed without development of a “positive current”’.

(v) Several ‘Strategic Turns’

100. In the instant case, the mediator identified ‘several strategic turns’ that had taken place during mediation:²⁰⁰

(a) It was possible to intentionally involve the Chief Executives of both parties. With the support of the CEOs, it is far much easier to obtain the support of ‘recalcitrant internal players’, especially those previously identified as being the ‘reason for previous obstruction’. There is inherent in the logic of mediation a ‘natural parallelism’, meaning that if one party moves (e.g. offers

¹⁹⁹ *Ibid.*, pp.223–225.

²⁰⁰ *Ibid.*, pp.225–226.

to have its CEO involved), the other party is ‘compelled to follow’ if it does not wish to ‘lose face’ and ‘appear uncooperative’. Mediators can make use of this logic to acquire ‘considerable power’ within the process.

(b) Another key turn occurred through consultations with several outside players. Several key ‘external’ forces (e.g. the Polish energy regulator, the Swedish network operator and the EU Competition Directorate) were all ‘very constructive’. The mediator observed that it was not always easy to ‘encourage’ outside influential non-stakeholders to ‘participate in a constructive way’.

101. The mediator’s approach to preparation of this case was divided into the following steps:²⁰¹

(a) *Searching for cultural traits in both Swedish and Polish business practices and for particular problems in the interactions of Swedish and Polish businesspeople:* In this case, the mediator noted with surprise that it ‘did not confirm the prejudices each party held about itself and about the other’. He observed that ‘the mediator’s discussion of such prejudices’ and ‘his very presence inhibited conduct conforming to the prejudice’.

(b) *Bringing the information gathered by both the regulatory deal-making and the technical-financial teams together.*

(c) *Preparing a series of formal papers consisting of a ‘Joint History’ and an ‘Assessment of Each Party’s Particular Situation’.*

(d) *Series of ‘shuttle-missions’ where the case assessments and the outlines of the proposal were presented at internal meetings to senior executives of both parties.* The mediator stated that the purposes of these meetings were (1) ‘to get the proposal refined in order to make it both

²⁰¹ *Ibid.*, pp.226–228.

practical and acceptable on both sides' and, more subtly, (2) 'to transfer ownership of the proposal' from the mediator to the parties. He found it necessary for the parties to 'familiarise themselves with the proposal'.

(vi) Significance of Drawing up the Details of the Direct Mediation Session

102. The choices of 'dates, rules, venue, procedure, agenda' of the direct mediation meeting were all crafted deliberately and were of significance to the mediation process:²⁰²

(a) *Place and venue*: In that case, St Andrews, Scotland was chosen as the venue for its 'distance from home office, extended travel and a relatively isolated location'. The venue was intended to help the participants focus on the mediation without distraction.

(b) *Agenda, rules of engagement, and roles of participants*: The mediator prepared the agenda (on the basis of prior consultations), a set of rules of engagement, and a general description of the roles of the participants. The meeting was not labelled as a 'mediation-negotiation' meeting but as a 'technical meeting' in which the parties were to 'listen to, review and discuss the proposals of the mediation team'. This labelling was intentionally attached to (1) 'provide a face-saving exit' in case it did not result in a concluded deal, and (2) to 'provide a more detached and technical atmosphere' for the parties to search professionally for solutions.

(c) *Composition of the teams on both sides*: Parity in numbers was, in the mediator's view, paramount. In this case, the outside counsel of one of the parties was 'unusually constructive'. The parties looked at the Chief Negotiators from the past as 'adversaries'. Eventually,

²⁰² *Ibid.*, pp.228–229.

a ‘compromise solution’ was preferred, with the mediator pursuing an effort at ‘re-education’ of the ‘one trouble-maker who was present’ and who ‘turned out to be more a lamb than a lion’.

(vii) Conduct and Outcome of the Mediation Meeting²⁰³

103. Professor Wälde described his varying role in the capacity as mediator during the two-day mediation meeting (with a day in reserve); essentially, from being that of a ‘central player’ evolving into that of a ‘friendly adviser’ as the parties ‘managed to interact constructively’.²⁰⁴ He further stressed the importance of organising social interactions (e.g. formal dinners, toasts, outings) as a part of the management of emotions.

104. In the mediation meeting, the mediator, together with his technical adviser, attempted to draw up an ‘outline agreement’ (MoU). On reflection, he felt that they ‘should have had a draft MoU in hand right from the start’.

105. The outcome of the mediation meeting was ‘a half-written agreement on principles’. Thereafter, for three to four months, the parties continued with their negotiations (in which the mediator’s team had ‘little involvement’), and resulting in a final, detailed deal agreeable to both sides.

106. The outcome was seen to be a success for all stakeholders. In the postscripts of the mediator, it is recorded that the original contesting parties had achieved great success under the renegotiated deal, and that several participants in the mediation process had been promoted and had assumed higher responsibilities as a result of this success.

107. The above two cases illustrate the flexibility of mediation – both, in terms of the composition of the mediation team assigned (from sole mediator, to mediator assisted by experts, and even to multiple mediators) as well as with regard to the mediation process

²⁰³ *Ibid.*, pp.230–231.

²⁰⁴ This conversely illustrates the observation made in above n.2, Salacuse, p.155, that as the disputant parties move from negotiation to mediation, they ‘increasingly lose control’ and the ‘third party increasingly intrudes’.

itself (from giving the parties the mediator's non-binding views on the procedural and substantive disputes, to assuming different roles at different stages of the mediation process).

C. Recent Success: Odebrecht Mediation

108. Recently, the mediation between the Dominican Government and the 'Odebrecht-led consortium' over the 'coal-fired Central Termoeléctrica Punta Catalina Project' (CTPC) has resulted in a settlement under which the Dominican State entity is to pay the investor claimant approximately USD 395.5 million (with only USD 59.5 million to be disbursed) in settlement of the latter's claim which was in the region of USD 973.2 million.²⁰⁵ It represents full and final 'settlement of all the existing disputes to date'.²⁰⁶

109. The disputing parties embarked upon the whole process, beginning with their negotiations, as quickly as 'their respective claims and positions were formulated' back in July 2017. This procedural step ended with an 'international mediation' under the ICC Mediation Rules, presided by Mrs Mercedes Tarrazón, a 'renowned international mediator'.²⁰⁷ The mediation took the form of 'several sessions' between January and March 2020.²⁰⁸ The mediator 'guided the parties in extensive discussions' that analysed 'their different positions' as well as 'the advantages and disadvantages of reaching an agreement through mediation versus subjecting the dispute to a lengthy and costly arbitration process'.²⁰⁹ It remains to be seen whether further information will be published so as to shed additional light on how the mediation succeeded.

²⁰⁵ Cosmo Sanderson, 'Billion-Dollar Odebrecht Dispute Settled Through Mediation', *Global Arbitration Review* (18 March 2020). See also below n.209, Businesswire.

²⁰⁶ 'Billion-dollar Central Termoeléctrica Punta Catalina Project Dispute Settled Through International Mediation', *Sage Mediation* (19 March 2020). Available at <https://sagemediation.sg/news/billion-dollar-central-termoelectrica-punta-catalina-project-dispute-settled-through-international-mediation/>

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Christina Levin, 'The Dominican Government and the Odebrecht-Tecnimont-Estrella Consortium Reach Agreement to Settle All Existing Disputes and Guarantee Completion and Final Delivery of the Coal-Fired Central Termoeléctrica Punta Catalina Project (CTPC)', *Businesswire* (17 March 2020). Available at <https://www.businesswire.com/news/home/20200317005791/en/The-Dominican-Government-and-the-Odebrecht-Tecnimont-Estrella-Consortium-Reach-Agreement-to-Settle-All-Existing-Disputes-and-Guarantee-Completion-and-Final-Delivery-of-the-Coal-Fired-Central-Termoel%C3%A9ctrica-Punta-Catalina-Project-CTPC>

VIII. Overcoming Challenges in Using Mediation in ISDS Context

A. Developing the Legal Framework for Mediation

110. In light of the ‘distrust’ ventilated by some governments and other bodies, mediation appears to have ‘regained its momentum’ in more recent times. Indeed, there are a rising number of IIAs in which mediation has been included as a part of their dispute resolution clauses.²¹⁰ Figures available from a treaty survey done in March 2020 show that 624 out of 2,572 bilateral investment treaties (BITs), which accounts for roughly 24% of all BITs, included mediation or conciliation as a part of their ISDS mechanisms.²¹¹

(i) At the Treaty Level: Mediation Provisions

111. It is observed that the ‘integration of mediation into ISDS systems’ is becoming more frequent at the treaty level. First, there are treaties that provide for ‘cooling-off periods’ that (1) contain an express invitation to the disputant parties to attempt mediation or (2) remain silent on what method (or whether mediation) is available to facilitate amicable settlement of their disputes. Secondly, there are treaties which expressly ‘single out’ mediation as a mechanism available ‘at all stages’. In fact, recent treaty practice in this regard varies considerably, ranging from a brief mention of mediation as a ‘non-binding procedure’ to the provision of a specific, comprehensive code of mediation in the text of the IIA.²¹²

²¹⁰ Above n.52, Fan, p.328.

²¹¹ *Ibid.*, p.331. The data on which the treaty survey is based (last visited on 25 March 2020) have been drawn from the database ‘International Investment Agreements Navigator’ compiled by Investment Policy Hub. Available at <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>. The latest data which this Paper’s authors accessed show that 626 out of 2,576 international investment agreements (inclusive of BITs) contain provisions for mediation as part of their ISDS systems.

²¹² *Ibid.*, p.331.

112. These are typical examples of IIAs or multilateral treaties (with investment provisions) that encourage the use of mediation in ISDS by way of a ‘reference’ to such means.²¹³ These references are ‘neither precise when and how mediation can take place nor conducive to mediated settlement’:²¹⁴

(a) *The Investment Agreement between the Hong Kong SAR, China and Chile* (2016) (the Hong Kong SAR, China-Chile BIT) makes specific reference to the use of mediation in ISDS. Article 20.1 relevantly provides:

1. In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultations, which may include, where this is acceptable to the disputing parties, *the use of non-binding, third-party procedures*, such as *good offices, conciliation and mediation*.²¹⁵

(b) *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (2018) (CPTPP), a free trade agreement amongst 11 States, with investment provisions incorporated (with exceptions) in Chapter 9 of the Trans-Pacific Partnership, provides specifically in Article 9.18.1:

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include *the use of non-binding, third party procedures*, such as *good offices, conciliation or mediation*.²¹⁶

²¹³ *Ibid.*, p.334.

²¹⁴ Above n.65, Joubin-Bret, p.154. It provides for a comprehensive analysis of the evolution in treaty practices across time on the references to mediation or conciliation.

²¹⁵ Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download>

²¹⁶ Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/download>

113. There are some examples of IIAs or multilateral treaties (with investment provisions) ‘singl[ing] out’ mediation as an available option ‘at all times’, regardless of whether or not arbitration is underway.²¹⁷

(a) *The Association of South East Asian Nations (ASEAN) Comprehensive Investment Agreement* (2009) in Article 30 provides, in ‘generic terms’,²¹⁸ for the possible use of conciliation at any stage, and such conciliation may continue when the arbitral procedures under Article 33 are in progress. Such conciliation is ‘without prejudice’ to the disputant parties’ rights.²¹⁹

(b) *The Common Market for Eastern and Southern Africa (COMESA) Investment Agreement* (IA) contains provisions in Article 26 on the use of mediation. The language of that Article – ‘the parties *shall* seek the assistance of a mediator to resolve disputes during the cooling-off period’ – appears to connote that mediation is mandatory. Such mandatory character is further featured in the power of the President of the COMESA Court of Justice to make an appointment in the event of the parties’ failure to appoint a mediator. The President’s appointment is ‘binding on the disputant parties’.²²⁰

²¹⁷ Above n.65, Joubin-Bret, p.155.

²¹⁸ Above n.65, Joubin-Bret, p.155. The relevant Article provides:

Article 30 Conciliation

1. The disputing parties may at any time agree to conciliation, which may begin at any time and be terminated at the request of the disputing investor at any time.
2. If the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress.
3. Proceedings involving conciliation and positions taken by the disputing parties during these proceedings shall be without prejudice to the rights of either disputing parties in any further proceedings under this Section.

²¹⁹ Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3095/download>

²²⁰ Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download>

114. In addition to mediation being adopted in the IIA as *an additional* means of ADR, it is worth noting that in the *Investment Agreement* signed between Mainland China and the Hong Kong SAR on 28 June 2017 under the framework of the Closer Economic Partnership Arrangement (CEPA), the CEPA Investment Agreement²²¹ (the **Mainland-HKSAR CEPA IA**), mediation is made *the primary means* for resolving ‘investment disputes’ between an investor and the host government, which is not supplemented by recourse to arbitration:²²²

(a) Hong Kong or Mainland investors may submit an investment dispute to a mediation institution of the Mainland or Hong Kong, as the case may be (Articles 19–20). There is a list of mediation institutions and mediators mutually agreed by the two Sides to the Mainland-HKSAR CEPA IA.²²³

(b) The two Sides have also established the *CEPA Mediation Mechanism*, which is applicable to mediation conducted under the Mainland-HKSAR CEPA IA.²²⁴ In respect of disputes involving Mainland investors, a distinct set of comprehensive procedural rules, the *Mediation Rules for Investment Dispute*, is also applicable.²²⁵

The Mainland-HKSAR CEPA IA is a *prime example* and a pioneer in championing the rise of the use of mediation to resolve investment disputes. While no statistics have been published so far on the use of mediation, the authors have been given to understand that there are cases in which parties have embarked on mediation under the arrangement, and the lack of arbitration as a fallback option has not adversely affect the stakeholders’ willingness to engage in a serious mediation process.

²²¹ Available at <https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html>

²²² Above n.61, Ng, p.305.

²²³ The lists of mediation institutions and mediators mutually agreed by the two sides are available at <https://www.tid.gov.hk/english/cepa/investment/mediation.html>

²²⁴ Available at <https://www.tid.gov.hk/english/cepa/investment/files/mediation.pdf>

²²⁵ Available at <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>

115. The recent trend of incorporating a more sophisticatedly drafted mediation clause is often accompanied by tailor-made, comprehensive mediation rules.²²⁶ For instance:

(a) Under the Mainland-HKSAR CEPA IA, the ‘Mediation Mechanism’ sets out the procedural framework for the mediation. The mediation institutions designated under the Mainland-HKSAR CEPA IA, in turn, promulgate the mediation rules specifically for such mediations.

(b) Under the *Comprehensive Trade and Economic Agreement Between Canada and the European Union* (Canada-EU CETA) (2016), mediations are governed either by rules agreed to by the disputing parties or by the rules for mediation adopted by the Committee on Services and Investment established under CETA.²²⁷

(ii) Mediation Rules and Frameworks

116. A number of institutions have developed bespoke rules and procedures for investor-State mediation. ICSID adopted its Conciliation Rules in 1967 as well as its Fact-Finding Additional Facility Rules in 1978. In 2018, ICSID initiated work on a new, stand-alone set of Mediation Rules for investment disputes. IBA also released in 2012 their *Ad hoc* Rules for Investor-State Mediation (the **IBA Rules**), representing an ‘extremely important first step’ towards ‘legitimizing’ the use of mediation in ISDS.²²⁸ These developments were followed, in 2014, by both the ICC Mediation Rules²²⁹ and the SCC Mediation Rules,²³⁰ albeit these rules are not made specifically for investor-State disputes.

²²⁶ Above n.52, Fan, pp.336–337.

²²⁷ See, specifically, Annex 29-B (Code of Conduct for Arbitrators and Mediators) (pp.536–538) and Annex 29-C (Rules of Procedure for Mediation) (pp.539–542). Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download>

²²⁸ Nancy Welsh and Andrea Schneider, ‘The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration’, *Harvard Negotiation Law Review*, 18 (2013), p.71, p.83.

²²⁹ Available at <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>

²³⁰ Available at https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf

117. The development of mediation rules for ISDS has been accompanied by joint efforts at education. The Energy Charter Conference, with the support of the International Mediation Institute (IMI), ICSID, SCC, ICC, UNCITRAL and the PCA, endorsed the Guide on Investment Mediation in 2016.²³¹ The Guide serves as ‘a helpful, voluntary instrument’ that (1) explains the mediation process in general, (2) provides facilitating tips, and (3) explains the role of the Energy Charter Secretariat (ECS) and other institutions.

118. At a broader level, international efforts have been made to promote the use of mediation. In 2018, UNCITRAL amended and renamed the 2002 UNCITRAL Model Law on International Commercial Conciliation as the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the **2018 Model Law**). The 2018 Model Law provides uniform rules in respect to the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use. Whilst the Model Law is not tailor-made for ISDS disputes, the uniform standards promulgated, which have been adopted or modelled-on by 45 jurisdictions, serves at least as a good starting point for States to develop their own mediation frameworks and policies.

(iii) Enforcement Regimes

119. An enforcement mechanism also exists under certain rules, in that, if the parties to the dispute have reached an amicable settlement through mediation, they may request the arbitral tribunal to incorporate their settlement into a Consent Award (e.g. Rule 43(2) of the ICSID Arbitration Rules) and that Consent Award can be enforced under the existing enforcement regimes, such as the ICSID Convention and/or the New York Convention. However, such a process still requires the parties to commence and fund the arbitration process until the

²³¹ ‘Conference Endorses Guide on Investment Mediation’, *International Energy Charter* (1 August 2016). Available at <https://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/>

Consent Award is reached. More importantly, if the arbitration proceedings are commenced *after* the dispute has been settled by mediation, the Award may be seen to be not enforceable, given that the arbitration process was not backed by an existent dispute (for the dispute had already been settled by mediation *prior* to commencement of the arbitration), and in particular when an existent dispute is seen to manifest a ‘modicum of formality required for a proceeding to constitute arbitration [which] is no empty ritual’: *Castro v Tri Marine Fish Co. LLC* 921 F.3d.766 (9th Cir. 2019).²³²

120. Another instrument is the United Nations Mediation Settlement Convention, which came into force on 12 September 2020.²³³ The Working Group agreed that mediated settlement agreements for investment disputes ‘should not be excluded from the scope’ of the Convention,²³⁴ leaving it for the contracting States to decide whether such agreements are to be excluded from its application by making a reservation pursuant to Article 8.²³⁵ Two options of reservations are available under Article 8:

- (a) The first alternative would disapply the Convention to a State, (and its various entities and representatives) ‘to the extent specified in the declaration’. This form of reservation, if used only to ‘limit which agency or individual can speak for the State’ instead of wholly eliminate the Convention’s application, may be able to bring ‘State expertise’ to the ISDS process, and ‘clarity to the contracting parties’ by clarifying which is the proper State entity with whom they should mediate.²³⁶

²³² Similarly, in the ICSID context, the requirement of Article 25 of the ICSID Convention would not be fulfilled because there is no longer a ‘legal dispute’ by the time the arbitral process is sought to be commenced. In addition, potentially, all grounds of Article V of the New York Convention would apply to a consent award resulted from a mediated settlement agreement. Thus, there may be an argument that a settlement agreement covering matters outside the scope of the dispute originally referred to arbitration may be caught by Article V(1)(c).

²³³ As of the date of this Paper (October 2020), there are 53 signatories, of which 6 have ratified or approved the Convention.

²³⁴ Note by the Secretariat, *International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation* (A/CN.9/942), p 12, para.20.

²³⁵ *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Dominican Republic* (A/CN.9/WG.III/WP.160), para.54. Of the six contracting States, Belarus, Iran and Saudi Arabia have invoked the reservation to exclude mediation settlement agreement to which the States (and/or their agencies) are parties from the application of the Convention.

²³⁶ Mark E. Appel, ‘A “Done Deal” For States and Investors? The New UNCITRAL Convention on International Settlement Agreements Resulting from Mediation’, *The Journal of Enforcement of Arbitration Awards*, 1(2) (2018), p.1, pp.11–12.

(b) The second alternative would permit the Convention to be applied ‘on a case-by-case basis.’²³⁷ This may arm the State with a ‘powerful new bargaining chip’, i.e. an ‘offer of finality’ where the reciprocal exchange in favour of the State ‘justifies giving the investor the added insurance of an enforceable settlement.’²³⁸

As of the time of this Paper (October 2020), out of the six contracting States which have ratified or approved the Convention, three States have made reservations to exclude mediated settlement agreements from application if the States (and/or their agencies) are parties to such agreements.

B. Increasing Stakeholders’ Awareness of Investment Mediation

121. Lack of awareness has been identified as a barrier to promoting investment mediation. A clear legal framework clearly helps the stakeholders understand mediation and gain confidence in it.

122. It is also essential to educate all stakeholders about what investment mediation is and what they can expect from mediation. The ECS’s Guide on Investment Mediation provides a handy reference to stakeholders to understand investment mediation. In addition, education can be – and in fact has been – provided in various forms, such as seminars and colloquia attended by stakeholders, and roundtables and dialogues with government officials. On this front, there is room for the government sector to work in collaboration with the private sector (including NGOs) to build the capacity of the users (e.g. legal practitioners and government officials in charge of cross-border investments).

²³⁷ *Ibid.*, p.12.

²³⁸ *Ibid.*, p.12.

C. Training of Investment Mediators

123. A skilled mediator is almost a *sine qua non* of successful mediation. The task of an investment mediator is not an easy one:

... The sea he sails is only roughly charted, and its changing contours are not clearly discernible. He has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing at most of few guiding stars, and depending on his personal powers of divination.²³⁹

124. In September 2016, IMI developed a set of ‘competency criteria’ for investor-State mediators.²⁴⁰ An investor-State mediator is expected to have knowledge and experience in (i) the understanding of investor-State issues; (ii) mediation; (iii) the different forms of negotiation, mediation and conciliation; (iv) arbitration and adjudication; (v) intercultural competency; and (vi) other competencies, such as technical competency, case management skills and familiarity with related issues such as third party funding, etc.

125. The authors are given to understand that many institutions such as ICSID, the Centre for Effective Dispute Resolution (CEDR), ECS and IMI have been organising workshops and structured training programmes tailored to investor-State disputes. In addition to the efforts of institutions, the Hong Kong SAR, through its Department of Justice, has been a pioneer in organising (jointly with ICSID, CEDR, ECS and AAIL) investment mediator training to a mix of government officials (coming from Asian jurisdictions) and private practitioners since 2018.

126. It is expected that the collaborative effort at training will, in due course, build up a sufficiently large, strong and diversified pool of investment mediators, which is essential to the success of investment mediation.

²³⁹ Arthur S. Meyer, ‘Functions of the Mediator in Collective Bargaining’, *Industrial and Labour Relations Review*, 13 (1960), p.160.

²⁴⁰ ‘IMI Competency Criteria for Investor-State Mediators’, *International Mediation Institute* (19 September 2016). Available at <https://imimediation.org/about/who-are-imi/ism-tf/>

D. Permitting Flexibility in the Mediation Process

127. Mediation takes place in various styles (e.g. facilitative and evaluative). Some jurisdictions in their domestic legal frameworks prohibit mediation from being conducted in one or the other style(s). However, in the ISDS context, since the participants come from different cultures and hold different values or perceptions, mediators should be allowed to be as flexible as the parties permit in order to adopt the most appropriate – or even a mixed – style in conducting mediation. A skilled mediator can even alter the style in adopting or adapting any changes that happen in the course of a mediation.

128. An aspect of flexibility is the conferral of power on the investment mediator to issue a ‘mediator’s proposal’ at the appropriate juncture of the mediation – usually when there is a lack of progress in the mediation. A ‘mediator’s proposal’ is a settlement proposal that the mediator issues to all the concerned parties, and each party is requested to accept or reject the exact terms proposed in a confidential communication to the mediator. If both parties accept, settlement is reached; if either or both rejects, the mediation process continues. On this front, it is notable that the investment mediator under the *EU-Vietnam Free Trade Agreement* is expressly conferred the power to ‘*offer advice and propose a solution for the consideration of the parties which may accept or reject the proposed resolution or may agree on a different solution*’²⁴¹

E. Guidance and Structural Reform to Ease Government Officials’ Concern

129. While a government official owes a duty to his own government and to the investor (representing the host State) to participate in the mediation conference diligently, guidance should be developed to alleviate their fear with regard to settlement of the case. Where necessary, structural (including legal) reform can be implemented to

²⁴¹ EU-Vietnam FTA, Chapter 15, Clause 15.4 referring to Annex 15-C (Mediation Mechanism), Article 5(3)

give comfort to the government officials in charge, when they consider that the dispute should be settled on certain terms. Also, an external expert or legal advice can be sought in confidence before the final decision to settle is made.

F. Mediation Always Being an Option

130. Steps must be taken to dispel the misconception that parties can never resort to mediation once arbitration has started. Hybrid modes of arbitration and mediation, such as ‘Med-Arb’, ‘Arb-Med’, ‘Arb-Med-Arb’, or even ‘Arb-in-Med’ and ‘Med-in-Arb’, are observable in the context of commercial disputes and there is no reason why those hybrid options cannot be available in ISDS. In fact, where appropriate, the arbitral tribunal can bifurcate the proceedings and decide on some issues, leaving other issues to be sorted out by the parties via mediation.

131. Professor Jack Coe has proposed an innovative idea, which he termed as ‘Concurrent Med-Arb’.²⁴² The new model involves one or more mediators ‘*shadowing*’ the concurrent arbitral process and applying mediation techniques at various junctures of the process with a view to assisting the parties in reaching a settlement that might then be embodied in the consent arbitral award. This model envisions a default composition of one arbitrator and one mediator, with each of them to be jointly appointed by the parties. A variation of the said model is to have two mediators, with each disputant party appointing one mediator.

²⁴² Jack J. Coe Jr., ‘Concurrent Med-Arb (CMA) – Some Further Reflections on a Work in Progress’ in n.86, UNCTAD, p.43. See also, above n.61, Ng, pp.330–331.

G. Mandatory Mediation?

132. Despite general welcoming and encouraging remarks by almost all stakeholders about embracing mediation (or similar processes) to resolve investor-State disputes, it is not difficult to detect within academia as well as from States some reservations on the use of mediation as a *mandatory* process. The reservation is that such a mandatory process is ‘at odds with the voluntary nature’ of the mediation process, and that it may be futile or even ‘detrimental’ in some situations.²⁴³

133. Mandatory mediation can take many forms and it has been suggested that mandatory mediation can take place during the ‘cooling-off’ period. Scholars arguing for compulsory mediation offer the following justifications:

(a) A ‘time-limited’ approach should be adopted and the rules of mediation should provide for ‘easy opt-outs’ after a period of compulsory participation.²⁴⁴

(b) By using mandatory mediation ‘with an opt-out clause’, it ‘presumes’ the use of mediation on every occasion, and avoids the problem of ‘looking weak’ on the part of either disputing party when it actually wishes to reach out to the other party to attempt mediation.²⁴⁵ Especially in the context of ISDS, this presumptive use of mediation precisely ‘chip[s] away at’ the ‘reluctance’ on the part of the host State’s officials to attempt mediation or accede to any settlement, in that (as noted above) such moves may later be viewed as a source of liability – legal or political.²⁴⁶

²⁴³ *Possible reform of investor-State Dispute Settlement (Addendum)* (revised draft summary) (A/CN.9/WG.III/XXXIX/CRP.1/Add.1) para.18. See also above n.61, paras.85–88 explaining the possible use of mandatory mediation during the ‘cooling-off’ period.

²⁴⁴ Nancy A. Welsh, ‘Mandatory Mediation and Its Variations’, in above n.86, UNCTAD, p.111.

²⁴⁵ Lisa Blomgren Bingham, ‘Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels’, in above n.86, UNCTAD, p.36.

²⁴⁶ Above n.94, Claxton, p.99.

(c) The ‘timing for a paradigm shift is opportune’, and a proposal for compulsory mediation is rightly made at this point, given that mediation has gained ‘currency’ in ISDS in recent times (as noted above).²⁴⁷

134. Scholars opposing or expressing reservation to the idea of compulsory mediation often hold the following views:

(a) Any form of mandatory mediation is in ‘violation’ of a party’s autonomy and may, inadvertently or otherwise, inject an element of ‘coercing settlement’ into the process.²⁴⁸ A scheme that requires the parties to participate in ‘the entire mediation process’ is clearly at *the extreme end* of the scale; a less intrusive approach (such as requiring an acceptable period of mandatory participation) may on the other hand be able to dispel these concerns and, in fact, appear more sensible.²⁴⁹

(b) It is incorrect to assume that every dispute that is liable to be arbitrated is ‘automatically qualified to mediate’.²⁵⁰ It risks ‘singling out’ and ‘elevating’ mediation as the best option in all cases. Each dispute has its own factual matrix and peculiarities, which may call for other better or more suitable options, such as ‘expert evaluation or adjudication’, to be used. Or simply, the disputing parties may be ‘amenable’ to other options but not mediation.²⁵¹

(c) Mediation remains an “investment” in time and money with uncertain results.²⁵² As such, the question to ‘mediate or not to mediate’ is best left for the parties to decide. Any successful experiences with compulsory

²⁴⁷ *Ibid.*, p.100.

²⁴⁸ Above n.228, Welsh and Schneider, p.128.

²⁴⁹ Above n.228, Welsh and Schneider, p.129.

²⁵⁰ Wolf von Kumberg, ‘Making Mediation Mainstream: An Application for Investment Treaty Disputes’, in above n.86, UNCTAD, p.74.

²⁵¹ Above n.94, Claxton, p.96.

²⁵² *Ibid.*, p.96.

mediation in ‘domestic legal systems’ must be approached with caution and cannot be a perfect analogue’; as such, it may be impossible to translate such experiences into a workable practice in the ISDS context.²⁵³

(d) Even if minimum level of participation is prescribed under the rules of mediation, there is no possible way to compel any unwilling disputing parties to take part in it in ‘good faith’; these parties would only ‘go through the motion’ without ‘any genuine intention to settle’ to avoid any findings or accusation of non-observance.²⁵⁴

(e) Information obtained as an outcome of the mediation process can subsequently be used not as *evidence* directly (which is, in any case, probably inadmissible under the relevant evidentiary rules) but as *tools* to identify or procure further evidence that is detrimental to the opponent’s case or to formulate a better strategy in the ensuing arbitral proceedings.²⁵⁵

IX. Conclusion

135. The authors echo the consensus reached at the 39th session of UNCITRAL Working Group III (see paragraph 27 above).

136. At the level of the international legal framework, States under the coordination of UNCITRAL should strive to develop model treaty mediation clauses and investment mediation protocols in the ISDS context. A recognised and uniform legal framework is essential to the parties not just using mediation as their ‘first port of call’ to resolve their disputes but also to appreciate their legal duty to participate in the mediation process. On this front, the mediation clause and mediation rules under the Mainland-HKSAR CEPA IA, amongst others, provides a valuable reference model.

²⁵³ *Ibid.*, p.98.

²⁵⁴ *Ibid.*, p.96.

²⁵⁵ *Ibid.*, p.96.

137. In addition, guidance should be provided, both at international and domestic levels, to government officials in order to address their concerns with regard to participating in the mediation process or, more relevantly, in settling the dispute in mediation. It is fundamental to develop protocols obliging (and/or encouraging) the participating officials to weigh the pros and cons *from the perspective of the State(s)* in settling the dispute with the investor(s) through mediation.

138. The above efforts will not succeed if there is a lacuna of trained mediators, government officials and legal practitioners understanding mediation in the ISDS context. In fact, it is of paramount importance, particularly when investment mediation is still at the ‘infancy’ stage. Training can take various forms, such as seminars, workshops, international conferences and/or structured training.²⁵⁶ Such efforts would greatly assist all stakeholders (government officials, investors and legal practitioners) in familiarising themselves with the mediation process, which in turn will assist them in developing (or improving) their policies and legal frameworks. Training will enable a sufficiently large, strong and diversified pool of trained investment mediators to be built and the pool, in turn, will fortify the stakeholders’ confidence in mediation, and in the long-run maintain the vibrancy of mediation.

139. Mediation is not a ‘*panacea*’ to all investor-States disputes. Yet, at any rate, mediation no doubt has been ‘undervalued and overlooked’ as a form of dispute resolution in investor-State disputes.²⁵⁷ None of the challenges identified in this Paper is insurmountable and, in fact, institutions and stakeholders have taken steps to overcome them.

140. With the commitment and concerted effort of international organisations like UNCITRAL, governments and non-governmental bodies, it is hoped that mediation, being a commonly shared culture not only in Asia but also in many other civilisations, will soon overcome these challenges and find its appropriate place in the ISDS context.

²⁵⁶ The Department of Justice of the Government of the Hong Kong SAR, China, ICSID and AAIL co-organised a one-week ‘Investment Law and Investor-State Mediator Training Course’ in October 2018 and in November 2019.

²⁵⁷ C. Brown and P. Winch, ‘The Confidentiality and Transparency Debate in Commercial and Investment Mediation’ in Titi and Fach Gómez, above n.50, p.329.

SESSION I:

Overcoming Challenges to the Use of Mediation in ISDS

Moderator



Shane Spelliscy

Chair

UNCITRAL Working Group III

General Counsel and Director

Investment and Services Law, Global Affairs Canada

Shane Spelliscy is currently the Director General of the Trade Law Bureau of the Government of Canada and the Deputy Legal Adviser at Global Affairs Canada. As the Director General, he is the Government of Canada's most senior international trade lawyer, responsible for all trade related legal advice, including trade remedies, market access, trade barriers, trade in goods and services and international investment law. He joined the Trade Law Bureau in 2008, and since then he has provided advice on Canada's obligations under its trade and investment treaties and served as counsel in trade and investment treaty negotiations and in disputes under its investment treaties. He has acted as Canada's delegate at the United Nations Commission on International Trade Law (UNCITRAL) since 2008, including with respect to the revision of the UNCITRAL Arbitration Rules, the development of the UNCITRAL Rules on Transparency, and the negotiation of the Mauritius Convention on Transparency in Treaty-Based Investor-State Dispute Settlement. In November 2017, he was elected by the Member States of UNCITRAL as the Chair of Working Group III, which has been tasked with considering possible reforms in the field of investor-State dispute settlement.

Panellist



Justin D'Agostino

CEO

Herbert Smith Freehills

Justin D'Agostino is Herbert Smith Freehills' CEO, leading a 6,000-person global legal advisory business. During a 21-year career with the firm, Justin has overseen the growth of successful businesses including its market-leading Disputes practice and rapid expansion in Asia. A thought leader and skilled practitioner in dispute resolution, Justin also works closely with the firm's largest clients, both in his personal practice role and as a regional and global business leader. He is an alternate member for Hong Kong of the ICC (International Chamber of Commerce) Court of Arbitration and a Member of the ICC's Governing Body on Dispute Resolution Services. He also serves as a member of the Hong Kong Department of Justice's Committee for Promotion of Arbitration. Justin is admitted as a solicitor in Hong Kong and a solicitor advocate in England and Wales.

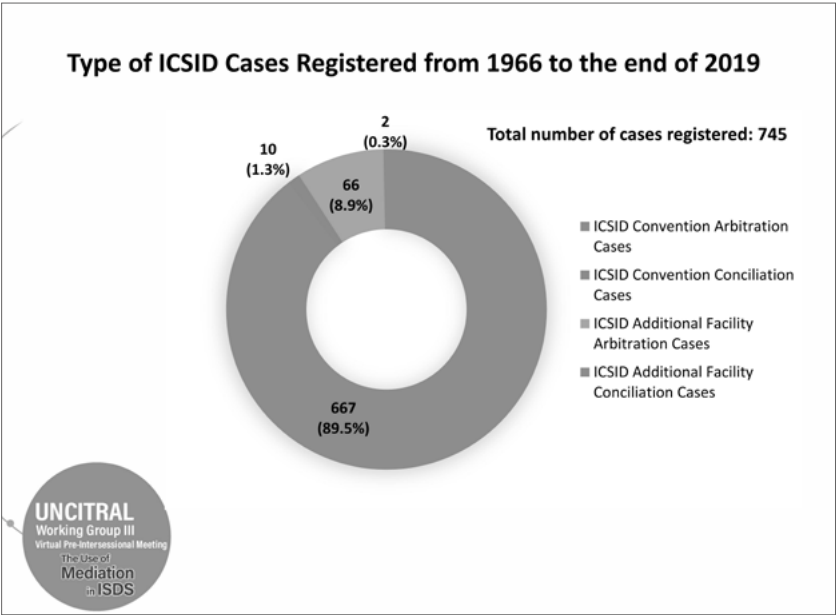
A Practitioner's Perspective on Overcoming Challenges to the Greater Use of Mediation for ISDS



[Slide 1]

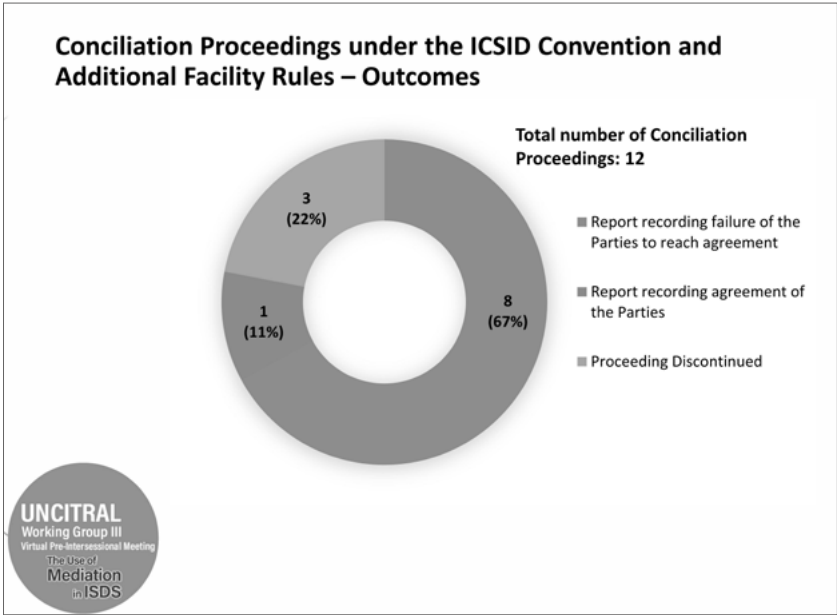
We are here to discuss overcoming challenges to the greater use of mediation for investor-State dispute settlement (ISDS). I have been asked to tackle this topic from the perspective of a practitioner. I am aided in this task by the excellent and comprehensive Background Paper prepared by Adrian Lai and Matthew Suen for this session. Their paper, as well as identifying the obstacles, has some very useful and interesting historical background leading to the present discussion on the need to reform the ISDS system, including to encourage greater use of mediation. My brief remarks will draw on my own experience advising both investors and States on the resolution of investment disputes. So, I will endeavour to be 'fair' to both sides in identifying the obstacles to greater use of mediation.

To give some further context for our discussion, I think it is worth highlighting a few data points from the latest International Centre for Settlement of Investment Disputes (ICSID) Caseload – Statistics.



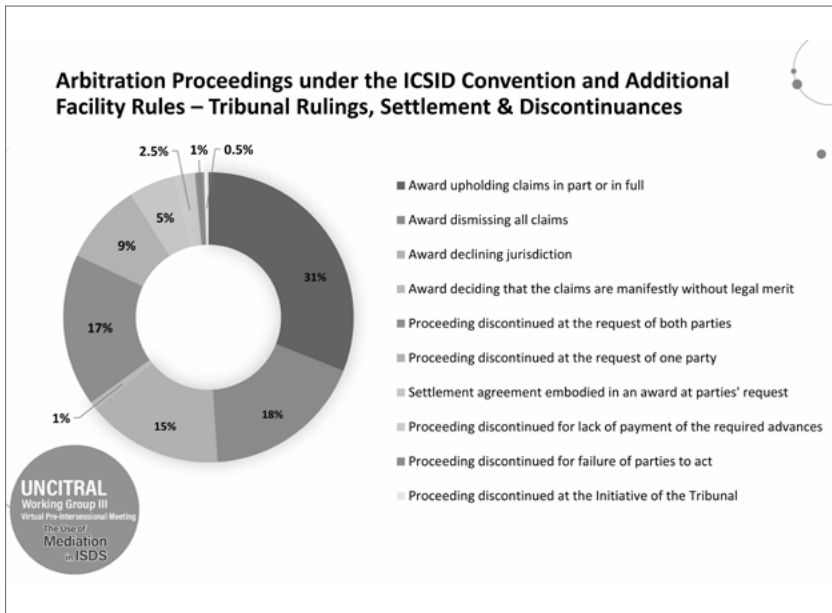
[Slide 2 – Type of ICSID Cases Registered from 1966 to the end of 2019]

The doughnut on this slide shows a breakdown of *all* cases registered at ICSID from 1966 to the end of 2019. Of 745 cases in total, *only* 12 (just 1.6%) were referred to conciliation. A new conciliation request was registered in July 2020. So, as of today, I understand that there are in fact 13 cases. That is a small number. Conciliation is not, of course, exactly the same as mediation but we can perhaps agree that it is a close cousin.



[Slide 3 – Outcomes in Conciliation Proceedings]

This slide shows outcomes in ICSID Conciliation Proceedings. As you see, the parties only reached an agreement in 11% of cases. Because there were only 12 conciliations in total and a number were discontinued before a final report was issued, this means that only one of these conciliations resulted in an agreement.

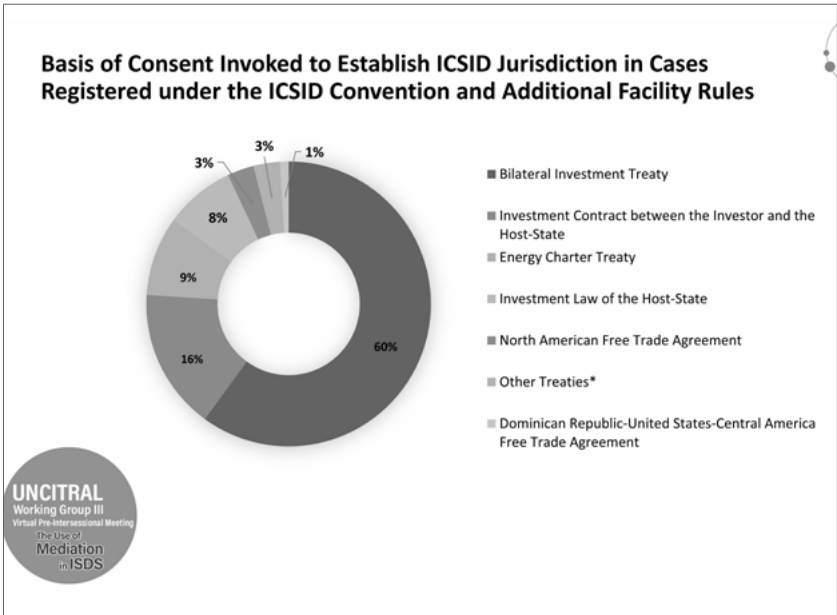


[Slide 4 – Outcomes in Arbitration Proceedings]

This doughnut shows outcomes in ICSID *arbitration* proceedings. It is a busy slide but let me draw out a few things. Meg will correct me if I am wrong but I understand that we can interpret these statistics as implying an overall settlement rate at ICSID of around 20%. This is because roughly half of the discontinuances are at the request of both parties, which tends to imply that some settlement was reached even if this is not formally notified to ICSID.

The United Nations Conference on Trade and Development (UNCTAD) has also calculated an overall settlement rate of 21%, which includes cases referred to arbitration at other institutions or *ad hoc* arbitration. These overall settlement rates are lower in comparison with what we see in commercial disputes. For example, over the past three years, the settlement rate in the English Commercial Court has been around 60%. At least part of the disparity in settlement rates can no doubt be explained by some of the same factors which have been identified as obstacles to mediation in ISDS.

In other words, there are features of ISDS disputes or of the ISDS system which make reaching settlements more challenging, whether that is through direct negotiations or mediation. With that context, let's now start at the beginning of a dispute.



[Slide 5 – Basis of Consent Invoked to Establish ICSID Jurisdiction]

Discussion about ISDS tends to focus on claims under investment treaties. But, at ICSID, 16% of cases are based on investment contracts and 8% on the investment law of the host State. This means that in almost a quarter of all cases, the State’s consent to arbitrate arises from a contract or a domestic law. I think this is important. Because if States wish to encourage mediation, or even to make it mandatory, the provisions of investment contracts and domestic law are the ‘low hanging fruit’ for reformers. They will be easier to change in the short term than to achieve consensus with other States on the approach to take in treaties.

2008 UK Model BIT – Cooling-off provision

If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.



[Slide 6]

Turning to treaties then. As the Background Paper mentions, a common approach in investment treaties over the last few decades has been to impose a ‘cooling-off’ period, typically, of three to six months, before the investor may refer a dispute to arbitration.

The clause on the slide comes from the 2008 UK Model Bilateral Investment Treaty (BIT):

If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.

There has been significant debate as to whether such cooling-off periods are mandatory. That debate extends to whether a tribunal may decline to exercise jurisdiction if the claimant has not complied strictly with this period. I am not going to wade into that debate today, which in any event turns on the particular language of the treaty at issue. Instead, I would offer some preliminary observations from practice.

In my experience, it is almost always the case that the claimant investor will send a notice to trigger the cooling-off period. In a minority of cases, the investor may seek to commence arbitration either without issuing such a notice or before the cooling-off period has expired.

My experience has been that this is only typical in cases where there are some circumstances of exceptional urgency, meaning that the investor cannot wait. In those cases, it seems doubtful that a mandatory requirement to ‘cool-off’ is likely to increase the prospects of a mediated settlement early in the dispute and more likely that the investor will look for other remedies.

In cases where there is no urgency, as I have said, the investor will typically send a notice. Often, the investor will also invite the host State to negotiate. Sometimes this may be in order to comply with a provision which indicates expressly that the cooling-off period is to be used for consultations or negotiations. But, based on my experience, I think it is also fair to say that the majority of claimant investors would be more than willing to negotiate with the host State if it was also willing.

Speaking again from experience, it remains quite rare for a host State to accept the investor’s invitation to negotiate at this stage. Indeed, it is quite common for the host State to completely ignore the notice until the investor files a Request for Arbitration.

There are a number of reasons why States may be reluctant or less likely to engage in negotiations at this stage. These include the reasons mentioned in the Background Paper:

- The relationship with the investor is already very strained;

- State officials may have a desire to defer responsibility for decision-making to a third party (the Background Paper notes, in turn, that this desire may stem from fear of criticism, fear of being accused of corruption, or fear of setting a precedent); and
- There may well be obstacles to coordination within the host State, i.e. between different ministries or departments with interest in the dispute.

To that list, I would add the following:

- First, the dispute may have no urgency for the host State. Indeed, like many respondents, the host State may perceive that there is a strategic advantage to be gained in delaying resolution of the dispute.

I would pause briefly to note, however, that a desire to cause delay is not incompatible with agreeing to mediate. That is because, of course, engaging in mediation may take some considerable time and may therefore serve to delay the commencement of arbitration or other adjudicative proceedings;

- Secondly, I would add that governments are often not able to make decisions as quickly as corporations. This may limit the prospects for using mediation or other forms of alternative dispute resolution (ADR) expeditiously, and certainly so at the outset of a case;
- Thirdly, most host States are not ‘repeat litigators’ in ISDS proceedings and therefore may not automatically appreciate the inherent advantages of mediation, including that its use at an early stage may assist to narrow the issues in dispute, even if does not result in a settlement;
- Last but by no means least, I would add to the list the fact that at the very early stages of the case, it may be very difficult to predict its eventual outcome and therefore difficult to make decisions on parameters for settlement.

In my experience, this last factor is very important in thinking about how to encourage more frequent use of mediation in ISDS.

Critically, we should ensure that we are not only thinking about increasing the use of mediation at the *outset* of a dispute or thinking about mediation exclusively.

- Earlier in my presentation, I referred to the 60% settlement rate in the English Commercial Court. A significant number of these settlements are only reached shortly before trial, on the metaphorical ‘courthouse steps’. This suggests that the prospect of a binding third party decision if the parties can not reach agreement is itself a critical ingredient in encouraging settlement.

Domestic law may also incentivise mediation and settlement in other ways.

- It is common, for example, in commercial disputes for parties to make settlement offers which are ‘without prejudice, save as to costs’. This means that the offer cannot be referred to during any arbitration or court proceedings but may be referred to when it comes to the question of costs. In some jurisdictions, civil procedure rules specify the cost-related consequences of such offers – essentially, a party who rejects an offer and then fails to recover more than the offer is liable to be ordered to pay the other party’s costs – and it has also become standard practice in international arbitration for tribunals to take account of such offers when awarding costs.
- It is not necessarily the case that an ISDS tribunal would not take such an offer into account, but it is certainly less common than in the context of commercial arbitration.
- Further, ISDS tribunals are less likely, generally speaking, to award costs on the ‘costs follow the event’ basis, compared with the practice in international commercial arbitration.
- The consequence, in practice, is that making a settlement offer in an ISDS case may not offer the same costs protection as we would expect in commercial cases. In my view, this also creates

an obstacle, not insurmountable however, to negotiated or mediated settlements because it removes a key incentive for parties to make reasonable offers.

I would end with the observation that there are probably also some psychological obstacles to mediation in the ISDS context, borne of the fact that it remains very rare.

Discussions such as this today serve to build awareness of the potential of mediation and many of the organisers of the conference have also been involved in a very innovative programme to build the awareness and capacity of State officials. In order to see more frequent use of mediation, we will also need to build confidence in the process, which means convincing both investors and governments of the fairness and other advantages of the process.

Panellist



Meg Kinnear

Vice President

World Bank Group

Secretary-General

International Centre for Settlement of Investment Disputes

Ms Kinnear was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, she was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. From October 1996 to April 1999, Ms Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada. Prior to this, she was Counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996), where she appeared before federal and provincial courts as well as domestic arbitration panels. Ms Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. Ms Kinnear has published numerous articles on international investment law and procedure and is a frequent speaker on these topics.

The ICSID Perspective on Mediation of Investment Disputes

I have been asked to speak to the International Centre for Settlement of Investment Disputes' (ICSID) perspective on mediation of investment disputes. It is fair to say that from a policy perspective, ICSID drafters started from the very beginning to design the tools that are most suited to resolve a given dispute. And interestingly, they first offered arbitration and conciliation, and the delegates were quite convinced that conciliation would be the tool that would be inevitably used. Over time, in 1978, another alternative dispute resolution (ADR) mechanism was also added to the rules and that was the Fact-Finding Rules in the Additional Facility. But as Justin has noted, we have had only 13 conciliations in the more than 50 years of ICSID and no fact-finding cases. So, for some reason – and I think there are a number of reasons we can discuss – arbitration has been the dispute settlement mechanism of choice. That said, our policy view is that we would like to continue offering ADR and other mechanisms and continue to give parties much greater options to select the right dispute settlement mechanism for their dispute.

In our most recent amendment process, we have been looking at new sets of rules. First of all, we updated the Arbitration Rules and we have updated the Conciliation Rules to make them much more of a modern ADR and flexible type of process. We have also updated the Fact-Finding Rules to make them self-standing and, again, a more user-friendly type of process. Most importantly for today, we have proposed a set of new, stand-alone Mediation Rules. That's what I'd like to address. Why have we proposed these rules? I think it's evident that there is a lot of interest right now in mediation and a lot of disputing parties would like to have access to investor-State mediation rules. That was one of the reasons we decided the time was right. Our view is that it's very important to give parties broad access to these rules and that we are able to provide an impartial and trusted forum to engage in the kind of facilitated negotiation that you would have in a mediation. We believe that these are going to be a very advantageous set of rules and

hopefully just the existence and knowledge about these rules is going to help incentivise parties to use them.

One of the things we keep saying is that these Mediation Rules offer broad access; and I wanted to focus on two things in particular with respect to broad access. The first, of course, is that these rules are consent based. So, they are entirely voluntary, and you cannot mediate unless both parties agree to mediation. We need mediation consent at the start, obviously at the outset of the process, as you would find in a usual arbitration, and it has to remain throughout the whole process. As a result, either party can unilaterally withdraw their consent to mediation at any time during the mediation process. In order to encourage access to these rules, we've given two ways to consent to use of the Mediation Rules. The first is the method that I think we are all most familiar with in the arbitration context and that is when you have a clause in your investment instrument – either your treaty, your contract or your law – saying that you agree to follow a mediation process and you agree to the mediation rules. So that is fairly simple and one that we are all very familiar with. However, as Justin mentioned, there are not many treaties that do have clauses with these mediation offers. And so, we thought, how can we make the Mediation Rules immediately available? And what we came up with was another way to consent to mediation in these rules and that's consent absent prior party agreement. And essentially what this provision says is that if you don't have an option to mediate in your investment treaty or contract, you can have one party request mediation and include an offer to mediate that will be sent by the Secretary-General to the other party. And the other party has 60 days to accept the offer to mediate. So essentially, you crystallise consent at that point under this mechanism of consent. If the other party refuses consent or fails to accept, then no further action is taken on the mediation. But at least this approach gives another option, even without these specific forum clauses to use the ICSID Mediation Rules. That is one way we were trying to encourage or incentivise broad use of these rules.

The other reason we are encouraging broad access is because these are self-standing rules and, in particular, the scope of these rules is really quite open. The only thing that is required here is that there be an

investment, that it involves a State or a regional economic integration organisation, and that the parties consent in writing to using the Mediation Rules. So, you don't have a lot of the technical difficulties that you have in a regular arbitration where you have to fit into the jurisdiction of ICSID's Article 25 or show that it is directly related to or directly arising out of an investment involving an ICSID member State and a national of another ICSID member State. What this means, most importantly, is that these rules are available to both States and investors who are from countries that are not ICSID members. Again, hopefully thereby allowing a lot more access and a lot easier access for the parties.

In terms of the process, I will not take you through it step-by-step but there are several things that I would like to draw your attention to. In particular, there are several aspects of the mediation process in these rules that make it specific to investor-State. First of all, we have a requirement to initiate the process through a Request for Mediation but it involves a very light screening process. It is not the kind of screening process you might be used to in arbitration. And that stems from the much more easily met or much simplified scope provision that I've just talked about. The rules have a preference for a sole mediator and in fact, that's the default position. But if the parties would like co-mediators or two mediators, then that is something that they are able to opt into. The process starts with a very short Statement of Facts and Statement of Positions and any agreements that the parties have. And then you go to a meeting with the arbitrator and together you pull together what's called the Mediation Protocol, which is essentially the rules of how you go along through this mediation process.

One of the things that I think is very important, and this is something we heard back from people who have done mediations, is that we required each party to identify somebody at the first session who would have authority to settle the case and who could describe to the mediators how they would implement a settlement. And you can see that the obvious reason for that requirement is to make sure that the parties are very much committed to the process, involved in the process, and can see the mediator in action. So, we thought that this requirement was very, very useful. After the Mediation Protocol comes

together, you go through the mediation and you can use all the classic tools we talk about in mediation. These are techniques like caucusing with one party or the other separately, coming back, having other meetings – those kinds of tools. In terms of cost, we decided that it would be appropriate to have the parties bear the costs equally, unless they agreed otherwise. Again, the idea being that you didn't want to have a discussion about costs come in the way of actually trying mediation.

A next issue that's been one for discussion is the whole question of confidentiality. And obviously everyone in this room is familiar with discussions about confidentiality and transparency in investor-State arbitration. What the Mediation Rules do is to propose essentially that all the information in the mediation and all the documents generated in that process shall be kept confidential, unless the parties agree otherwise or alternatively if the information is independently available or its disclosure is required by law. You can see that there is a preference in these rules for the confidentiality of the process. That said, the rules also say that the fact of mediating will *de facto* be available, unless the parties agree otherwise. So at least that much information under these rules should usually be available to the public. It is a bit of a compromise between 100% confidentiality and 100% transparency but it certainly does lead to overall confidentiality as well as confidentiality of the process.

The other important provision, which is in Rule 11, is that any position taken, admissions made, offers of settlement made, or views expressed by either party during the mediation or by a mediator is without prejudice to the legal positions that they may take later-on in any other process. This is one of the very basics. Obviously, parties would be quite loath to even start a mediation and to have a frank and open mediation when they felt it might come back to bite them if they were not ultimately able to resolve the whole matter through the mediation. So, that is a standard clause but obviously a very important one to incentivise the use of mediation.

The final thing that we thought was extremely important was to make sure that any mediated resolution was going to be enforceable. And so, we've offered two potential mechanisms here. First of all, if

the mediation is corollary to an ongoing arbitration, then you are able to use the usual ICSID rule that says the parties can have the settlement incorporated into an Award. And that Award then benefits from the full weight of the ICSID enforcement regime. That is one way through which parties make sure that their mediated resolution will be readily enforceable. The other thing that was important for us was to align the Mediation Rules with the formal requirements in Article 4 of the Singapore Convention. Essentially the settlement must be in writing and signed by the parties, and that evidence should be produced that the settlement agreement resulted from mediation, as defined by the Singapore Convention. If you resolve the case under these rules, we think it's quite clear that you would be able to enforce it in accordance with the Singapore Convention. And I think that is something that's also going to provide quite a bit of comfort to the parties. That is a quick walk through the proposed ICSID Mediation Rules.

I think as Justin has also mentioned, it's extraordinarily important not just to have rules that we can all use but at this point to get ourselves familiar with the process too, and to be comfortable with the process so that the parties will be inclined to use them. As a result, we have been doing a huge amount of technical assistance so that parties are getting to know this option. We have done a number of mediation trainings, both for mediators and for government officials. We have done a lot of work on dispute prevention and management and we have got a huge amount of information that we have made available to parties. So, all of this is an effort to make sure the parties feel comfortable with mediation.

That said, I wanted to make a few final points and they may seem evident to you but I think they are important. The first is that it's extremely important to develop an internal awareness about mediation and the party's capacity to mediate. You obviously do not want to be in the situation where you receive a Request for Arbitration and all of a sudden say to your clients or to in-house government officials, 'let's mediate' and have them reply, 'what are you really even talking about here?' So, knowing about mediation, having an openness to it and having at least some idea of when you're going to be willing to mediate and when you might just say that's not the process we choose to follow,

is very, very important. In this respect, it's important to remember mediation and these Mediation Rules are not just available, or not just conceived, for the cooling-off period. Our thought is that these are rules that are available throughout the entire process, that they may well be used stand-alone, or that they could be used in parallel to another dispute resolution method. The situation you might think of most often is arbitration, with mediation beside. They can also be used at any stage in the process. I think parties can start to become a bit creative about this and say, 'well, we might not have decided on mediation at the beginning but now we're starting to understand our case better, so let's try mediation'. That's the kind of thinking that we need to start getting comfortable with around these rules.

The next big point is one that we've often made in the context of arbitration and which is that you need to get your internal framework basically ready. Who is the lead agency? Are there any domestic law concerns that need to be addressed? Can State officials mediate and ultimately resolve the dispute? Are there any particular permissions required? Are there any particular authorisations required? And if part of your mediated settlement includes pecuniary relief, how do you get that paid? So, having that internal framework really is key.

The final point that I wanted to note is regarding the whole issue of communications. No government wants to be in the position of being portrayed as compromising or implicitly saying that they are liable for a problem as being their public communications message. It is extremely important that any kind of resolution therefore can be linked to why you're doing investor-State dispute resolution in the first place, which is that you have managed to attract, or more importantly in this situation, to retain or even expand foreign direct investment (FDI) in your jurisdiction.

UNCITRAL

Working Group III

Virtual Pre-Intersessional Meeting

The Use of
Mediation
in ISDS


The ICSID Perspective on
Mediation of Investment Disputes

Ms Meg Kinnear

Vice President, World Bank Group

Secretary-General, ICSID

[Slide 1]



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ICSID's Current Dispute Settlement Services

Convention

Both disputing parties
from ICSID Member States

Cconciliation

Arbitration

Additional Facility

One disputing party
from Member States

Cconciliation

Arbitration

Fact-finding

Other

Need not be from
Member State

Case & hearing
administration under
other Rules or Treaties
(e.g.: UNCITRAL or other
investment cases; FTA &
State-to-State cases)


Other functions on
consent of parties
(e.g.: Appointing
Authority,
Registry)

Acting as Secretariat for
Regional Trade
Agreements (e.g.: CETA,
EU-Singapore; EU-
Vietnam; EU-Mexico)

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[Slide 2]

Proposed Amendments – Update and Increase Options for Dispute Settlement




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- Updated Arbitration Rules
- Updated Conciliation Rules
- Updated Fact-Finding Rules
- New Mediation Rules

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[Slide 3]

Why ICSID Mediation Rules?



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The ICSID Mediation Rules are intended to:

- Offer disputing parties broad access to investment mediation facilities;
- Provide States and investors with an impartial, trusted forum to engage in facilitated negotiations;
- Provide a party-driven, flexible process with tailor-made solutions;
- Offer a time and cost-effective dispute resolution process;
- Reflect formal requirements for settlement agreements in the Singapore Convention.

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Nature of ICSID Mediation – Consent Based

- ICSID Mediation is entirely voluntary
- Requires party consent at the outset & throughout the process
- Either party may unilaterally withdraw at any time (*“ongoing consent”*)

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Two Ways to Consent to Mediation

(1) MR 5: CONSENT IN PRIOR PARTY AGREEMENT

- Written consent to mediate is found in relevant treaty, contract or law

(2) MR 6: CONSENT ABSENT PRIOR PARTY AGREEMENT

- Request for mediation includes an offer to mediate
- SG transmits the offer to the other party
- Other party can accept the offer and continue to mediation
- If other party refuses or fails to accept, no further action is taken on mediation

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[Slide 6]




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ICSID Mediation – Scope (MR 2)

- The Secretariat is authorized to administer any mediation that relates to an investment, involves a State or an REIO, and which the parties consent in writing to submit to ICSID.
 - Provides States and investors with broad access to investment mediation facilities without the limitations applicable to Convention or Additional Facility arbitration and conciliation proceedings.

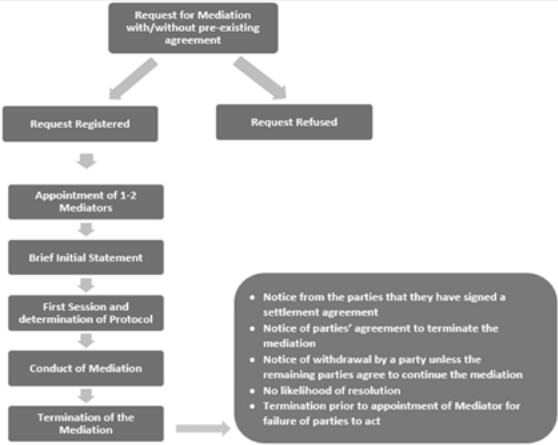
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ICSID Mediation – Process Overview



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graph TD; A[Request for Mediation with/without pre-existing agreement] --> B[Request Registered]; A --> C[Request Refused]; B --> D[Appointment of 1-2 Mediators]; D --> E[Brief Initial Statement]; E --> F[First Session and determination of Protocol]; F --> G[Conduct of Mediation]; G --> H[Termination of the Mediation]; H --> I[Notice from the parties that they have signed a settlement agreement  
Notice of parties' agreement to terminate the mediation  
Notice of withdrawal by a party unless the remaining parties agree to continue the mediation  
No likelihood of resolution  
Termination prior to appointment of Mediator for failure of parties to act];
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[Slide 8]



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ICSID Mediation – General Provisions

Costs (MR 9)

- Unless parties agree otherwise, the costs of the mediation are borne equally by the parties and each party to bear its own costs and expenses

Confidentiality (MR 10)

- All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be kept confidential, unless:
 - the parties agree otherwise
 - the information or document is independently available
 - disclosure is required by law

Without Prejudice Provision (MR 11)

- Any position taken, admissions or offers of settlement made, or views expressed by a party during the mediation is without prejudice to the legal positions it may take in any other proceeding

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Enforcement of Mediated Resolution

- Embody in Award if corollary to ongoing arbitration (AR 43) – benefits of ICSID enforcement regime
- MR are aligned with formal requirements in Art. 4 of the Singapore Convention
 - Settlement needs to be in writing & signed
 - Evidence that the settlement agreement resulted from mediation (as defined by the Singapore Convention)

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ICSID Mediation Activities in 2020

- Member State Consultations on MR – aiming to have Rules adopted as soon as possible
- Offering administration of investment mediations
- Mediation Capacity-building activities
 - Investor-State Mediator Training
 - Training for Government Officials with IFC
- Technical assistance workshops on dispute prevention and management
- Dissemination of information on investment mediation

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Final Points

- Developing internal awareness about mediation and capacity to mediate
- Consider internal framework
 - Lead agency
 - Liability concerns
 - Authorizations needed
- Communications
 - Tie to attracting, retaining and expanding FDI

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[Slide 12]



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[Slide 13]

Panellist



Jaemin Lee

Representative

Korean Delegation

Professor

School of Law, Seoul National University, Korea

Jaemin Lee obtained his LL.B., LL.M. and Ph.D. from Seoul National University; LL.M. from Georgetown University Law Center; and J.D. from Boston College Law School. His major areas of teaching and research are public international law, international economic law and international dispute settlement. Upon graduation from College of Law, Seoul National University in 1992, he joined the Korean Ministry of Foreign Affairs as a foreign service officer. His post in the ministry included deputy directorship of the Treaties Division and the North American Trade Division. Between 2000 and 2004, he also practiced law with Willkie Farr & Gallagher LLP (Washington, DC office) as an associate attorney of the firm's international trade group. From 2004 to 2013 he taught international law and international economic law at School of Law, Hanyang University in Seoul, Korea. He has published articles and books (including book chapters) on various topics of public international law, international trade law and international investment law. Since 2012, he has been participating in the United Nations Commission on International Trade Law (UNCITRAL) Working Groups II and III as delegate of Korea.

Settling Investment Disputes Through Mediation – Korea's Experience and Challenges Ahead

I'd like to thank the United Nations Commission on International Trade Law (UNCITRAL), the Department of Justice of the Hong Kong Special Administrative Region (Hong Kong SAR) and the Asian Academy of International Law (the Academy). I'll just follow up on what Madam Secretary Kinnear just mentioned and also what Justin mentioned as well. Largely, I'll talk about why mediation could be effective in the investment dispute settlement mechanism and why therein, it could actually address some of the concerns identified during our discussion at the UNCITRAL Working Group III, and how we could do better in making this system work more efficiently than before. I'll just talk about the experience of Korea from time to time but I believe the experience of Korea could be equally applicable to other countries because the application of mediation is still in the very early stage. And I would also note, very skeletal, in the development stage as well. So, that's why many countries have an interest in this particular topic now.

Mediation is in increasing demand in other segments of international dispute settlement proceedings as well. Commercial arbitration for one, as mentioned by Secretary-General Kinnear and Justin. The Singapore Convention provides a good momentum for facilitating the utilisation of mediation in commercial disputes, and the benefits of mediation is well known. And most importantly, State-to-State dispute settlement mechanisms are also paying attention to the effectiveness of such a non-binding dispute settlement mechanism as well. With respect to Korea, the country is relying on a non-binding dispute settlement mechanism for certain disputes in its own free trade agreements (FTAs) – that is, for State-to-State disputes. For instance, Korea has a non-binding dispute settlement mechanism in the name of mediation with the European Union (EU) to deal with non-tariff barrier dispute issues, and a similar one with China as well. And with the United States, Korea has a mediation procedure for automobile sector issues. So increasingly, even States are relying upon the

effectiveness of mediation. Perhaps we could also think about utilising mediation in the context of controversial and very complex investment disputes as well.

As explained by Shane at the start of our panel, within Working Group III, discussion is already taking place about mediation as well as larger dispute prevention and mitigation and alternative dispute resolution (ADR) more generally. In particular, Working Group III discussion is focused on mediation and I also believe many States are paying close attention to this development – a very timely development, as just explained by Madam Secretary with respect to the new rule which was most recently updated in February 2020. All these things provide us, i.e. the States and investors as well, a timely opportunity to talk about mediation seriously, and how mediation can be effectively and robustly applied in the context of investment settlement proceedings, as explained by Justin. It's also very interesting to note that conciliation has been utilised only in 13 instances during the long history of the International Centre for Settlement of Investment Disputes (ICSID). So, it makes us pause to think about what we could do better and what we could do differently in this respect.

The most important thing when we consider mediation in the context of investment disputes is the uniqueness of mediation in maintaining and preserving long-term relationships. On numerous occasions in the investment dispute context, for instance, with respect to the experience of career investment, arbitration usually leads to a very difficult relationship between host State governments and foreign investors, which may make the environment of the whole investment dispute very contentious and very difficult to resolve – even after an award is rendered by a tribunal. That's why I think the uniqueness of mediation in preserving a long-term relationship, valuing long-term relationships, and trying to find a common ground between the investor and the host State is a very important factor that we should consider in the context of investment, arbitration and mediation. Also, it appears that having a mediator is very important. It's one thing for us to say that we should try to find an amicable resolution. In fact, almost all international investment agreements (IIAs) have a particular provision saying consultation, reconciliation and mediation are always available.

And we encourage parties to rely upon those proceedings. But, in fact, it's really difficult for States to rely upon these proceedings because there's just one single statement, a short statement in the IIAs, without much detail on how to proceed with the mediation. I think that's one fundamental problem. And I think that's why these developments and ICSID and the recent development in other areas, including the Comprehensive and Economic Trade Agreement (CETA) between the EU and Canada, where detailed provisions of mediation are now finally being discussed. It is a very important development because these provisions now provide States with a really practical opportunity to consider mediation seriously, in addition to or in lieu of arbitration. It is something that we can consider while discussing mediation in the investment dispute context.

With respect to the career experience, it seems as far as I understand, at least to countries like Korea, it is difficult. Unless we have a specific provision in an IIA, unless we have a specific framework in an IIA or another multinational international instrument, where mediation is arguably one viable option in parallel with arbitration, it is really difficult for a government official to go ahead with an amicable resolution in the context of mediation. Again, as Justin mentioned, the responsibility – the practical responsibility, sometimes the legal responsibility – would fall on the shoulders of the decision-maker in the government. That's why I think having a framework and detailed provisions in mediation is important in many respects.

Now, a couple of challenges to consider. The first is the final one – the responsibility issue. From the perspective of government officials, it is really difficult for any government official to decide on mediation. It is one thing for him or her to continue with arbitration and encounter the final arbitral award, whatever it may be. But it would be quite another for him or her to say, 'This is it; I'll make the decision. And mediation is the final solution for this dispute. I'll take care of it.' It would be quite difficult for any government official to get to that point. That's something we should contemplate while considering these issues. And another one is how to reconcile the increasing trend of underscoring public oversight in the context of transparency, with the inherent trait of mediation, which values confidentiality. I see

some of the balancing points, as just explained by Madam Secretary Kinnear – particularly in Rule Ten of the new Mediation Rule, wherein we can see the effort to find a balancing point. But again, fundamentally, on the one hand, we tried to underscore the transparency issue in the larger context of investor-State dispute settlement (ISDS). But, on the other hand, mediation is based upon strong or strict confidentiality rules. How to reconcile this – that’s another question that we could consider. And the third one from the bottom is how to deal with the costs during its duration, because it could be used as a delaying tactic from time to time. So, how to safeguard good faith mediation from such delaying tactics? That is another issue. And the fourth one from the bottom is how to coordinate mediation with the existing system of arbitration. If we include mediation in the context of the ISDS mechanism generally, then we have to think about the relationship between mediation and arbitration. Should mediation be a mandatory option or just a voluntary option as we have today? Should it be an alternative or should it be a way station on the path to arbitration, etc.? That’s something we could also consider while formulating mediation-related texts in future IIAs or multilateral international conventions as well.

The key question is flexibility and how to deal with this issue procedurally. Well, the beauty of mediation lies in its flexibility. And in mediation, an expertise in communications is preferred in order for the mediator to freely talk to one party or sometimes two parties. And a mediator has an obligation not to disclose what he or she has heard from one party to the other party. So, a mediator has the full trust of the two parties in resolving disputes, even if he or she cannot impose the binding resolution outcome on the parties. But still, he or she enjoys the full trust and confidence of the two parties. That’s the beauty of mediation with flexibility. But at the same time, how do we select a mediator? How do we oversee the mediator? How do we preserve the core elements of due process? That’s another issue. I also see that the CETA agreement and the new Mediation Rules of ICSID provide detailed provisions of a code of ethics to mediators. It is one good starting point for this discussion as well.

Then, some thoughts on how to overcome or try to overcome these challenges. As I mentioned, I think the first point that we should contemplate should be elaboration. Providing a brief statement of the possibility of mediation is not enough for mediation to be adopted in practical terms by government officials and government agencies and investors. So, the States and the stakeholders should try to contemplate how to elaborate existing provisions on mediation in a way that provides detailed guidelines on mediation in order for States and investors to adopt mediation as an effective alternative to the existing dispute settlement mechanism of arbitration. So, elaboration is just a starting point. And the new Mediation Rules in ICSID is a good benchmark for other discussions and for Working Group III discussions as well. At the same time, for system litigation – not just mediation alone, but how to understand mediation in the overall context of ADR for settling investment disputes and arbitration. What is the relationship between mediation and the cooling-off period? What is the relationship between arbitration and mediation?

When we look at mediation provisions these days, there is typically one short statement of the possibility of mediation. Usually, we can find a statement to the effect that mediation can be initiated at any time of the proceedings, which could be understood as before arbitration, during arbitration, or perhaps even after arbitration to deal with how to enforce the official award. So, it's not clear how to understand mediation in the larger context of arbitration. That's just something we should also think about in the overall context of systematic mediation of the investment settlement mechanism in the ISDS system generally in IIAs, and how to safeguard this legitimacy issue. Again, with regard to the mediator, how to oversee or perhaps not to oversee the mediator, the code of ethics, etc. Perhaps, we could include a roster of mediators in IIAs or in a multinational instrument as well. Also, how to ensure at least a minimum level of transparency? Again, this is all about finding a balance. Confidentiality is essential for mediation but at the same time, the argument for ISDS improvement lies in how to increase public awareness, public oversight and transparency. How to find a balancing point? Perhaps the minimum elements of mediation,

such as the fact that mediation is taking place and the elements being disputed. Those issues could be conveyed for public oversight, if possible, so that's something we could contemplate.

Finally, how to announce its practical availability? Perhaps, I think for investors and government agencies, they might have a strong interest in pursuing mediation because it's cost efficient and it's time efficient. And most importantly, it helps them to preserve a long-term relationship. So, they have a strong interest in mediation. The question is whether it is really practical. Is it really practically available for decision-makers of the government or, for that matter, decision makers of the investors or investing companies? Is it really a practical alternative? It is something that we should contemplate while discussing this issue down the road.



UNCITRAL
Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS


**Settling Investment Disputes Through
Mediation – Korea’s Experience and
Challenges Ahead**

Professor Jaemin Lee
School of Law, Seoul National University

[Slide 1]

Contents

- Increasing Demand for Mediation
- Investment Disputes & Mediation
- Contribution and Benefit
- Challenges to Consider
- Overcoming Challenges



UNCITRAL
Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

Increasing Demand for Mediation

- **Increasing Use of Mediation to Settle Int'l Disputes**
 - Fast
 - Flexible
 - Low-cost
 - Party-autonomous
- **Global Trend**
 - Useful for commercial disputes and State-to-State disputes
 - Valuing long-term relationship and amicable resolution
- **New Momentum**
 - 2019 *United Nations Convention on International Settlement Agreements Resulting from Mediation* ('Singapore Convention')
 - 53 signatories and counting
- **Korea's Experience and Treaty Practice**



[Slide 3]

Investment Disputes & Mediation

- **IAs value amicable resolution of disputes**
 - Consultation, Conciliation, Mediation
 - Have not been effectively or robustly used
- **WG III discussion**
 - Dispute prevention & Mediation
 - Renewed attention to ADR generally
 - Exploring alternative ways of resolving disputes
 - Not to replace arbitration but to offer more options
 - May help address states' concerns identified
- **Renewed attention to mediation**
 - Recent IAs begin to include meaningful provisions
 - Discussion of Mediation Rules at ICSID



[Slide 4]

Mediation- Contribution & Benefit

- **Arguably equally useful investment disputes**
 - Maintaining long-term relationship
 - Seeking common ground between investor/host state
 - Reducing cost and duration
 - Dealing with political sensitivity
 - Addressing arbitration-specific concerns identified
- **In particular:**
 - 1.5 track between consultation and arbitration
 - Involving a third party (mediator) and still maintaining flexibility
 - Lessening confrontation and preserving relationship
- **Korea's Experience and IIA Practice**



[Slide 5]

Challenges to Consider

- **Risk stemming from new experiments**
 - Insufficient precedents
- **Flexibility vs. Procedural Due Process**
 - B/w mediation's core feature & the need to regulate
- **Coordination with ISDS Arbitration**
 - Timing, consequence, materials and arguments
- **Possible impact on Cost and Duration**
 - Inserting another procedural layer leading to ISDS?
- **Possible impact on public oversight**
 - Reconcile with increasing trend of transparency?
- **Responsibility issue**
 - Possibly mediation-averse stance of gov't officials?



[Slide 6]

Overcoming Challenges

- **Elaboration**
 - Detailed provisions in IIA for mediation
 - Clearer guidance for proceedings
- **Systematization**
 - Structuring mediation in the overall context of ISDS
 - An alternative or a way station
- **Legitimacy safeguard**
 - Roster of mediators, and related code of ethics
 - Ensuring a minimum level of transparency
- **Practical availability**
 - Voluntary selection of mediation seems inevitable
 - But IIAs should foster & encourage in a stronger voice



[Slide 7]

Thank you

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[Slide 8]

Panellist



Mairée Uran Bidegain

Head

Program for the Defense of the State in International Investment Arbitration, Vice-Ministry of Trade, Ministry of Foreign Affairs, Chile

Ms Mairée Uran Bidegain is the Head of the Program for the Defense of the State in International Investment Arbitration of the Ministry of Foreign Affairs of Chile since 2018, where she leads the team in charge of the State's defense in investor-State arbitrations and dispute prevention. She also coordinates the State's position on investor-State dispute settlement (ISDS) reform matters, including before UNCITRAL (United Nations Commission on International Trade Law) and ICSID (International Centre for Settlement of Investment Disputes). Prior to this position, she was a Team Leader and Senior Legal Counsel at ICSID, where she led one of the four ICSID teams in charge of the administration of proceedings and served as Secretary of tribunals, commissions and *ad hoc* committees in arbitration, conciliation and annulment proceedings. Prior to joining ICSID, Mairée worked as an associate in the international arbitration group of White & Case LLP, in Washington D.C. (2006–2011) where she advised sovereign States as well as private parties on international dispute resolution, cross-border negotiations and international transactions. She is admitted to practice in New York State.

Encouraging Mediation Through a Multilateral Instrument on ISDS Reform

I would like to start by congratulating the Asian Academy of International Law (the Academy), the Department of Justice of the Government of the Hong Kong SAR as well as the United Nations Commission on International Trade Law (UNCITRAL) for the outstanding organisation of this event. I was requested to explore whether a multilateral instrument on investor-State dispute settlement (ISDS) reform could encourage the use of mediation. In order to delve into this topic, I would like to take a step back and give some context to our audience, which I understand includes not only Working Group III delegates but also members of the general public. To do this, I propose to proceed as follows.

First, I will take a few minutes reminding our audience of what we discussed a month ago at the 39th session of Working Group III, where the topic of mediation in investor-State disputes (ISD) was one of the six reform options on the agenda, which has already been mentioned by our Secretary-General. The second part of my presentation will be devoted to explaining why a multilateral instrument on reform has been perceived by a number of States as a reform option itself and an implementation mechanism for many of the other reform options, including mediation, that merits the Working Group's attention.

And third, I will explore if indeed such an instrument could be of assistance to overcome the challenges that mediation has faced and, in short, whether such an instrument could be a means to encourage the use of mediation.

Let me start with a summary of the discussion held a month ago before Working Group III on the topic of mediation.

First, it was considered that alternative dispute resolution (ADR) methods are still largely underutilised in the ISDS context, among others, because of unfamiliarity with these mechanisms, including mediation, by stakeholders. Second, it was underscored that States

need to address the structural or policy impediment to implement mediation as mechanism to resolve ISDS. Third, the need to set up a legal framework to encourage mediation and the need to set up policies providing legal certainty for the use of mediation was mentioned. Fourth, the Working Group's delegates also emphasised that not all disputes are suitable for mediation and any future work on this topic should ensure that the application of ADR methods not lead to unintended consequences, such as regulatory chill or reduced transparency. In this sense, the Working Group did mention that the public interest shall also be represented in the course of the mediation process.

At the end of the session, the Working Group requested the Secretariat (1) to prepare guidelines and best practices on ISDS mediation, which could help States overcome some of the impediments and concerns I mentioned a few minutes ago, and (2) to work with interested organisations, such as the International Centre for Settlement of Investment Disputes (ICSID), to develop rules for mediation in the ISDS context, as well as model clauses that could be used not only in investment treaties but also in a potential multilateral instrument on ISDS reform.

Now, why a multilateral instrument for ISDS reform? Why could this be an appropriate implementation option? The reasons are multiple but I will try to explain in particular for the members of the audience who have not had a chance to participate in the Working Group discussion what we refer to when we are talking about a multilateral instrument on ISDS reform and why we believe this could be a good implementation option.

After the last few years of discussion at UNCITRAL, it became clear that States not only have different interests and may face different concerns, but even if they share the same concerns, they may not be in a position to implement the same solution at the same time. It has also become evident that a reform process will only be successful if there's buy-in of the process by a significant number of States. To obtain the widest possible participation of States in reforming ISDS, we need to provide a flexible framework that allows different reform tools or solutions to be pursued and implemented independently from one another.

After three years of discussions and having reached the third stage of the process, Chile and a number of other delegations believe that the time has come to have some certainty as to the mechanism through which we would implement the hard-fought consensus embodied by Working Group III.

The right implementation mechanism could be to integrate the various procedural solutions developed by the Working Group into a multilateral, legally binding treaty – not only for the reasons described before, but also because a flexible multilateral instrument would allow States to benefit from solutions when they are ripe, without needing to wait for all solutions to be fully developed before they can implement any of the reform options, including ISDS mediation.

In addition, the instrument could contribute to achieving uniformity of the applicable procedural rules, and thus consistency and coherence of the investment regime as a whole.

And last but not least, developing and elaborating a multilateral instrument could be a very effective mechanism for countries to efficiently and effectively update their network of older style international investment treaties with modern procedural provisions. This could go a long way to modifying the current ISDS system.

With the aforementioned context on why we are discussing the idea of a multilateral instrument, let's explore whether such an instrument could indeed encourage the use of mediation. And to do this, I propose to begin the analysis with the challenges that are most commonly cited as an obstacle for the wider use of mediation, in order to then determine if and to what extent a multilateral instrument could assist to overcome those challenges.

Many have already been mentioned by prior speakers, referring to the very useful Background Paper prepared for this pre-intersessional meeting. As Jaemin mentioned earlier on, today we have a situation in which even if parties to an investor-State dispute would like to resort to mediation, chances are that they lack the appropriate basis to do so as it is not common for bilateral investment treaties or investment chapters of free trade agreements to provide for mediation of investor-State

disputes. Therefore, the first challenge for ISDS mediation to be used on a wider scale is the lack of a proper and effective legal framework. While there are a rising number of international investment agreements (IIAs) in which consensual mediation has been included as part of the dispute resolution process, this is not the case for the majority of investment treaties in force today. Thus, incorporating mediation in a multilateral instrument on ISDS reform on the basis of best practices considering, among others, the new ICSID mediation rules and modern IIAs would not only promote investment mediation, going forward, but it would also be the most efficient way to ensure that mediation is incorporated in hundreds of first-generation treaties that do not include any reference to mediation at this point. In this sense, the multilateral instrument would be one of the best options to transform ISDS mediation from talk to action. In addition, the multilateral instrument could put in place a uniform legal framework for ISDS mediation available to all States instead of having each State try to include different frameworks. By eliminating the potential for fragmentation that this could cause, we could have a uniform legal framework. In short, a carefully drafted multilateral mediation legal framework that is included in the multilateral instrument could indeed foster the use of mediation in the ISDS context.

The second challenge commonly cited, and which was already mentioned today, is the State's official unwillingness to assume responsibility for voluntary settlements or preference to defer decision-making responsibility to an arbitration tribunal or to a third party. And this is reasonable and understandable. Deciding to use taxpayer's money to settle a claim is no doubt a difficult decision that will always need to be carefully considered and properly justified by any State official. But even if this is the case, in my experience, States are more frequently than not willing to engage in a meaningful negotiation process to settle the dispute before the request for arbitration is filed with ICSID. This does not mean that materialising an agreement reached through negotiation or mediation is not a difficult proposition, but incorporating mediation as a mechanism to settle investor-State disputes in a multilateral instrument could assist in this respect. Let me explain:

First, including mediation as an ADR method under the treaty could increase confidence in the process and promote it as an adequate means to resolve disputes. This, in turn, could justify its use in the eyes of State authorities. Second, a State authority may be more willing to accept a mediation if the process is initiated on the basis of a detailed mechanism, set forth in a multilateral binding treaty that has been signed and ratified by the State. In other words, the multilateral treaty could become the State officials' justification for its decision to use an alternative means to arbitration to solve the claim, and he or she could be less exposed to public and political criticism for preferring a mediated agreement over engaging in a long and costly arbitration.

The third challenge I will address is what the Background Paper has called resistance to mandatory mediation. Reflecting on this took me back to the old tension between transparency and confidentiality. While confidentiality of the mediation process is regularly cited as a potential benefit of this mechanism over other forms of dispute resolution, the potential lack of transparency of the mediation process that this confidentiality entails has also drawn negative attention. This is because part of the concerns that we seek to address in Working Group III relate to the need to have increased legitimacy and accountability of the ISDS system through, among others, increased transparency.

This should be considered in conjunction with the idea that not all disputes are suitable for mediation. For example, disputes that are contractual in nature disguised as an investment dispute, or are subject to umbrella clauses, may be well-suited for mediation; however, cases where important public policy issues are at stake are less likely to be good candidates. Accordingly, while we could incorporate a clause in the multilateral instrument that seeks to make mediation a mandatory process prior to arbitration, such a clause would run counter to the objective of fostering the use of mediation. It is because States would be cautious of adopting a mechanism which could replicate the same concerns that investment arbitration has faced.

Thus, while we understand that some of the literature see the lack of mandatory mediation as a concern, we consider that recourse to mediation shall remain consensual and its use limited to disputes where such a mechanism is appropriate.

Finally, apart from incorporating mediation in a multilateral instrument, we believe there are some other practical challenges that perhaps a multilateral instrument on ISDS reform will not be able to tackle, and that other initiatives will be necessary. For example, it would be necessary to ensure that policies, rules and regulations are put in place at the national level to ensure a coordinated response by the State, including appointing the appropriate authorities to sign a settlement agreement reached through mediation – the enforcement of which will only be possible if the appropriate regulations are in place. Similarly, it will be necessary to set forth a strong capacity-building mechanism in order to make sure the general public and all users are actually more aware of mediation. These two challenges, among others, would require other types of solutions.

To conclude, while a multilateral instrument for ISDS reform will not be able to address all the challenges, it could be a relevant instrument to implement modern mediation rules at a global scale and foster its use as a prime mechanism for the resolution of disputes between States and investors.



[Slide 1]



[Slide 2]

1. The 39th session of Working Group III: discussion on Mediation



[Slide 3]

Working Group III: Key Takeaways on Mediation

Common understanding:

- Underutilization of ADR in ISDS
- Need to overcome structural or policy impediment to implement mediation within States
- Need legal certainty on the use of mediation and an appropriate legal framework
- Not all disputes are suitable for mediation
- Need to avoid unintended consequences derived from ADR
- The public interest shall be taken into consideration in the mediation process

[Slide 4]

Working Group III: Key Takeaways on Mediation

WG's requests to the Secretariat:

- Interest in pursuing further work on mediation and other forms of ADR, with a view to ensure that ADR could be more effectively used
- Request to prepare guidelines and best practices on ISDS mediation
- Request to develop or adapt rules for mediation in the ISDS context as well as model clauses
 - to be used in investment treaties or
 - to form part of a potential multilateral instrument on ISDS reform.

[Slide 5]

2. Why a Multilateral Instrument on ISDS Reform?



[Slide 6]

Why a Multilateral Instrument on ISDS Reform?

- Not all States face the same concerns
- Not all States need, want, or are in a position to implement the same solutions at the same time
- To attain the **widest possible participation of States** in reformed ISDS, we need to provide a **flexible framework** to independently implement reform solutions
- **Need certainty** on how to implement the hard fought consensus reached in WG III on the various reform options, including mediation

[Slide 7]

Why a Multilateral Instrument on ISDS Reform?

- The Multilateral Instrument can provide a framework to implement reform solution, including mediation, when they are ripe
- The Multilateral Instrument could contribute to achieve uniformity of the applicable procedural norms, and thus consistency and coherence of the investment regime as a whole
- The Multilateral Instrument will enable countries to efficiently update their networks of older-style bilateral investment treaties

[Slide 8]

3. Could a Multilateral Instrument on ISDS Reform Encourage the Use of Mediation?



[Slide 9]

Could a Multilateral Instrument Encourage the Use of Mediation?

CHALLENGES:

- Ineffective mediation legal framework
- Unwillingness to assume responsibility for voluntary settlements
- Resistance to mandatory mediation
- Practical considerations
 - Unfamiliarity with and misperception of the use of mediation in ISDS
 - Timing
 - Lack of coordination of relevant state entities
 - Strained relationship between the investor and the State

10

[Slide 10]

Could a Multilateral Instrument Encourage the Use of Mediation?

CHALLENGE:

- Ineffective Mediation Legal Framework

ADDRESSED BY THE MULTILATERAL INSTRUMENT (“MI”)? Yes

- The MI permits the incorporation of ISDS mediation in older IIAs
- The MI could incorporate a sophisticated mediation mechanism developed by States multilaterally on the basis of best-practice:
 - Draft ICSID Mediation Rules
 - Modern IIAs
- The MI could make available to all States a carefully drafted and uniform legal framework for effective ISDS Mediation

11

[Slide 11]

Could a Multilateral Instrument Encourage the Use of Mediation?

CHALLENGE:

- State officials’ unwillingness to assume responsibility for voluntary settlements

ADDRESSED BY MI? Yes

- Incorporating ISDS mediation in the MI
 - May increase confidence in the mechanism
 - May promote it as an adequate means to resolve ISDS disputes and justify its use in the eyes of State authorities

12

[Slide 12]

Could a Multilateral Instrument Encourage the use of Mediation?

CHALLENGE:

- Resistance to mandatory mediation

ADDRESSED BY MI? Yes, but....

- Mandatory mediation could deter the objective of fostering its use
- “Not all disputes are suitable for mediation”
- Need to ensure the representation of public interest in the mediation process, including transparency

13

[Slide 13]

Could a Multilateral Instrument Encourage the Use of Mediation?

CHALLENGE:

- Practical considerations (e.g. timing, coordination within State, relationship with investor, misperception of mediation in ISDS)

ADDRESSED BY MI? Yes and No

- MI could incorporate a provision providing flexibility to use mediation at all times, including before relation with investor is broken
- Different initiatives will be necessary to overcome other challenges:
 - Ensure national regulations provide for a coordinated response
 - Increase understanding of system and diversity of mediators’ pool

14

[Slide 14]

SESSION II:
Multi-Tiered Dispute Resolution
Process (Mediation Protocol)

BACKGROUND PAPER

Writer



Iu Ting-kwok MH

Founder

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Mr TK Iu, a trained investment law and investor-State mediator, is a leading mediator and mediation trainer in Hong Kong. He is also a consultant solicitor with Kwok, Ng & Chan (www.kncsol.com). TK is a director of eBRAM Online Dispute Resolution Centre Limited and the founder of Asia Conflict Resolution Institute Internationally. TK is a panel mediator of the Singapore International Mediation Centre and the Japan International Mediation Center (JIMC-Kyoto). He is also on the panel of Kluwer Mediation Blog as a regular contributor. Between 2013 and 2017, TK advised the Department of Justice of the Hong Kong SAR on the enactment of the apology legislation. The Apology Ordinance came into effect on 1 December 2017. Currently, TK is a member of the Secretary for Justice's Steering Committee on Mediation and the Chairman of the Special Committee on Evaluative Mediation. TK holds adjunct professorships at several universities in Hong Kong, namely (1) School of Law, City University of Hong Kong; (2) Department of Law and Business, Hong Kong Shue Yan University; and (3) Hang Seng University of Hong Kong. He is also the first Hong Kong-based Visiting Professor of the University of Law, UK. In 2017, the Hong Kong SAR Government awarded TK a Medal of Honour in recognition of his contribution to the promotion of mediation.

Writer



Andy Kwok

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Andy CY Kwok read law at the City University of Hong Kong, where he obtained his Juris Doctor (J.D.), Master of Law in Arbitration and Dispute Resolution and P.C.L.L. He intends to practise as a barrister and develop a solid alternative dispute resolution (ADR) practice. Andy received mediation training from Professor Nadja Alexander in 2012. Since then, he has developed a strong interest in mediation and ADR. Throughout these years, he has received extensive mediation and negotiation training from local and overseas mediation gurus. Andy passed the Hong Kong Mediation Accreditation Association Limited (HKMAAL) Stage 2 Assessments at his first attempt. He is currently a HKMAAL accredited general mediator and is an eBRAM enlisted mediator. Andy has previously worked with The Law Society of Hong Kong as a legal researcher and the post provided him with a wealth of exposure in conducting academic research on various mediation topics. As a young mediator, Andy actively participates in mediation activities and training programmes as a helper.

Background Paper

I. Executive Summary

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III has discussed the possibility of combining mediation with arbitration and other dispute resolution methods to function as a multi-tiered dispute resolution system for international investment disputes. The International Centre for Settlement of Investment Dispute (ICSID) is also one of the leading institutions in promoting the use of multi-tiered dispute resolution systems to resolve international investment disputes. Recently, ICSID took the initiative to encourage States and investors to adopt mediation by introducing a set of draft mediation rules to be used in the context of investor-State dispute settlement (ISDS). In these ISDS reform exercises, one may draw inspirations from the Hong Kong multi-tiered dispute resolution mechanisms adopted by the Financial Dispute Resolution Scheme of the Financial Dispute Resolution Centre and the COVID-19 Online Dispute Resolution Scheme of eBRAM International Online Dispute Resolution Centre Limited (eBRAM).

The majority of bilateral investment treaties (BITs), with the incorporation of a two-tiered dispute settlement clause, used to provide the parties with some forms of alternative dispute resolution (ADR) process before such disputes were to be heard before an arbitral tribunal. The first tier (generally being a period of ‘cooling-off’) has long been criticised for not being sufficiently conducive to facilitating the disputing parties to go through a collaborative process with a view to finding a resolution to their dispute. Arbitration process, being the second tier of the mechanism, has also aroused increasing concerns from States and international institutions. As such, due to the collective efforts of UNCITRAL Working Group III and ICSID, mediation is receiving more attention. The mediation process is now more commonly found

in the recent treaties signed by States as a form of ISDS mechanism. Furthermore, as an innovative internal arrangement within China, the Mainland China and the Hong Kong Special Administrative Region Investment Agreement enhancing the Closer Economic Partnership Arrangement (CEPA) has incorporated a mediation protocol to provide guidelines on the procedural matters and core values of the mediation process.

The benefits of incorporating a mediation protocol in investment treaties are manifold. First, it serves as a mediation manual to provide parties with functional suggestions on how mediation can be used to resolve claims in specific instances. Further, mediation rules offer guidance on the behaviour of mediators and the process through which the mediation is to be conducted. A mediation protocol also offers practical guidelines to States and investors about what to do and what to expect during the mediation process.

By reference to certain established mediation protocol and/or mediation rules in Hong Kong and overseas, this Paper attempts to set out important elements that would enable a mediation protocol to be user-friendly and effective.

II. Introduction

1. This Paper seeks to provide information to facilitate the discussion of the UNCITRAL Working Group III's virtual pre-intersessional meeting on mediation. It comprises four main parts, namely (1) an overview of the multi-tiered dispute resolution process in ISDS; (2) an analysis of the existing practice regarding provisions of mediation in international investment agreements; (3) a discussion on the benefits, if any, of incorporating a mediation protocol (i.e. a set of mediation rules) to promote the greater use of mediation in ISDS; and (4) a discussion on the elements for an effective mediation protocol.

III. Overview of the Multi-Tiered Dispute Resolution Process

A. The International Centre for Settlement of Investment Dispute System

2. A multi-tiered dispute resolution mechanism has long been adopted in the context of ISDS. The ICSID is part of the World Bank Group and it aims to promote international investment by helping to build trust and confidence in the investment dispute resolution process.¹ Established in 1966 by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), ICSID provides a multi-tiered dispute resolution system for the resolution of international investment disputes, including conciliation and arbitration.²

3. The ICSID Convention, which has been ratified by 155 States, provides a procedural framework for conciliation and arbitration of investment disputes between contracting States and nationals of other contracting States.³ Where the investment disputes arise between an ICSID contracting State or its national and a non-contracting State or a national of a non-contracting State, the Additional Facility Rules for conciliation or arbitration (AF Rules) are to be adopted. The AF Rules are, in most ways, the same as those of the ICSID Convention.⁴

4. ICSID conciliation is a cooperative and non-adversarial dispute resolution process.⁵ The goal is to clarify the issues in the dispute,⁶ so as to promote an amicable and non-imposed settlement between the parties on mutually acceptable terms.⁷

¹ See the website of International Centre for Settlement of Investment Dispute: <https://icsid.worldbank.org/>

² *Ibid.*

³ See Article 1 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

⁴ See n.1, ICSID.

⁵ See n.1, ICSID.

⁶ See Article 34(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

⁷ Jack J. Coe Jr., 'Chapter 4 Settlement of Investor-State Disputes Through Mediation – Preliminary Remarks on Processes, Problems, and Prospects' in R. Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet LLC, 2009), pp.73–112.

5. To commence an ICSID conciliation proceeding, a written request shall be addressed to the Secretary-General of ICSID.⁸ Such written request is treated as a binding consent to ICSID conciliation and it cannot be withdrawn by the party unilaterally.⁹ Upon receipt of the Request for Conciliation, the Secretary-General will proceed to register the case unless it is ‘manifestly outside’ the jurisdiction of ICSID, which extends to any legal dispute arising directly out of an investment between a contracting State and a national of another contracting State.¹⁰ Following the registration, a conciliation commission is required to be constituted as soon as possible and it shall consist of a sole conciliator or any uneven number of conciliators.¹¹ Should the parties fail to agree on the number of conciliators to be appointed, the ICSID regime defaults to a three-conciliator conciliation commission.¹² When three conciliators serve, each disputant selects one conciliator; and the third is designated jointly by the parties.¹³

6. After the constitution of the conciliation commission, each party is required to submit a written statement of that party’s position and thereafter the parties are required to attend hearings together in private.¹⁴ The conciliation commission may at any stage recommend terms of settlement with arguments in support of its recommendations to the parties.¹⁵ Where settlement is reached, the conciliation commission is responsible for drawing up a report noting the issues in dispute and recording that the parties have reached an agreement.¹⁶ Where no settlement is reached, the conciliation commission is required to close the proceedings and draw up a report noting the submission of the dispute and recording the failure of the parties to reach an agreement.¹⁷

⁸ See Article 28(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

⁹ See Article 25(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

¹⁰ See Article 28(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

¹¹ See Article 29 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

¹² *Ibid.*

¹³ See Article 29(2) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

¹⁴ See Rules 25 and 27 of the ICSID Convention Conciliation Rules.

¹⁵ See Rule 22 of the ICSID Convention Conciliation Rules.

¹⁶ See Article 34(2) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

¹⁷ *Ibid.*

7. The approach to be adopted by a conciliator in dealing with investor-State investment disputes is not clearly prescribed in the ICSID Convention. One prominent conciliation case (*Tesoro Petroleum Corporation v Trinidad and Tobago* (ICSID Case No. CONC/83/1)) has shed light on the role of a conciliator under the ICSID Convention. In that case, the late Lord Wilberforce, who was the sole conciliator for the case explained that he ‘conceive[d] that his task in these proceedings is to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement’.¹⁸ Afterwards, based on the parties’ memorials, informal oral arguments and views submitted in confidence by the parties as to what might constitute an acceptable settlement, Lord Wilberforce advanced a proposed settlement for consideration by the disputing parties based on ‘his estimate of the parties’ chances of success on the issue in dispute’.¹⁹

8. It is reflected in the nature of the process in the said case that the conciliation under ICSID exhibited elements of evaluative mediation.²⁰ This is because an ICSID conciliator assists the parties in reaching a resolution by pointing out the weaknesses of their case, and predicting what a judge or jury would be likely to do.²¹ Like an evaluative mediator, an ICISD conciliator might make formal or informal recommendations to the parties as to the outcome of the issues in their dispute.²²

9. Where the parties are not able to settle their disputes by conciliation, they may initiate an arbitration proceeding at ICSID by filing a Request for Arbitration to the Secretary-General of ICSID,²³ who will then proceed to register the case unless it is ‘manifestly outside’ the jurisdiction of ICSID.²⁴

¹⁸ Stephen M. Schwebel, ‘Is Mediation of Foreign Investment Disputes Plausible?’, *ICSID Review – Foreign Investment Law Journal*, 22(2) (1 October 2017), pp.239–240.

¹⁹ *Ibid.*

²⁰ David Ng, ‘Investment Mediation’, *Proceedings of ISDS Reform Conference 2019: Mapping the Way Forward* (Asian Academy of International Law), pp.293–294.

²¹ Susan D. Franck, ‘Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide’, *ICSID Review – Foreign Investment Law Journal*, 29(1) (1 February 2014), p.71.

²² *Ibid.*

²³ See Article 36(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

²⁴ See Articles 25 and 36(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

10. Under the ICSID Convention, parties have the autonomy to determine the number of arbitrators and appoint any arbitrator as they see fit, save and except that there is a prohibition for parties to constitute an even numbered tribunal.²⁵ By allowing the parties to pick arbitrator(s), it lends more legitimacy to the proceedings and gives the parties greater buy-in on the process.²⁶ Once the tribunal is constituted, the first session of the arbitration proceeding must be held within 60 days of its constitution, or such other period as the parties may agree.²⁷ During the proceedings, parties are required to submit written submissions and attend oral hearings to present their cases for the tribunal's consideration.²⁸

11. A final written award shall be drawn up and signed within 120 days by the tribunal after the closure of the proceeding.²⁹ Such award is binding and the disputing parties must comply with the terms set out in the award, except otherwise provided for under the ICSID Convention.³⁰ Each ICSID contracting State has an obligation to recognise ICSID awards as binding and enforce the pecuniary obligations of such awards within its territories as if they were final judgments issued by its courts.³¹ Unless the parties consent, the ICSID Secretariat shall not publish the award but is under an obligation to make excerpts of the award public.³²

12. In addition to the arbitration and conciliation provided by the ICSID Convention and Rules, there are other alternative dispute resolution mechanisms available, including but not limited to fact-finding, early evaluation and facilitated negotiation.³³

²⁵ See Article 37(2) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

²⁶ See n.21, Franck, p.5.

²⁷ See Rule 13 of ICSID Convention Arbitration Rules.

²⁸ See Rule 29 of ICSID Convention Arbitration Rules.

²⁹ See Rule 46 of ICSID Convention Arbitration Rules.

³⁰ See Article 53 of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

³¹ See Article 54 of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

³² See Article 48(5) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

³³ See n.1, ICSID.

13. Since 2016, ICSID has been considering ways to strengthen its multi-tiered dispute resolution mechanism.³⁴ In particular, ICSID began work on a new set of mediation rules as part of a broader effort to modernise its mechanism to resolve investment disputes in 2018.³⁵ Since the new set of mediation rules has not been finalised, ICSID may draw inspiration from two multi-tiered dispute resolution mechanisms in Hong Kong.

B. Multi-Tiered Dispute Resolution Mechanism in Hong Kong

14. In Hong Kong, multi-tiered dispute resolution processes have been transplanted to various schemes. One example is the Financial Dispute Resolution Scheme (FDRS) of the Financial Dispute Resolution Centre, which was established in August 2017. The FDRS provides an independent channel for financial institutions and their individual customers to resolve monetary disputes primarily by way of ‘Mediation First, Arbitration Next’.³⁶

15. Under the FDRS, the mediator is required to commence and conduct the mediation as soon as possible but in any event must commence proceedings within 21 days of his appointment.³⁷ The mediator shall ensure that the parties sign an agreement to mediate prior to the start of the substantive mediation session.³⁸ The substantive mediation session under FDRS shall not exceed four hours.³⁹ If no settlement is reached during the mediation session, an extended mediation session could be arranged.⁴⁰ Alternatively, the disputing parties may resort to arbitration for the resolution of their disputes. An arbitral award is to be rendered within one month after receipt of the last document by the arbitrator.⁴¹

³⁴ *Ibid.*

³⁵ The full text of the ICSID draft Mediation Rules is available at https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf

³⁶ See the website of Financial Dispute Resolution Scheme: https://www.fdrs.org.hk/en/html/resolvingdisputes/resolvingdisputes_fdrs.php

³⁷ See Rules 2.3.2 of FDRS Mediation and Arbitration Rules.

³⁸ See Rules 2.3.1 of FDRS Mediation and Arbitration Rules.

³⁹ See Section A of FDRS Terms of Reference.

⁴⁰ *Ibid.*

⁴¹ See Rules 3.8.8 of FDRS Mediation and Arbitration Rules.

16. The latest example is the COVID-19 Online Dispute Resolution (ODR) Scheme of eBRAM, which aims to provide speedy and cost-effective means to resolve COVID-19 related disputes, with the claim amount for each case capped at HKD 500,000.⁴²

17. Under the eBRAM Rules for the COVID-19 ODR Scheme (eBRAM Rules), parties are to resolve their disputes through a multi-tiered dispute resolution mechanism. The process moves forward in five principal stages: commencement of proceedings;⁴³ submission of a claim and response (and counterclaim and response [if any]);⁴⁴ the negotiation stage;⁴⁵ the mediation stage;⁴⁶ and the arbitration and award stage.⁴⁷

18. Each tier is to be conducted within a limited time. For instance, if the parties are not able to settle their dispute by negotiation within three calendar days of the commencement of the negotiation stage, the mediation stage of the proceedings shall commence immediately.⁴⁸ This is, however, subject to the parties' agreement to extend the deadline for reaching a settlement.⁴⁹ The parties may then agree to appoint a neutral person as a mediator to conduct the mediation from a list of five names provided by eBRAM.⁵⁰ After the appointment, the mediator shall communicate with the parties through the eBRAM system with a view to reaching a settlement agreement.⁵¹

⁴² The full text of the eBRAM Rules for the COVID-19 ODR Scheme is available at https://ebram.org/download/Covid-19%20Rules_English.pdf

⁴³ See Article 4 of eBRAM Rules.

⁴⁴ See Article 5 of eBRAM Rules.

⁴⁵ See Article 6 of eBRAM Rules.

⁴⁶ See Article 7 of eBRAM Rules.

⁴⁷ See Article 8 of eBRAM Rules.

⁴⁸ See Articles 6.4 and 6.5 of eBRAM Rules.

⁴⁹ *Ibid.*

⁵⁰ See Article 7.1 of eBRAM Rules.

⁵¹ See Article 7.2 of eBRAM Rules.

19. Should there be an agreement, the mediated settlement agreement shall be signed and executed electronically by the parties on the eBRAM Platform.⁵² If the parties are not able to settle their dispute by mediation within three calendar days of being notified of the appointment of the mediator, the arbitration stage of the proceedings shall commence immediately, subject to the arbitrability of the dispute.⁵³ Parties may appoint an arbitrator to adjudicate their disputes.⁵⁴

20. While it is recognised that investor-State investment disputes generally involve complicated international trade and investment law issues, ICSID, when considering reforms to its consensual dispute resolution process, may not wish to ignore the possibility of allowing the parties to have recourse to a speedy and relatively low cost online process.

IV. Existing Practice Regarding Provisions on Mediation in International Investment Agreements

21. According to the Investment Policy Hub's database of the United Nations Conference on Trade and Development (UNCTAD), there are 3,285 bilateral and multilateral investment treaties,⁵⁵ and almost all of them contain some forms of ISDS mechanism.⁵⁶ These treaty-based dispute mechanisms can be traced back to the historical concern of private investors when they had to resolve disputes in developing countries' court systems.⁵⁷ The investors worried about the independence of the local court systems and that foreigners, whether actual or merely perceived, would be subject to worse treatment than their respective national counterpart.⁵⁸ This set the backdrop for a common mechanism for dispute resolution between host States and foreign investors in order to prevent politicisation of conflicts.⁵⁹

⁵² *Ibid.*

⁵³ See Article 7.3 of eBRAM Rules.

⁵⁴ See Article 8.1 of eBRAM Rules.

⁵⁵ See the website of Investment Policy Hub: <https://investmentpolicy.unctad.org/>

⁵⁶ T. Allee and C. Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions', *International Studies Quarterly*, 54(1) (March 2010), pp.1–26.

⁵⁷ See n.21, Franck, p.70.

⁵⁸ *Ibid.*

⁵⁹ Wolf von Kumburg and M. R. Dahlan, 'Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation', *Pepperdine Dispute Resolution Law Journal*, 18(3) (May 2018).

22. Traditionally, the majority of BITs have incorporated a two-tiered dispute settlement clause, providing first for some forms of alternative dispute resolution before submitting the disputes to an arbitral tribunal.⁶⁰ The first tier may make reference to a period of ‘cooling-off’. Some treaties expressly provide that such a ‘cooling-off’ period can be utilised by the parties to attempt mediation or conciliation,⁶¹ while others regard the ‘cooling-off’ period as a mere procedural condition precedent to arbitration.⁶² The latter has long been criticised for contradicting the objective of a ‘cooling-off’ period, which is to encourage negotiation before formal arbitration procedures are initiated.⁶³

23. Another problem identified by UNCTAD is that the ‘time frame of three to six months usually allocated’ for the purpose of ‘cooling-off’ ‘is rather short’.⁶⁴ States may need a substantial amount of time to discern the source of the breach and the responsible institutions among their myriad of government agencies.⁶⁵ Therefore, the ‘cooling-off’ period in practice is utilised for the preparation of the contemplated arbitration, rather than utilised as a collaborative process with a view to finding a resolution of the dispute.⁶⁶ As a result, the mindset of the parties remains to resolve the disputes by way of arbitration rather than a non-adversarial procedure.

⁶⁰ UNCITRAL Working Group III Secretariat, note by the Secretariat on the 39th session, *Possible Reform of Investor-State Dispute Settlement (ISDS): Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190), para.35.

⁶¹ C. Kessedjian, A. van Aaken, R. Lie, and L. Mistelis, ‘Mediation in Future Investor-State Dispute Settlement’, *Academic Forum on ISDS Concept Paper 2020/16* (March 2020), p.11.

⁶² *Ibid.*

⁶³ The full text of the UNCTAD Paper, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, is available at https://unctad.org/en/docs/diacia200911_en.pdf

⁶⁴ See n.62, UNCTAD, p.10.

⁶⁵ *Ibid.*

⁶⁶ Wolf von Kumburg, ‘The Time for Investor State Mediation Has Come’, *Quraysh IDR Brief* (June 2020).

24. Arbitration is a consensual dispute resolution process in which a dispute is submitted by agreement of the parties to an arbitral tribunal for adjudication. The arbitral award is final and binding. In addition, arbitration is supported by a firm treaty network enabling global enforcement of promises to arbitrate and arbitral awards.⁶⁷ All these make arbitration become a dominant method of ISDS during the past 20 years.⁶⁸ Nevertheless, arbitration outcomes remain difficult to predict.⁶⁹ The transplantation of the confidential commercial arbitration mechanism into a public law context has led to an insufficiency of binding precedents.⁷⁰ Although the ICSID Secretariat reserves the right to publish parts of the reasoning when the parties to the case do not consent to have the arbitral award published in full, there is no official system of precedent in arbitration in the context of ISDS.⁷¹ This may create some perceived unwelcome discrepancies,⁷² which could ‘undermine the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged’.⁷³

25. In addition, arbitration proceedings in the context of ISDS are often lengthy since they involve complicated facts and novel issues of substance or procedure.⁷⁴ On average, it requires three years to come up with an award in an ICSID arbitration.⁷⁵ Accordingly, substantial costs are incurred in arbitration in the context of ISDS. It is estimated by the Organisation for Economic Co-operation and Development (OECD) that arbitral proceedings cost States an average of USD 8 million and can exceed USD 30 million, all of which they have no chance of recovering, whether they win or lose.⁷⁶

⁶⁷ R. D. Bishop, J. Crawford, and W. M. Reisman, ‘Foreign Investment Disputes: Cases, Materials and Commentary’, *Kluwer Law International* (2014), pp.1515–1653.

⁶⁸ See n.21, Franck, p.5.

⁶⁹ C. H. Brower II, ‘Mitsubishi, Investor-State Arbitration, and the Law of State Immunity’, *American University International Law Review*, 20(5) (2005), p.911.

⁷⁰ Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, *Fordham Law Review*, 73(4) (October 2005), pp.1511–1625.

⁷¹ D. Gaukrodger and K. Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’, *OECD Working Paper* (No. 2012/3) (February 2013), p.102.

⁷² Stephan Wilske, Martin Raible, and Lars Market, ‘International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or Only a Status Thing’, *Contemporary Asia Arbitration Journal*, 1(2) (November 2008), pp.213–234.

⁷³ X. Y. Huang and C. Y. Cheng, ‘Protection of International Investment – The Study of Establishing Appellate Mechanisms in International Investment Arbitration’, *International Review of Management and Business Research*, 3 (2014), p.1819.

⁷⁴ *Ibid.*

⁷⁵ See n.7, Coe, p.76.

⁷⁶ See n.71, Gaukrodger and Gordon, p.43.

26. Moreover, the Court of Justice of the European Union (CJEU) in *Slovak Republic v Achmea B.V.* (Case C-284/16) found that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia Bilateral Investment Agreement ‘has an adverse effect on the autonomy of EU law’.⁷⁷ In particular, the CJEU noted that the arbitral tribunal constituted under the said investment agreement was required to rule on the basis of the law in force of the contracting State involved in the dispute (Slovak Republic) and other relevant agreements between the Parties.⁷⁸ As far as CJEU was concerned, requesting the arbitral tribunal to determine disputes of EU law was in violation of Article 344 of the Treaty on the Functioning of the European Union (TFEU),⁷⁹ which prohibits Member States from submitting a dispute concerning the interpretation or application of EU treaties to any method of settlement other than those provided in the treaties.

27. Further, the CJEU observed that the arbitral tribunal was not a court or tribunal of a member State of EU law within the meaning of Article 267 of the TFEU.⁸⁰ As such, Article 8 of the said investment treaty was held to be incompatible with certain key principles of EU law.⁸¹ As a result of the judgment, agreements for terminating intra-EU BITs were signed by numerous EU Member States on 5 May 2020.⁸²

28. Given all the above-mentioned concerns, there has been a rising chorus of voices for viable alternatives to arbitration in the context of ISDS dispute resolution and conflict management.

29. At the 50th session of United Nations Commission on International Trade Law’s meeting in 2017, the UNCITRAL Working Group III was entrusted to work on the possible reform of the ISDS system.⁸³ In Part 1 of the Report of WG on the work of its 34th session, WG identified mediation as one of the alternative dispute resolution

⁷⁷ *Slovak Republic v Achmea B.V.* (Case C-284/16), Judgement of 6 March 2018, ECLI:EU:C:2018:158, para.59.

⁷⁸ See n.76, Slovak Republic, para.40.

⁷⁹ See n.76 Slovak Republic, para.41.

⁸⁰ See n.76 Slovak Republic, para.48.

⁸¹ *Ibid.*

⁸² See n.59, Kumberg and Dahlan, p.8.

⁸³ United Nations, official records of the 72nd session of the General Assembly, *Report of the United Nations Commission on International Trade Law* (A/72/17), para.227.

methods that could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration.⁸⁴ Later, the significance of the use of mediation in ISDS for reaching amicable settlements was singled out during the round-table session of the first intersessional meeting of WG in September 2018.⁸⁵ The idea of enhancing the use of mediation in the context of ISDS received overwhelming support from a number of delegations, including the delegations from China and the EU.⁸⁶

30. In the Report of WG on the work of its 36th session, WG agreed that there were sufficient concerns with the ISDS system to warrant reform,⁸⁷ and recognised mediation as a reform option to address the concerns in the annex to Working Paper 149 of UNCITRAL Working Group III for its 36th session (A/CN.9/WG.III/).⁸⁸ In view of the under utilisation of alternative dispute resolution in the context of ISDS, WG, in the 39th session of its meeting which was held in October 2020, requested the UNCITRAL Secretariat (the Secretariat) to develop model clauses to be used in investment treaties indicating procedural steps the disputing parties could usefully take as well as guiding parties on how to conduct a mediation in the context of ISDS.⁸⁹ WG stressed the significance of reflecting on best practices with regard to the ‘cooling-off’ period, including an adequate length of time and clear rules on how such period could be complied with.⁹⁰ This is to avoid unnecessary delays and costs and ensure that mediation would be used in a meaningful manner.⁹¹ Furthermore, the Secretariat was tasked to develop more specific guidelines for the effective use of alternative dispute resolution (ADR) and rules for mediation in the ISDS context.⁹²

⁸⁴ UNCITRAL Working Group III Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session – Part I* (A/CN.9/930/Rev.1), paras.31–33.

⁸⁵ UNCITRAL Working Group III Secretariat, *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea* (A/CN.9/WG.III/WP.154), para.43.

⁸⁶ *Ibid.*

⁸⁷ UNCITRAL Working Group III Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session* (A/CN.9/964), paras.54–90.

⁸⁸ UNCITRAL Working Group III Secretariat, note by the Secretariat, *Possible Reform of Investor-State Dispute Settlement* (A/CN.9/WG.III/WP.149), pp.5–6 of the Annex.

⁸⁹ UNCITRAL Working Group III Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), paras.27–40.

⁹⁰ See n.89, UNCITRAL.

⁹¹ *Ibid.*

⁹² *Ibid.*

31. In 2018, the Secretariat of ICSID proposed to its 151 Member States the Rules of Mediation Proceedings (ICSID Mediation Rules) and the Additional Facility Rules of Procedure for Mediation Proceedings, which have been specifically designed for investor-State disputes.⁹³ Since then, the ICSID Secretariat has engaged in stakeholder consultations with States and the general public.

32. Under the proposed ICSID Mediation Rules, parties who have or have not agreed in writing to mediate could file a request to the Secretary-General of ICSID to institute a mediation.⁹⁴ The mediation is required to be conducted by either one or two mediator(s), who are to be mutually appointed by the parties.⁹⁵ Some core values of mediation, such as confidentiality and ‘without prejudice’ are included in the draft ICSID Mediation Rules.⁹⁶ It appears that the facilitative model of mediation is preferred under the draft ICSID Mediation Rules as the mediators do not have the authority to impose a resolution of the dispute upon the parties.⁹⁷

33. In addition to WG’s exploration of the use of ISDS mediation, mediation is also gaining traction in recent treaties signed by States. A new generation of treaties has increasingly referred specifically to mediation or recourse to third party neutrals as available to the parties to reach an amicable settlement before going to international arbitration.⁹⁸

⁹³ ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Synopsis* (2 August 2018), p.13.

⁹⁴ See Rules 5–6 of ICSID Mediation Rules.

⁹⁵ See Rule 13 of ICSID Mediation Rules.

⁹⁶ See Rules 10–11 of ICSID Mediation Rules.

⁹⁷ See Rule 17 of ICSID Mediation Rules.

⁹⁸ A. J. Bret and B. Legum, ‘A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules’, *ICSID Review*, 29(1) (March 2014), pp.17–24.

A. Model Bilateral Investment Agreement

34. For instance, the Netherlands Model Bilateral Investment Agreement (2019) provides that ‘any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation.’⁹⁹ A similar provision can be found in the Model Text of the Indian BIT (2015), which provides that parties should settle the disputes through consultation or negotiation or the use of non-binding third party mediation before pursuing arbitration.¹⁰⁰

B. Bilateral Investment Agreement

35. A few States have included mediation among the continuum of options available in their bilateral investment agreements. Article 16(3) of the Japan-Morocco Bilateral Investment Agreement, which was signed in January 2020, provides that:

Any investment dispute shall, as far as possible, be settled amicably through, consultations and negotiations conducted in good faith between the disputing investor and the disputing Party (hereinafter referred to in this Article as “the disputing parties”). To this end, the disputing investor shall deliver to the disputing Party a written request for consultations setting out a brief description of facts regarding the measure or measures at issue. The consultation shall be commenced no later than thirty days after the date of its receipt by the disputing Party. Nothing in this paragraph precludes the use of non-binding, third party procedures, such as good offices, conciliation or mediation.¹⁰¹

⁹⁹ See Article 17(1) of Netherlands Model Bilateral Investment Agreement (2019).

¹⁰⁰ See Article 31.1 of Model Text for the Indian Bilateral Investment Treaty (2015).

¹⁰¹ See Article 16(3) of Japan-Morocco Bilateral Investment Agreement (2020).

36. Similarly, article 12(1) of the Switzerland-Egypt Bilateral Investment Agreement states that:

Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as “investment dispute”) shall, without prejudice to Article 13 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation or mediation (hereinafter referred to “procedure of amicable settlement”).¹⁰²

37. The Egypt-Mauritius Bilateral Investment Agreement adopts a similar first-tiered dispute settlement clause, while the Switzerland-Egypt Bilateral Investment Agreement includes ‘conciliation’ as one of the means to settle the disputes.¹⁰³

C. Plurilateral Investment Treaty

38. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force on 30 December 2018, is a free trade agreement between Canada and ten other countries in the Asia-Pacific region.¹⁰⁴ It sets out a two-tiered dispute settlement mechanism. Under its Article 9.18, the parties should initially seek to resolve the dispute through consultation and negotiation before arbitration.¹⁰⁵ However, no further guidance concerning mediation is provided under CPTPP.

39. The Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area (COMESA) was signed on 23 May 2007.¹⁰⁶ It is a multilateral investment agreement with the goal of

¹⁰² See Article 12(1) of Switzerland-Egypt Bilateral Investment Agreement (2010).

¹⁰³ See Article 10(1) of Egypt-Mauritius Bilateral Investment Agreement (2014).

¹⁰⁴ See the website of Comprehensive and Progressive Agreement for Trans-Pacific Partnership: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/index.aspx?lang=eng>

¹⁰⁵ See Article 9.18 of Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

¹⁰⁶ See the website of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area: <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>

promoting and protecting cross border investments within 20 African States.¹⁰⁷ COMESA provides for the use of informal settlement methods as a first option, and then goes on to prescribe mediation should no alternative means of dispute settlement be agreed upon by the parties.¹⁰⁸ If amicable negotiation or mediation fails, parties may resort to arbitration.¹⁰⁹

40. The above model investment agreements, bilateral investment agreements and plurilateral treaties name mediation as one of the options to be utilised to amicably settle the investment disputes between the investors and States. The inclusion of mediation in a system of ISDS as an alternative dispute resolution process provides for the right balance of flexibility, efficiency, confidentiality and consensus that is needed to reach settlements.¹¹⁰ Some recent treaty signatories go even further in encouraging mediation as an alternative to resolve investment disputes by incorporating a comprehensive protocol with detailed procedural rules.

D. Mainland and Hong Kong Closer Economic Partnership Arrangement

41. The Mainland China and the Hong Kong Special Administrative Region Investment Agreement under CEPA (CEPA Investment Agreement) is a unique example of an arrangement that contains a well-established mediation mechanism and detailed CEPA Investment Mediation Rules (CEPA Mediation Rules).¹¹¹ The purpose of signing the CEPA Investment Agreement is to deepen economic and technical collaboration between Mainland China and Hong Kong, and to provide for promotion and protection of increasing investments between the two jurisdictions within one country.¹¹²

¹⁰⁷ Peter Muchlinski, 'The COMESA Common Investment Area: Substantive Standards and Problems in Dispute Settlement', *SOAS Law Working Papers*, 11 (2010), p.2.

¹⁰⁸ See Articles 26(3) and (4) of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area.

¹⁰⁹ Article 28 of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area.

¹¹⁰ Klaus Peter Berger, 'Integration of Mediation Elements into Arbitration: "Hybrid" Procedures and "Intuitive" Mediation by International Arbitrators', *Arbitration International*, 19 (3) (September 2003), pp.387–403.

¹¹¹ Please refer to the website of the Trade and Industry for the full text of the CEPA Investment Mediation Rules. Available at <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>

¹¹² See the website of the Trade and Industry Department: <https://www.tid.gov.hk/english/cepa/investment/mediation.html>

42. Article 19 and Article 20 of the CEPA Investment Agreement stipulate the dispute resolution mechanism, which includes consultation and mediation, to be utilised by the disputing parties. Unlike most other investment treaties, arbitration is not available as a means of alternative dispute resolution settlement.¹¹³ In most of the BITs, the ISDS mechanisms usually envision a series of steps from negotiation to arbitration, where mediation is often considered as a ‘gap filler’.¹¹⁴ It is innovative to have a stand-alone mediation mechanism as a form of dispute settlement process under the CEPA Investment Agreement. While one may initially be puzzled by the absence of arbitration under the CEPA Investment Agreement, one will appreciate that the use of mediation to resolve disputes between investors of one jurisdiction and the government of another jurisdiction within the same country has the benefit of maintaining the harmony of the people of the two jurisdictions within one country.

43. Pursuant to Article 19 of the CEPA Investment Agreement, a Hong Kong investor is eligible to apply for mediation to the China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Centre or to the China International Economic and Trade Arbitration Commission to deal with his investment disputes arising from the CEPA Investment Agreement between himself and a Mainland authority or institution.¹¹⁵ Likewise, a Mainland investor may apply to the Hong Kong International Arbitration Centre-Hong Kong Mediation Council or the Mainland-Hong Kong Joint Mediation Centre to deal with his investment disputes arising from the CEPA Investment Agreement between himself and a Hong Kong authority or institution by way of mediation.¹¹⁶

¹¹³ See Article 19 of CEPA Investment Agreement.

¹¹⁴ Shu Shang, ‘Responding to the ISDS Legitimacy Crisis by Way of Mediation: Implications from CEPA’s Dispute Resolution Mechanism’, *Journal of International Business and Law*, 18(2) (Spring 2019), pp.217–236.

¹¹⁵ For the lists of mediation institutions and the lists of mediators, please refer to the website of the Trade and Industry Department: <https://www.tid.gov.hk/english/cepa/investment/mediation.html>

¹¹⁶ *Ibid.*

44. The CEPA Mediation Rules specify the conditions for the disputing parties to submit their dispute to mediation, and in particular the condition that mediation should only be handled by the designated institutions mentioned above.¹¹⁷ In addition, the CEPA Mediation Rules set out certain core principles that mediators are required to observe throughout the mediation process.¹¹⁸ Comprehensive guidelines with regard to the appointment of mediators;¹¹⁹ the replacement and resignation of a mediator;¹²⁰ the role of the Mediation Commission;¹²¹ the commencement and the conduct of mediation;¹²² and the termination of the mediation, are clearly provided for under the CEPA Mediation Rules.¹²³

E. Comprehensive Economic and Trade Agreement

45. The Comprehensive Economic and Trade Agreement (CETA) was signed on 30 October 2016 and it has been provisionally applied since 21 September 2017. It is a multilateral investment treaty signed between Canada, of the one part, and the EU and its Member States, of the other part, with the intention to liberalise and facilitate trade and investment and to promote a closer economic relationship between the EU and Canada.¹²⁴ The Agreement provides for a three-tiered dispute resolution process in ISDS, which includes consultation, mediation and arbitration in the ISDS matrix.¹²⁵ Article 8.20 of CETA is the mediation clause, supplemented by the Procedure Rules and Code of Conduct of Mediators (the Code) in Annex 29 to CETA.

¹¹⁷ See Article 2.3 of CEPA Mediation Rules.

¹¹⁸ See Articles 3 and 7 of CEPA Mediation Rules.

¹¹⁹ See Article 5 of CEPA Mediation Rules.

¹²⁰ See Article 6 of CEPA Mediation Rules.

¹²¹ See Article 7 of CEPA Mediation Rules.

¹²² See Article 10 of CEPA Mediation Rules.

¹²³ See Article 12 of CEPA Mediation Rules.

¹²⁴ European Commission, 'Council Decision (EU) 2020/681 of 18 May 2020 on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, as regards the adoption of rules for mediation for use by disputing parties in investment disputes', COM/2019/460 final.

¹²⁵ See Articles 7–8 of Comprehensive Economic and Trade Agreement.

46. Core values of mediation, such as impartiality of the mediator, are laid down in the Code.¹²⁶ The treaty provides that the mediator in the context of ISDS must not be a citizen of either party, unless otherwise agreed.¹²⁷ This is to avoid State officials from acting as mediators who could be perceived as biased.¹²⁸ Additionally, the mediators should avoid direct and indirect conflicts of interest, and must disclose such conflicts if the same are likely to affect their impartiality.¹²⁹

47. Since June 2018, the European Commission has been working with the Member States in the Trade Policy Committee on Services and Investment of the Council and with Canada to refine the rules for mediation for use by disputing parties.¹³⁰ A decision concerning the said rules (the Envisaged Act) was adopted by the Committee on Services and Investment in late 2019.¹³¹ The purpose of the Envisaged Act is to implement the CETA by establishing a mediation mechanism to facilitate the finding of a mutually agreed solution between the disputing parties in an investment dispute through a comprehensive and expeditious procedure with the assistance of a mediator.¹³²

48. The Envisaged Act serves as a procedural rule and includes detailed guidance on the initiation of a mediation procedure,¹³³ the appointment of the mediator,¹³⁴ the mediation procedure,¹³⁵ the implementation of a mutually agreed solution,¹³⁶ and the time limits and costs of the mediation procedure.¹³⁷

¹²⁶ See Rules 2 and 11 of Code of Conduct for Arbitrators and Mediators of CETA.

¹²⁷ Nancy A. Welsh and Andrea K. Schneider, 'Becoming Investor-State Mediation', *Penn State Journal of Law & International Affairs*, 1(1) (April 2012), pp.86–95.

¹²⁸ *Ibid.*

¹²⁹ See Rules 3–4 of Code of Conduct for Arbitrators and Mediators of CETA.

¹³⁰ See n.120, European Commission, para.3.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ See Article 3 of the Envisaged Act.

¹³⁴ See Article 4 of the Envisaged Act.

¹³⁵ See Article 5 of the Envisaged Act.

¹³⁶ See Article 6 of the Envisaged Act.

¹³⁷ See Article 8–9 of the Envisaged Act.

49. It is worth noting that one of the disputing parties may request for a mediation at any time under the Envisaged Act.¹³⁸ Under the Envisaged Act, mediators may offer advice and propose solutions for consideration by the disputing parties, and that demonstrates evaluative mediation is not excluded in the process.¹³⁹

50. Other well-known treaties that provide mediation protocol are the draft text of the Transatlantic Trade and Investment Partnership and the International Bar Association Rules for Investor-State Mediation (IBA Rules) adopted by the IBA Council. It is foreseeable that there will be an upward trend in the incorporation of an exhaustive mediation protocol in a number of investment agreements in the future.

V. Benefits of Incorporating a Mediation Protocol in Promoting the Greater Use of Mediation in ISDS

51. The ISDS Mediation Working Group, which was established after the 2019 ISDS Mediation Colloquium at Harvard University, has identified two major obstacles to the more effective implementation of mediation in the context of ISDS. Firstly, there is a lack of awareness of mediation as an alternative to arbitration by States and investors.¹⁴⁰ Secondly, there is an insufficient legal framework to support mediation and mediated settlements.¹⁴¹ Therefore, the Working Group recommended that clear rules surrounding mediation in ISDS with frameworks should be developed.¹⁴²

¹³⁸ See Article 3.1 of the Envisaged Act.

¹³⁹ See Article 5.3 of the Envisaged Act.

¹⁴⁰ 2020 ISDS Mediation Working Group Report, *Unlocking Value Through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes* (June 2020), p.10.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

52. In international commercial mediation, the objective of a mediation protocol is to promote and encourage negotiated settlement as well as the early and cost-effective resolution of disputes by mediation.¹⁴³ The Mediation Rules serve to provide a guide to the rights and responsibility of all participants in the mediation.¹⁴⁴ This is conducive to empowering the disputing parties to negotiate and resolve the dispute promptly and confidentially.¹⁴⁵

53. In the context of ISDS, a mediation protocol serves as a mediation manual that provides parties with functional suggestions on how mediation can be used to resolve claims in specific instances.¹⁴⁶ The parties get to know the precise framework well in advance of any actual disputes, which enhances the transparency of mediation in the context of ISDS. The transparent procedures laid down in the mediation rules may well encourage State officials or senior executives to engage in mediation.¹⁴⁷ Without a set of clear mediation rules, the disputing parties may otherwise need to negotiate the rules and formats of the mediation at a time when the parties are holding strong opposing views against each other as a result of the different perceptions on how their dispute has arisen. This may prevent the mediation from commencing in a timely manner and thus more unnecessary costs will be incurred.

54. The Investor-State Mediation Committee of the IBA has also identified insufficient knowledge of the potential usefulness of mediation and the role of the mediator within the process as one of the major obstacles to the use of ISDS mediation.¹⁴⁸ Mediation rules, such as the CEPA Mediation Rules and the IBA Rules, offer guidance on the behaviour of mediators and the way to conduct a mediation. This helps the parties understand how the role of mediators is distinct from that of conciliators and arbitrators.¹⁴⁹ In fact, mediation rules serve to educate

¹⁴³ See Rule 1.5 of New Zealand International Arbitration Centre Mediation Protocol.

¹⁴⁴ See Rule 1.6 of New Zealand International Arbitration Centre Mediation Protocol.

¹⁴⁵ See Rule 1.4 of New Zealand International Arbitration Centre Mediation Protocol.

¹⁴⁶ Wolf von Kumburg, Jeremy Lack, and Michael Leathes, 'Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come', *ICSID Review – Foreign Investment Law Journal*, 29(1) (February 2014), p.137.

¹⁴⁷ *Ibid.*

¹⁴⁸ See n.98, Bret, p.24.

¹⁴⁹ See n.146, von Kumburg, Lack, and Leathes, p.139.

the parties as to what mediation is and how it could be used to resolve their dispute.¹⁵⁰ A mediation protocol also sets out the rights and obligations of the mediation participants as well as outside parties.¹⁵¹ The core values and code of conduct specified in the protocol preserve certainty regarding the performance and integrity of the mediators.

55. As observed above, investment treaties usually provide for a ‘cooling-off’ period. There are no guidelines or international norms suggesting how parties can use this period productively.¹⁵² As discussed by the panellists during a SIDRA (Singapore International Dispute Resolution Academy) Webinar on Investor-State Mediation held on 12 September 2020, a mediation protocol offers practical guidelines to States and investors about what to do and what to expect during the ‘cooling-off’ period.¹⁵³

56. Furthermore, the incorporation of a mediation protocol encourages mediation to be used systematically during the ‘cooling-off’ period and also enables the parties to focus on the procedural issues.¹⁵⁴ This facilitates the parties to make use of the period to consider ways of enabling faster and less costly outcomes and allows interests and other constraints to be taken into consideration at an early stage.¹⁵⁵

57. It is obvious that a mediation protocol is generated after substantial discussion by the concerned committees as well as after a gathering of public views. For instance, the State Mediation Subcommittee (the Subcommittee) of the IBA launched the rule-drafting process of the IBA Rules in early 2011.¹⁵⁶ The Subcommittee established a working group with several drafting committees, each devoted to preparing between two and four articles on specified topics.¹⁵⁷ The drafting committees were broadly representatives, including representatives from

¹⁵⁰ See n.98, Bret and Legum, p.20.

¹⁵¹ Nadja Alexander, ‘Mediation and the Art of Regulation’, *Queensland University of Technology Law and Justice Journal*, 8(1) (June 2008), p.15.

¹⁵² See n.146, Kumberg, p.135.

¹⁵³ See the website of SIDRA Webinar: https://mediacast.smu.edu.sg/media/SIDRA+Webinar+on+Investor-State+Mediation+and+the+Singapore+Convention+on+Mediation+%2812+September+2020%29/1_7fgyrft4

¹⁵⁴ See n.146, Kumberg, Lack, and Leathes, p.138.

¹⁵⁵ *Ibid.*

¹⁵⁶ See n.98, Bret and Legum, p.20.

¹⁵⁷ *Ibid.*

potential end-users (States and investors), arbitration and mediation practitioners, institutions supporting arbitration and mediation, and other stakeholders.¹⁵⁸ The IBA Rules were launched in 2012 following these collective efforts. Similarly, the initial draft of the ICSID Mediation Rules was unveiled in ICSID's first working paper on the amendment of the rule in August 2018.¹⁵⁹ Since then, ICSID has invited inputs from States and arbitration and mediation practitioners. Incorporating a reliable mediation protocol into investment agreements enhances the public confidence in the process. It also makes mediation more predictable despite its voluntary character.¹⁶⁰

VI. Elements of an Effective Mediation Protocol

58. An effective mediation protocol should outline detailed and clear guidelines on the procedural matters of the mediation in the context of ISDS. Among those items routinely covered by the mediation rules of the various investment treaties are the scope of mediation, the timing of mediation, the process of appointment of mediator, cost and fee of the mediation, and termination of the proceedings. This Section will look into the areas and core values that a mediation protocol should address, and the range of innovative mechanisms that are available in existing mediation protocols.

A. Number of Mediators

59. There is no consistent requirement on the number of mediators in the various investment agreements.

60. Under the IBA Rules, the default rule is that a sole mediator should be appointed unless the parties agree otherwise.¹⁶¹ Parties may opt for a co-mediation in accordance with Article 6, which is one of the main features of the IBA Rules.¹⁶²

¹⁵⁸ See n.98, Bret and Legum, p.21.

¹⁵⁹ The full text of ICSID's first working paper is available at https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf

¹⁶⁰ See n.7, Coe, p.76.

¹⁶¹ See Article 4 of IBA Investor-State Mediation Rules.

¹⁶² Article 6 of IBA Investor-State Mediation Rules.

61. The CEPA Mediation Rules adopts a different approach. Similar to the ICSID Conciliation Rules, the default position under the CEPA Mediation Rules is that a mediation commission with three mediators should be constituted.¹⁶³ Under such a mechanism, each party selects one mediator to the mediation commission and the parties jointly propose a mediator to be the president of the commission.¹⁶⁴ The role of the mediation commission is to clarify the issues in dispute between the parties, facilitate communication and explore the interests of the parties, and endeavour to bring about a mediated settlement agreement based on terms acceptable to both parties.¹⁶⁵ One of the key features of the CEPA Mediation Rules is the formation of a three-mediator mediation commission, which means mediators of different backgrounds and expertise – including but not limited to those with investor-State arbitration experience – could be included in the mediation commission so that the mediation commission would be better equipped to assist the parties to resolve their disputes, which usually involve emotional, procedural and substantive dimensions. Besides, should the mediation commission be requested to make non-binding recommendations to the parties with a view to resolving the disputes, a three-mediator mediation commission would mean a smaller possibility of having a deadlock of opinions among the members of the mediation commission.

62. As observed by Professor Jack Coe, parties should have the autonomy to elect the neutrals to conduct the neutral-aided collaborative procedures.¹⁶⁶ The CEPA mediation mechanism allows each party to exercise control over the mediation proceedings, and this could enhance the attractiveness of such an ISDS mechanism for governments and investors alike.¹⁶⁷ Furthermore, the CEPA mediation model offers a greater diversity of linguistic, cultural and technical abilities to be placed at the disposal of the mediation commission while handling complicated investment disputes.¹⁶⁸ It is, therefore, conducive to addressing the needs of the parties from two differing jurisdictions.

¹⁶³ Article 5 of CEPA Mediation Rules.

¹⁶⁴ *Ibid.*

¹⁶⁵ Article 8(1) of CEPA Mediation Rules.

¹⁶⁶ Jack J. Coe Jr., 'Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch', *Journal of Transnational Dispute Management*, 4(1) (February 2007), p.32.

¹⁶⁷ See n.59, Kumberg and Dahlan, p.470.

¹⁶⁸ See n.166, Coe, p.38.

B. Process Model

63. To strengthen the predictability and transparency of mediation in the context of ISDS, a mediation protocol should include guidance on how the mediation is to be conducted by the mediators.

64. For instance, the CEPA Mediation Rules allow the mediation commission to hold joint sessions and private meetings with the parties and their representatives.¹⁶⁹ The CEPA Mediation Rules, however, do not specify a precise model as to when the joint session and caucus should begin or come to an end. Moreover, the mediation commission should take into account the views of the parties before determining how to conduct the mediation.¹⁷⁰ This is to preserve the flexibility of the mediation proceedings and at the same time cater to the differing needs of disputing parties in different cases.

65. Throughout the mediation process, the mediation commission is expected to adopt a facilitative approach to encourage direct communication between the parties and to explore their common interests.¹⁷¹ Although the mediation commission may make recommendations to the disputing parties, such recommendations are not binding on the parties.¹⁷² The advantage of this model is to generate momentum for the parties to focus on their future relationship value in light of the parties' current constraints and needs,¹⁷³ and thereby lay the basis for a wholly new relationship between the disputing parties.¹⁷⁴

66. Some mediation protocols may include parties' obligations during the mediation process. According to the International Chamber of Commerce Mediation Rules (ICC Rules), the parties' agreement to participate in the mediation proceedings pursuant to the ICC Rules implies that they are committed to the process until an initial meeting or a discussion with the mediator has taken place.¹⁷⁵ In contrast, the ICSID Conciliation Rules instruct the conciliators to close the proceedings if a party fails to participate.¹⁷⁶

¹⁶⁹ See Article 8.3 of CEPA Mediation Rules.

¹⁷⁰ See Article 8.8 of CEPA Mediation Rules.

¹⁷¹ See Article 8.1 of CEPA Mediation Rules.

¹⁷² See Article 8.4 of CEPA Mediation Rules.

¹⁷³ See n.21, Franck, p.10.

¹⁷⁴ See n.166, Coe, p.24.

¹⁷⁵ See the website of International Chamber of Commerce: <https://iccwbo.org/dispute-resolution-services/mediation/procedure/>

¹⁷⁶ See Article 2(3) of the ICSID Conciliation Rules.

67. A similar mechanism is provided for in the CEPA Mediation Rules where the mediation commission has the power to declare the mediation terminated if a party fails to appear or participate in the mediation.¹⁷⁷ This is in line with the principles of self-determination and voluntariness of the parties, which are core values of the facilitative mediation approach.

C. Management Conference of the Mediation Process

68. Currently, only the CEPA Mediation Rules and the IBA Rules provide for a mediation management conference within the process. According to the CEPA Mediation Rules, a mediation management conference should be held as soon as practicable after the constitution of the mediation commission, in order to allow for the organisation of the process.¹⁷⁸ The conference can be done in person or by any other means of communication.¹⁷⁹

69. The mediation management conference goes further than being a mere procedural meeting as it paves the way to the mediated settlement agreement by clarifying important issues, such as the conduct of the mediation,¹⁸⁰ a provisional timetable for the mediation process,¹⁸¹ and the confidentiality and privacy arrangements throughout the mediation.¹⁸²

70. The mediation management conference allows the parties and the mediator to go through a checklist of issues that will facilitate the process.¹⁸³ As such, it gives the mediation a chance to proceed and provides a platform for the parties to communicate and establish a dialogue.¹⁸⁴

¹⁷⁷ See Article 12(5) of CEPA Mediation Rules.

¹⁷⁸ See Article 9(1) of CEPA Mediation Rules.

¹⁷⁹ *Ibid.*

¹⁸⁰ See Article 9(1)(a) of CEPA Mediation Rules.

¹⁸¹ See Article 9(1)(b) of CEPA Mediation Rules.

¹⁸² See Article 9(1)(c) of CEPA Mediation Rules.

¹⁸³ See n.98, Bret and Legum, p.22.

¹⁸⁴ *Ibid.*

D. Scope of Matters for a Mediated Settlement Agreement

71. One major obstacle to promoting the use of ISDS mediation was that there was no mechanism to transform the mediated agreement into an enforceable award in a cross-border context.¹⁸⁵ With the coming into force of the United Nations Convention on International Settlement Agreements Resulting from Mediation (UN Mediation Convention) in September 2020, there is a mechanism now for signatory States of the UN Mediation Convention to enforce mediated settlement agreements, so long as the requirements of the UN Mediation Convention are met.¹⁸⁶ This is similar to the recognition and enforcement of arbitral awards pursuant to the New York Convention of 1958.¹⁸⁷

72. With regard to the applicability of the UN Mediation Convention on mediation in the context of ISDS, one may refer to the Preamble of the UN Mediation Convention which states:

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

¹⁸⁵ See n.166, Coe, p.18.

¹⁸⁶ See Article 3 of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

¹⁸⁷ See Article III of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.

73. Furthermore, the UN Mediation Convention applies to an agreement pertaining to a commercial dispute resulting from mediation which, at the time of its conclusion, was international.¹⁸⁸ There is, however, no definition of ‘commercial dispute’ available in the text.

74. According to the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UNCITRAL Model Law), which was developed simultaneously along with the UN Mediation Convention, the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.¹⁸⁹ Footnote 1 of the UNCITRAL Model Law provides some examples that fall within the definition of a ‘commercial transaction’, namely an investment transaction, joint venture and other forms of industrial or business cooperation, and carriage of goods or passengers by air, sea, rail or road.¹⁹⁰

75. That said, when it comes to the issue of enforcement, one cannot be totally sure as to how the court of a signatory State to the UN Mediation Convention will interpret the definition of a ‘commercial transaction’, and whether the court will give any reference to the examples laid down in the UNCITRAL Model Law’s footnote for purposes of determining the inclusion or exclusion of investor-State investment dispute within the scope of a ‘commercial transaction’.

¹⁸⁸ See Article 1 of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

¹⁸⁹ See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, footnote 1.

¹⁹⁰ *Ibid.*

76. It appears Annex E of the ICSID (Additional Facility) Mediation Rules confirms that the UN mediation convention will apply to settlements reached in the context of investment disputes.¹⁹¹ As such, mediated settlement agreements in the context of ISDS could be enforced and invoked internationally, so long as the requirements of the UN Mediation Convention are met.

77. However, those familiar with investor-State investment disputes are aware that enforcement of a settlement agreement may be more arduous when it contains non-monetary undertakings.¹⁹² CEPA Mediation Rules specify that the solutions under the mediated settlement agreement must be confined to monetary compensation or restitution of property and/or other legitimate means of compensation agreed by the disputing parties.¹⁹³ Under such rules, parties could anticipate the scope of the mediation outcome. This enhances the predictability of mediation in the context of ISDS.

78. In addition to the procedural matters mentioned above, a comprehensive mediation protocol could also set out core values applicable to the mediation.

E. Voluntariness and Self-Determination

79. A party's self-determination and voluntariness are two of the key principles in the context of mediation, which differentiate mediation from other forms of alternative dispute resolution. Adjudicative dispute settlement methods, such as arbitration, usually remove all the decision-making power from the parties and place it in the hands of professional adjudicators. In contrast, mediation at its core rests on the premise that people have the capacity to make their own decisions about the issues that confront them.¹⁹⁴ Parties are empowered to determine how the mediation will be conducted and the outcome of the mediation.

¹⁹¹ ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper*, 3 (August 2018), p.748.

¹⁹² Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2nd (ed.) (Cambridge University Press, September 2010), p.1143.

¹⁹³ See Article 2.3(i) of CEPA Mediation Rules.

¹⁹⁴ Robert A. Baruch Bush and J. P. Folger, 'Mediation and Social Justice: Risks and Opportunities', *Ohio State Journal on Dispute Resolution*, 27(1) (2012), p.48.

80. The voluntary nature of mediation begins with the necessity of consent to participate in the mediation process. This is the rationale for requiring the party who initiates the mediation to submit a request for mediation,¹⁹⁵ and for the other party to submit a written consent to the mediation under the CEPA Mediation Rules.¹⁹⁶

81. Although facilitative mediators are often regarded as process managers, they have to consult both parties as to the way to conduct the process during the mediation management conference.¹⁹⁷ The intention of the parties must be taken into account priorly by the mediation commission;¹⁹⁸ as such the process essentially belongs to the parties and they have control over the mediation process.

82. The voluntary nature of mediation also sheds light on the fact that all parties may choose whether to participate in or withdraw from the mediation.¹⁹⁹ Under Article 12 of the CEPA Mediation Rules, the mediation can be terminated if one of the parties withdraws from the proceedings.²⁰⁰

83. Although most mediation practitioners are familiar with the core values of voluntariness and self-determination, it does not necessarily mean that users of mediation services, and in particular parties to an investor-State investment dispute, are aware of these core values. As such, the express inclusion of these principles in a mediation protocol will certainly assist the parties to understand the core values of the mediation process better.

¹⁹⁵ See Article 4(1) of CEPA Mediation Rules.

¹⁹⁶ See Article 4(5) of CEPA Mediation Rules.

¹⁹⁷ See Article 9(1)(a) of CEPA Mediation Rules.

¹⁹⁸ See Article 8(8) of CEPA Mediation Rules.

¹⁹⁹ See Article 3 of CEPA Mediation Rules.

²⁰⁰ See Article 12 of CEPA Mediation Rules.

F. Confidentiality and Transparency of Mediation in the Context of ISDS

84. Much of the success of international commercial mediation builds on the confidential nature of the process. This provides a safe environment for the parties to discuss and negotiate disputes outside the glare of public proceedings. In return, confidentiality strengthens the parties' confidence in mediation.

85. Laws on mediation in different States and institutions may have different features. Confidentiality, however, remains a key element of the relevant laws. For example, 'mediation communication' is required to be kept confidential under Section 8 of the Hong Kong Mediation Ordinance, subject to certain exceptions.²⁰¹ The UN Model Law also has provisions to protect confidentiality in mediation proceedings. Article 10 requires all information relating to the mediation proceedings to be kept confidential, except where disclosure is required under the law or for the purpose of implementation or enforcement of a settlement agreement.²⁰²

86. When it comes to mediation in the context of ISDS, the confidential nature of the process would probably arouse suspicion, given that governments of all States need to maintain accountability.²⁰³

87. That said, confidentiality remains the cornerstone of mediation in the context of the mediation process. A State, for example, may be concerned about the revelation of secrets bearing on its national security or the negative publicity generated by an investor's allegations.²⁰⁴ The investor may fear disclosure of trade secrets to its litigation-prone shareholders.²⁰⁵ Therefore, the inclusion of confidentiality helps the parties, especially those from jurisdictions which do not enjoy the benefits of mediation legislation covering confidentiality, understand the necessity of the confidential nature of mediation.

²⁰¹ See Section 8 of the Mediation Ordinance.

²⁰² See Article 10 of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

²⁰³ See n.166, Coe, p.27.

²⁰⁴ *Ibid.*

²⁰⁵ See n.166, Coe, p.23.

88. In accordance with Article 11 of the CEPA Mediation Rules, the mediation proceedings must not be disclosed and must remain confidential, save as otherwise agreed by the parties and the mediation commission.²⁰⁶ Moreover, the participants of the mediation proceedings are not allowed to disclose any mediation communication to any other person.²⁰⁷ In particular, the appointed mediators are required to sign declarations to undertake not to disclose any information arising out of or in connection with the mediation of the dispute.²⁰⁸ It should be noted that the definition of mediation communication under Article 1 of the CEPA Mediation Rules does not cover an agreement to mediate or a mediated settlement agreement. This echoes Professor Jack Coe's proposal to publicise the terms of settlement so as to achieve greater predictability and transparency of mediation in the context of ISDS.²⁰⁹

89. Furthermore, disclosure of mediation communication cannot be done unless there is an agreement not only among the parties but also the mediation commission. Besides, the parties and the mediation commission have to agree on the purposes of the disclosure before they are allowed to disclose the relevant mediation communication.²¹⁰ The purpose of such requirements under the CEPA Mediation Rules is to foster a balance between retaining privacy and achieving transparency in mediation in the context of ISDS.

90. More importantly, the confidentiality obligation does not extend to the fact that the parties have agreed to mediate or a settlement has been reached from the mediation, unless otherwise agreed by the parties in writing.²¹¹ This allows the designated institution to have a system of statistics and generate data for academic and research purposes, which aids the promotion of the use of ISDS mediation.

91. Despite the fact that the importance of confidentiality in mediation is hardly in question, the inclusion of confidentiality in a mediation protocol can provide a certain and clear scope of its application, which in the long term will facilitate the use of ISDS mediation.

²⁰⁶ See Article 11 of CEPA Mediation Rules.

²⁰⁷ See Article 11(3) of CEPA Mediation Rules.

²⁰⁸ See Article 7 of CEPA Mediation Rules.

²⁰⁹ See n.166, Coe, p.40.

²¹⁰ See Article 11(4) of CEPA Mediation Rules.

²¹¹ See Article 11(5) of CEPA Mediation Rules.

G. Qualifications and Code of Conduct for Mediators

92. According to Professor Jack Coe, the quality of the third party neutral is the most critical element affecting the success of a neutral-aided collective mechanism.²¹² This is not difficult to understand. The quality of the persons enlisted to serve as neutrals directly influences the credibility and effectiveness of the ISDS mechanism.

93. An extensive mediation protocol should include provisions on the qualification of mediators so as to ensure that the mediators are fit for handling the investment disputes. A mediator in the context of ISDS should possess the skills to understand the legal issues as well as deal with the emotional and psychological dimension of the parties.²¹³

In addition, it is important for the mediators to have a broad cultural understanding of the parties that are involved in order to help them reach a mutually acceptable agreement.²¹⁴

94. Under the CEPA Mediation Mechanism, one must fulfil a set of eligibility criteria in order to be designated as a mediator and he or she is required to have attained relevant qualifications in mediation and acquired professional knowledge and experience in the fields of cross-border or international trade and investment and law.²¹⁵

95. The requirement of impartiality and independence of the mediators is of paramount importance in a well-drafted mediation protocol. Neutrality enables both the mediation process and the mediator to operate effectively,²¹⁶ and provides legitimacy to the mediator and the process.²¹⁷ A facilitative mediator may not be able to build up rapport and trust with the parties if he or she has a vested interest in the outcome or is perceived to be biased.

²¹² See n.166, Coe, p.38.

²¹³ J.W. Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution', *Journal of Transnational Dispute Management*, 6(1) (March 2009), p.441.

²¹⁴ See n.59, Kumberg and Dahlan, p.492.

²¹⁵ See para. 1.6 of the CEPA Mediation Mechanism.

²¹⁶ Joseph P. Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind', *Vermont Law Review*, 6(1) (Spring 1981), pp.85-118.

²¹⁷ Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice', *Social and Legal Studies*, 16 (June 2007), p.225.

96. ICC Rules requires the mediator to be guided by the principles of fairness and impartiality.²¹⁸ Before appointment, a prospective mediator is required to sign a statement of acceptance, availability, impartiality and independence.²¹⁹ Similar requirements are set out in the IBA Rules, which provides that appointed mediators shall be impartial and independent.²²⁰ The mediators shall disclose any facts or circumstances that might call into question the mediator's independence or impartiality in the eyes of the parties.²²¹

97. The requirement of neutrality is detailed in Article 7 of the CEPA Mediation Rules.²²² Mediators are required to mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.²²³ Similar to the ICC Rules, the mediator has to sign a declaration undertaking not to be adversely affected in his or her ability to mediate the dispute prior to the appointment.²²⁴

98. Throughout the mediation, mediators are required to avoid their performance from being influenced by their own financial, business, professional, family or social relationships or responsibilities.²²⁵ If, during the course of the mediation, a mediator becomes aware of any facts or circumstances that may call into question his or her independence or impartiality in the eyes of the parties, the mediator is required to forthwith disclose those facts or circumstances to the parties in writing without delay.²²⁶

99. In the context of ISDS mechanisms, one should not rely on the integrity and self-claimed qualifications of mediators. The mediation protocol must prescribe detailed qualifications of a qualified mediator and the code of practice that the mediators have to comply with, so as to enable the users to have confidence in mediation and at the same time provide a guideline for uniform practice.

²¹⁸ See Article 7 of ICC Mediation Rules.

²¹⁹ See Article 5(1) of ICC Mediation Rules.

²²⁰ See Article 3(1) of IBA Mediation Rules.

²²¹ See Article 3(3) of IBA Mediation Rules.

²²² See Article 7(1) of CEPA Mediation Rules.

²²³ *Ibid.*

²²⁴ See Article 7(2) of CEPA Mediation Rules.

²²⁵ See Article 7(3) of CEPA Mediation Rules.

²²⁶ See Article 7(5) of CEPA Mediation Rules.

VII. Conclusion

100. As mentioned earlier, this Paper has intended to provide background information on the use of ISDS mediation and its related issues. The four main parts of this Paper discussed above are only some of the issues for consideration by those who are committed to the promotion of mediation as an alternative and appropriate process for the resolution of investor-State investment disputes. With experts from different jurisdictions putting their heads together, mediation in the context of ISDS will surely gather more momentum in its development and eventually become the preferred process, as has been adopted in the CEPA arrangement.

SESSION II:
Multi-Tiered Dispute Resolution
Process (Mediation Protocol)

Moderator



Anthony Neoh QC SC JP

Chairman

Asian Academy of International Law

Dr Neoh is a senior member of the Hong Kong Bar specialising in international litigation, arbitration and financial regulatory matters. From 1991 to 1994, he was a member of the Hong Kong Stock Exchange Council and its Listing Committee, and chaired its Disciplinary Committee and Debt Securities Group, and was Co-Chairman of the Legal Committee of the Hong Kong and China Listing Working Group. He was the chief architect of the legal structure for the listing of Chinese enterprises in Hong Kong. He is former Chairman of the Hong Kong Securities and Futures Commission from 1995 to 1998; during this time, he was the first Asian to be elected Chairman of the Technical Committee of the International Organization of Securities Commissions. From 1999 to 2004, he was Chief Advisor of the China Securities Regulatory Commission, at the personal invitation of the former Premier Zhu Rongji. He is also the Co-Chairman of the 2018 B20 Financing Growth and Infrastructure Task Force, and Co-Chairman of The China Securitization Forum. On 1 June 2018, Dr Neoh was appointed as Chairman of the Hong Kong Independent Police Complaints Council.

Panellist



Wolf von Kumberg

International Mediator and Arbitrator

Mr von Kumberg spent nearly 30 years in London, England, as European Legal Director and Assistant General Counsel to Northrop Grumman Corporation, a global aerospace and security company. In that position he was responsible for its international legal affairs. Prior to that, he served five years as the Vice President – Legal Affairs for Litton Canada, after having spent several years in legal practice with a major Toronto law firm. He retired from Northrop Grumman in 2015 as its Assistant General Counsel. He is now a member of specialist International ADR Chambers in London, Int Arb Arbitrators & Mediators – based at the International Arbitration Centre. Wolf is also the Managing Director of Global Resolution Services, a provider of dispute resolution services. Mr von Kumberg is a qualified lawyer in both Canada and England, a certified CEDR (Centre for Effective Dispute Resolution) mediator and an arbitration Fellow of the Chartered Institute of Arbitrators (CIArb). He has experience of disputes across Aviation & Aerospace, Defence, Compliance, Intellectual Property (IP), Cyber Security and High-Tech industries throughout Asia, US, Europe and the Middle East, which includes commercial, government and State entities. Wolf is also active in international commercial and investor-State dispute settlement (ISDS) arbitration and mediation. As arbitrator he has been involved in disputes under AAA-ICDR (American Arbitration Association-International Centre for Dispute Resolution), ICC (International Chamber of Commerce), LCIA (London Court of International Arbitration) and AIAC (Asian International Arbitration Centre) rules as well as *ad hoc* matters. As mediator, he sits on various panels and has experience of ICC, CEDR, AIAC, WIPO (World Intellectual Property Organization), SCCA (Saudi Center for Commercial Arbitration), EMAC (Emirates Maritime Arbitration Centre) and the AAA/ICDR disputes. He is co-founder of AAA/

ICDR AANS (Aerospace, Aviation, and National Security) Panel which specialises in aerospace, security and defence related disputes, and is also a AAA-ICDR Master Mediator. He has also been a keen proponent for the broader use of dispute boards by industry and government as a conflict avoidance tool and instrumental in bringing mediation to investor-State disputes through work with the ECT (Energy Charter Treaty), IMI (International Mediation Institute), CEDR and ICSID (International Centre for Settlement of Investment Disputes). Mr von Kumberg was the first Chair of the IMI, which has advocated international standards for mediators. Wolf is also the former Chair of the CIArb Board of Management. He serves as a Director of the American Arbitration Association (AAA) and of CEDR in the UK. In addition, he has been widely involved in arbitration, mediation and conflict avoidance board training for the CIArb, AAA-ICDR and CEDR.

Integration of Mediation and Arbitration in a Multi-Tiered Dispute Resolution Process

I have been an international arbitrator and accredited mediator for 20 years. Over the past five years, I have been involved in helping to develop the field of investor-State mediation.

With the signing of the Singapore Convention in August 2019 and its coming into force this past September, mediation has been given new credibility as an international process for the resolution of disputes. Having been an in-house lawyer for several multinational companies investing worldwide for over more than 25 years and involved in investor-State dispute settlement (ISDS) disputes, I come at this very much from an investor perspective.

One must first look at what has been happening in the way of encouraging the use of mediation and integrating it into ISDS. ISDS had its own unique dispute resolution system that had grown out of investment treaties negotiated between individual States (bilateral investment treaties or BITs) or on a multilateral basis between larger groups of States, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Previously, BITs contemplated that arbitration would be used to finally resolve disputes between investors and States. Mediation was not even mentioned or contemplated as having a role in these disputes. The International Centre for Settlement of Investment Disputes (ICSID), the body of the World Bank responsible for trade disputes, had arbitration rules and in addition a set of conciliation rules. The conciliation rules were not, however, a form of traditional mediation but rather a tribunal that heard the dispute and then rendered a non-binding opinion. Most parties never used conciliation and moved directly to arbitration. The cooling-off period provided for in BITs (usually three to six months) was not used to try to find a resolution to the dispute but rather to prepare for the arbitration. Therefore, we need to find a way to overcome the psychological barriers to using something new.

As said already by other speakers, States require a framework to permit them to mediate.

Increasingly, modern BITs have included a multi-tiered dispute resolution structure into their provisions:

- The Netherlands Model Bilateral Investment Agreement 2019, states that ‘as far as possible disputes should be settled amicably through negotiations, conciliation or mediation.’
- The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Canada and ten Asia-Pacific region countries entered into force on 30 December 2018 and foresees the use of ‘good offices, conciliation and mediation.’
- The Closer Economic Partnership Arrangement (CEPA) Investment Agreement between Mainland China and Hong Kong provides for consultation and mediation as the dispute resolution mechanism. Uniquely, there is no arbitration provision.
- The Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union – Article 9 provides:
 6. A settlement procedure may be entered into if a potential violation of Union law caused by the State measure being contested in the proceedings referred to in paragraph 1 can be identified and neither paragraph 3 nor 4 applies.
 7. The settlement procedure shall be overseen by an impartial facilitator with a view to finding between the parties an amicable, lawful and fair out-of-court and out-of-arbitration settlement of the dispute which is the subject of the Arbitration Proceedings. The settlement procedure shall be impartial and confidential. Each party to the settlement procedure shall have the right to make its views known.

- The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union provides a three-tiered dispute resolution process.

How It Is Intended to Work

A multi-tiered dispute resolution process is now common in many commercial contracts. In effect, when a dispute arises the parties are guided through the agreed tiers, normally starting with negotiation, followed by mediation, failing which the parties proceed to arbitration or litigation. There is typically a specified time period for each step, and one may only proceed to the next step if the prior step fails to end in settlement within the specified time period. Modern BITs, as we have seen, are now emulating this tiered approach in the context of ISDS.

Obstacles to Effective Application of Mediation

Last December, we organised a Colloquium at Harvard, convening stakeholders in the ISDS process, including investors, States, institutions and academics, to review the obstacles to the use of mediation. Several key obstacles were identified including:

- Providing adequate authority to settle;
- Transparency vs confidentiality in the mediation process;
- Opaque responsibility within a State administration;
- State officials avoiding liability for taking decisions; and
- State budgets being unclear as to who pays for a mediated as opposed to arbitrated outcome

There were other public policy concerns, as well. The prime obstacles were identified as:

1. Lack of awareness of mediation as an alternative in ISDS;
2. Insufficient legal framework to support mediation and mediated settlements.

For those who are interested in continuing to follow these developments, a follow-on conference to the Colloquium at Harvard is being held virtually at the British Institute of International and Comparative

Law (BIICL) on 8 and 9 December 2020. Further details are available at the BIICL website.

Institutional Developments to Overcoming Obstacles

Five years ago, we started assisting the Energy Charter Treaty Secretariat, a grouping of 54 States which establishes a multilateral framework for cross-border cooperation in the energy sector, to look at how mediation could be introduced to its Rules. The Rules provided for arbitration to resolve disputes with investors and had a reference to conciliation, without any specific process. The Secretariat was interested in filling in the gaps by providing for the possibility of mediation. We worked on a mediation guide, which would provide the Member States with an outline of the mediation process and how it might be used in investor-State disputes. The Guide on Investment Mediation was published on 19 July 2016. It was recognised that the Guide alone would not be enough. States have largely not pursued mediation because of the factors outlined previously. As a result, the Secretariat then went on to review with the Member States a model protocol that could be adopted within State organs through which these issues could be dealt with. This Model Instrument on Management of Investment Disputes was published in December 2018 and has been adopted in the interim by several Member States.

Very important for the acceptance of mediation in ISDS is the fact that ICSID, the organisation through which most of these disputes are heard, has given its full support to the development effort. As Meg already said, this has culminated with ICSID proposing its own investor-State mediation rules. This has given the initiative credibility with both investors, their counsel and States and is a strong endorsement for making mediation an integral part of the ISDS process. This follows up on the International Bar Association (IBA) Investor State Mediation Rules, which had laid the groundwork back in 2011.

In fact, there have already been several important investor-State disputes where mediation has now been used. The most recent reported case (as many are not reported) was that of the Dominican Republic and Odebrecht that was mediated this January by the well-known

international mediator, Ms Mercedes Tarrazón. The matter was mediated under the International Chamber of Commerce (ICC) Mediation Rules and led to a settlement agreement between the parties.

So back to the Singapore Convention and its application to the enforcement of mediated investor-State disputes. I would like to point to the Preamble, which to my mind is also of key significance to the development of investor-State mediation. It states:

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.

While there are still differing views as to whether the Convention will apply to mediated investor-State settlements, it is difficult to see why – given that States having entered into this treaty – they would choose to exclude it from application to themselves. One may look at the New York Convention as precedent for this argument.

Integrating Processes

So where do we go from here? Mediation is a cost effective, relatively speedy and efficient way for disputes with investors to be resolved, often allowing for relationships to be maintained. This makes it particularly attractive for States seeking foreign direct investment (FDI), to convince investors that there is an effective way to deal with investment issues as they arise. It is also useful for resolution of investment disputes arising from the Pandemic, given that adverse impacts on investors might be caused by States simply seeking to protect their citizens in this time of a health crisis. Such disputes often require existing legal relationships to be renegotiated – something mediation, but not arbitration, can help achieve.

Mediation is also an effective tool to use together with arbitration. Whereby the two processes can complement each other running sequentially to deal with reducing issues in dispute, leaving a smaller

number to be decided in arbitration. They might also, as Jack Coe will address, be run concurrently, allowing parties to arbitrate primary matters and then returning to mediation. Med-Arb-Med which has been much talked about in commercial arbitration, might also have a role in the ISDS context and should be explored.

While there are obstacles to utilising mediation in ISDS, through the concentrated effort of stakeholders in the process, including both the investor and the State, these are being overcome. Mediation is inevitably becoming part of the investor-State dispute resolution landscape, and thereby becoming integrated with the traditional arbitration process.



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

Integration of Mediation and Arbitration in a Multi-Tiered Dispute Resolution Process

Mr Wolf von Kumberg
Arbitrator and Mediator
Int-Arb Arbitrators and Mediators
London and Washington DC

[Slide 1]

Mixed Mode Concepts

- Netherlands Model Bilateral Investment Agreement
- The Trans-Pacific Partnership (CPTPP)
- The CEPA Investment Agreement
- The Comprehensive Economic and Trade Agreement (CETA)
- The Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU – Article 9



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

Multi Tiered Provisions

Example: The Comprehensive and Economic Trade Agreement (CETA)

- Section F – Resolution of Investment Disputes between Investors and States
 - Article 8.19 Consultations – Required Step
 - Article 8.20 Mediation – Voluntary Step
 - Article 8.23 Submission of Claim to the Tribunal

[Slide 3]

How Intended to work

- Use of mediation in conjunction with arbitration
- Holistic dispute resolution system (consultation, mediation, arbitration)

Obstacles to Effective Application

- State barriers to mediation
- Historical development in ISDS towards arbitration
- System geared towards preparing for arbitration during cooling off periods



[Slide 4]

Institutional Developments

- IBA Investor State Mediation Rules
- ICSID – Mediation Rules
- ECT – Mediation Guide and Model Instrument on Management of Investment Disputes
- Singapore Convention



[Slide 5]

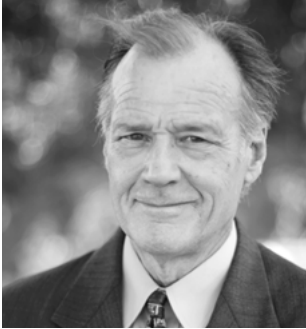
Integrating Processes – The Future

- Mediation as a tool for Foreign Direct Investment
- Process design considerations should include mediation with arbitration (sequential or concurrent)
- Med/Arb/Med considerations blending mediation with arbitration
- Continuing evolution of institutional frameworks



[Slide 6]

Panellist



Jack J. Coe Jr.

Professor of Law

Caruso School of Law, Pepperdine University, USA

Professor Coe teaches at the Straus Institute for Dispute Resolution. He is an Associate Reporter for the Restatement on the US Law of International Commercial Arbitration and has authored numerous books and articles on arbitration, private international law, and related topics. Professor Coe has held leadership posts in several professional societies, including the International Bar Association, the American Bar Association, and the Institute for Transnational Arbitration, and has worked at the Iran-US Claims Tribunal. His ongoing expert and arbitral appointments have involved a variety of international transactions and direct investment disputes. He has degrees from the University of California, Los Angeles, Loyola (Los Angeles), Exeter, and the London School of Economics and Political Science. He also holds the Diploma of The Hague Academy of International Law.

Concurrent Co-Mediation Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution

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I. Introduction

As has been much discussed,¹ over the past two decades, investment treaty arbitration has been transformed from a largely untested disputes regime to one regularly invoked by investors. The claims that have been involved, now numbering in the hundreds, have been often quite large – sometimes staggeringly so. As might have been expected, when pressed by an avalanche of proceedings, the investor-State arbitration system has proven to be imperfect, although the extent to which its flaws are fundamental is subject to debate. Those expressing misgivings about the current system have included the disputants themselves (not least States), scholars (to varying degrees) and – it seems increasingly – various casual observers (often with great conviction).²

Among the more often-cited shortcomings of investor-State arbitration is that, as a mechanism for confirming rights and duties, the system underperforms, producing jurisprudence that is too indeterminate. Under a popular line of reasoning, it follows from such legal insecurity that States will exercise uncalled-for self-restraint when regulating in the public interest because they are uncertain what an arbitral tribunal later will deem to be the content of their investment treaty undertakings. Concurrently, so goes the argument, elasticity in treaty terms such as ‘fair and equitable treatment’ encourage claimants to advance exorbitant putative theories of recovery.

¹ See International Centre for the Settlement of Investment Disputes (ICSID), *Bibliography on Investment Law and Procedure*. <https://icsid.worldbank.org/en/Pages/resources/Bibliography-on-Investment-Law-and-Procedure.aspx#>

² See Elizabeth Warren, ‘The Trans-Pacific Partnership Clause Everyone Should Oppose’ *The Washington Post* (25 February 2015) (‘[B]uried in the fine print of the closely guarded draft [is] an increasingly common feature of trade agreements, [...] called “Investor-State Dispute Settlement,” or ISDS. The name may sound mild, but don’t be fooled’). https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utmterm=.3e12cf2c3ce8

Aside from issues of legal certainty, there have also been complaints about the adjudicative process used to decide investor claims. These are not deficiencies exclusive to investment arbitration but, rather, are associated with international commercial arbitration in general (i.e. slow, expensive, highly combative, involves limited review of arbitral work-product, and is designed to produce a winner and a corresponding loser).³

Heightened interest in reforming the prevailing investor-State disputes regime has led to earnest consideration by policymakers of numerous reforms,⁴ including the use of third party assisted non-arbitral problem-solving, particularly mediation (conciliation).⁵ Most often, what is envisioned is the use of mediation as a process that supplements arbitration in some fashion.

As part of a continuing examination of the many questions raised by investor-State mediation, this Essay returns to the topic of concurrent (or ‘shadow’) mediation.⁶ The terms ‘concurrent’ or ‘shadow’ here mean that the activities of the third party neutrals would coincide with those of the arbitrators (or arbitrator). The emphasis is on a model that employs two mediators rather than one – an approach variously referred to as ‘team mediation’ or ‘co-mediation’.

II. The General Proposal

Elsewhere,⁷ this author has suggested that mediation ought to be routinely and purposefully made available in investor-State disputes,

³ Other process-related critiques have targeted the standard arbitration model's failure to account for the public nature of investment disputes and the corresponding need for greater transparency. See Jack J. Coe Jr., ‘Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership’ (2006) 54 *University of Kansas Law Review*, p.1339; UNCITRAL, *United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration*, U.N. Doc. A/69/496 (2015). <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-c.pdf>

⁴ For an overview of the present investor-State system and current thinking about concrete reform options viewed from the State's perspective, see United Nations Commission on Trade and Development (UNCTAD), *UNCTAD's Reform Package for the International Investment Regime* (United Nations, 2017). <http://investmentpolicyhub.unctad.org/News/Hub/Home/1576> [hereinafter Reform Package]

⁵ This chapter uses ‘mediation’ and ‘conciliation’ interchangeably to refer to the process in which one or more neutrals use various techniques to achieve settlement of a dispute.

⁶ For an earlier assessment, see Jack J. Coe Jr., ‘Concurrent Med-Arb (CMA): Some Further Reflections on a Work in Progress’, in Susan D. Franck and Anna Joubin-Bret (eds.), *Investor-State Disputes: Prevention and Alternatives to Arbitration II*. Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, 29 March 2010, Lexington, VA. (United Nations, 2010) p.43.

⁷ See Jack J. Coe Jr., ‘Toward a Complementary Role for Conciliation in Investor-State Disputes: A Preliminary Sketch’, *University of California Davis Journal of International Law and Policy*, 12(2005), p.7; Jack J. Coe Jr., ‘Settlement of Investor-State Disputes Through Mediation: Preliminary Remarks on Processes, Problems and Prospects’, in R. Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet, 2009) Ch.4; Jack J. Coe Jr., ‘Should Mediation of Investment Disputes Be Encouraged, and if So, by Whom and How?’, in Arthur W. Rovine (ed.), *Contemporary Issues In International Arbitration and Mediation* (Brill, 2010), p.339.

not as a substitute for arbitration, and not merely as a precursor to be exhausted before arbitration begins, but as a parallel process. Thus, the mediation would coincide with the arbitration in question and, indeed, might extend into the post-award sphere (remaining at the disposal of the disputants even after the arbitral tribunal is *functus officio*).⁸ Under the model I envision, the two processes would be coordinated, at least to a degree; the two types of neutrals – arbitrators and mediators – would be aware of and accommodate the others’ activities.⁹ The process would be triggered by prompts in the bilateral investment treaty (BIT) involved and supported by the rules available to the parties through an administering institution or otherwise.

It is a fact that a percentage of investor-State arbitrations settle, and do so without the help of one or more third party neutrals. This author’s thesis remains that one or more skilful and well-prepared¹⁰ mediators would likely add to the number of investor-State disputes that settle,¹¹ and would often produce outcomes that are more authoritative, inventive, and attentive to individual party interests than those accomplished through unassisted negotiation.

Additionally, mediation will likely prove more able than arbitration to accommodate the interests of non-parties to the legal dispute; that is, the mediation process and a mediated settlement may include various types of third parties, either directly or indirectly.¹²

⁸ The rendition of the award often marks a new round of negotiations between the parties. See, e.g. Reuters Staff, ‘ConocoPhillips to receive \$337 million in accord with Ecuador’, *Reuters* (4 December 2017). <https://www.reuters.com/article/us-conocophillips-ecuador/conocophillips-to-receive-337-million-in-accord-with-ecuador-idUSKBN1DY1KP>

⁹ This coordination might be reflected in allowing the mediators to receive briefs and to attend hearings, and in scheduling accommodations.

¹⁰ I have in mind mediators with notable standing in the investor-State arbitration or related communities; that is, persons who enjoy excellent stature and authoritativeness on par with the arbitrator or arbitrators forming the tribunal; they should have a very good grasp of investment law and arbitral practice. Relatedly, and putting aside arguments about labels, my view of mediation is that the process is most promising when mediators are equipped to give, when appropriate, a specialist’s evaluation of each side’s case, both in general and as to selected issues and arguments.

¹¹ The settlement rate has been variously calculated depending on how one defines settlement. A reliable premise is that about one-third of the filed cases settle. See, e.g. Rachel Wellhausen, ‘Recent Trends in Investor State Dispute Settlement’, *Journal of International Dispute Settlement*, 7(1) (2016), p.117 (153 of 461 studied cases settled).

¹² Such third parties might include subsidiary divisions of the host State or third party funders. At least as to the mediation *process* (as opposed to the result), in appropriate circumstances the investor’s home State and relevant non-governmental organisations (NGOs) might profitably be included. By contrast, an arbitral tribunal is highly limited in its ability to bind, or directly consider the interests of, various third party stakeholders, despite the advent of amicus briefs and more transparent hearings.

Importantly, even when not achieving a full settlement, mediation would enhance the arbitration process that it shadows. In particular, mediation might assist the parties in navigating the many instances during an arbitration in which successful bilateral give-and-take is to be preferred to defaulting to the arbitral tribunal, such as when particular issues of documentary disclosure arise, or when there is deadlock in agreeing on the structure and content of a confidentiality agreement, or when a disputant intends to press motions or substantive arguments with little chance of succeeding. Equally, the mediation process will often also help the parties to better understand their respective cases, thus promoting higher-quality arguments before the arbitral tribunal.

To the extent that mediation becomes embedded in disputant expectations and routinised, greater sophistication and best practices should emerge, allowing its users to more fully to realise mediation's 'value-adding' potential.¹³

III. How It Might Work – Water Delivery in Ruritania

A. The Dispute

Having had its concession to retrieve, purify and deliver water revoked by a local municipality, the American company Watertime, Inc. delivered to Ruritania its Notice of Intent to file a claim under the Ruritania-US BIT. As authorized under that BIT, in that Notice, Watertime signified its intent to elect the optional process set forth in fictional Appendix D (Nonbinding, Concurrent, Third Party Procedures).¹⁴

¹³ Regarding the use of mediation's ability to promote agreements that do more than settle the legal dispute before the arbitrators, see Kimberlee Kovach, *Mediation Principles and Practice*, Thompson-West (3rd ed, Thompson-West, 2004) pp.196–198.

¹⁴ 'That election establishes that, subject to a different appointment procedure agreed by the disputants, the claimant (with or without the help of an institution) shall nominate within one month of issuing the Notice of Intent, a mediator to be attached to the case. Upon notification of the claimant's election to invoke Appendix D, the State may nominate a mediator, who will be the co-mediator, or instead may affirm its intention to let the one-mediator default govern. If upon giving its Notice of Intent the claimant does not elect Appendix D, the State may nevertheless do so. Either disputant may, but need not, enlist the Permanent Court of Arbitration (PCA), ICSID or other institution to assist in identifying its nominee for mediator. Nominees for mediator are subject to disclosure and challenge procedures analogous to those applicable to any arbitrator that serves.'

By virtue of the Notice, Ruritania's central government became aware of the dispute for the first time. After less than systematic correspondence with the Municipality and officials of the province in which it operates, Ruritania's Ministries of Justice and Foreign Affairs developed a general sense of the local government's reasons for revocation. Based thereon, it informed Watertime that it would resist the claim vigorously.

B. The Mediation Underway

Within one month of the Notice, two mediators had been provisionally appointed pursuant to Appendix D. Both were appointed by an institution, both had government experience, and both had at some point served as counsel and arbitrators in investor-State matters. Neither was Ruritanian nor American. With the parties' agreement, the two affirmed that they would be guided, but not strictly bound, by the International Bar Association (IBA) Rules for Investor-State Mediation.¹⁵

After both sides had summarised their respective cases in ten-page memos (simultaneously submitted), the disputants and mediators met, first in short private caucuses during which the mediators assessed the feasibility of moving to joint sessions, and then in two joint sessions lasting four hours each. The joint meetings did not end in settlement, but the mediators and the two disputants learned a great deal. Among other things, Ruritania came to better understand the basis upon which Watertime would press not only expropriation and fair and equitable treatment claims, but also national treatment and most favoured nation (MFN) theories of recovery. Those theories were rooted in Watertime's belief that both local companies and third country concessionaires who provided trash collection services to the municipality were allowed to operate significantly older trucks than those used by Watertime and that, like Watertime, the third country service providers had employed local agents to help them formulate their initial bids without being accused of improper influence.

¹⁵ The IBA Mediation Rules are available at [https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Aproved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Aproved%20by%20IBA%20Council%204%20Oct%202012).pdf)

For its part, Watertime learned that Ruritania would rely on myriad jurisdiction-related defences, and in particular specific BIT provisions excluding from BIT protections certain measures maintained by municipalities. The mediators, in turn, came to better understand each side's case, if still at a preliminary level, and, as importantly, to know more about the personalities involved.

When the notice and cooling-off periods had elapsed,¹⁶ Watertime initiated arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention, one of the options offered under the BIT.¹⁷ As contemplated in Appendix D, both disputants affirmed that the mediators who had served during the cooling-off period could continue to serve. Additionally, Ruritania failed to insist on a three-arbitrator tribunal, so that under the Appendix D default rule, the tribunal would consist of one arbitrator, appointed by the parties or ICSID, as needed.

As foreshadowed during the earlier mediation sessions, however, Ruritania urged that ICSID not register the request for arbitration. It advanced several admissibility and jurisdiction-related arguments.¹⁸ After receiving from Watertime certain clarifications, the ICSID Secretariat registered the Request, citing its limited role in the process and emphasising the word 'manifestly' in Article 36 of the ICSID Convention.¹⁹ Soon thereafter, the two mediators resumed joint sessions. With the help of a list procedure suggested by the two mediators, a sole arbitrator was institutionally appointed.²⁰

¹⁶ Under the fictional BIT, the cooling-off period is 'six months [...] since the events giving rise to the claim'.

¹⁷ According to Section B of the fictional BIT, the investor may choose whichever form of ICSID arbitration is available (Additional Facility or ICSID Convention) or United Nations Commission on International Trade Law (UNCITRAL) Rules arbitration. If either disputant has set in motion Appendix D mediation, the default assumption is that one arbitrator will serve and will be jointly appointed by the parties (or, if needed, by ICSID or the Permanent Court of Arbitration (PCA), depending upon which arbitration format the claimant chose). Either disputant may supplant the default rule by requesting that three arbitrators serve, in which case the mode of appointment established in the governing arbitration rules will be followed.

¹⁸ Ruritania insisted in correspondence with the Secretariat, that under both the BIT and ICSID Convention jurisprudence, Watertime was neither an investor, nor had an investment in Ruritania; that the acts it complained of were, at most, merely garden-variety breaches of contract (not BIT breaches); that Watertime could be denied protection under the denial of benefits clause found in the BIT; and that the Municipality's insistence on modern equipment for delivering water was a health and safety measure that fell under the BIT's essential security provision. It also relied on clauses in the concession designating domestic courts and Ruritanian law in the event of disputes under the concession, which according to Ruritania, meant that Watertime had in any event 'contracted away' any BIT protections it might have had.

¹⁹ Article 36(3) of the ICSID Convention provides in relevant part: 'The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre'.

²⁰ The initial list comprised five names proposed by the mediators; Ruritania declined two; Watertime declined one of those two, and also rejected one other name. From the remaining two names, the appointment was made by ICSID (acting as appointing authority under Appendix D).

Soon after her appointment, the arbitrator immediately scheduled an ‘organisational’ meeting. The agenda contemplated consideration of the usual matters that lead to an initial procedural order and also indicated that the parties would be invited to give a brief overview of their respective cases. During the intervening two weeks, the mediators jointly caucused with both parties. Each was persuaded to streamline its case. Watertime agreed not to introduce a performance requirements theory (which, in caucus, both mediators insisted was very weak) and Ruritania agreed, *inter alia*, that it would not rely on the BIT’s denial of benefits provision nor its reservation for certain existing municipal measures, both of which arguments the mediators had in caucus described as so fanciful as to alienate the tribunal.²¹

The procedural order that followed the arbitrator’s subsequent meeting with the parties anticipated a bifurcated proceeding addressing admissibility and jurisdictional defences only. Shortly after the one round of pleadings had been completed but before the prehearing conference, the mediators re-engaged. In a joint session, each disputant evinced complete confidence that it would prevail. Then followed additional private caucuses.

During those separate caucuses, after probing questions by the mediators, each party conceded some weaknesses in their jurisdictional cases. Watertime agreed with the mediators that, while no bribery had been alleged, under the domestic jurisprudence upon which both sides relied, the investment might be deemed to have been procured in violation of local law because Watertime had employed as a consultant a former government official. Much would depend on how the tribunal interpreted the facts and Ruritania’s recently enacted ‘influence’ statute.

Ruritania agreed in private that despite its pleadings, Watertime’s concession and related activities most probably met the definition of ‘investment’, both under the BIT and under ICSID Convention jurisprudence. On its illegal-procurement-of-investment argument, Ruritania disclosed in caucus that it needed more time to gather further critical

²¹ The legal team for Ruritania in fact welcomed the assessment offered by the two mediators, as those theories had been insisted upon over the legal team’s objection by an influential cabinet person serving in Ruritania.

facts and that the witness on whose written statement it relied had become unavailable. Armed with these confidential disclosures, the mediators successfully proposed to the parties that they indicate to the tribunal their shared preference that the question of illegal acquisition be deferred to the merits. Persuaded, they did so jointly. At the prehearing conference, Ruritania also advised the tribunal that while it was not abandoning its argument based on the BIT's definition of 'investment', it would 'use its limited hearing time to focus on the meaning of investment under the ICSID Convention.'

The hearing was held. Immediately after the hearing, as prefigured in the agreed mediation 'pre-sets',²² the parties were invited by the mediators to join in a joint session. Watertime agreed, but Ruritania declined. The mediators decided not to caucus with the investor but to re-propose a joint meeting after the tribunal had ruled on jurisdiction. One month later, the tribunal did so rule.

The arbitrator determined that Watertown had an investment under both the BIT and ICSID jurisprudence. It joined to the merits, however, all remaining admissibility and jurisdiction-related questions. Its contemporaneous procedural order set a schedule for submissions on the merits. In accordance with a mediation pre-set, the mediators again invited the parties to participate in a joint session; again, the investor was willing but the State declined.

After the parties had completed a round of written submissions on the merits and another invitation to mediate was declined by Ruritania, the mediator with the more pronounced government service background visited the capital to urge Ruritania to re-engage. That meeting ultimately functioned as a private caucus in which the other mediator was not present. At that session, the situation faced by the government lawyers became clear. About the time of the jurisdictional hearing, management of the case had been transferred from the Ministry of Foreign Affairs to the Ministry of Justice; the latter was unconvinced that mediation was a productive use of State resources.

²² Here, 'pre-set' means a designated juncture at which the mediators will invite the parties to reengage. Pre-sets are soft commitments to convene at future benchmarks; they make the process becomes more predictable and trigger mediation without either disputant having to instigate it.

Lawyers at the Ministry of Justice also believed that continued participation in mediation would be characterised as weakness both by Watertime and, of equal concern, by Ruritanian voters. There was, after all, an election scheduled to occur in a few months. Moreover, both politically and legally, many of the potential solutions already broached by the mediators could not be effectuated without the direct involvement of the Municipality.

The dispute had indeed become politically significant. The political party not in power used it as an example of why BITs were harmful to Ruritanian sovereignty. In particular, much was made publicly of the USD 100 million in damages sought in Watertown's Request for Arbitration. The mediator nevertheless expressed her confidence that settlement could be had through mediation on terms favourable to the State, such that it could claim victory, while also ending the arbitration (which had been an evergreen inspiration for news stories and opposition talking points). The mediator affirmed her understanding that because the Ruritanian press and public had fixated on the USD 100 million figure, any settlement amount approaching that figure was out of the question. In part, on the strength of the mediator's urgings and her undertaking to allow the Municipality to be directly involved in mediation sessions, the State agreed to attend further sessions.²³

The two mediators next met in caucus with Watertime. That meeting confirmed that, as the mediators had suspected, a sophisticated analysis of damages had not been undertaken yet by the investor, who had arrived at the USD 100 million number based on several questionable assumptions, including that the concession (initially granted for a five-year term) would be renewed for at least two successive five-year terms.²⁴ It also had applied a rather relaxed discount rate in arriving at present value, assumed the cost of fuel would remain constant over the 15-year period, and adopted a highly optimistic useful life for its fleet of trucks.

²³ In keeping with best practices, the attending mediator fully briefed the absent mediator after the caucus. See Article 8(5) of the IBA Mediation Rules ('co-mediator shall share with the other co-mediator all written or oral communications received from a party or parties').

²⁴ In its briefs, it had argued that Ruritania was obliged to renew because the trash concessions held by third-country investors had been repeatedly renewed. The investor's assumption, of course, was that trash collection and water delivery were sufficiently analogous to constitute 'like circumstances'.

When asked about these assumptions in caucus, Watertime intimated that it had endeavoured to reach the highest possible number to signal its seriousness and to maximise settlement value. The mediators then proposed that Watertime undertake, on a confidential basis, the same exercise that the tribunal might perform, i.e. to consider to what damages it would be entitled if the concession (already entering year three) ended at the completion of year five, and to discount the expected cash flow using a more realistic discount rate. Additionally, the mediators suggested that Watertime consider the possibility that it might have to bear its own legal fees, both, as to the current proceeding and for any annulment proceeding that might follow. The next day, Watertime returned to a caucus session with numbers ranging between USD 16 and 20 million (not adjusted downward to account for legal fees).

After the investor accused the mediators of favouring the State, the mediators spent some time disabusing the claimant of that belief. The caucus ended with the mediators confirming that they would not share with Ruritania any disclosures made during the caucus.²⁵ The two mediators were, however, authorised to continue exploring settlement options with the State.

The presence in the mediation of the Municipality added another dimension to the dispute. From that direct municipality involvement, for a first time, an alternative justification for cancellation of the concession emerged – which was that municipal officials had suspected that Watertime had, in violation of Ruritanian law, become engaged in local politics and, in particular, was thought to have supported the opposition party's bid to retake power in the next election. According to those officials, those suspicions provided a legitimate reason for cancelling the concession. It was not lost on either the claimant or the government lawyers attending the session that such a basis for cancellation might not be consistent with Ruritania's treaty undertakings.

²⁵ See Article 8(4) of the IBA Mediation Rules ('No information provided orally by a party to the mediator during a separate meeting may be disclosed to any other party by the mediator, unless the party explicitly so authorizes the mediator').

C. In the Fullness of Times – Settlement

As might have been expected, the above fictional case was settled for an amount far less than USD 100 million. Indeed, the settlement did not involve the State issuing a check to Watertime. Instead, the mediators orchestrated an outcome in which the concession was renegotiated for a term of three years, with a second five-year term to be granted automatically absent a showing ‘cause’ (carefully defined in the new concession).

Although no money was paid directly to Watertime, at a cost of USD 5 million, the federal government purchased a fleet of new water trucks, which it leased to the Municipality; the Municipality in turn subleased the fleet to Watertime on favourable terms. The service fee structure contemplated in the original concession was maintained in the new arrangement, as adjusted by the lease payments to be made by Watertime.

As part of the settlement, Watertime supplied the federal government with several dozen three-year-old computers, which it had just decommissioned in favour of newer technology. In turn, those computers were placed in libraries, schools, and government offices (mostly in the Municipality). Watertime also expressly affirmed that it had not, and would not in the future, involve itself in political activities of any kind.²⁶

Additionally, at the request of both parties, the mediators issued a joint written opinion concluding, *inter alia*, that 1) the outcome of the case in the hands of the arbitrator was very difficult to predict; 2) the arbitration might last another four years (including, possibly, a period needed to conclude annulment proceedings under the Convention); 3) the manner in which the tribunal and *ad hoc* committee would allocate costs could not be forecast; 4) Watertime had not involved itself in local politics; and 5) as a result of the settlement agreement, Ruritanian public safety would likely be enhanced.

²⁶ The federal government’s investigation of the alleged illegal campaign activity uncovered only that some of Watertime’s employees (Ruritanian nationals) had been active, quite lawfully, in supporting candidates, but that the company itself had no involvement in political activities.

IV. Reflections on the Scenario

A. Generally

It is an essential feature of mediation that the parties may control the outcome of the process, just as they do when negotiating.²⁷ When an advancing arbitration forms the backdrop of such paralleling collaborative processes, those processes are the means by which the parties could not only end the dispute, but also avoid an uncontrollable approaching result – the substance of which they cannot fully predict. In modern corporate practice, settlements have long been viewed as a business decision.²⁸ While States face considerations in contemplating settlement different from those driving businesses, ultimately, as with companies, the exercise involves an assessment of the risks of settlement in comparison with the risks of non-settlement.²⁹

Mediation is a more powerful settlement tool than bilateral settlement negotiations alone because mediators, as problem-solving neutrals, can perform functions that partisans generally do not pursue. While the factual and legal issues in the Watertime case supplied an important backdrop for the mediators' work, ultimately their goal was to deemphasise those issues in favour of identifying to each disputant the obstacles to a mutually beneficial end to the dispute.

B. Selected Features

Despite its simplicity, the Watertime scenario demonstrates several features of a successful shadow co-mediation. These features would also be involved in managing much larger, more complex disputes.

²⁷ Alan W. Kowalchuk, 'Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your 'Case'', *Dispute Resolution Journal*, 61(2) (2006), p.36 ('mediation provides parties with the greatest amount of control over [...] resolution of their dispute').

²⁸ On the evolving attitudes of corporations toward alternative dispute resolution (ADR) and the tendency for such disputes increasingly to be seen in business terms, see Jean Claude Najjar, 'Corporate Counsel in the Era of Dispute Management 2.0', *Business Law International*, 15(2) (2014), p.37.

²⁹ See generally Jessica Notini, 'Effective Alternatives Analysis in Mediation: "BATNA/WATNA" Analysis Demystified', [https:// www.mediate.com/ articles/ notini1.cfm](https://www.mediate.com/articles/notini1.cfm)

(i) Triggering

First, the expectation that mediation might occur was expressly prefigured in the BIT's text – in the negotiation and consultation provision,³⁰ and in the fictional Appendix D. Commercial entities often associate mediation with contract triggers;³¹ the treaty provisions perform the same function, while not purporting to require mediation as an obligatory first step.³² Rule formula in turn may redouble the invitation to meditate.³³ The agreed-upon pre-sets also serve as triggers throughout the process.

(ii) Counsel and Mediators

The scenario did not focus on the often-critical role played, for good or for ill, by counsel.³⁴ Writing in 1982, and presumably referring to the US Bar, Professor Leonard Riskin opined that, '[m]ost lawyers neither understand nor perform mediation nor have a strong interest in doing either.'³⁵ Nearly four decades later, Riskin's assessment is no doubt less accurate than when he wrote it. One finds today many lawyers who have a very sophisticated understanding of mediation and who have developed skills to harness mediation's potential on behalf of their clients.³⁶

³⁰ See, e.g. Article 23 of the US Model BIT 2012 ('[C]onsultation and negotiation...may include the use of nonbinding, third-party procedures' [emphasis added]). The fictional scenario's counterpart might add: 'in accordance with Appendix D, or as otherwise agreed'.

³¹ For data consistent with one's anecdotal sense that mediation provisions formalised before a dispute arises improve the likelihood that mediation will occur, see Tom Stipanowich and J. Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations', *Harvard Negotiation Law Review* 19 (2013), pp.34–36 (for commercial disputes, 54% of responders identified contract provisions as ADR triggers (arbitration and mediation not distinguished)).

³² The extent to which parties should be urged to pursue what is supposed to be a consensual process is an important, and nuanced, question. See n.7, Coe, pp.100–102.

³³ Such rule provisions might invite the parties to state that pursuit of mediation is not inconsistent with arbitration; invite the parties to notify the arbitrators of any mediation, planned or underway; and direct the tribunal to remind the parties of the possible appropriateness of mediation at the initial procedural meeting.

³⁴ The role of counsel in mediation is now the subject of considerable literature, ranging from highly academic to very trade-craft-oriented. For an example of the latter, see Eileen Carrol and Karl Mackie, *The Art of Business Diplomacy: International Mediation* (Kluwer Law International, 2000) pp.61–63.

³⁵ Leonard L. Riskin, 'Mediation and Lawyers', *Ohio State Law Journal*, 43 (1982), p.43.

³⁶ See Thomas J. Stipanowich, 'Living the Dream of ADR: Reflection on Four Decades of Quiet Revolution in Dispute Resolution', *Cardozo Journal of Conflict Resolution*, 18 (2017) p.513, p.524 (citing a 2014 survey of mediators by International Academy of Mediations (IMA) confirming mediator perception that the majority of lawyers encountered in mediation seemed to have substantial mediation experience).

Nevertheless, party representatives who view arbitration to be the principal enterprise for which they have been engaged may be reluctant to involve mediators in that adjudicatory-challenging process. The available anecdotes suggest several potential explanations. Chief among them is that lawyers understandably wish to maintain as much control of the process and of client expectations as possible. They also may assume, often with justification, that their negotiation skills will suffice to bring about settlement, if settlement is warranted. Counsel may also simply regard mediation to be an unwelcome distraction and diversion of resources from arbitration, which is their specialty and chief assignment.

Counsel will nevertheless sometimes overlook or undervalue certain opportunities to end a dispute on beneficial terms. They may do so because of their emotional investment in a particular theory of the case or because they enjoy only such access to information about their counterpart's case as the arbitral mechanism allows them, in contrast to mediators who are informed by a wider range of data than counsel. Despite the increasing presence of alternative dispute resolution (ADR) courses available to lawyers-in-training, counsel may still be expected to give primacy to the legal case, whereas in the hands of mediators the legal merits of the case are merely one element in the mix of considerations driving the process.

Consider, for example, Watertime's 'donation' to the Municipality of its used, but still useful, computers. It would have been unlikely to suggest itself to either legal team. And, why would it?³⁷ Certainly, it is hard to imagine that the prospect of free computers, and the pre-election good will they might generate, fundamentally altered the State's negotiating position. But, at the margin, that gesture may have helped mollify an essential

³⁷ Riskin observed that, by their training, lawyers have a 'rule orientation' that causes them to evaluate factual elements in terms of legal meaning (their bearing on rights and duties) and that they assume that these analytics govern most situations, thus encouraging them to overlook, or regard as detrimental, other modes of problem solving. See n.35, Riskin, pp.43–48.

stakeholder – the Municipality. In addition to helping generate good will, they added value to an integrative bargain³⁸ that was reached with no new money being paid directly to the investor, and that made it unnecessary for the Municipality to find replacement water delivery concessionaires. Adding computers to the bargaining conversation is also a good example of how the methods and thought processes of mediators may supplement, and not merely duplicate, those of counsel.³⁹ It is also a classic example of mediators adding to the mix an item of little value to one party but of tangible value to the other.

(iii) Number of Mediators

Consistent with the focus of this Essay, the Watertime scenario involved two neutral⁴⁰ mediators, operating as a team and paralleling the arbitration. Although having multiple mediators is by no means indispensable to the success of a mediation, there are good reasons to employ a team approach – reasons that parallel those often offered to explain the common preference for three arbitrators, which are that the additional mediator might bring to the process linguistic, subject-matter, and cultural traits that complement those of her co-mediator;⁴¹ and that there can occur a division of labour⁴² between the two that

³⁸ See n.12, Kovach, pp.196–198; Dwight Golann and Jay Folberg, *Mediation: The Role of Advocate and Neutral* (Aspen Publishers, 2006) pp.58–62, pp.184–187.

³⁹ The mediators' suggestion to contribute computers to Ruritania started with a joint session; both lawyers and mediators were present when a Watertime executive, struggling to navigate his new computer, lamented the loss of his more familiar but decommissioned laptop. For the lawyers, it was of no interest but for the mediators, it was a fact that corresponded to another fact, also irrelevant to the legal case but noticed by the mediators – which was, that Ruritanian public libraries, classrooms, and government offices seemed to have only a few, outdated computers.

⁴⁰ One can imagine a co-mediation model in which each mediator is expected to be a partisan on behalf of the party that appointed him or her. That is not the norm. See Article 3(1) of the IBA Mediation Rules ('The mediator shall be impartial and independent'); *ibid.*, at Article 7(1) ('The mediator shall be guided by principles of fairness, objectivity, independence and impartiality'). Partisanship would undercut the trust that allows both disputants to consider mediator proposals without suspicion and the ability of the two mediators to rely on each other; partisanship would also impede mediator synergy. A co-mediator may, of course, have a particular affinity for a party by virtue of shared cultural or linguistic traits, or familiarity with vicissitudes affecting that disputant, such as might result from having been (as the case may be) a government, or corporate in-house, lawyer.

⁴¹ *Ibid.* See also n.27, Kowalchuk, p.33 (using co-mediators might eliminate the need to employ experts).

⁴² Often involving protracted sessions, mediation can be exhausting for all the participants. See n.34, Carrol and Mackie, p.37 (co-mediators 'can share the energy demands').

produces a more complete understanding of the dispute and harnesses the respective skill-sets of both mediators. There is also the non-negligible possibility that each disputant will be more likely to deem the process legitimate and to engage fully in it if at least one of the mediators seems already familiar with the concerns, values, and strictures that are important to that party.⁴³ Co-mediation,⁴⁴ of course, is not untested. It has been used successfully in complex disputes, e.g. those that arise from large construction projects, which generally involve multiple parties and short time-frames.⁴⁵ It has also served well when cross-cultural dynamics are at work.⁴⁶

The arguments against using two mediators include that the introduction of an additional person increases the likelihood that personality conflicts will impede the process, i.e. conflicts between a party and a mediator and those between the mediators themselves. The prospect of conflicts in style, method,⁴⁷ and personality raises important questions, not least those that bear on the mediator appointment process.⁴⁸ Ultimately,

⁴³ Thus, in the hypothetical, one of the two mediators was singular in attempts to re-establish momentum in the mediation process when the State had disengaged for internal reasons.

⁴⁴ Roy E. Wagner and Terry F. Peppard, 'Mediating Complex Construction Claims,' *State Bar of Wisconsin* (2008), available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/pages/article.aspx?Volume=81&Issue=6&ArticleID=1558>. See also Article 6 of the IBA Mediation Rules

⁴⁵ See n.44, Wagner and Peppard.

⁴⁶ See generally Bianka Keys, 'Co-Mediation: Positives, Pitfalls and Lessons Learned,' *ADR Bulletin*, 11(4) (2009), Article 3, ff; Cf. Bruce E. Barnes, 'Co-Facilitation and Team Facilitation: Core Skills for Leading Restorative Justice and Circle Processes to Expand Our Range of Peacemaking Skills in Indigenous and Multicultural Settings,' <http://www.uaf.edu/files/justice/adr-symposium/symposium-papers/Co-Facilitation-and-Team-Facilitation-Barnes.pdf> 4 February 2012 (co-mediation has been used 'regularly and successfully for over 30 years' in the Hawaii mediation centers, especially in cross-gender disputes).

⁴⁷ Individual mediator views vary concerning, for instance, the timing and number of caucuses, when and how to evaluate the merits of the controversy, and the role of counsel.

⁴⁸ There are good arguments for letting an institution designate the mediators who will serve. Increasingly, institutions, e.g. ICSID, know capable and authoritative persons with backgrounds in investor-State disputes who also have mediation skills. Significant substantive background and high standing in the field, taken together, greatly improve the chances of mediation success. Under a co-mediation model, moreover, an institution's thoughtful pairing of mediators can improve complementarity. If each mediator is appointed by a party, by contrast, it is unlikely the parties will coordinate their appointments to optimise intermediator teamwork and associated possibilities. Additionally, in comparison to a party-appointment model, tasking an institution with making mediator appointments should greatly reduce the potential for a party to expect partisanship, or for one mediator to feel obliged to align herself with one disputant rather than another. On the other hand, party appointment, for all its faults, is the common method employed to form investor-State arbitral tribunals. In investor-State arbitration, just as in international commercial arbitration, the practice persists because disputants – ever risk averse – tend to favour it.

however, the system must depend on the neutrals themselves to assess if and how they can function well enough together to carry out their mandate. As to budgeting, two mediators, of course, imply two fees. Cost as an argument for not using the second mediator, however, seems unpersuasive in all but the smallest value cases. Especially in a larger case, the additional cost of the second neutral will ordinarily seem modest, and indeed well spent, if settlement results.

(iv) Number of Arbitrators

Instead of the established three-arbitrator pattern in investor-State arbitration, the Watertime arbitration involved a sole arbitrator. While single arbitrator tribunals are not the norm in investment arbitration, the advantages of using a sole arbitrator, when shadowed by two co-mediators, are worth considering. A sole-arbitrator tribunal can usually be formed more quickly than a standard three-arbitrator panel, and with fewer calendars to reconcile and persons to consult, the tribunal can more nimbly advance the arbitration. In addition, there are the obvious cost-savings that result in terms of arbitrators' fees when only one arbitrator serves.⁴⁹

(v) Mediator Authoritativeness and Vouching

As broached in the Watertime scenario, the difficulty of getting and keeping the State engaged in the mediation process is a recurrent theme among those who study the prospect of investor-State mediation. With respect to both bilateral negotiations and mediation, it is sometimes suggested that

⁴⁹ One might be tempted to add that, to the extent the party-appointed arbitrators would have disagreed as to the outcome, the chair is the deciding vote in any event. It is not necessarily true, however, that a chair faced with opposing wing arbitrators will always, or even most often, produce the same award as a sole arbitrator would. The dynamics of three-arbitrator decision-making processes can differ significantly from those involving a sole arbitrator taking her own counsel. It is in part this dynamic that disputants may hope for when opting for three arbitrators instead of one.

government officials lack incentives to settle sufficient to outweigh the perceived risks of doing so. Nevertheless, in comparison to simple settlement negotiations, mediation conducted by two authoritative neutrals attuned to the below-the-surface obstacles facing government representatives can help ameliorate the risks. In particular, mediated outcomes can be packaged to forestall unfounded charges that incompetency or corruption has tainted the settlement; in this connection, the vouching function performed by the mediators would be an important part of a strategy for satisfying the various government (and, for that matter, corporate) oversight mechanisms through which such an agreement must pass.

(vi) Concurrency

Because the mediation was concurrent with the arbitration, the former had an opportunity to fully function while not delaying the latter; the process leading toward an award moved forward apace while mediation was pursued. By contrast, mediation limited to a single segment early in or before the arbitration may be handicapped by a lack of the information; States cannot be expected to settle without sufficient information to justify doing so, and if not fully informed claimants may suffer from unwarranted optimism. By contrast, a parallel process can account for (and capitalise upon) changes in the circumstances occurring throughout the arbitration process that impact the disputant's respective views on settlement.⁵⁰

⁵⁰ Rulings on jurisdiction or liability, for example, are major events that can change momentum. External factors, such as a change of government or a fundamental corporate change, may also induce pro-settlement attitudes among disputants. Mounting legal costs, of course, also exert settlement pressure simply by virtue of the process advancing.

(vii) Roles and Methods

In some ways, the Watertime-Ruritania dispute entrusted to the mediators was different from that placed before the arbitrator. The tribunal's mandate was to determine what the Municipality had done, and perhaps the reasons for its actions; that conduct (generally equated to State acts under international law) would then have been assessed in light of the standards set by the BIT and related jurisprudence. Ruritania the State, and not the Municipality, was before the tribunal, and the burden of any award rendered against Ruritania would be allocated to the Municipality, if at all, in accordance with Ruritania's internal law and politics.

The assignment given to the mediators overlapped with, but ultimately looked very different from, that before the arbitrators. The mediators, too, had to consider the extent to which the Municipality's conduct seemed to violate the BIT, viewed not in light of the information before them but by reference to the information before the arbitral tribunal. That evaluation (whether shared with the disputants or not) was merely one element, however, in an overall cataloguing of the interests (and vulnerabilities) of the parties; it influenced, but did not dictate, the mediation's outcome. Moreover, the mediation succeeded in part because the Municipality, as a key stakeholder, was directly involved in the process (in a manner it would not have been in the arbitration).

(viii) Evaluative, or Purely Facilitative?

In the Watertime scenario, the mediators, when invited, selectively offered the parties educated assessments of the merits, without purporting to predict conclusively the outcome concerning any of the substantive and procedural issues that arose. Across legal cultures, there are differing views as to when, if ever, mediators should attempt to evaluate the merits.⁵¹

⁵¹ If one adopts a broad definition of evaluation, it might be said to be occurring in any event when a mediator uses well-informed questions to point to weaknesses in each side's case. Under a model in which the mediators do not have deep exposure to investment law, the opportunities for evaluation are highly limited.

The arguments for allowing evaluation in appropriate circumstances are that it may give the disputants a means of confirming the assessment given by their respective legal teams and may provide needed support for the company or government representatives responsible for sponsoring the mediated agreement, both internally and before other constituencies.⁵²

The arguments against evaluation, which seem less persuasive, include that mediators may not be able to predict reliably what the arbitral tribunal will later decide, creating a risk of misdirecting the parties. The risk is heightened moreover to the extent that the request for an evaluation comes early in the process and thus may be based on evolving circumstances⁵³ or to the extent the evaluation is based on information known to the mediators but not to the arbitral tribunal. To offset these risks, experienced mediators generally will not speak in absolutes; rather, they will opine in terms of probabilities.

(ix) Caucusing

The mediator team serving in the Watertime dispute made liberal use of caucusing (having *ex parte* meetings with each side). There is a debate among mediators as to whether heavy emphasis on caucusing is desirable. Some mediation styles, particularly among American mediators, rely extensively on caucuses to lay the ground work for joint sessions. The mediators serve as buffers, filters, and interpreters as they shuttle between camps. Caucuses are more easily managed than joint sessions as a rule; the advance work done is intended to make joint sessions more productive.

⁵² Those responsible for approving the settlements may perceive certain risks. See National University of Singapore Center for International Law, *Report: Survey on Obstacles to Settlement of Investor-State Disputes* (CIL 2017). <https://cil.nus.edu.sg/wp-content/uploads/2017/08/Final-Report-of-CIL-Obstacle-Survey-26-May-2017.pdf> The most frequently mentioned obstacles to settlement were 'the desire to avoid or defer responsibility', 'the fear of allegations of or future prosecution for corruption', and 'the fear of public and/or political criticism'.

⁵³ After all, witnesses may ultimately prove to be weak, authenticity of a key document may become doubtful, or lawyers from one side may simply be more persuasive than the other.

The argument against caucusing is that it may allow skilful lawyers to manipulate the process (and the mediators) by shaping the narrative without the other party present to object or offer needed context. However, experienced mediators can be relied upon to resist effectively attempts by counsel to commandeer the process at any given point. Whereas to limit the use of caucusing would be to encumber the mediators in critical respects; there are simply important facts revealed in caucus that do not emerge in joint session.

V. Conclusion

Proposals that mediation play a greater supporting role in investment disputes are not new.⁵⁴ At least as early as 2005, for example, the United Nations Conference on Trade and Development (UNCTAD) alerted its constituencies to the notion that, principally as a pre-arbitration exercise, use of mediation should be considered.⁵⁵ In 2018, mediation continued to be discussed in connection with investor-State disputes,⁵⁶ reflecting continuing pressure to reform the current system, the long-standing success enjoyed by mediation in other commercial sectors,⁵⁷ and the sense among those familiar with

⁵⁴ Among the earlier discussions by commentators are Clyde C. Pearce and Jack J. Coe Jr., 'Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico', *Hastings International and Comparative Law Review*, 23 (2000), p.311, p.343 (proposing that pre-arbitration mediation be required); Barton Legum, 'The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack [J.] Coe's "Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch"', *International Arbitration Quarterly Law Review* (2006), p.81, pp.82–83; Ucheora Onwuamaegbu, 'The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience', *News From ICSID*, 22(2) (2005), p.12.

⁵⁵ UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (United Nations, 2005) pp.53–54.

⁵⁶ Quite appreciably, the literature on the subject has grown steadily. Examples include: Monde Marshall, 'Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation', *Pepperdine Dispute Resolution Law Journal*, 17 (2017), p.233; Jan K. Schäfer, 'Alternatives to Investment Arbitration', in Marc Bungenberg, Jorn Griebel, Stephan Hobe, and August Reinisch (eds.), *International Investment Law* (Nomos/ Hart, 2015) p.186; Anna Joubin-Bret, 'International Dispatch: Investor-State Disputes', *Dispute Resolution Magazine*, 20 (2013), p.37; Margrete Stevens and Ben Love, 'Investor-State Mediation: Observations on the Role of Institutions', in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (Martinus Nijhoff, 2011) p.389; Nancy A. Welsh and Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration', *Harvard Negotiation Law Review* 18 (2013), p.71.

⁵⁷ CEDR reports a high success rate. See 'Mediation Market Grows by 5%: The 2016 Mediation Audit', *CEDR News* (11 May 2016), <https://www.cedr.com/news/?item=Mediation-Market-grows-by-5-percent-The-CEDR-2016-Mediation-Audit> (2016 CEDR Audit demonstrated an 'aggregate settlement rate from mediations of around 86%').

mediation that it remains underexplored in connection with investment disputes. The continuing work of UNCTAD, the growing interest in mediation evident at ICSID,⁵⁸ the existence of supporting texts specific to investor-State mediation,⁵⁹ and the systematic inquiries beginning to be undertaken by academic institutions⁶⁰ are significant markers. The United Nations Commission on International Trade Law's (UNCITRAL) efforts toward instituting a global enforcement regime for mediated agreements is also a promising development.⁶¹ Indeed, at this point, it may not be unrealistic to expect UNCITRAL to consider the topic as part of its newly commissioned study of investor-State disputes.⁶²

Mediation is not a stand-alone solution to all that ails the current system. Rather, it should be part of an overall coordinated set of strategies that include not only various refinements to prevailing arbitration regimes and improved precision in the way substantive treaty protections are delimited, but also more pervasive use of host State systems for detecting and managing inchoate disputes.⁶³

Relatedly, the difficulties States face given the public nature of investor-State disputes,⁶⁴ and the intra-governmental intricacies involved in agreeing to settlements, should not be underestimated.

⁵⁸ Mediation is now a searchable topic on the ICSID website.

⁵⁹ Regarding the IBA-sponsored Investor-State Mediation Rules, see n.56, Anna Joubin-Bret, p.40 (summarizing the Rules); and see *Competency Criteria for Investor-State Mediators* (sponsored by an Investor-State Mediation Task Force of International Mediation Institute (IMI)), see 'IMI Competency Criteria for Investor-State Mediators', <http://www.imimediation.org/about-im/who-are-im/inv/inv-state-mediation-task-force/> (19 September 2016).

⁶⁰ See n.52, National University of Singapore, Center for International Law.

⁶¹ See UNCITRAL Working Group II (Dispute Settlement), 6–10 February 2017, *International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation*, UN Doc. A/CN.9/WG.II/WP.200, GAOR, 66th session, Note by the Secretariat (2017).

⁶² See 'UNCITRAL to Consider Possible Reform of Investor-State Dispute Settlement', *UN Press Release* (14 July 2017). <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html>

⁶³ See, e.g. Françoise Nicolas, Stephen Thomsen, and Mi-Hyun Bang, *Lessons from Investment Policy Reform in Korea* (OECD, 2013) pp.24–25. (Post-investment, Office of Foreign Investment Ombudsman focuses on services for foreign investors and, *inter alia*, 'resolves grievances reported by foreign investors not only directly by sending experts who are licensed and experienced to business sites but also by taking pre-emptive measures to prevent future grievances by encouraging systemic improvements and legal amendments.'). South Korea has had few investor claims brought against it. The post-investment regime in place there may explain that fact. Broad adoption of this kind of early-warning system might be facilitated by model regimes sponsored, perhaps by UNCITRAL, analogous to its Model Arbitration and Conciliation Laws. It remains to be seen whether this kind of project will be considered in UNCITRAL's work under its investor-State disputes initiative. See n.62.

⁶⁴ See Mark Clodfelter, 'Why Aren't More Investor-State Treaty Disputes Settled Amicably?', in n.6, Franck and Joubin-Bret p.38, p.40 ('The public nature of the parties and the measures at issue in most investor-State disputes makes them very different from commercial disputes').

Yet, somehow, roughly one out of three investor-State cases are already settled.⁶⁵ As there is nothing inherent in investor-State disputes that renders them inappropriate for settlement *per se*, the question is whether introducing concurrent co-mediation into the process will lead to a higher percentage of settlements, or a cheaper process overall, or greater satisfaction with the process, or some other benefit that would make the effort worthwhile.

Quite arguably, the principal challenge is not how to make attempts at mediation worthy exercises, but rather, how to convene the parties in the first instance. Treaty and rule text triggers are a partial answer. Institutional encouragement must also play a role. Ultimately, however, the more important ingredient in mediation's wider use will be attitudinal changes, reflected in new standard operating procedures, among States in particular; these new habits will generate and reinforce new best practices and new expectations that will in turn encourage the mastery of new and quite powerful techniques.

⁶⁵ See n.11, Wellhausen (153 of 461 investment arbitrations settled).

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Innovation of the Investment Mediation Rules under the CEPA Investment Agreement

I. Introduction

There is no coincidence that Hong Kong has been able to establish itself as a successful global financial centre. The comprehensive legal protections offered to global investors is certainly one of the significant factors which carries Hong Kong to today's status in the global business world. In the context of investor-State dispute resolution mechanisms, Hong Kong yearns to break through the conventional boundaries by implementing mediation as one of the dispute resolution mechanisms for the resolution of cross-border investment disputes, in addition to investor-State arbitration.

As a starting point, the Mediation Mechanism for Investment Dispute under the Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement (the CEPA Mediation Mechanism) is an ideal ground for initially showcasing what investor-State mediation is capable of achieving in the area of cross-border investment disputes resolution. Being a pioneer in this area is certainly challenging, but Hong Kong and Mainland China have sufficient will and ability to make it a success.

II. CEPA as a Gateway to China – Statistics

The interlocked and vivid economic relationship between Hong Kong and Mainland China is manifested in various eye-catching statistics. Here we are concerned with the investment area.

To begin with, Hong Kong is the largest source of realised foreign direct investment in Mainland China. According to the statistics provided by the Hong Kong Trade and Industry Department (TID), foreign investments made through and from Hong Kong accounted for 54% of Mainland China's national total as of the end of 2018, with

a cumulative value reaching HKD 8,616.6 billion.¹ These investments from Hong Kong cover a wide array of activities, including areas such as information and communications, financial services, real estate, manufacturing, wholesale and retail trades, and professional and business services. The cumulative number of Certificate of Hong Kong Origin (CEPA) applications received has reached 205,207 as of 31 October 2020, indicating the strong interest of Hong Kong investors to participate in Mainland China's economy.²

Such successful and prosperous economic ties between the two sides is largely powered by the driving force of CEPA. In the following section, we will first give a brief overview of CEPA. We will then discuss about the CEPA Mediation Mechanism.

III. CEPA: A Brief History

The Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) is a bilateral free trade agreement signed between Mainland China and Hong Kong on 29 June 2003.³ Its objectives are to promote joint economic prosperity and facilitate the economic links between the Mainland and Hong Kong in four major areas, namely trade in goods, trade in services, investment, and economic and technical cooperation. To strengthen trade cooperation, CEPA allows for progressive reduction and elimination of tariff barriers and discriminatory measures on trade in goods between the two sides.

In order to enhance CEPA by strengthening investors' confidence to engage in cross-border market activities, Hong Kong and Mainland China signed an Investment Agreement (the CEPA Investment Agreement) on 28 June 2017. This Agreement imposes certain obligations on the Mainland China and Hong Kong authorities for the purposes of protecting the investment interest of investors of

¹ 'Hong Kong and Mainland of China: Some Important Facts', *Trade and Industry Department* (14 October 2020). Available at <https://www.tid.gov.hk/english/aboutus/publications/factsheet/china.html>

² 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)', *Trade and Industry Department* (4 November 2020). Available at https://www.tid.gov.hk/english/cepa/statistics/cocepa_statistics.html

³ 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)', *Trade and Industry Department* (14 October 2020). Available at https://www.tid.gov.hk/english/cepa/cepa_overview.html

the two sides. The CEPA Investment Agreement has been into force since 1 January 2018.⁴

Under the CEPA Investment Agreement, Hong Kong investors enjoy various facilitation measures and protection (e.g. mechanism for settlement of investment disputes) when investing in Mainland China.⁵ On the other hand, foreign investors can also set up production lines in Hong Kong and, subject to some conditions, enjoy the zero tariff benefit upon exportation to Mainland China and use various dispute resolution mechanisms to settle their investment disputes.

In the past decade, the CEPA Investment Agreement and CEPA have continuously benefitted the Hong Kong economy, with its substantial beneficial effects reflected in various areas of cooperation such as trade and investment promotion and customs clearance facilitation. The implementation of CEPA is undisputedly a great success.

IV. CEPA Investment Agreement: Incorporation of Dispute Settlement Mechanism

Although the increase in economic transactions between Hong Kong and Mainland China has increased the mutual flow of capital, it inevitably brings about an increase of cross-border investment disputes. The CEPA Investment Agreement provides a foundation for resolution of disputes relating to investment made by the investors of one side on the other side. The dispute settlement mechanisms for such cross-border investment disputes are set out in Articles 19 and 20 of the CEPA Investment Agreement, which includes resolution through amicable consultation between the parties, a complaint-handling mechanism, mediation and judicial proceedings. It is significant to note that investor-State arbitration is not one of the options. This is different from the provisions of conventional bilateral investment treaties (BITs), where the dispute resolution process usually consists

⁴ Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), *Trade and Industry Department* (14 October 2020). Available at <https://www.tid.gov.hk/english/cepa/investment/investment.html>

⁵ See Chapter 3 of CEPA Investment Agreement.

of various steps proceeding from negotiation to arbitration, and where mediation is only treated as a ‘gap-filler’ without any actual execution value. However, under the CEPA Investment Agreement, the CEPA Mediation Mechanism is included as a stand-alone dispute settlement process. Such an arrangement, apart from enshrining the value of mediation in solving disputes while preserving relationships between people, can also confer a number of benefits to the investors, which will be discussed below.

V. CEPA Mediation Mechanism

A. Significance to Investors

Under the CEPA Investment Agreement, substantive obligations⁶ have been imposed on the authorities of Mainland China and Hong Kong to ensure that investors from the other side will be treated fairly and equitably and, in a way, no less favourably than its own investors. As such, the investors on both sides enjoy a high degree of investment protection against discriminatory measures. In addition, the CEPA Mediation Mechanism allows private investors to raise their disputes against the State or governmental authorities, which would otherwise have been difficult to do as a result of the significant imbalance in bargaining power and financial capabilities between the parties.

B. CEPA Mediation Mechanism: The Five Sections

Under the CEPA Mediation Mechanism, there are five key sections, namely (1) mediation principles, (2) submission conditions, (3) settlement, (4) confidentiality, and (5) notification. We will discuss these sections in detail below.

(i) Mediation Principles

The CEPA Mediation Mechanism is a bilateral mechanism between Hong Kong and the Mainland. The parties that are covered include the disputing investors from Mainland China

⁶ See Chapter 2 of CEPA Investment Agreement.

and Hong Kong, and the responsible State or the governmental authorities of Mainland China and Hong Kong.⁷

In the case of a Hong Kong investor investing in the Mainland, the disputing side is limited to the particular authority or institution implementing the specific administrative action; and in the case of a Mainland investor investing in Hong Kong, it is limited to the relevant authority or institution which is in alleged breach of its obligations under the CEPA Investment Agreement. One important point to note is that the mediation process can only be undertaken by the designated mediation institutions on the territory where the investment is made.⁸ In this regard, the designated mediation institutions handling disputes between a Hong Kong investor and a Mainland authority are the China Council for the Promotion of International Trade (CCPIT) / China Chamber of International Commerce (CCOIC) Mediation Center; and the China International Economic and Trade Arbitration Commission (CIETAC).⁹ On the other hand, the mediation institutions which are designated to handle investment disputes arising between a Mainland investor and a Hong Kong authority are the Hong Kong International Arbitration Centre – Hong Kong Mediation Council (HKIAC) and the Mainland-Hong Kong Joint Mediation Center (MHKJMC).¹⁰

Chapter 2 of the CEPA Investment Agreement imposes a number of substantive obligations on the relevant State and/or governmental authorities of Mainland China and Hong Kong to protect the investors coming from the other side. These obligations include fair and equitable treatment of investors, provision of full protection and security to the investment (i.e. minimum standard of treatment), that investors and investments

⁷ See Article 2(10) of CEPA Investment Agreement.

⁸ See Paragraph 1 of Mediation Mechanism – CEPA Investment Agreement.

⁹ 'Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)', *Trade and Industry Department* (14 October 2020). Available at <https://www.tid.gov.hk/english/cepa/investment/mediation.html>

¹⁰ *Ibid.*

made by the other side be treated no less favourably than its own and any other investors and investments (i.e. national treatment and most-favoured treatment); the non-imposition of any restriction or condition on the import and export of goods (i.e. performance requirements); the non-imposition of any requirement of residency or nationality on the investment enterprise of the other side (i.e. with regard to senior management, boards of directors, and entry of personnel); non-expropriation of investment and returns of the investors of the other side (i.e. expropriation); compensation for losses suffered as a result of war, state of emergency, insurrection, riot, natural disaster or other similar events in a manner no less favourably than those entitled to by its own investors (i.e. compensation for losses); and free transfer of investments across the border (i.e. transfer).¹¹ Any breach of these obligations can entitle the investor to seek redress against the defaulting State or governmental authority or institution through, amongst others, the CEPA Mediation Mechanism.

(a) Impartiality of Mediators

According to Paragraph 1.6 of the CEPA Mediation Mechanism, mediators are required to facilitate the dispute resolution in a neutral manner. This principle has been embodied within the institutional mediation rules of both jurisdictions. Investment mediations conducted in Hong Kong require the mediators to mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.¹² They are also required to remain independent and impartial at all times, and to ensure that they have the capacity to conduct the mediation in a manner that their own affairs (i.e. financial, business, professional, family, or social responsibilities) do not affect the performance of their duties during the mediation.¹³ Similarly, investment

¹¹ See Chapter 2 of CEPA Investment Agreement.

¹² See Article 7 of CEPA HK Mediation Rules.

¹³ *Ibid.*

mediations conducted in Mainland China also require mediators to maintain impartiality and independence while conducting the mediation.¹⁴

During the course of mediation, if a mediator becomes aware of any facts or circumstances that could call his/her independence into question in the eyes of the parties, the mediator is required to disclose such facts or circumstances without delay. The parties enjoy the final power to decide if the mediator should continue to conduct the mediation.¹⁵

(b) Mediation Institution, Rules and Mediators

Case 1: Dispute Settlement Between a Hong Kong Investor and the Mainland

Where a Hong Kong investor has suffered losses in an investment in Mainland China as a result of a breach by the Mainland China authorities of the obligations provided in the CEPA Investment Agreement,¹⁶ the dispute may be settled by any of the means as provided in Article 19, of which paragraph 1(v) provides:

(v) Resolution through mediation whereby a Hong Kong investor may submit an investment dispute arising from this Agreement between that investor and the Mainland to a mediation institution of the Mainland side.

The disputing Hong Kong investor can submit the investment dispute to CCPIT or CIETAC, which are the designated mediation institutions of Mainland

¹⁴ See, for example, Article 5 of the Rules of the CIETAC Investment Dispute Mediation Rules of CEPA Investment Agreement and Article 17 of the Rules of the CCPIT Investment Dispute Mediation Rules of CEPA Investment Agreement.

¹⁵ See, for example, Article 17 of the Rules of the CCPIT Investment Dispute Mediation Rules of CEPA Investment Agreement and Article 7(5) of the CEPA HK Mediation Rules.

¹⁶ Limited to Article 4 (Minimum Standard of Treatment), Article 5 (National Treatment), Article 6 (Most-Favoured Treatment), Article 7 (Performance Requirements), Paragraph 1 of Article 8 (Senior Management, Boards of Directors and Entry of Personnel), Paragraph 2 of Article 8 (Senior Management, Boards of Directors and Entry of Personnel), Article 11 (Expropriation), Article 12 (Compensation for Losses) and Article 14 (Transfer).

China, for mediation in accordance with their respective CCPIT or CIETAC Investment Dispute Mediation Rules, under the CEPA Investment Agreement. These Rules are published online and are readily accessible to investors.

With regard to the appointment of a mediator, in the case of CCPIT, the mediator is to be chosen currently from a panel of 91 mediators from various provinces in Mainland China who come from different occupational backgrounds, including the legal, commercial and educational fields. On the other hand, in the case of CIETAC, the mediator is to be chosen currently from a panel of 56 mediators, of which 13 are from Hong Kong and four are from Macau.¹⁷ All of these mediators possess a wide range of skills and experiences.

Case 2: Dispute Settlement Between a Mainland Investor and Hong Kong

Where a Mainland investor has suffered losses in an investment in Hong Kong as a result of the Hong Kong authorities' breach of their obligations as imposed in the CEPA Investment Agreement, the dispute is to be settled by any of the means as provided in Article 20, of which paragraph 1(iv) provides:

(iv) Resolution through mediation whereby a Mainland investor may submit an investment dispute arising from this Agreement between that investor and Hong Kong to a mediation institution of Hong Kong.

The disputing Mainland investor can submit the dispute to HKIAC or MHKJMC, the designated mediation institutions of Hong Kong, for mediation in accordance with the Mediation Rules for Investment Disputes of the Investment Agreement under the framework

¹⁷ See CCPIT and CIETAC Investment Dispute Mediation Rules of CEPA Investment Agreement respectively.

of the Mainland and Hong Kong Closer Economic Partnership Arrangement (collectively the CEPA HK Mediation Rules). These Rules are published online and are readily accessible to investors.

With regard to the appointment of a mediator, in the case of HKIAC, the mediator is to be chosen currently from a panel of 27 mediators. On the other hand, in the case of MHKJMC, the mediator is to be chosen currently from a panel of 21 mediators.¹⁸ All of these mediators possess a vast array of skills and experiences, which is a requirement to satisfy the eligibility criteria in order to be qualified.

As a unique feature of the CEPA Mediation Mechanism in Hong Kong, the mediation rules explicitly allow the parties to introduce any non-party who it is believed could be beneficial for facilitating the settlement of the dispute.¹⁹ This feature does not exist in the mediation rules of the Mainland mediation institutions.

Where a disputing investor submits an investment dispute to mediation, the mediation will be subject to the laws and regulations of the jurisdiction where the mediation is commenced. In other words, the mediation will be subject to the laws and regulations of Mainland China in the case of a Hong Kong investor commencing mediation in Mainland China, and the laws and regulations of Hong Kong in the case of a Mainland investor commencing mediation in Hong Kong. Each side will be responsible for developing their own mediation rules based on the principles as

¹⁸ See HKIAC and MHKJMC Investment Agreement under the framework of the Mainland and Hong Kong CEPA HK Mediation Rules ('Rules') for Investment Disputes respectively.

¹⁹ See Article 9(3)(c) of the CEPA HK Mediation Rules.

set out in the CEPA Mediation Mechanism and the CEPA Investment Agreement.²⁰ Moreover, if a disputing Hong Kong investor has commenced judicial proceedings or a disputing Mainland investor has commenced administrative review or judicial proceedings in relation to the investment dispute, they cannot submit the relevant investment dispute for mediation, unless such submission is in compliance with the relevant laws and regulations of the jurisdiction where the investment is made.²¹

(c) The Mediation Commission for Investment
Mediations Conducted in Hong Kong

For an investment mediation conducted in Hong Kong, unless otherwise agreed, the mediation commission is to consist of three mediators, of which each party will select one mediator and the third mediator, being the president of the commission, will be appointed by agreement of the parties or failing which, the mediation commission, after consultation with the parties.²²

The mediation will be conducted in a flexible manner, subject to the intentions of the parties, circumstances of the case, and the overall goal of a cost efficient and timely settlement of the disputes.²³ Following consultation with the parties, the mediation commission is to decide on the procedural matters of the mediation, including the place, format, time and dates of the mediation meetings.²⁴ Joint sessions and private meetings with the parties and their representatives are allowed whenever required.

²⁰ See Article 19(2) of CEPA Investment Agreement.

²¹ See Article 19(3) of CEPA Investment Agreement.

²² Article 5 of CEPA HK Mediation Rules.

²³ Article 8(8) of CEPA HK Mediation Rules.

²⁴ Article 8(7) of CEPA HK Mediation Rules.

The vast experience and expertise possessed by mediators is intended to be instrumental in clarifying the issues in dispute, facilitate communication among the parties, and explore common interests between the parties.²⁵ In order to assist the parties to settle their disputes, the mediators may provide non-binding recommendations or terms of settlement for the parties' consideration.²⁶

(d) Eligibility Criteria of CEPA Mediators in Hong Kong

To ensure the professionalism of the designated CEPA Mediators in Hong Kong, there are a number of eligibility criteria²⁷ required to be satisfied before one can be accredited as a CEPA Mediator.

A CEPA Mediator in Hong Kong must have attended training within nine months before the date when he or she is designated as a mediator. The CEPA Mediator is also required to undertake training programmes accepted by the government on topics related to the CEPA Investment Agreement, the CEPA Mediation Mechanism, investment law and/or mediation of investment disputes.

With regard to the background of a CEPA Mediator in Hong Kong, he or she should have (i) occupied a post at the managerial level or above in a company which is engaged in cross-border or international trade and investment for a minimum of three years, (ii) possess an academic qualification in law, or (iii) received training in law.

²⁵ Article 8(1) of CEPA HK Mediation Rules.

²⁶ Article 8(4) of CEPA HK Mediation Rules.

²⁷ See the Eligibility Criteria for Designation as Mediator of the Mainland-Hong Kong Joint Mediation Center.

Apart from the above criteria, a CEPA Mediator in Hong Kong must:

- (1) Have been accredited as a mediator by the Hong Kong Mediation and Accreditation Association Limited, or other such body as accepted by the Hong Kong Government;
- (2) Have conducted mediation of **at least two disputes** relating to cross-border or international trade and investment;
- (3) Be proficient in both written and spoken Chinese (including Putonghua) and English; and
- (4) Undertake to conduct mediation in accordance with the CEPA Investment Agreement and the CEPA Mediation Mechanism, as may be amended by the Government from time to time.

(ii) Conditions for Submission of Investment Dispute to Mediation²⁸

If a disputing investor wants to solve an investment dispute through mediation, the investor should submit the investment dispute to mediation within three years of the date on which the disputing investor first acquired knowledge of the alleged breach and the loss or damage suffered.²⁹ However, any delay resulting from *force majeure* shall not be taken into account in counting the aforementioned three-year period.

At least one month prior to the delivery of the notice of mediation, the disputing investor should have requested an amicable consultation with the disputing side in accordance with sub-paragraph 1(i) of Article 19 (Dispute Settlement Between a Hong Kong Investor and the Mainland) or sub-paragraph 1(i) of Article 20 (Dispute Settlement Between a Mainland Investor and Hong Kong) of the Agreement.³⁰

²⁸ See Paragraph 2 of CEPA Mediation Mechanism.

²⁹ See Paragraph 2.5 of CEPA Mediation Mechanism.

³⁰ See Paragraph 2.3 of CEPA Mediation Mechanism.

If no agreement can be reached to settle the investment dispute, the disputing investor can deliver a notice (i.e. Request for Mediation) to the chosen mediation institution, confirming its consent to the mediation which is required to be conducted in accordance with procedures as set out in the CEPA Mediation Mechanism. These procedures list out, amongst others, the particulars of the disputing investor; the provisions alleged to have been breached under the CEPA Investment Agreement; the legal and factual basis of the claim; the means of compensation sought and the approximate amount of the claim.³¹ The Request for Mediation must be accompanied with proof that the disputing investor is a Qualified Investor of the other side at the time of submission of the investment dispute.³²

The disputing investor is also required to waive its right to commence or continue the dispute settlement procedures under any agreement that may exist between any other party and the disputing side in relation to the alleged breach.³³

(iii) Mediation Settlement Agreement (MSA)

Depending on the nature of the investment dispute and the remedies sought, there are several settlement options available to the parties, including monetary compensation, restitution of property or monetary compensation in lieu of restitution, or other legitimate means of compensation agreed upon by the parties.³⁴ It should however be noted that no declaratory remedy or relief can be agreed upon by the parties in the mediation. The mediation settlement agreement (MSA) can be enforced in accordance with the laws and regulations of the side where the investment is made.³⁵

³¹ See Paragraph 2.1 of CEPA Mediation Mechanism.

³² See Paragraph 2.2 of CEPA Mediation Mechanism.

³³ See Paragraph 2.4 of CEPA Mediation Mechanism.

³⁴ See Article 4.2 of CEPA Mediation Mechanism.

³⁵ See Article 4.3 of CEPA Mediation Mechanism.

(iv) Use of Information and Confidentiality

Subject to the laws of the relevant jurisdiction, except for matters that the disputing parties agree to disclose as well as matters for notification (as set out in the next section – Notification), no information relating to the investment dispute and the mediation process can be disclosed by any party. If no settlement can be reached between the parties in the mediation, unless otherwise agreed by all disputing parties, neither party may adduce any statements, admissions or concessions made by the other disputing party or the mediator overseeing the mediation as information or evidence in the subsequent legal proceedings to the prejudice of the other disputing party.³⁶ Similar protections are reflected in the respective mediation rules of the relevant mediation institutions of both jurisdictions.³⁷

(v) Notification

The Hong Kong and Mainland authorities are obliged to notify each other of the mediation rules – and any amendment thereof – published by their mediation institutions, and report annually on matters related to the handling of CEPA investment disputes that have been submitted to mediation.³⁸

VI. Mediation Procedures under the CEPA Mediation Mechanism

After the disputing investor delivers the Request for Mediation to the chosen mediation institution, the procedure which carries the process forward will depend on the mediation rules adopted by the relevant mediation institution.

³⁶ See Article 3 of CEPA Mediation Mechanism.

³⁷ See, for example, Article 15 of the Rules of the CIETAC Investment Dispute Mediation Rules of CEPA Investment Agreement, Article 23 of the Rules of the CCPIT Investment Dispute Mediation Rules of CEPA Investment Agreement, and Article 11 of the CEPA HK Mediation Rules.

³⁸ See Paragraph 5 of CEPA Mediation Mechanism.

We take an example of a CEPA mediation conducted in Hong Kong. Within 21 days of receipt of the Request for Mediation, the requisite mediation institution will send an invitation to pursue mediation (i.e. Invitation to Mediation) to the disputing investor and the other party. If the other party agrees to mediate, within 21 days of receipt of the Invitation to Mediation, the disputing investor needs to submit a written consent to the mediation institution agreeing that the mediation shall be conducted in accordance with the requirements as set out in the CEPA Investment Agreement, the CEPA Mediation Mechanism, and the mediation rules of the mediation institution. A written response to the allegations made in the Request for Mediation and the relevant documents and evidence in support is also required to be furnished. The mediation institution is then required to notify the disputing investor by a written notice (i.e. Mediation Notification) of the other party's consent to mediation within ten days of receipt of the other party's written consent. If the other party fails to respond within the 21-day period, the other party shall be deemed to have rejected mediation, unless otherwise agreed by the disputing investor.³⁹

The mediation commission is required to consist of three mediators. Within ten days of the mediation notification, the disputing investor is to notify the other party of the mediator it intends to appoint, as well as its proposed president mediator of the mediation commission. The other party must respond promptly regarding the mediator it intends to appoint and the proposed president mediator. If no agreement can be reached on the appointment of the president mediator within 20 days of the mediation notification, the mediation institution is required, after consultation with the parties, to appoint the president mediator.⁴⁰

After its constitution, the mediation commission must convene a mediation management conference with the parties to discuss the procedural matters related to the conduct of the mediation. The mediation can then proceed in accordance with the procedure as agreed.⁴¹

³⁹ Article 4 of CEPA HK Mediation Rules.

⁴⁰ Article 5 of CEPA HK Mediation Rules.

⁴¹ Article 9 of CEPA HK Mediation Rules.

The procedure for a CEPA mediation conducted in Mainland China is similar but the time allowed for the different stages varies.

VII. A Recent CEPA Mediation Case

This is a real-life case which will probably utilise the CEPA Mediation Mechanism. A Hong Kong investor invested in the high technology sector in Mainland China. As a result of certain administrative orders issued by the Mainland authorities, the Hong Kong investor has been unable to obtain loans from its bankers to finance its operation. Its business has ground to a halt. The Hong Kong investor has suffered losses of around RMB 20 billion. Pursuant to Article 19 of the CEPA Investment Agreement, the Hong Kong investor intends to submit the investment dispute to mediation. This case is currently proceeding to mediation in the Mainland.

Although the CEPA Mediation Mechanism is relatively new and its potential is yet to be fully explored, its practical effectiveness in solving cross-border investment disputes is definitely something worth watching and noting.


VIII. Hong Kong: Spearheading the Investor-State Mediation Initiative

Hong Kong is taking a leading role in aggrandising its dispute settlement credentials with the CEPA Mediation Mechanism. This bilateral and transparent mediation protocol sets out clear and defined rules to eliminate uncertainties and protect investors of both Hong Kong and Mainland China. Being a stand-alone dispute settlement option, it is an innovative exemplar in the field of cross-border investment dispute resolution.

The adoption of the CEPA Mediation Mechanism shows the commitment of the authorities of Mainland China and Hong Kong to promote mediation as the preferred method for resolution of cross-border investment disputes, which will boost the confidence of

foreign investors to utilise Hong Kong as the main gateway to invest in the Mainland.

It is believed that the CEPA Mediation Mechanism will continue to attract global attention. Hopefully, it can serve as a blueprint or reference for interested jurisdictions to establish a similar mediation mechanism for resolution of investor-State investment disputes.

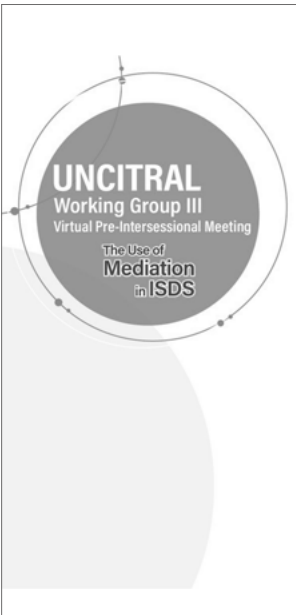


UNCITRAL
Working Group III
Virtual Pre-Interessional Meeting
The Use of
Mediation
in ISDS

**Innovation of the Investment
Mediation Rules under the
CEPA Investment Agreement**

Mr Ronald Sum
Partner & Head of Dispute Resolution (Asia)
Addleshaw Goddard

[Slide 1]



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in ISDS

Agenda

- Introduction of CEPA
- CEPA Mediation Mechanism
- Implications for ISDS

[Slide 2]

Closer Economic Partnership Arrangement

What is the coverage?

1. Trade in Goods
2. Trade in Services
3. Investment
4. Economic and Technical Cooperation

Benefit to HK investors?

HK Investors can:

- enjoy facilitation measures in investing in the Mainland
- enjoy protection, e.g. mechanism for settlement of investment dispute

C

E

P

A

What is it?

A bilateral free trade agreement signed between Mainland China and HK

Benefit to foreign investors?

Foreign Investors can:

- set up production lines in HK, enjoy zero tariff benefit on importation into the Mainland
- make use of CEPA measures to start business in the Mainland
- enjoy protection, e.g. mechanism for settlement of investment dispute

[Slide 3]

CEPA as a Gateway to China

Mainland's largest source of Realised Foreign Direct Investment

Foreign Investment through and from Hong Kong accounts for 54% of national total (US\$1,099.2 billion as at end-2018)*

Cumulative number of Certificate of Hong Kong Origin (CEPA) applications received

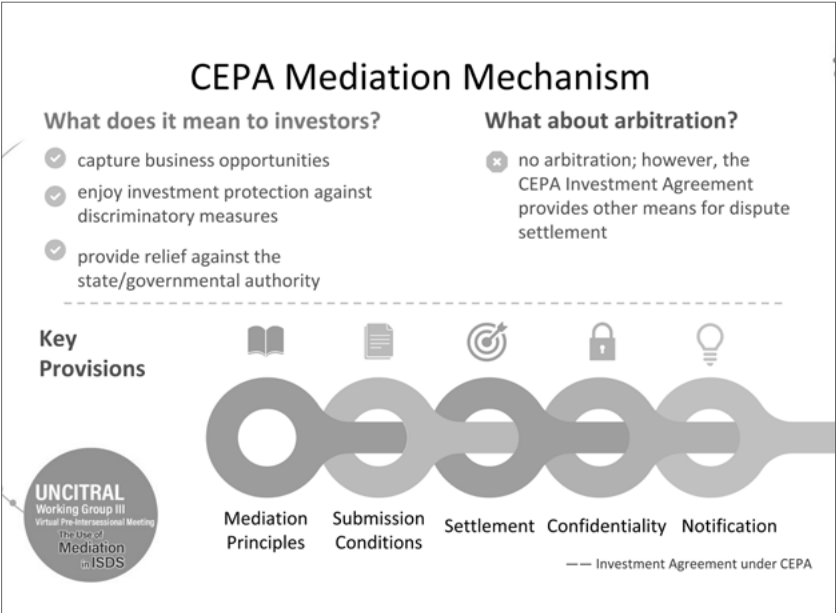
203,897 as at 30 September 2020**

References:

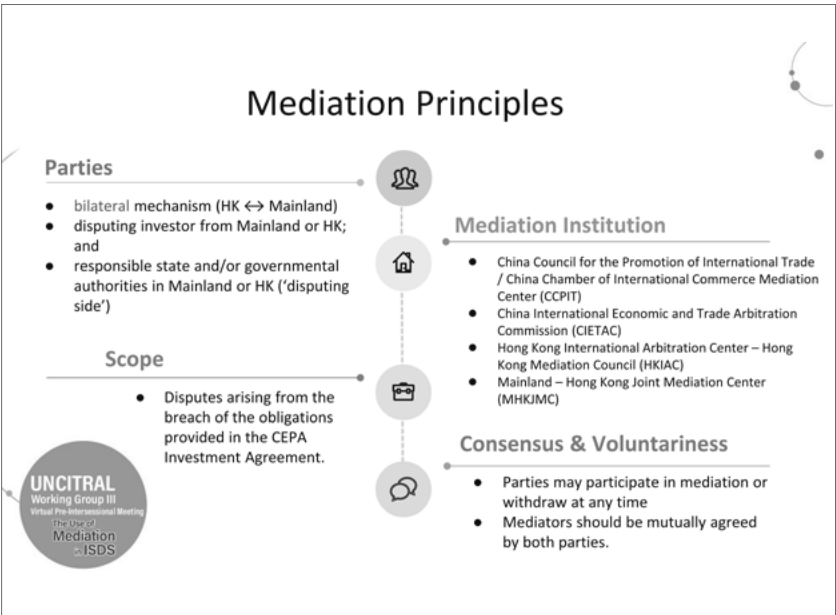
*<https://www.tid.gov.hk/english/aboutus/publications/factsheet/china.html>
**https://www.tid.gov.hk/english/cepa/statistics/cocepa_statistics.html

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[Slide 4]



[Slide 5]



[Slide 6]

Mediation Institution, Rules and Mediators

Hong Kong Investor ↔ Mainland Authority

Which Mediation Institution can the HK investor go to?

- One of the following mediation institutions of the Mainland:-
 1. China Council for the Promotion of International Trade / China Chamber of International Commerce Mediation Center (CCPIT)
 2. China International Economic and Trade Arbitration Commission (CIETAC)

What are the applicable Mediation Rules?

- the CCPIT and CIETAC *Investment Dispute Mediation Rules of CEPA Investment Agreement* respectively
- Both set of rules are published online and are readily accessible to investors

Who can be appointed as the Mediator?

- CCPIT: choose from a panel of 91 mediators from various Mainland provinces and different occupational backgrounds including legal, commercial and educational
- CIETAC: choose from a panel of 56 mediators, out of which 13 are from HK and 4 are from Macau; all mediators have a vast array of skills and experiences



[Slide 7]

Mediation Institution, Rules and Mediators

Mainland Investor ↔ Hong Kong Authority

Which Mediation Institution can the Mainland investor go to?

- One of the following mediation institutions of HK:-
 1. Hong Kong International Arbitration Center – Hong Kong Mediation Council (HKIAC)
 2. Mainland–Hong Kong Joint Mediation Center (MHKJMC)

What are the applicable Mediation Rules?

- The HKIAC and MHKJMC *Investment Agreement under the framework of The Mainland and Hong Kong CEPA Mediation Rules ("Rules") for Investment Disputes* respectively
- Both set of rules are published online and are readily accessible to investors

Who can be appointed as the Mediator?

- HKIAC: choose from a panel of 27 mediators
- MHKJMC: choose from a panel of 21 mediators
- all CEPA mediators possess a vast array of skills and experiences and have to fulfil the eligibility criteria in order to be qualified.



[Slide 8]

More on CEPA Mediators in Hong Kong: Eligibility Criteria

1 TRAINING

- Attend training within 9 months before designated as mediator
- Undertake training programmes accepted by the government on topics related to Investment Agreement, the Mediation Mechanism, investment law and/or mediation of investment disputes

2 BACKGROUND

- Either:-
- has occupied a post at managerial level or above of a company which engaged in cross-border or international trade and investment for 3 years minimum; or
 - possesses academic qualification in law; or
 - has received training in law

3 ACCREDITATION

Accredited as a mediator by the Hong Kong Mediation and Accreditation Association Limited or such other body as accepted by the HKSARG;

4 EXPERIENCE

Mediated at least 2 disputes relating to cross-border or international trade and investment

5 LANGUAGE

Proficiency in both written and spoken Chinese and English (including Putonghua);

6 UNDERTAKING

Undertake to conduct mediation in accordance with the CEPA Investment Agreements and Mediation Mechanism as may be amended by the Government from time to time

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The Use of
Mediation
in ISDS

[Slide 9]

Conditions for Submission of Investment Dispute to Mediation

Limitation Period

Within **3 years** from the date on which the investor first acquired knowledge of the breach and/or loss

Qualified Investor

The relevant investor must fulfil the relevant requirements on the definition of "Investor" as provided under Annex 1 of the CEPA Investment Agreement

Consultation

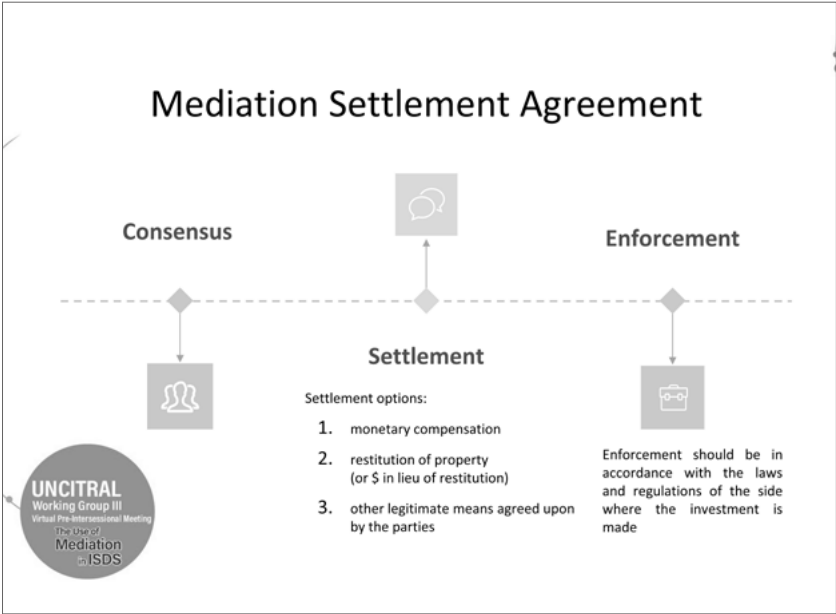
Request amicable consultation with the government authority at least **1 month** prior to the delivery of the notice of mediation

Waiver

Waive the right to initiate or continue dispute settlement under any agreement between any other party and the government authority

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[Slide 10]



[Slide 11]

More on Enforcement of Mediation Settlement Agreement ('MSA')

Enforcement in Hong Kong

- MSAs are enforceable as contractual agreements
- The usual rules of contractual construction thus applies in the case of dispute

Enforcement in the Mainland

- Governed by the *Provisions Dealing With Actions Relating To Settlement Agreements* issued by the Supreme People's Court in 2002
- MSAs are enforceable as contractual agreements
- The party seeking enforcement must prove the validity of the MSA against objections raised by the party resisting enforcement
- A party can execute MSAs involving monetary obligations at the People's Court where the paying party resides or where his properties are situated

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The Use of Mediation in ISDS

[Slide 12]

Use of Information and Confidentiality

- ✓ No disclosure by mediators, parties and/or any of their agents
- ✓ No disclosure by the mediation institution
- ✓ Any statement, admission or concession made during the mediation is inadmissible in future proceedings
- ✓ Confidentiality is subject to the laws in either jurisdictions

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The Use of
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in ISDS

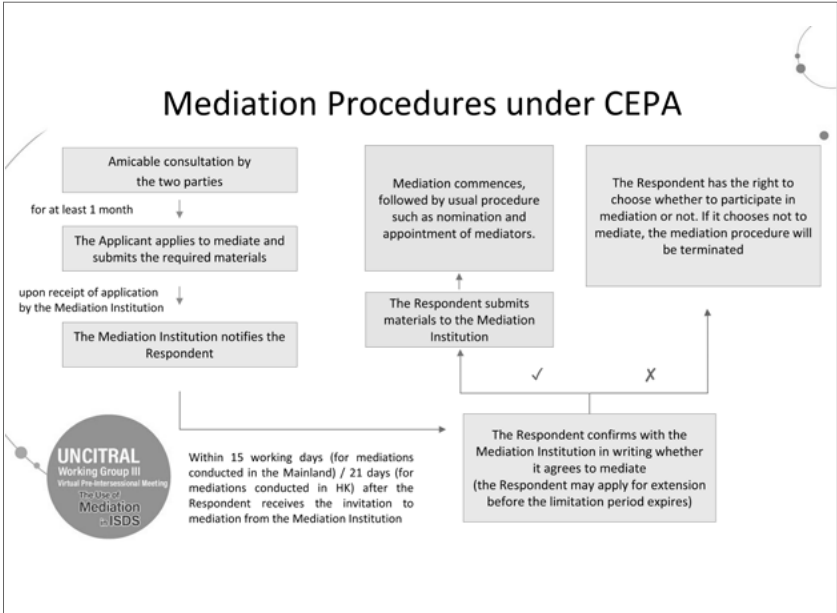
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Notification

- ✓ Reporting obligations by the Hong Kong and Mainland authorities
- ✓ Obligations of one side to notify the other side for any amendments made to their mediation rules published by its mediation institutions.
- ✓ Obligations of the mediation institutions to report annually on matters relating to its handling of the CEPA mediation disputes.

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in ISDS

[Slide 14]



[Slide 15]

CEPA Mediation Rules in Hong Kong: Mediation Management Conference

- ✓ A compulsory procedure under the Mediation Rules of the CEPA mediation institutions in HK.
- ✓ Parties to discuss procedural matters of the mediation, such as agreeing on a provisional timetable, the language and location of the mediation meetings, and the payment of the mediator's fees.
- ✓ Third party standing – only applicable to investment mediation in HK.

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The Use of Mediation in ISDS

[Slide 16]

Latest CEPA Mediation case

- HK investor v. Mainland China authority
- HK investor involved in high-tech related investments in Mainland China
- Around RMB 20 billion of damages and loss
- Joint mediators play a key role
- Proceeding to mediation
- Likely to reach a win-win settlement



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Mediation
in ISDS

[Slide 17]

Key Takeaways from CEPA Mediation Mechanism

1 clear set of rules

2 protection for foreign investors

3 future UNCITRAL initiatives

- an open and transparent mechanism
- bilateral
- HK is a major gateway to China for foreign investors
- Although voluntary, the mechanism shows the government commitment to mediate and drives parties to sit together and talk
- It is in these foreign investors' interest that CEPA offers an effective mediation system to settle investment disputes
- Win-win settlement relief against the state/government
- HK takes a leading role in developing mediation mechanisms for investment dispute resolution
- HK has many experienced professionals in this area
- The mechanism of CEPA mediation could be a reference for UNCITRAL's future initiatives

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in ISDS

[Slide 18]

SESSION III:
Hybrid Models
for Resolving International
Investment Disputes
BACKGROUND PAPER

Writer



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The Chinese University of Hong Kong

Dini Sejko is a Research Associate at the Centre for Comparative and Transnational Law at the Faculty of Law of The Chinese University of Hong Kong and a Research Affiliate at The Fletcher Network for Sovereign Wealth and Global Capital, Tufts University. Dr Sejko's research focuses on international economic law and the governance of State-owned enterprises and sovereign wealth funds (SWFs). For his research on the impact of UN sanctions on the governance of the Libyan SWF, Dr Sejko received the Society of International Economic Law PEPA Best Paper Award 2018. Dr Sejko is the author of the forthcoming book, *The Transnational Law of Sovereign Wealth Funds: Governing State Capitalism at the Time of Protectionism*. Dini Sejko has obtained a Combined Bachelor and Master of Science in Law from Bocconi University, a Master of Laws in International Economic Law and a Ph.D. from The Chinese University of Hong Kong.

Background Paper

I. Executive Summary

This Paper examines current scholarship and policy developments to provide a comprehensive analysis of the use of mandatory mediation in investor-State dispute settlement (ISDS) and to evaluate various issues related to the potential use of different hybrid dispute resolution models for the solution of investor-State disputes.

Initially, this Paper examines the current investment treaty regime and investor-State arbitration jurisprudence in order to assess possibilities for the use of mediation. This Paper then considers the use of mandatory mediation, and analyses potential issues and advantages of mandatory mediation. This Paper then examines hybrid dispute resolution models, such as Arb-Med-Arb and Med-Arb for ISDS, discussing the legal issues involved and how to address such problems. The last part of this Paper discusses the role of shadow mediators and arbitrator-facilitated settlement in solving investor-State disputes and assesses how these models combine the strengths of both arbitration and mediation and address issues related to the impartiality of neutrals and enforceability of mediated settlements.

II. Introduction

1. This Paper aims to support the United Nations Commission on International Trade Law (UNCITRAL) Working Group III's virtual pre-intersessional meeting on mediation. This Paper relies on current scholarship to examine issues related to the use of mandatory mediation and evaluate various issues related to the potential use of different hybrid dispute resolution models for the solution of investor-State disputes. This Paper is organised as follows. Firstly, it analyses investor-State arbitration and the possibility of using mediation focussing on issues relating to the use of mandatory mediation in investor-State

dispute resolution. This Paper then focusses on hybrid dispute resolution models, such as Arb-Med-Arb and Med-Arb for investor-State dispute settlement (ISDS), and discusses related legal issues and explores how to address such problems. The last part discusses the use of shadow mediators as well as arbitrators acting as ‘mediators/facilitators’ in settlement of investor-State disputes.

III. Investor-State Arbitration and the Need for Mediation

2. The development of investor-State arbitration (ISA) in the 1950s successfully substituted gunboat diplomacy for the settlement of disputes involving Aliens and States. For more than half a century, ISA has provided foreign investors and States with a reliable process for depoliticisation and resolution of disputes. However, in the last 20 years, an exponential increase in the number of cases, the increased duration of the ISA process, the complexification of ISA claims, their impact on public finances, and the potential regulatory chill effect have triggered a backlash against ISA. Notably, a shift from expropriation-based claims to claims dealing with public policy issues, such as environmental and public health matters, has led to greater public scrutiny and dissatisfaction with the operation of the system.

3. The cost and duration of ISA claims have also increased. The arbitral process has become more judicialised, and the outcomes of final awards have had a large effect on the expectations of foreign investors, States and public interest groups. *Metalclad Corp. v The United Mexican States* has become a typical example of the indication of such dissatisfaction, with the Chief Executive Officer of Metalclad having expressed regret at having resorted to this mechanism.¹

¹ After winning a USD 17 million arbitral award against Mexico, the Chief Executive Officer of Metalclad expressed regret at having resorted to this mechanism. He noted that despite ‘winning’ the case, the arbitration had been so dissatisfying that he wished the company had relied on other options to resolve the dispute. The proceedings had spanned approximately five years, involved a battle in domestic courts, and the claimant’s side alone had an estimated USD 4 million in direct and indirect costs. See Jack J. Coe Jr., ‘Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch’, *UC Davis Journal of International Law and Policy*, 12 (2015), p.7, pp.8–10.

4. Importantly, while disputes between States and foreign investors deal mostly with economic and commercial interests, they increasingly involve other issues that are peripheral to the commercial nature of the dispute, such as public policy decisions that include among others the protection of the environment and public health. The increasing length and ballooning cost of proceedings and the unpredictability of the outcome regarding disputes related to public policy decisions that are of great importance for the respondent States, is driving the pursuit of different and more suitable venues and procedures for the solution of investor-State disputes.

5. When disputes arise, foreign investors and respondent States should consider how to prevent the unnecessary escalation of the conflict in order to conserve resources and preserve mutually beneficial relationships. Against this background, it is important to facilitate the amicable solution of disputes by fostering investor-State mediation within the international ISDS system.

A. The State of International Agreements

6. An examination of the provisions of international investment agreements (IIAs) indicates that treaty provisions that require or suggest parties to rely on mediation to solve investor-State disputes are limited. Although there is no definitive quantitative research on mediation in investment treaty-linked ISDS clauses, a few studies do provide guidance. A machine-learning study by Catherine Kessedjian, Anne van Aaken, Runar Lie, and Loukas Mistelis using the World Trade Institute's EDIT database of IIAs showed that 2,052 of 2,885 treaties surveyed, or 71%, contain cooling-off provisions – although only 3% expressly mention conciliation, and 1% mention mediation.²

7. From a qualitative perspective, we can refer to the Indonesia-Australia Comprehensive Partnership Agreement, which explicitly uses language that provides for mandatory conciliation against a claimant investor:

² Catherine Kessedjian, Anne van Aaken, Runar Lie, and Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement', *Academic Forum on ISDS Concept Paper 2020/16* (March 2020). Available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>

If the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, *which shall be mandatory for the disputing investor* [emphasis added], with a view towards reaching an amicable settlement. Such a conciliation process shall be initiated by a written request delivered by the disputing Party to the disputing investor.³

8. Free trade agreements (FTAs) and investment agreements (IAs) that involve the Hong Kong Special Administrative Region (SAR) increasingly refer to the possibility of the parties relying on mediation for the solution of investor-State disputes. For example, Article 20.1 of the Chile-Hong Kong SAR IA of 2016 provides that:

[I]n the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultations, which may include, where this is acceptable to the disputing parties, the use of non-binding, third-party procedures, such as good offices, conciliation and mediation.⁴

9. A similar provision can be found in the Australia-Hong Kong SAR IA of 2020, which substituted the previous Investment Promotion and Protection Agreement (IPPA) signed in 1993 by the Hong Kong SAR and Australia. Article 23 of this treaty provides that:

³ If the dispute cannot be resolved within 180 days from the date of receipt by the disputing party of the written request for consultations, the disputing party may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement. Such a conciliation process shall be initiated by a written request delivered by the disputing party to the disputing investor. The conciliation process under this Article can only be initiated by a written request delivered by the disputing party within 180 days from the date of receipt by the disputing party of the written request for consultations. Expenses incurred in relation to the conciliation process shall be borne equally by the disputing parties. Each disputing party shall bear its own legal expenses. See Indonesia-Australia Comprehensive Partnership Agreement, Article 14.23(1) (4 March 2019). Available at <https://www.dfat.gov.au/trade/agreements/in-force/ia/cepa/ia/cepa-text/Pages/ia/cepa-chapter-14-investment>

⁴ Investment Agreement Between the Government of the Hong Kong SAR of the People's Republic of China and the Government of the Republic of Chile, Article 20.1 (7 September 2012).

Consultations 1. In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation *or mediation* [emphasis added].⁵

10. While there is increasing use of treaty language that recommends mediation of disputes to the parties, this provision is not consistently present in all investment agreements signed by the Hong Kong SAR. In general, express treaty texts which refer to mediation of an investor-State dispute remain rare, even though such language is increasingly used in recently negotiated investment agreements signed by Asia-Pacific States and their partners.⁶

B. The State of International Investment and State Disputes

11. Recent efforts to promote conciliation and mediation and to clarify the beneficial aspects of alternative dispute resolution (ADR) mechanisms have, for now, not generated significant empirical effects. Based on data publicly available on the International Centre for Settlement of Investment Disputes (ICSID) website, 13 cases have been registered under the ICSID Convention's Conciliation Rules and four of these cases are still pending. Notably, a larger majority of these conciliation cases involve an African respondent State and only one of these cases involves an Asia-Pacific State.⁷

12. In a case decided by the Permanent Court of Arbitration (PCA), the tribunal suggested that the parties (*Achmea B.V. and the Slovak Republic*) make use of mediation in order to address their dispute.⁸

⁵ Agreement Between the Government of Australia and the Government of the Hong Kong SAR for the Promotion and Protection of Investments, Article 23 (2020).

⁶ European Union-Canada Comprehensive Economic and Trade Agreement, Article 8.20; European Union-Singapore Investment Protection Agreement, Article 3.4; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.18.

⁷ *Barrick (Niugini) Limited v Independent State of Papua New Guinea* (ICSID Case No. CONC/20/1).

⁸ See PCA Case No. 2008-13, para.60. The tribunal remarked that it had a sense 'that a settlement in this case would be a good thing, in that the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case'. The tribunal emphasised that it was not its role to 'get involved in this in any way at all' but suggested that should the parties desire to seek out somebody who might act as a mediator or conciliator, the Secretary-General of the PCA might be in a position to assist. The tribunal noted that any such steps would be taken in parallel with the continuation of the case.

13. In contrast with the limited use of conciliation proceedings, parties frequently discontinue arbitral proceedings and choose to settle.⁹ In the Asia-Pacific region, there are increasing examples which indicate that parties have opted to settle investment cases. For example, in 2018, a case initiated by a Chinese State-owned enterprise (SOE) against Yemen was discontinued pursuant to ICSID Arbitration Rule 43(1), after the Chinese investors prevailed at the jurisdictional stage.¹⁰ A case brought by a Malay investor against the Chinese government was similarly discontinued in 2013.¹¹

IV. Mandatory Mediation

14. Mediation enables the parties to resolve their dispute in a more timely and less confrontational manner, thus allowing for the investment relationship to potentially continue. Mediation enables the disputing parties to have control over the dispute and be the decision-makers. If the parties cannot come to a settlement agreement, the mediator has no authority to impose a decision on the parties.¹² Mediation is a kind of dispute resolution mechanism that emphasises harmony and achieving a win-win situation for the disputing parties.¹³ It provides host States and foreign investors with options to resolve investment disputes consensually with a high degree of autonomy and flexibility. Mediation gives the parties the possibility to address issues that are peripheral to their core economic interests and allows them to consider public policy issues that in the case of an arbitral proceeding might be excluded from the scope of the dispute – thanks to exceptions built-in regarding public health, environment, or national security.

15. Under Working Paper 190 (Paragraphs 30–31), the reasons put forward in support of ADR revolve around three elements. They are (i) time- and cost-efficiency; (ii) the ability to clarify the issues in dispute and to thus help narrow the gap between the disputing parties;

⁹ International Centre for Settlement of Investment Disputes, *The ICSID Caseload — Statistics* (Issue 2020-1).

¹⁰ *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen* (ICSID Case No. ARB/14/30).

¹¹ *Ekran Berhad v People's Republic of China* (ICSID Case No. ARB/11/15).

¹² James Claxton, 'Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?', *Pepperdine Dispute Resolution Law Journal*, 20 (2020), p.78.

¹³ Teresa Cheng, 'Investor-State Dispute Settlement Reform – Mapping the Way Forward'. Available at <https://www.doj.gov.hk/eng/public/pdf/2019/sj20190712c1.pdf>

and (iii) flexibility and adaptability which could help preserve the relationship between the host State and the investor.¹⁴

16. Investor-State dispute settlement must reflect the needs of the parties and embrace the reality of the situation. As a less adversarial means of dispute resolution, mediation could alleviate specific concerns of investors, especially foreign investors, who might otherwise be hesitant to sue the government.¹⁵

17. Legal and cultural traditions, as well as practical incentives have supported the expansion of mediation in domestic legal systems across the globe. At the domestic level, States have supported resort to mediation and conciliation before relying on court proceedings. Financial incentives are used by governments to encourage parties to mediate and parties that obstruct mediation are penalised. Some courts waive or reduce court fees for parties that settle their disputes through mediation while others withhold public funding to parties who do not meet with mediators.¹⁶ Early-stage mediation can reduce the cost and length of dispute settlement, while the use of creative solutions might reduce the economic burden and maintain or further the economic relationship between the parties.

18. Considering the success of mediation in domestic courts and considering its increasing use in the settlement of commercial disputes, one might ask if investors and States should be compelled to mediate? Another key question is whether the use of mediation should be wholly voluntary or structured as a compulsory step before arbitration?

19. Scholars and practitioners including Lucy Reed¹⁷ and Jack J. Coe Jr.¹⁸ have expressed some scepticism regarding the effectiveness of mandatory mediation in investor-State arbitration, while also emphasising the need for more research and policy analysis on the possible

¹⁴ United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), 39th Session (New York, 30 March–3 April 2020). Available at <https://undocs.org/en/A/CN.9/WG.III/WP.190>

¹⁵ Kun Fan, 'Mediation of Investor-State Disputes: A Treaty Survey', *Journal of Dispute Resolution*, 2 (2020).

¹⁶ See n.12.

¹⁷ Lucy Reed, 'Synopsis of Closing Remarks' in Susan D. Franck and Anna Joubin-Bret (eds.), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (UNCTAD, 2010), p.30: 'while there is value in the way national court systems rely on mandatory ADR, including court-ordered mediation, this does not readily translate to resolution of disputes between States and foreign nationals.'

¹⁸ Jack J. Coe Jr., 'Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch', *Journal of Transnational Dispute Management*, 4(1) (February 2007), p.32: 'the system ought to be particularly on guard against adding elements of coercion unsupported by data or an articulated policy basis.'

use of mediation. Compulsory mediation can mean very different things depending on the type of mediation required. There are nevertheless some essential constants which include the presence of a mediator, communication and negotiation between the parties, and voluntary decision-making or agreement by the parties.

20. A time-limited mandatory mediation programme has the potential to force lawyers and other repeat players to learn how to participate in mediation.¹⁹ Research has demonstrated that lawyers who have participated in mediation proceedings are more likely to recommend voluntarily use of mediation. After a period of ‘coerced education’, courts may then convert to voluntary programmes or provide for easy opt-outs.²⁰

21. Professor Nancy Welsh has examined situations where investors have worked with lead agencies or pursued administrative review in compliance with a BIT’s pre-arbitration requirements. In these circumstances, the investor requests mediation with an independent third party mediator and the BIT could compel the State or affected agency to comply with such a request. One concern with this approach is that a multinational corporation can gain experience in using the mediation process against the interests of the States. The requirement is however balanced because representatives of the State will not be obliged to reach an agreement unless and until they are satisfied with the appropriateness, value, and consequences of such an agreement.²¹ Recently negotiated treaties, for example those negotiated by the European Union (EU), provide to the parties the opportunity to enter into ‘good faith’ consultations with no obligation of result.²²

¹⁹ Nancy A. Welsh and Andrea Kupfer Schneider, ‘The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration’, *Harvard Negotiation Law Review*, 18 (2013), p.71.

²⁰ *Ibid.*

²¹ *Ibid.*

²² See for example the European Union-Viet Nam Investment Protection Agreement (2019), Article 3.3, which says ‘The Parties shall endeavour to resolve any dispute referred to in Article 3.2 (Scope) by entering into consultations in good faith with the aim of reaching a mutually agreed solution’.

22. Investor-State mediation could be made compulsory in treaties. The submission of the Government of Indonesia at the 37th session of the Working Group refers to the use of mandatory mediation before going to ISA.²³ By adopting mediation in investment treaties, States could reduce the duration and costs of proceedings. Indonesia sees mandatory mediation after the exhaustion of the consultation process as a way to prevent a dispute from escalating into a legal dispute, which can be costly and damaging to the disputing parties' relationship. Investors, as the case requires, are obliged to seek the assistance of a mediator to resolve the dispute, once notification of a potential dispute has been rendered against the State and the consultation process has been exhausted.²⁴

23. The most significant criticism against mandatory mediation is its effect on the autonomy of the parties, which can undermine the essence of mediation.²⁵ However, it is crucial to focus on the degree of compulsion or requirement to mediate. The more robust the incentive or compulsion, the more likely such measure may be considered as an infringement on a party's autonomy or even a denial of access to justice whereupon the investor opts to proceed directly to arbitration.²⁶

24. Mandating the use of mediation can create the expectation that the parties will make serious attempts to solve the dispute through mediation before resorting to arbitration.

25. The ICSID Convention establishes a forum for solving investor-State disputes. Article 1 which establishes the purpose of the Centre provides that:

The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between the Contracting States and nationals of other Contracting States following the provisions of this Convention.²⁷

²³ Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156), para.19.

²⁴ *Ibid.*

²⁵ Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program', *Cardozo Journal of Conflict Resolution*, 11 (2010), pp.479–480.

²⁶ See n.16.

²⁷ ICSID Convention, Article 1.2.

26. The ICSID Convention does not expressly include mediation as a form of dispute settlement. However, Rule 43(2) of the ICSID Arbitration Rules recognises the possibility for the parties to reach settlement agreements that could ultimately be incorporated into the award of the arbitral tribunal.²⁸

27. Treaty language that creates the obligation for the parties to engage in mediation prior to the arbitration has been criticised because it can coerce settlements and jeopardise the right of the parties to resort to arbitration. In addition, the obligation for the parties to mediate before arbitration might create an additional economic constraint on the parties. Conversely, in public policy-related disputes, the use of mediation under the guidance of an experienced mediator might enhance the parties' ability to communicate with each other (and other important constituents) and could represent an 'experience of justice' related with the arbitral proceedings.²⁹

28. The use of compulsory mediation has proven to be effective in specific jurisdictions and sectors but settlement rates are higher in the case of voluntary mediation. Some commentators have however expressed support for time-limited compulsory programs of compulsory mediation in order to encourage lawyers and other repeat players to learn how to participate in the process.³⁰ The introduction of a compulsory requirement to mediate leads to a higher number of cases where mediation proceedings are initiated, with the resulting effect that more cases will be settled.³¹

29. The current investment treaty regime has very few examples of provisions that compel parties to mediate, and those provisions have not been examined by arbitral tribunals.³² A proviso that obliges the parties to mediate before initiating the arbitral proceedings can be seen as similar to a cooling-off period clause.

²⁸ ICSID Convention, Article 43.

²⁹ See n.19.

³⁰ *Ibid.*, p.129.

³¹ *Ibid.*

³² See for example the provisions mentioned in EU's recently negotiated agreements and the Indonesia-Australia FTA.

30. Unlike investment treaty clauses that establish compulsory mediation, clauses that create the obligation for cooling-off period requirements already exist and are common in the texts of older as well as more recent investment agreements. Cooling-off periods may vary from three to twelve months, during which time the parties may solve the dispute through an amicable settlement. This type of provisions can also be found in domestic laws that regulate aspects of foreign investment.³³

31. The application and significance of these provisions has been addressed by arbitral tribunals. Even though the jurisprudence is not entirely consistent, views expressed by arbitral tribunals concerning the application of cooling-off periods can help us to draw lessons for the drafting of treaty provisions which mandate mediation.

32. Arbitral tribunals have not had a coherent approach towards this type of provisions. In some disputes, tribunals have adopted a strict interpretation which requires the parties to use the entire cool-off period to attempt at settling the dispute.³⁴

33. In *Biwater Gauff v Tanzania*, the arbitral tribunal explained that:

[T]his six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further

³³ *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No. ARB/94/2 24 December 1996, p.168: 'Tradex made no good faith effort to resolve the "dispute" amicably before resorting to arbitration, as required by the 1993 Law and general principles of international law'.

³⁴ See n.17.

negotiations are obviously futile, or settlement obviously impossible for any reason;

- forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.³⁵

Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition.³⁶

34. Dolzer and Schreuer have argued that the use of the cooling-off period as a jurisdictional bar to access arbitration is non-economical. They suggest that as an alternative to dealing with non-compliance with such a clause, proceedings can be suspended to allow for additional time for negotiations if they appear promising.³⁷

35. Mandatory mediation must consider the autonomy of the parties and their right to rely on other available dispute resolution mechanisms. Thus, once the parties have initiated an investor-State arbitration, they can still agree to mediate and settle. Some recently negotiated investment agreements provide this opportunity to the parties. No provision of the ICSID Convention prevents the use of an ICSID Conciliation Proceeding once an arbitration proceeding has commenced. Article 26 of the ICSID Convention envisions that parties might explicitly agree to pursue another remedy, e.g. conciliation or mediation alongside ICSID arbitration.³⁸ Similarly, neither the United Nations Commission on International Trade Law (UNCITRAL) Arbitration and Conciliation Rules nor the Stockholm Chamber of Commerce (SCC) Arbitration and Mediation Rules contain any provisions which prevent mediation/conciliation once the arbitration proceeding has commenced.

³⁵ *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, para.343.

³⁶ *Ibid.*, para.345.

³⁷ Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2012), p.270.

³⁸ ICSID Convention, Article 26. 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'

36. Mandatory mediation also needs to consider the risk of lack of good faith during mediation proceedings. The parties might take advantage of the openness of the mediation proceedings to collect information on the position of the other party and then use that information during the arbitration that will take place later.

37. Some other practical problems that already affect the use of mediation are likely to remain valid too in the case of compulsory mediation. There are issues of political opportunity, political risks and personal risk, as pointed out by the survey developed by Lucy Reed and other researchers concerning the current problems with mediation.³⁹ Governmental officials and State representatives might want to avoid accepting responsibility for agreeing to pay taxpayer money out or giving up a monetary claim to reimburse taxpayers, and would rather let a third party arbitral decision-maker take that decision.⁴⁰

38. With these considerations in mind, an investor-State mediation is more likely to take place if the applicable IIA requires the parties to initiate mediation prior to arbitration.

39. The Chartered Institute of Arbitrators (CIArb) suggests that as an alternative, parties should be asked to attempt mediation before filing an investor-State arbitration claim. Requirements to mediate prior to filing an ISDS claim can be drafted into treaties and agreements by States with little risk to themselves. Investment treaty provisions which require mediation as a necessary step seem, at first, to be a practical solution for not only expediting ISDS disputes but also for avoiding them altogether.⁴¹

40. A possible solution might involve a requirement to be included in the treaty for pre-mediation submissions, and the neutral could find that the parties have fulfilled the mandatory mediation requirement by merely making their pre-mediation submissions.

³⁹ Seraphina Chew, Lucy Reed, and J. Christopher Thomas QC, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes', *NUS Centre for International Law Working Paper 18/01* (September 2018).

⁴⁰ The decision of the Albanian government to settle a dispute with a Czech investor in the electricity sector for around USD 136 million while the investor was initially claiming USD 258 million (*CEZ v The Republic of Albania*, UNCITRAL). The opposition parties and civil society groups criticised the governmental decision to settle.

⁴¹ The Chartered Institute of Arbitrators, *Discussion Papers – CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers*. Available at https://ciarb.org/media/3480/ciarb-uncitral_discussion-papers.pdf

41. For successful investor-State mediation, it is important that the selected mediator is an experienced and legally and politically-savvy individual who can, at the appropriate points, assist the parties in being realistic regarding their options and the consequences of their choices.

V. Hybrid Dispute Resolution Models

42. Arbitration remains the more common and successful way to solve disputes between foreign investors and host States. Negotiations during arbitration proceedings have often assisted the parties to reach settlements and interrupt the arbitral proceedings. Combining mediation with arbitration, in hybrid forms, may increase the chances for parties to opt for mediation which will also promote more effective settlement of disputes.

43. Eunice Chua⁴² identifies the different hybrid forms under which mediation and arbitration can be used together, or consequentially, to create different alternatives for the parties involved in a dispute. These are a) Med-Arb: a process in which mediation is first attempted before arbitration is commenced; b) Arb-Med: a process in which the disputing parties initially commence arbitration and have the substantive arbitration hearings before mediation is attempted; and c) Arb-Med-Arb: a process where disputing parties commence an arbitration, which is then followed by mediation before the substantive arbitration hearing.

44. Chua also identifies the possibility of using techniques from one dispute resolution model within the other, i.e. a) Med-in-Arb, which is an arbitration process where the arbitrator uses facilitative techniques to encourage settlement without switching out of the arbitrator role; and b) Arb-in-Med, which is a mediation process where a mediator uses evaluative techniques without switching out of the mediator role.⁴³

⁴² Eunice Chua, 'A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure', *Journal of Transnational Dispute Management* (2018), pp.3–6.

⁴³ *Ibid.*

45. The different forms of mediation present different strengths and weaknesses that might affect the effectiveness of the process. In the following sections, this Paper evaluates how Arb-Med-Arb and Med-Arb can be used for ISDS, focusing on the legal issues which emerge and how to address them.

A. Arb-Med-Arb

46. The Arb-Med-Arb process starts after the disputing parties have initiated the arbitral claim. After the initial arbitral hearing, and before proceeding with the substantive arbitration hearings, the parties engage in the mediation process. This process relies on the arbitrator to act as a mediator, subject to arbitration rules governing such mediation.⁴⁴ In this scenario, the dispute between the parties has already escalated to the arbitration stage; however, the parties have the possibility to reduce the time spent in an arbitral proceeding and reach a mediated settlement.

47. Initiating the mediation after the parties have formulated their case and exchanged pleadings has distinct advantages. The parties have a clear understanding of the scope of the dispute. It is not clear what the exact implications on the overall investment relationship will be, since the initiation of the arbitration indicates that the relationship has already deteriorated. This scenario however has two significant positive implications. On the one hand, a mediation that starts after the initial pleadings increases the chances that parties that are acting in good faith can settle the dispute because the core elements of the dispute are outlined. On the other hand, this process reduces the chances that parties could take advantage of the mediation stage to gain access to information regarding the position of their counterpart.

48. The settlement will likely have positive implications by limiting legal costs related to the arbitration. More importantly, the respondent State and the investor(s) can control the outcome of the dispute by reaching a settlement via the mediation. If the mediation stage is

⁴⁴ Weixia Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med (-Arb) and Its Global Implications', *Washington International Law Journal*, 29 (2019), p.117.

successful, the dispute will be concluded and a neutral individual can eventually act as an arbitrator and register the settlement as a consent arbitral award. In this way, Arb-Med-Arb confers a significant advantage to the parties involved because it generates an enforceable award.

49. Conversely, if the parties fail to settle during the mediation stage, they can continue the dispute through subsequent arbitral proceedings and the mediator will act as an arbitrator. Arb-Med-Arb presents significant advantages for the parties involved, such as the speedy conclusion of the dispute and the possibility to enforce the mediated settlement. Several issues that can affect the process need to be considered though, and these include the role of the neutral (arbitrator/mediator); access to privileged information by the neutral; and access to confidential information by the other party.

50. The use of the same neutral intermediary can have a positive effect with respect to the efficiency of the settlement process. The same neutral has a better understanding of the dispute, reducing in this way the duration and cost of the dispute. However, the knowledge acquired by the neutral intermediary when acting as a mediator might affect his/her impartiality when acting as an arbitrator. At the same time, one should also consider the way the neutral is required to behave when acting as an arbitrator and when acting as a mediator.⁴⁵ The set of skills that arbitrators and mediators need to possess in order to be successful differ.⁴⁶

51. The parties will share in private caucuses with the mediator their real views about the strengths and weaknesses of their case, and what their needs are. In this way, parties provide more information in order to be assisted in reaching a deal but it can lead to other risks. The use of different neutral intermediaries can allow for this process to take place but it will increase the cost of dispute settlement and require more coordination among the neutrals.

⁴⁵ See n.18.

⁴⁶ Jesuald W. Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution', *Journal of Transnational Dispute Management*, 6(1) (2009), p.441: 'the resources and experience of a deal-making investment banker are probably much more germane to the mediation of an investor-State dispute than are the talents of a litigator'.

52. The expression of provisional opinions by the neutral intermediary might be perceived as affecting his/her impartiality if the dispute proceeds. For example, if the mediator engages in evaluative mediation, he/she might reveal to the parties the merits of their respective cases, which in the case of an arbitration would not be known to the parties until the award is rendered.⁴⁷

53. Access to confidential information during private sessions could affect the impartiality of the neutral. This problem can be addressed through rules that prohibit the arbitrator from using information obtained during the private sessions, and which make it compulsory for the arbitrator to disclose the information obtained during such sessions. The risk that the arbitrator may be influenced by an unconscious bias can be resolved by prohibiting private sessions during the mediation phase.

54. The Hong Kong Arbitration Ordinance, which is based upon the UNCITRAL Model Law, allows arbitrators to assume the role of mediators if the parties express their consent and have not withdrawn their consent in writing. The Ordinance expressly provides for a disclosure safeguard – if and when mediation fails, a neutral intermediary having confidential information from a party ‘must’ before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings’.⁴⁸

55. The safeguard requires disclosure to both parties of what information was given to the arbitrator, and prompts the parties to defend against such information during the arbitral proceedings.⁴⁹

⁴⁷ James T. Peter, ‘Med-Arb in International Arbitration’, *American Review of International Arbitration*, 8 (1997), p.83.

⁴⁸ Hong Kong Arbitration Ordinance 2019, Cap.609, para.33.

⁴⁹ See n.44, Gu, p.139.

B. Med-Arb

56. Med-Arb is a process in which the parties attempt to mediate their dispute before initiating arbitral proceedings. If the parties are not able to reach a settlement agreement, the appointed neutral intermediary switches roles. He/she (the neutral) who initially attempted to mediate the dispute then acts as arbitrator and hears the case.

57. The Med-Arb process presents a clear advantage because the dispute can be solved at an early stage, thereby preserving the relationship between the parties. Also, the mediator can play a facilitative role and help the parties to engage in discussion and find a common ground.

58. The mediator uses the Med-Arb process to help the parties solve the problem by focussing on future gains that the parties can control, rather than the formal allocation of blame for conduct in the past that cannot be altered.⁵⁰ The mediator needs to build a rapport with the participants in order to gain their trust. For this reason, the process needs to take place under a safety net that preserves the confidentiality of meetings and can be conducted without prejudice to protection of the mediation process, enabling the parties to have honest open exchanges with each other and with the mediator. The process must ensure that the parties feel safe enough to share their views about the strengths and weaknesses of their case and what their needs are privately with the mediator, so as to reach a deal.

59. The mediator may be better placed to help the parties to reach their desired outcome based on the strengths and the weaknesses of the dispute, based on the needs of the parties as well as based on the reality of the situation. Parties that reach this result are more likely to honour the deal. In the case of Med-Arb, it is pivotal that the parties implement the mediated settlement because unlike the Arb-Med-Arb process, the settlement reached through Med-Arb cannot be registered as an award.

⁵⁰ Susan D. Franck, 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide', *ICSID Review – Foreign Investment Law Journal*, 29(1) (2014), pp.66–89.

60. By acknowledging their weaknesses to the mediator, the parties can avoid engaging the dispute on a multi-front level. The parties can put aside their weaker arguments and, thus, focus on the big issues that can unlock the dispute.

61. Being honest with the mediator will facilitate the settlement process. At the same time, honesty can present a serious risk if one of the parties is not acting in good faith and, instead, taking advantage of the mediation stage to gather information – akin to a fishing expedition in order to build the case for the subsequent arbitration.

62. Rules on confidentiality and non-prejudice of the mediation process may help to prevent the admission of information or documents obtained during mediation in the arbitral proceeding. However, in practice, these rules might have limited impact because the neutral intermediary may have acquired information that might affect his/her determinations when drafting the arbitral award.

63. The expression of views by the neutral intermediary when acting as a mediator might affect his/her perceived impartiality if the mediation is not successful and if the dispute continues as an arbitration. This problem can be prevented if the neutral refrains from making evaluative remarks during the mediation and if he/she focusses only on the process.

VI. Arbitrator-Facilitated Settlement in ISDS Disputes

64. Professor Gabrielle Kaufmann-Kohler has expounded on the concept of arbitrator-facilitated settlement in a 2009 lecture.⁵¹ The arbitrator-facilitated settlement relies on the pivotal role of a sole neutral that acts mainly as an arbitrator and who, at the same time, attempts to reach a settlement during the arbitral proceedings acting as a mediator/conciliator.

⁵¹ Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard – Clayton Utz/University of Sydney International Arbitration Lecture', *Arbitration International*, 25(2) (2009), pp.187–205.

65. The main advantage of an arbitrator-facilitated settlement is an increased efficiency of the dispute settlement process. The arbitrator, who already knows the case, engages with the parties in a continuous manner in order to reach a settlement during various stages of the dispute. The arbitrator can rely on knowledge acquired during the hearing and, being the master of the timing of the proceedings, is best placed to identify the right moment to propose a settlement to the parties.⁵²

66. Arbitrator-facilitated settlement can prevent a settlement from occurring too early, especially when the arbitrator (and sometimes the parties as well) do not have sufficient understanding of the issues. It can also prevent a settlement from occurring too late, especially when the parties are no longer willing to settle. Kaufmann-Kohler has suggested that the settlement should take place with the support of the arbitrators, after the exchange of written briefs and before the hearing or after a partial award.

67. Another significant advantage of an arbitrator-facilitated settlement agreement is enforcement. Since the facilitated settlement is reached in the course of a pending arbitration, it may form part of a consent award and become enforceable under the New York Convention.⁵³ Kaufmann-Kohler has noted that an ICSID tribunal has actively and successfully facilitated a settlement in a contract-based arbitration in which the parties had indicated their will to settle but after which the parties were unable to agree on the terms.

68. Also, in an arbitrator-facilitated settlement, the impartiality of the arbitrator remains a concern that might affect the subsequent use of mediation. However, Professor Kaufmann-Kohler has described this threat as more perceived than real.⁵⁴

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p.198.

VII. Shadow Mediation

69. Shadow mediation refers to the use of mediation as a concurrent process with arbitration, and which has the objective of addressing some of the failures related to the operation of hybrid models. This Concurrent Med-Arb (CMA) model has been proposed by Professor Jack Coe.⁵⁵ The basic notion is that one or more mediators would 'shadow' the arbitral process (concurrently), applying mediation techniques at various junctures throughout the proceedings with a view to generate a settlement that might then be embodied in an award on agreed terms.

70. The main challenge of the CMA model is how to craft an architecture which can 'promote unencumbered exploitation of the strengths of [arbitration and mediation] while also containing costs and preventing one process from disrupting or subjugating the other.'⁵⁶ Professor Coe recognises the importance of a three-arbitrator model; however he proposes different combinations of neutrals, i.e. three arbitrators and one mediator, one arbitrator and one mediator, one arbitrator and two mediators. He argues for a model which does not focus solely on the added value of the mediator in enhancing the dispute settlement process but which also considers the cost implication of large neutral panels. He recognises that the adoption of a three-arbitrator model, with an additional mediator shadowing the arbitration process, would render the CMA model 'fee-heavy'.⁵⁷

71. The CMA model presents significant advantages. Most importantly, the mediated settlement is enforceable. Another significant advantage of the CMA model relates to the limited possibility for arbitrators to access confidential information that would be available only to the mediator, thus preserving in this way the impartiality of the neutrals. Under the CMA model, no arbitrator should attend a mediation session prior to the finalisation of a settlement agreement. The arbitrator may meet with the parties in the presence of the mediators to reach an award on agreed terms.⁵⁸

⁵⁵ See Jack J. Coe Jr., 'Concurrent Med-Arb (CMA) – Some Further Reflections on a Work in Progress' in Susan D. Franck and Anna Joubin-Bret, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (UNCTAD, 2010), pp.46–47.

⁵⁶ *Ibid.*

⁵⁷ See n.2, p.27.

⁵⁸ See n.56.

VIII. Conclusion

72. The current international legal framework does not sufficiently encourage the use of mediation for the resolution of investor-State disputes. Notwithstanding, evidence suggests that mediation could be beneficial for both investors and respondent States. In the last few years, there has been greater support for the use of mediation as well as educational initiatives that help to demystify the diffidence vis-a-vis mediation and make stakeholders aware of the benefits of mediation for resolving investor-State disputes.

73. The introduction of provisions that include mediation as part of the process for the settlement of ISDS in investment treaties can increase the use of mediation. Legal drafting and interpretation of these treaty provisions can draw on the lessons obtained from jurisprudence regarding cooling-off periods.

74. The Arb-Med-Arb model, the CMA model, and the Arbitration-Facilitated Settlement present several advantages, including possible enforcement of the settlement as awards under the ICSID Convention or the New York Convention.

75. The hybrid models also present some risks, especially risks associated with the impartiality of the neutral intermediaries. In practice, materialisation of the risks will depend on the skills and styles of the neutrals concerned. In addition, some recent regulatory responses that prevent the use of knowledge acquired during the mediation process will support the impartiality of the neutrals. Further studies and the development of more model rules can address outstanding issues and support the use of mediation in ISDS.

SESSION III:
Hybrid Models
for Resolving International
Investment Disputes

Moderator



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Ms Morris-Sharma is Deputy Senior State Counsel in the international law department of Singapore's Attorney-General's Chambers. Prior to this, she served in various capacities, including Director of the International Legal Division of Singapore's Ministry of Law and legal advisor to Singapore's Permanent Mission to the United Nations. Ms Morris-Sharma has participated in and led several bilateral and multilateral negotiations. Amongst her roles at the United Nations Commission on International Trade Law (UNCITRAL) were Chairperson of the Working Group that developed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Convention), Vice-Chairperson of the 50th UNCITRAL Commission session, as well as rapporteur to the UNCITRAL Working Group on investor-State dispute settlement. Ms Morris-Sharma has published on topics such as the Convention, investor-State dispute settlement, law of the sea, and the work of the International Law Commission.

Panellist



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With over 30 years of experience in international arbitration and litigation with a focus on arbitration under investment treaties in particular, Mr Legum has argued before numerous international arbitration tribunals, the International Court of Justice, and a range of trial and appeals courts in the US. He holds or has held various positions, including Past Chair of the American Bar Association's Section of International Law, Member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, Editor of *The Investment Treaty Arbitration Review*, and founding Editor of *International Litigation Strategies and Practice*. Mr Legum was a co-chair of the drafting committee for the *IBA Rules on Investor-State Mediation*, is a member of the roster of ICSID (International Centre for Settlement of Investment Disputes) conciliators and presently acts as president of an ICSID conciliation commission. Earlier in his career, Mr Legum served in the US Department of State as lead lawyer defending the US Government in the early arbitrations under the investment chapter of the NAFTA (North American Free Trade Agreement).

Legal Issues Presented by Hybrid Models of Mediation and Arbitration in ISDS

Hybrid models of dispute settlement integrate mediation with arbitration. Most of the issues presented by these models are practical ones, not legal ones. This Paper will address three categories of legal issues pertaining to (a) the treaty text; (b) the integrity of arbitration proceedings following a mediation; and (c) what it means for a settlement agreement to be enforced as an arbitral award.

I begin with treaty text and how *not* to draft a provision for hybrid mediation/arbitration. To illustrate this point, I set out below the text of one of the early references to conciliation in an investment treaty. This is the 1984 Bilateral Investment Treaty (BIT) between the United States and what is now the Democratic Republic of Congo.

Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes (“Centre”) *for settlement by conciliation or binding arbitration*.¹

Here, you can see that arbitration and conciliation are presented as alternatives. The presentation is similar in some respects to fork-in-the-road provisions in a number of BITs. One possible reading of the text is that *either* a party can invoke arbitration *or* it can invoke conciliation, but it cannot do both.

The ambiguity created here discourages use of conciliation. Arbitration before a neutral international forum is a material right for claimants when it is available. While many claimants might prefer to resolve the dispute through conciliation or mediation, they generally will not accept the risk of the mediation being unsuccessful if it means losing the right to go to arbitration. I have often thought that the infrequent use of conciliation in investor-State dispute settlement

¹ United States-Zaire BIT, Article VII(2)(a) (signed 3 August 1984).

(ISDS) is in part a product of this drafting – even though the intent behind the provision was almost certainly to promote conciliation as an avenue of ISDS.

So, the first legal issue with hybrid models is this: if you intend to implement a hybrid system, make sure that the provision you draft makes it clear that both mediation and arbitration are available without one precluding the other.

This is particularly important considering the priority given to arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention. Specifically, Article 26 of the ICSID Convention provides that:

Consent of the parties to arbitration under this Convention shall, *unless otherwise stated*, be deemed consent to such arbitration to the exclusion of any other remedy.²

If parties consent to ICSID arbitration, that excludes other remedies *unless otherwise stated*. Given this text, clarity is critical.

The second set of legal issues results from key differences between mediation and arbitration. These are summarised in the table below and addressed in the discussion that follows:

Arbitration	Mediation
Each party sees all information provided to the arbitrator	Confidential information separately provided to the mediator
No <i>ex parte</i> meetings	Caucuses
Each party puts its strongest case	Parties recognise weaknesses
Formality, distance between arbitrator and parties	Dynamic, facilitative relationship between mediator and parties

² ICSID Convention, Article 26.

Arbitration works because of transparency between the arbitrator and the parties. There is a certain distance between them. *Ex parte* contacts – separate discussions between the arbitrator and only one party concerning the case – are not permitted. Each party has access to all information communicated by the other party to the arbitrator. Each party knows every detail of the case the other side has put to the arbitrator. It therefore knows the case it has to meet. It would raise serious due process issues for one party to be able, separately and secretly, to communicate information to the arbitrator on the issues in dispute. At the same time, each party has the right to put its strongest case to the arbitrator. It is not required to admit to or volunteer weaknesses in its case.

Mediation can and often does involve a different relationship between the parties and the neutral intermediary. Caucuses – separate meetings between the mediator and one party concerning the case – are one of the strongest tools in the mediation toolkit. Caucusing works because each party knows that what it says to the mediator will remain secret unless the party expressly authorises disclosure to the other side. Caucusing can give the mediator a perspective on how to resolve the dispute that neither party has. The mediator's role can be that of cheerleader encouraging the parties to put aside their differences and find a common ground. It can be that of confidant and counsellor, working with each party to help it frame its offer in terms that the other side might accept. It can be that of critic, working to assist a party in recognising the weaknesses in its position and to modify that position if is unrealistic. The role can be that of coach, working with the parties to present their respective positions in more contrite and realistic terms that generate the ambiance needed to bring the parties together.

Mediation and arbitration individually work well on their own terms because they are different processes. Hybrid models can work well as long as they keep the processes separate. When the processes are combined or when confidential information disclosed in mediation leaks into the arbitration process however, problems can result.

These problems qualify as legal issues because arbitral awards are subject to independent legal review. This review is limited to specific

grounds. But it is fair to say that under most legal standards, whether those for annulment of awards under the ICSID Convention, set aside under national arbitration laws or enforcement under the New York Convention, a violation of fundamental due process can render the award unenforceable or subject to annulment. This ground is framed as follows in Article 52 of the ICSID Convention:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

... (d) that there has been a *serious departure from a fundamental rule of procedure*; ...³

While it is dangerous to generalise, it is fair to say that many reviewing courts or annulment committees would not look kindly on separate meetings between an arbitrator and a party in which matters concerning the case are discussed in secret.

Similar issues arise with the use in arbitration proceedings of confidential communications disclosed for purposes of a mediation. The default approach of the ICSID Convention bars any use of such communications absent party agreement to the contrary, as provided in its Article 35:

Except as the parties to the dispute shall otherwise agree, *neither party* to a conciliation proceeding *shall be entitled in any other proceeding*, whether before arbitrators or in a court of law or otherwise, *to invoke or reply on any views expressed* or statements or admissions of offers of settlement made by the other party *in the conciliation proceedings....*⁴

³ ICSID Convention, Article 52.

⁴ ICSID Convention, Article 35.

While the Convention uses the term conciliation rather than mediation, the process of ICSID conciliation today is not materially different from what I would call mediation, and this is therefore a pertinent provision for hybrid ISDS.

It is tempting, in designing a hybrid model, to attempt to save some costs and time by having the same person serve as both mediator and arbitrator. But the legal issues that I have identified counsel in favour of keeping the two processes separate. Compared to arbitration, mediation is not costly. The incremental cost of a separate mediator is greatly outweighed by the risk of a much more costly arbitration being for nothing because the award is annulled or unenforceable.

In a thoughtful 2009 article, Professor Gabrielle Kaufmann-Kohler addressed the limits of what an arbitrator properly may do to facilitate settlement of a dispute. There are indeed a number of things that an arbitrator can do without crossing the line of propriety. But caucuses are not on that side of the line. According to her, the arbitrator may *‘not meet separately with the parties’* and *‘his or her involvement will be evaluative rather than facilitative’*.⁵

To my mind, an arbitrator that respects these lines remains an arbitrator and does not act as mediator. Professor Kaufmann-Kohler does not here address a hybrid model combining arbitration and mediation but addresses what an arbitrator can do to facilitate settlement while while remaining an arbitrator.

It may be tempting to think that these legal issues can be put aside if a treaty binding on the host State and the investor’s home State provides to the contrary. It is correct that, with the right implementing legislation, a treaty can change the law in those States that are parties to it. The difficulty is that investors frequently seek enforcement in the courts of non-party States. To the extent that this is important for the effectiveness of ISDS, bilateral arrangements may not be sufficient to address the legal issues posed.

⁵ Gabrielle Kaufmann-Kohler, ‘When Arbitrators Facilitate Settlement: Towards a Transnational Standard’, *Arbitration International*, 25 (2009), p.187, p.204.

The safest course, I would submit, is for different neutrals to act as mediators and arbitrators in hybrid systems and for the system to prohibit any use in arbitration of confidential information disclosed in mediation.

This brings me to the final legal issue, which is the usefulness of embodying a settlement agreement into an arbitration award. Converting a mediated settlement into an arbitration award is often mentioned as a benefit of the hybrid model. From my perspective as a litigation professional, this benefit provides added value in some cases but these are relatively few and far between. I will explain briefly why this is the case.

Both settlement agreements and awards set out obligations that are legally binding on the parties. The difference is that the obligations in awards can be enforced by the officers of courts.

But not every part of the award is capable of enforcement. Only the dispositive part of the award is enforceable. The excerpt below is taken from the very last pages of the *Interocean Oil Development Co. v Nigeria* ICSID Award, just before the signatures of the arbitrators:

395. The Tribunal finds no liability on the part of Respondent in connection with Claimants' loss of control over their investment, Pan Ocean.

...

399. The Tribunal hereby orders Claimants to pay USD 660,129.87 to Respondent as reimbursement of its share of the arbitration costs incurred in these proceedings.

400. All other claims are dismissed.⁶

⁶ *Interocean Oil Development Co. v Nigeria*, ICSID Case No. ARB/13/20, Award of 6 October 2020.

The obligation in Paragraph 399 is a simple, clear and unconditional order of payment. This can be enforced by court officers without adversary proceedings or the intervention of a judge.

There may be settlements in which it would be useful for a party to have a consent award with an order of payment such as this. However, in most settlements I have advised on, the parties would much prefer to have money in the bank. An arbitral award can be monetised only if sufficient assets are located and can be seized and sold at judicial auction. This is good. But doing this takes time, effort and a bit of luck. Money in the bank is better.

The other paragraphs quoted above deal with findings of non-liability and dismissal of claims. These in an award have *res judicata* effect – they preclude any further claim on the topics addressed. Again, this is a good thing. But, in most cases, this is no more effective than a well-drafted release, waiver and covenant not to sue in a settlement agreement.

Moreover, many settlements include more complex provisions, such as representations, warranties, indemnities and covenants. These provisions are not generally capable of being stated in terms that a court officer can enforce without intervention of a judge and adversary proceedings. Whether these provisions are in a settlement agreement or in an award, further litigation will be required in the event of breach. Again, the value proposition for a consent award over a settlement agreement is not obvious.

The greatest benefit of consent awards is in cases where the relevant national legal system requires or expects settlement agreements to be approved by the tribunal before which the dispute was pending. Here, there is a clear added value but it is one that has more to do with authentication than with enforcement.

This concludes my brief review of legal issues presented by hybrid models.

Panellist



Francis Xavier SC

President

Chartered Institute of Arbitrators

Francis was appointed Senior Counsel in January 2009 and practices international commercial and treaty arbitration and litigation. He has appeared as counsel and has acted as arbitrator (both party-appointed and presiding) in a large number of arbitrations (both *ad hoc* and administered arbitrations including by the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), the Asian International Arbitration Centre (AIAC), the Hong Kong International Arbitration Centre (HKIAC), the Badan Arbitrase Nasional Indonesia (BANI Arbitration Center) and the Permanent Court of Arbitration (PCA). Francis has acted for a number of parties in treaty disputes (including several Asian governments). He is currently sitting as a party-nominated arbitrator of a Mauritius entity in a bilateral investment treaty (ICSID) dispute with the Government of India. He is presently assisting several governments in setting up their international arbitration framework. He is currently the global President of the Chartered Institute of Arbitrators (UK) and the immediate Past President of the Inter-Pacific Bar Association. He is a Chartered Arbitrator and also a Past Chairman of the Singapore branch of the Chartered Institute of Arbitrators. He is the General Editor of two major publications – *Civil Litigation in Singapore* (Sweet & Maxwell, 2017) and *Arbitration in Singapore: A Practical Guide* (2nd ed. Sweet & Maxwell, 2018). He is a member of the Rules Committee, Singapore Academy of Law.

The Use of Mandatory Mediation in a Hybrid Dispute Resolution Model

First of all, I want to talk about the current landscape; let me just say a few words before I go to the first slide. The current landscape is that jurists have noted that out of 2,577 international investment agreements (IIAs) that have been recorded by the United Nations Conference on Trade and Development (UNCTAD) as of March 2020, 627 treaties contain voluntary alternative dispute resolution (ADR) provisions and none contain mandatory ADR provisions. Only 1% of the IIAs mapped globally even mention mediation.

In another study where over 3,000 IIAs worldwide were surveyed, as of September 2020, there are only two recent treaties, which were entered into in 2019, that make conciliation a mandatory precondition to arbitration. They are the Hong Kong-United Arab Emirates (UAE) Bilateral Investment Treaty (BIT) and the Indonesia-Australia Comprehensive Economic Partnership Agreement. When you talk about mandatory mediation, that's hardly on the scene at the moment.

Mandatory mediation, as you know, is an entrenched feature of modern international commercial arbitration. In the 2019 Queen Mary study, as most of you would be aware, 64% of the respondents favoured the use of mandatory mediation in treaty disputes. And obviously this is on the rise because as you will see, for instance, in the 2016 Model BIT produced by India, there is a provision for mandatory conciliation and mediation.

First of all, I want to talk about the many advantages of mediation in the investor-State dispute settlement (ISDS) context. Many of you would be familiar with the need to preserve the relationship, which would be a key relationship central to nation-building. In terms of the range of settlement options available to a State player, as opposed to a dispute between two private players, the options available to the latter are limited. The options available to a State player is much wider,

such as granting licences in the future or providing preferential tax access to the country's markets, for instance. So, that means you can have more creative options in resolving a dispute and not have to go through the whole fight.

The next advantage is that the formalistic nature of treaty disputes invariably results in even greater time and costs being expended. And so mandatory mediation would have the advantage of – even if it doesn't resolve the entire dispute – having parts of the dispute that are more easily resolvable amenable to agreement. More importantly, by the mere fact that parties had met and tried to seek a middle ground, the experience on the ground in international commercial arbitration suggests that the level of adversarialism that parties experience in a dispute can be reduced thereby to some extent.

And, of course, in a treaty dispute, the attendant media coverage poses a risk of politicisation of the issues in the domestic country, i.e. in the host country. And mandatory mediation can provide a valid platform for State players to consider alternative approaches. One of the advantages, of course, is the advent of the Singapore Mediation Convention in 2019, on which Ms Natalie Morris-Sharma is a walking expert.

Now, I just want to talk about some other advantages. Non-legal issues may, in fact, be crucial in ISDS. So, there may be more scope for resolving the dispute, especially as compliance with the treaty award is not always guaranteed. Long and exhaustive proceedings may need to follow during the enforcement phase, as Mr Legum has foreshadowed. I think this is helpful for a State because a State risks having a high-value adverse outcome in a treaty with no right of appeal. And so, having a mandatory mediation provides the State with a platform for self-determination in the sense that they are able to explore options to determine the outcome of the dispute outside a formal process. This in particular is key, especially when the outcome of a treaty dispute impacts many stakeholders in a nation. It's all the more important in a treaty dispute that there be this alternative.

Those are the benefits of mandatory mediation. While there is

a dispute or there is some debate as to whether mandatory mediation is suitable for ISDS, I think the consensus – and I would submit the overwhelming sense – is that there are many benefits. And indeed, I think there is a tendency that we are seeing a movement towards mandatory mediation slowly but surely in ISDS.

The next point – and many jurists have discussed it – is well-acknowledged, i.e. the use of mediation, especially mandatory mediation in ISDS, does offer challenges that need to be overcome. While we are promoting it, we need to keep a keen finger on the pulse of the challenges that arise too.

The first challenge is when you're talking about mandatory and non-mandatory language, you need to be careful in the way that a BIT is drafted in particular. You need to have an express carveout from a most favoured nation (MFN) obligation clause, because if you have a mandatory mediation clause in a BIT which also has a MFN clause, the investor could well argue that a clause mandating mediation in that particular treaty – when a comparable treaty lacks that clause – would mean that the said mandated mediation is a breach of the MFN clause. It makes this treaty less favourable than the other treaty. I think one needs to be careful with the drafting of the treaty if one were to introduce mandatory mediation.

The second issue that I want to raise is that there are serious impediments to a State player resorting to mediation. Now, let me introduce a very good article to begin with. If you are unable to sleep tonight, maybe you may wish to get something to stir up your imagination. The National University of Singapore (NUS) Centre for International Law (CIL) Working Paper of 2018 sets out a number of obstacles. I'm just summarising the key ones. If a government, i.e. a State player is a party to the dispute, there are multiple stakeholder agencies and ministries across all levels of government representing the State and with different competing policy directives internally and externally. So, it's much harder to arrive at a mediated settlement.

The next big one is the risk of criticism and politicisation of the outcome. You may well have a new regime in a country, and it was

the old regime which had entered into this particular deal or it was the old regime that had expropriated certain mining licenses, so from the lens of the new regime, settling the dispute may be seen as capitulating on a key policy point. It may also be seen as creating a bad precedent and other investors may start taking out similar actions against you in the hope of being compensated.

There may also be in some countries allegations of corruption when you resolve a dispute and pay out taxpayer's money. So, again, there is a reluctance as a result to resolve the case outside the strict parameters of an arbitration.

The last difficulty concerns State sovereignty-related issues, such as security issues, national health regulations – as in the Philip Morris case, environmental issues that may be at stake, etc. and it may be very difficult to resolve them by mediation. Typically, they also sometimes involve sums in the billions of dollars and vast taxpayer funds may be at stake. Again, it may be difficult for the State to resolve it through a formal process. Therefore, the end result is that the State prefers to defer the responsibility to an arbitral tribunal and say, 'we are not going to be able to resolve this.' That is a feature of treaty arbitration that we need to be mindful of.

The last point that I have is regarding the use of mandatory mediation in ISDS because it offers challenges to be overcome. Certainly, my humble urging would be that more work needs to be done on the modalities involved, including the pool of mediators, the mediation platform and type of processes utilised.

Now, I'm going to set out a number of considerations. First of all, I will say that it's important that the mediation precede the commencement of a formal dispute process in the case of treaty disputes, because if the mediation happens after a treaty dispute is commenced and there is wide media coverage preceding the fact, it would be harder for State players to contain the parameters of the dispute. So, it's an important feature that mediation should precede the commencement of the formal process.

It is necessary for international bodies to consider the creation of a parallel mediation body. If you look at what is happening at the national level in Singapore, we have the Singapore Mediation Centre as well as the Singapore International Mediation Centre. Now, if the stakeholders want to seriously promote mediation at the treaty level, particularly with regard to disputes between investors and State players, it needs to create a platform that the State players can be comfortable with. And I think that platform needs to be created with the buy-in, involvement and support of State players.

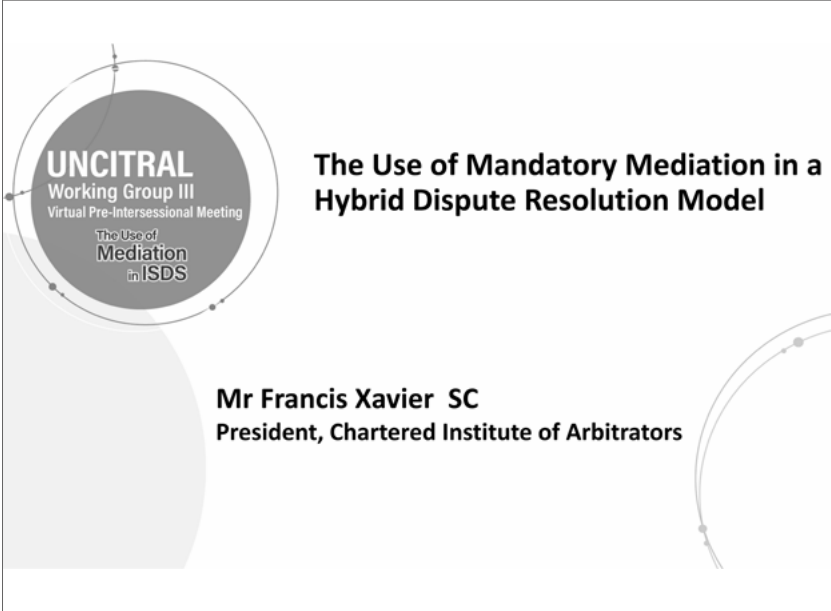
The creation of a parallel mediation body, which is particularly suited to treaty disputes, needs to be thought out seriously. The next consideration I would say is that an adjudicative element may be key. I think it is very important for States, where sovereignty issues are at stake, that they have the ability to control their own destiny, especially when vast amounts of taxpayer funds may be at stake. It's very important for them to be able to inform their stakeholders that they had good reason to resolve it, and introducing some form of an adjudicative element as part of it may be key – even if that adjudicative element is only internal to the State player and it's not shared with the investor. It could be a useful tool for the State to be able to justify internally why this dispute is better resolved outside the parameters of a strict arbitration.

One other issue that I want to mention, which I didn't have time to include in the slides, is the concern that mediation could negate the gains achieved in transparency arising from the Mauritius Convention and all the other efforts that have been taken at an international level in terms of resolving treaty disputes. This needs careful thought. As Mr Legum has helpfully pointed out, mediation by its very nature involves private caucuses, i.e. private caucuses with the State; private caucuses with the investor.

If you want to have transparency, how can you do that? Because the caucuses need to stay private with respect to, say, either the investor or the host State. This is something where further thought needs to be given. Maybe, at the common sessions, some level of transparency can be introduced. But obviously, in terms of confidential information and

in terms of private caucuses, the ability to provide for transparency may not be fully present. One other point I want to make is that, this is internal to governments from experience. We find that because of the many ministries and agencies potentially involved in treaty disputes, it's very important for a State while undertaking mandatory mediation to form a special task force across ministries – a cross-agency task force, perhaps – created by statute and imbued with the authority to resolve disputes. And we have many examples, such as Korea, Morocco, Guatemala and Colombia, that have successfully carried out and implemented such a task force concept.

And with that, I want to say that I would urge the use of mandatory mediation in ISDS. However, we need to keep a finger on the pulse of the fact that there are serious challenges which are not germane or not wholly germane to international commercial arbitration, but which are present in ISDS and which we need to tackle.

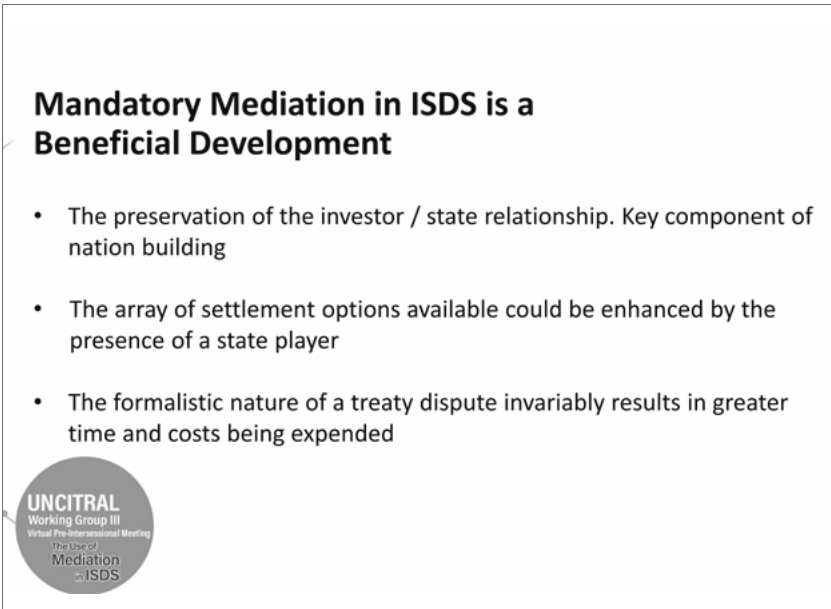


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Mediation
in ISDS

The Use of Mandatory Mediation in a Hybrid Dispute Resolution Model

Mr Francis Xavier SC
President, Chartered Institute of Arbitrators

[Slide 1]



Mandatory Mediation in ISDS is a Beneficial Development

- The preservation of the investor / state relationship. Key component of nation building
- The array of settlement options available could be enhanced by the presence of a state player
- The formalistic nature of a treaty dispute invariably results in greater time and costs being expended

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The Use of
Mediation
in ISDS

[Slide 2]

Mandatory Mediation in ISDS is a Beneficial Development

- The attendant media coverage poses a risk of politicization of the issues arising in a treaty dispute
- Provides a valid platform for state players to consider alternative approaches
- The advent of the Singapore Mediation Convention



[Slide 3]

The Use of Mediation in ISDS Offers Challenges to be Overcome

1. Exhortatory vs Mandatory language
 - Treaty wording revisited e.g. India Model BIT of 2016
2. There are serious impediments to a State player resorting to mediation
 - Multiple stakeholder agencies and ministries across all levels of government
 - Risk of criticism and politicization of outcome
 - State sovereignty at issue and taxpayer funds at stake



[Slide 4]

The Use of Mediation in ISDS Offers Challenges to be Overcome

Results in a desire to defer responsibility for decision making to a third party.



[Slide 5]

The Use of Mediation in ISDS Offers Challenges to be Overcome

3. More work needs to be done on the modalities involved – including pool of mediators , mediation platform and type of hybrid process utilized
 - The creation of a parallel mediation body
 - An adjudicative element may be key



[Slide 6]

Panellist



Cao Lijun

Partner

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Mr Cao is licensed to practice law in China and New York State. He has extensive experience in international arbitration and commercial litigation and is now the co-head of Zhong Lun's Dispute Resolution Department. He has been recognised by various legal directories as a leading lawyer in China-related disputes and ranked as a top international arbitration lawyer. Among his professional affiliations, Mr Cao is an arbitrator under the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), the Asian International Arbitration Centre (AIAC), International Centre for Dispute Resolution (ICDR), World Intellectual Property Organisation (WIPO), etc. He is also Member of the SIAC Court of Arbitration, Member and Secretary General of the All-China Lawyers Association (ACLA), and Member of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Advisory Committee. Mr Cao currently represents and advises clients on arbitrations in China, Hong Kong, Singapore, and other jurisdictions. He has represented clients in over 200 arbitration cases. Mr Cao recently co-authored the book, *A Guide to the CIETAC Arbitration Rules and Practice*, which was published by Oxford University Press.

Chinese Perspective and Experience on the Use of Hybrid Models

My topic pertains to the Chinese perspective and experience on the use of hybrid models. Under this topic, I have prepared three sub-topics, which are mediation under the Chinese tradition, use of hybrid models in Chinese legal proceedings, and China's perspective on the use of mediation in investor-State dispute settlement (ISDS).

Let me start with mediation under the Chinese tradition. This timeline highlights several dynasties in Chinese history under which the system of mediation witnessed major development. As can be seen, the first milestone here is during the West Zhou dynasty (around the year 1000 B.C.), where local magistrates called '*Tiao Ren* (調人)' helped to settle disputes, which is a type of mediation. Over these 3,000 years of Chinese history, there have been major developments in the Chinese mediation system. Basically, the theme was to develop an effective system to solve civil disputes and sometimes criminal disputes according to Confucian values, such as '*Rites* (禮)'.

Traditional mediation in China originated from Confucianism and was aimed at achieving social harmony. One recognised advantage of mediation was that it preserved the nobility and honour of the participants involved. Emperor Kangxi, one of the greatest emperors of the Qing dynasty in the 17th century, once said, '[t]he good citizens would be friends, neighbours and colleagues, and settle disputes and litigations'. Hence, it can be seen that the rulers attached a lot of importance to resolving disputes by mediation.

With this in mind, let's move on to the next sub-topic, which is the use of hybrid models in Chinese litigation and commercial arbitration. According to the People's Republic of China (PRC) Civil Procedure Law, for civil disputes, the court is required to mediate first, if possible, and mediation can be conducted at any time before rendering the final judgment. In addition, the court may refer cases to

mediation institutions or invite mediation institutions and ask them to provide advice, recommendations and assistance to the court. This is the so-called ‘referred mediation’.

The advantages of mediation during the course of a court litigation are two-fold. Number one, the settlement agreement can be reviewed and then confirmed by the court, so that it can gain judicial enforceability, i.e. it can be enforced by the court. Number two, the scope of a settlement agreement is not limited to the claims in the litigation. It can be a one-time solution for all the outstanding disputes and not just for the original litigation claims, so that the parties can resolve the disputes once and for all.

It is well known that mediation is widely used in commercial arbitration in China. Basically, there are two approaches. One is the so-called Arb-Med. According to Article 51 of the PRC Arbitration Law, the arbitral tribunal may mediate the dispute before rendering the arbitral award. The two leading institutions in China, the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC), have similar provisions in their rules on Arb-Med. The other approach is Med-Arb. Basically, it means that mediation can be commenced before arbitration. If successful, the settlement plan can be translated into a consent arbitral award, according to the relevant arbitral procedure. The consent arbitral award is a very brief one, according to the rules. This is not provided in law but instead they are incorporated as provisions in some of the institutional rules, such as Article 47 of CIETAC’s Rules.

Here are some statistics. They relate to the numbers of cases that have been settled through mediation at BAC, as well as the percentage of those cases settled through mediation against the annual caseload. As you can see, in the past four years, the percentage has grown from 12% to slightly over 18%. So, it shows that the popularity of Arb-Med is increasing.

Here, I summarise two key provisions under the institutional rules on Arb-Med. The first one is on the admissibility of information and evidence disclosed in mediation in subsequent legal proceedings.

The other is on the form of the settlement agreement. As for the admissibility of evidence, the basic rule is that with regard to the information disclosed or statements made by the parties or the tribunal during mediation, they are submitted on a ‘without-prejudice’ basis; as such, they cannot be relied upon if the mediation is not successful and the parties need to initiate or continue with the arbitration proceedings. As for the form of a settlement agreement, basically speaking, the settlement agreement can be translated into either, as I said, a consent arbitral award or a conciliation statement. Both are equally enforceable in a Chinese court.

The most controversial issue with Arb-Med in China is still the ‘double-hatting’ issue, i.e. whether the arbitrator should play the role of the mediator too. Most of the controversies are not raised by local commentators but rather they are raised by Western commentators, particularly those from a Common Law background. There have been many criticisms. Here is an interesting case, *Gao Haiyan & Anor v Keeneye Holdings Ltd* ([2012] 1 HKC 335). The losing party challenged the enforceability of the arbitral award rendered by a local arbitration commission in Shanxi province of China in the Hong Kong court. The basis of the challenge was that it was a violation of public policy, in light of what was alleged to be improper conduct by the arbitrator and the institutional officer during the Arb-Med process.

From the Chinese institutions’ perspective, their argument is that an arbitral tribunal can only mediate a dispute with the consent of both parties. So, if any party is worried about the negative effect caused by Arb-Med, they can say no to the tribunal in the first place. In that case, the next challenge would be, some commentators argue, that it’s difficult for counsel representing the parties to say no to the tribunal because this would be deemed as a disrespectful gesture towards the tribunal’s good-hearted suggestion for mediation.

This is not a big issue. It’s overstated because as experienced practitioners, we all know how to say no to a tribunal without having to say the word ‘no’. The other challenge relates to the issue of mediation by arbitrators, which is supposed to be on a ‘without-prejudice’ basis.

However, arbitrators being human, their minds probably could be contaminated during the mediation proceedings, meaning that when they resume their roles as arbitrators, they probably will rely on what they have learned from the mediation proceedings when making a decision.

This is a valid concern and I notice that this concern is recognised by both CIETAC and BAC. They have both introduced new arbitration rules during the past ten years. Basically, their solution is to engage a separate panel or separate team of mediators called independent mediators to undertake the mediation work, so that this concern can be gotten rid-off. I will go on with this sub-topic, which is China's perspective on the use of mediation in ISDS.

If you examine the international investment agreements concluded by China, there are basically two types of mediation clauses. One is to prescribe mediation as a mandatory pre-procedure for court litigation or arbitration proceedings; an example of this case would be the China-Tanzania Bilateral Investment Treaty (BIT). The other is to place mediation as one of the options, along with arbitration and court litigation, for resolving investment disputes; an example of which would be the China-New Zealand Free Trade Agreement (FTA).

China has another unique feature. Mainland China has some separate arrangements or agreements with the Hong Kong Special Administrative Region and the Macao Special Administrative Region. Between Mainland China and Hong Kong, there is the Closer Economic Partnership Arrangement (CEPA), under which disputes between a Hong Kong investor and the Mainland Chinese authorities are to be settled through mediation or court litigation. So, arbitration is not mentioned here.

China's attitude towards mediation is also shown in its Position Paper submitted to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III in July 2019, which states that, '[i]n contrast with investment arbitration, investment conciliation emphasizes the value of harmony and can offer the host

country and investors a high degree of flexibility and autonomy'. The most recent development in China is that both CIETAC and BAC, which are traditionally commercial arbitration institutions, now also offer investment arbitration rules. In these rules, there are clear and detailed provisions on mediation, and which allows mediation to be conducted by arbitrators as well as by the two institutions.

I understood from the earlier speakers, particularly Mr Xavier, that there are concerns regarding mediation in ISDS. From the PRC's perspective, these concerns, for example the desire to defer responsibility for decision-making to a third party, are valid concerns – both in the Chinese context as well as according to the Chinese perspective. They are true for both government authorities as well as for State-owned enterprise (SOE) investors.

If mediation is to be made a mandatory step in the cooling-off period, it may increase the popularity of the use of mediation in ISDS. I think there are differing views. The upside may be that government officials, if they are faced with such a clause, will not be faced with having to make a difficult decision about *whether* to proceed with mediation.

Further, with a mandatory provision, where the State refuses to mediate or refuses to accept what is a reasonable settlement proposal in mediation, the State may be at risk of receiving an adverse cost award in subsequent legal proceedings. The official in charge needs to evaluate the risk between settling the dispute, i.e. the pressure from his peers or from his superior, as opposed to the risk of not settling the dispute, which may or could have been settled on reasonable terms.

This could probably increase the chances of settlement through mediation in ISDS proceedings. However, there are also downsides to this practice. For thousands of years, mediation has been deemed as a voluntary process. If mediation becomes mandatory, maybe in the future, treaty negotiators will not be willing to incorporate such a clause in new treaties. That is my concern.



UNCITRAL
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Virtual Pre-Inter-Sessional Meeting
The Use of
Mediation
in ISDS

Chinese Perspective and Experience on the Use of Hybrid Models

Mr Cao Lijun
Partner, Zhong Lun Law Firm

[Slide 1]

Contents

- Mediation and Chinese Tradition
- Use of Hybrid Models in Chinese Litigation and Commercial Arbitration
- China's Perspective on Use of Mediation in ISDS



UNCITRAL
Working Group III
Virtual Pre-Inter-Sessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

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Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

Part 1

Mediation and Chinese Tradition

[Slide 3]

Mediation and Chinese Tradition

Mediation in Ancient China

Local magistrates called <i>Tiao Ren</i> helped settle disputes	Comprehensive judicial mediation system	Civil disputes are mediated according to "Rites" (礼).	Local magistrates may mediate minor criminal and civil disputes	Mediation system further developed and widely used in civil disputes	Clear statutory provisions for the basis and methods of mediation, and categories of disputes that can mediated
BC1046-BC771 West Zhou Dynasty	BC202-AD220 Han Dynasty	AD220-AD589 Wei Jin Southern and Northern Dynasties	AD618-AD907 Tang Dynasty	AD1271-AD1368 Yuan Dynasty	AD1368-AD1644 Ming Dynasty

UNCITRAL
Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

[Slide 4]

Mediation and Chinese Tradition

The pursuit of harmony may explain the emphasis on mediation in China

- Traditional mediation originated in Confucian ethics. Mediation hues to social accord as it preserves the nobility of participants.
- '[T]he good citizens would befriend neighbors and colleagues, and settle disputes and litigations.' (和乡党以息争讼)

Sacred Edict of Sixteen Maxims 《圣谕十六条》 of Emperor Kangxi



UNCITRAL
Working Group III
Virtual Pre-Inter-Sessional Meeting
The Use of
Mediation
in ISDS

[Slide 5]



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Virtual Pre-Inter-Sessional Meeting
The Use of
Mediation
in ISDS

Part 2 Use of Hybrid Models in Chinese Litigation and Commercial Arbitration

[Slide 6]

Mediation in Litigation

Mediation by the court

- For civil disputes, if possible, the court shall mediate first.
- Mediation can be conducted any time before rendering the final judgment.
- The court may refer cases to mediation institutions, or invite mediation institutions to provide advices, recommendations and assistance to the court.
- Parties may reach a settlement agreement during mediation.
 - Settlement agreement reviewed and confirmed by the court can be enforced.
 - Scope of settlement agreement not limited to litigation claims.



[Slide 7]

Mediation in Commercial Arbitration

China's Practices

Arb-Med

- 'the Arbitral Tribunal may mediate before rendering the arbitral award'.
(Article 51 of the PRC Arbitration Law)
- 'the arbitral tribunal may conciliate the dispute during the arbitral proceedings'.
(Article 47.1 of the CIETAC Rules)
- 'During the arbitral proceedings, the parties may ... apply to Mediation Center of BAC for mediation'.
(Article 44.1 of the BAC Rules)



[Slide 8]

Mediation in Commercial Arbitration

China's Practices

Med-Arb

- Mediation before commencement of arbitration, and a specific arbitral procedure be commenced to render an award in accordance with terms of the settlement agreement. *(Article 47.10 of the CIETAC Rules)*



[Slide 9]

Some Statistics

Statistics of BAC

- In 2016, 375 arbitration cases was settled through mediation, which constituted 12.86% of all arbitration cases.
- In 2017, 527 arbitration cases was settled through mediation, which constituted 13.18% of all arbitration cases.
- In 2018, 441 arbitration cases was settled through mediation, which constituted 15.46% of all arbitration cases.
- In 2019, 1072 arbitration cases was settled through mediation, which constituted 18.27% of all arbitration cases.

[Slide 10]

Some Provisions on Mediation in Commercial Arbitration

	CIETAC Arbitration Rules	BAC Arbitration Rules
Admissibility of evidence/ information in subsequent proceedings	Any opinion, view or statement, etc., by parties or the arbitral tribunal during mediation proceedings cannot be invoked by the in subsequent proceedings. (Art. 47.9)	Neither party is allowed to adduce evidence or use any statements or views, etc., by the other party or the tribunal during mediation in subsequent proceedings. (Art. 43.5)
Form of settlement agreement	The parties may withdraw the claims / counterclaim, or request the arbitral tribunal to render an arbitral award or conciliation statement in accordance with the terms of the settlement agreement. (Art. 47.5)	The parties may withdraw the claims or request the arbitral tribunal to issue a mediation statement or an arbitral award in accordance with the terms of the settlement agreement. (Art. 43.2)

[Slide 11]

Double-hatting: Arbitrator Acting as Mediator

- Criticism: *‘The argument against combining mediation with arbitration centers on the parties’ fears that the arbitrators may become biased or even corrupted as a result of the mediation.’*

By Randall Peerenboom, The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China

- Gao Haiyan & Anor v Keeneye Holdings Ltd [2012] 1 HKC 335
 - The losing party challenged the enforceability of the arbitral award rendered by a local arbitration commission in the PRC at the Hong Kong court on the ground of violation of public policy.

[Slide 12]

Double-hatting

General provisions on Arb-Med

- The arbitral tribunal may mediate where the parties consent.
(Article 47.1 of the CIETAC Rules; Article 43 of the BAC Rules)
- Mediation by arbitrators should be on 'without prejudice' basis.

Issue

- The arbitrators' minds may still be contaminated during mediation proceedings.

Solution

- Independent mediation can be arranged.
 - CIETAC – mediation by CIETAC (Article 47.8 of the CIETAC Rules)
 - BAC – mediation by independent mediator according to BAC Mediation Rules (Article 44 of the BAC Rules)



[Slide 13]



[Slide 14]

China's BITs and FTAs

- Mediation as mandatory pre-procedure for court or arbitral proceedings, e.g.,

'Article 13.1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, including conciliation procedures...'

-- China-Tanzania BIT

UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

[Slide 15]

China's BITs and FTAs

- Mediation as one of the options along with arbitration and/or litigation to resolve investment dispute, e.g.,

'Article 153 Consent to Submission of a Claim

1. If the dispute cannot be settled as provided for in Article 152 within 6 months from the date of request for consultations and negotiations then, unless the parties to the dispute agree otherwise, it shall, by the choice of the investor, be submitted to:

(a) conciliation or arbitration by the International Centre for the Settlement of Investment Disputes ('ICSID') under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or ...'

-- China-New Zealand FTA

UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

[Slide 16]

China's Proposal of Incorporating Mediation in ISDS

- China proposal

'In contrast with investment arbitration, investment conciliation emphasizes the value of harmony and can offer the host country and investors a high degree of flexibility and autonomy.'

-- China UNCITRAL WGIII Position Paper (19 July 2019)



[Slide 17]

Investment Arbitration Rules

- CIETAC
 - CIETAC issued the CIETAC Investment Arbitration Rules (For Trial Implementation) on 12 September 2017, which entered into force on 1 October 2017.
- BAC
 - BAC issued the Beijing Arbitration Commission/ Beijing International Arbitration Center Rules for International Investment Arbitration on 4 July 2019, which entered into force on 1 October 2019.



[Slide 18]

Investment Arbitration Rules

	CIETAC Investment Arbitration Rules	BAC Investment Arbitration Rules
Conditions	Both parties agreed to mediate.	
Confidentiality	The proceedings shall be kept confidential.	
Successful mediation	Parties may withdraw the claim/counterclaim, or request the arbitral tribunal to render an arbitral award according to the terms of the settlement agreement.	
Failed mediation	The arbitral proceedings be resumed with the original tribunal to further hear the case.	
Independent mediation	CIETAC may assist to mediate in a manner and procedure it considers appropriate.	The Parties may jointly request the BAC to mediate the Dispute in appropriate manner and procedure.
Subsequent use of info/evidence	Use of evidence or information obtained during mediation in subsequent proceedings is prohibited.	

[Slide 19]

Concerns regarding mediation in ISDS

From the Chinese perspective, the following issues are worth of consideration,

- Desire to defer responsibility for decision-making to a third-party (by both government authorities and SOE investors)
- Reconciliation between different levels of government
- Confidentiality in regard to sensitive issues
- Limited pool of good mediators
- Desire for a binding decision from the arbitral tribunal, rather than mediation, since the parties most likely have tried to solve the dispute amicably but have achieved no success

[Slide 20]

Solutions?

- Example: making mediation a mandatory step in cooling-off period?
 - For: Government officials do not have to make the difficult decision of whether the state should accept mediation as a way to resolve disputes. Further, with the mandatory provision, where the state refuses to mediate or refuses to accept reasonable settlement proposals in mediation, the state may be at risk of receiving adverse costs award at subsequent legal proceedings.
 - Against: 'Voluntariness' is considered as an inherent feature of mediation, thus it will be against the nature of mediation and the Chinese culture if mediation becomes a 'mandatory' step in ISDS.

UNCITRAL
Working Group III
Virtual Pre-International Meeting
The Use of
Mediation
in ISDS

[Slide 21]

Panellist



Blanca Salas-Ferrer

Legal Officer

Directorate-General for Trade of the European Commission

Blanca Salas-Ferrer is a legal officer at the Directorate-General for Trade of the European Commission. She advises on a range of trade and investment issues. Her work focuses on developing the European Union's approach to investment dispute resolution, in particular the Investment Court System and the work on the Multilateral Investment Court project, and she represents the European Union in several related international negotiations. Prior to her current position, Blanca worked as an associate lawyer in a boutique law firm advising both governments and private entities on market access and World Trade Organisation (WTO) compatibility matters. Blanca Salas-Ferrer holds an LL.M. on International and European Economic Law from the University of Maastricht (the Netherlands) and a Law Degree from the University of Barcelona (Spain).

The Views of the European Union and Its Member States on the Functioning of Mediation in the Context of a Multilateral Investment Court

I will speak today about the views of the European Union (EU) and its Member States on the design and the functioning of a mediation mechanism in the broader context of a Multilateral Investment Court.

For that, I will start by briefly touching on the European Union's experience with mediation. I will then move on to the views of how such a mechanism should work, in the context of a permanent structure. After that, I will outline a few of the elements that we can see stand to be relevant to be discussed, and I will then wrap up with a brief conclusion.

Mediation is specifically provided for in the case of investor-State disputes in the most recent agreements concluded by the EU with Canada, Mexico, Singapore and Vietnam. This is a significant novelty with respect to previous treaty practice. This is one of the first times, if not the first time, that such a framework is provided for in this type of treaties. Now, obviously, the rules and the regulations that are provided for in these agreements are not identical but they all pursue the same idea of seeking to make available to the disputing parties a framework that is stable, that is structured and that is clear, and which obviously provides for the necessary flexibilities, thus allowing them to resort to mediation at any time in their investor-State proceedings.

Beyond what constitutes strictly the context of an investor-State dispute, the EU is also a firm advocate for the resolution of disputes through alternative methods, notably mediation. And we have good examples of that in, as I said, areas other than investor-State dispute settlement, such as the Mediation Directive, which provides a platform for the resolution of cross-border disputes in civil and commercial matters – the Alternative Dispute Resolution (ADR) Directive or the Online Dispute Resolution (ODR) Directive.

Now, moving on, we see that a plethora of sets of rules on mediation is out there, but that these sets of rules are however not resorted to as often as one might expect. The question for us here, then, is to ask what is missing, what is the problem, and what do we need to put in place for these rules to be actually and more often resorted to.

In the view of the EU and its Member States, the problem is that there is no structure and there is no clarity on what is the process and what is the conduct, i.e. how it is to be conducted, but also a lack of clarity on the expectations that can be inferred from the process. And this leads to a situation of uncertainty and to a lack of confidence in the mechanism. And this is a problem, particularly for States that in an investor-State context find themselves essentially in a defensive position.

Now, States operate based on their ability to plan ahead and to anticipate, and their inability to do that has an important negative impact on their incentives to eventually resort to mediation. Going back to my question of what we need to put in place for mediation to be effectively resorted to, the EU submits that a permanent institution, i.e. a Multilateral Investment Court, would bring structure, support and stability, both to the process and the next steps to be followed in mediation, but also on the ability to anticipate scenarios and to infer expectations from those scenarios.

This increased predictability would result in a virtuous circle of increased confidence in the system and, at the same time, it would imply the ability to anticipate expectations. This would also mean that even if eventually the issue is solved by litigation, both parties start litigation with increased clarity on their actual chances of success and whether they might win or lose, or at least on which parts of the dispute they stand to be successful on and not.

That said, allow me to emphasise again that the EU and its Member States are committed to the creation of a permanent structure that also provides for the resolution of disputes via methods of ADR and, in particular, mediation.

Now, what are the elements that stand to be key on reflection and in this discussion? One possible element is the idea of an international ombudsperson. In this sense, one might draw inspiration from Korea's Foreign Investment Ombudsman Office, which has rendered very satisfactory results, at least partially thanks to the legitimacy and impartiality of the Office.

But obviously, when thinking of how to transpose this figure, which in this sense belongs to a national setting, into an international setting, there are additional elements to think about. On the one hand, this ombudsperson would enjoy increased legitimacy and confidence to the extent that the ombudsperson would be supported by a plurality of governments. At the same time, it would also preserve the transnational nature of investor-State disputes.

Something else to think about would be how exactly to do it, i.e. how to transpose it into a transnational setting and, in particular, how to ensure that fair access is provided for investors and that the mechanisms are there to cater to the needs of the foreign investors.

Additional elements that would need to be considered relate to how to ensure the fairness of the procedure as well as the efficacy of the procedure. When integrating a mediation mechanism into a multilateral investment court, we would see a pool of readily available mediators as already being there. These mediators would need to have expertise and experience in investor-State mediation. And importantly, this pool would need to be different from the pool of adjudicators that the multilateral investment court would maintain.

Mediators would also need to abide by a code of conduct foreseeing strict ethical standards, i.e. high ethical standards to ensure that independence and impartiality are safeguarded and to ensure that no undue interference takes place. The said mediation mechanism would also need to incorporate the necessary flexibilities. And in this sense, I am thinking of a flexibility that would apply to the conduct of the mediation, to the timeframes that would apply, and to the termination of the mediation.

And obviously, being part of a permanent core-type institution, there would also be some institutional and logistical support provided to the mediation process. And I am thinking in particular of teams of support staff dedicated to those mediation procedures.

Something that is also extremely relevant is the timing when the mediation would take place or could take place. And in this sense, we have heard questions being raised by the other speakers today. There are several options that could be explored because they all bring different advantages. One of the options is to have the recourse to mediation prior to litigation. In this sense, one might argue that the investment relationship is, at that point, less eroded, considering that litigation has yet to be formally triggered. But a different option that should be explored as well is the hybrid options wherein mediation is conducted at the same time or in parallel to or in the middle of the litigation.

And in this sense, obviously, something to think about very carefully concerns the identity of the mediator in relation to that of the adjudicator. And again, there are different options that one might consider. We can think of the same individual that adjudicates the case performing the role of the mediator and that is something which, with the necessary guarantees in place, can very well be considered. But we can also envisage scenarios where the adjudicator and the mediator are different individuals.

One last point that I would like to make relates to the enforcement of mediated solutions, because enforcement is absolutely essential and this importance of enforcement is very clear from the United Nations Commission on International Trade Law (UNCITRAL) Working Group III discussions. It might also be useful to spend some time reflecting, thinking and discussing possibilities to have the mediated solution benefit from the enforcement mechanism that would be attached to the multilateral investment court.

To conclude, I will only say that a permanent institution would bring added clarity, predictability and stability to the conduct of mediation. Obviously, such a structure has to be sufficiently broad

and flexible so as to be able to accommodate existing rules and best practices as well as ensure equality of arms, while at the same time bringing the sense of a pre-defined structure to the mediation process as well as allowing the parties to infer expectations from it – and thereby increasing their confidence in the system.



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

The Views of the European Union and its Member States on the Functioning of Mediation in the Context of a Multilateral Investment Court

Ms Blanca Salas-Ferrer
Legal Officer, Directorate-General for
Trade of the European Commission

[Slide 1]



Outline

1. Mediation in EU bilateral investment agreements
2. Mediation in the context of a permanent structure
3. Elements to consider as discussions move forward
4. Conclusion

UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

1. Mediation in EU bilateral investment agreements

- Investor-state mediation is specifically provided for in the recent EU agreements with Canada, Mexico, Singapore and Vietnam. Significant novelty in investment agreements.
- Idea is to make available a clear framework whilst incorporating flexibilities that allow the parties to resort to mediation at any time in the litigation proceedings.
- The EU advocates for the resolution of disputes through ADR and mediation as an efficient option in areas beyond investor-state. Examples of Mediation Directive, ADR Directive, ODR Directive.



[Slide 3]

2. Mediation in the context of a permanent structure

- Plethora of sets of mediation rules available contrasts with relatively poor track record of use of mediation in investor-state disputes.
- Structurally, there is little clarity on how to proceed and what to expect from mediation. States make policy choices based on their ability to plan ahead and anticipate scenarios and the lack thereof impinges on their incentives to resort to mediation.



[Slide 4]

2. Mediation in the context of a permanent structure (2)

- A permanent institution would provide the necessary support for mediation procedures to be carried out in a reliable manner and in a dedicated structure providing for the necessary support and procedural predictability, allowing for governments and investors to plan, anticipate the process and thereby encourage mediation.
- The EU is committed to the creation of a permanent court mechanism that provides also for the resolution of investor-state disputes through ADR and in particular mediation.



[Slide 5]

3. Elements to consider as discussions move forward

- International Ombudsperson (inspired by Korea's Foreign Investment Ombudsman):
 - Importance of legitimacy and impartiality.
 - Increased confidence derived from the support of a plurality of governments for the Ombudsperson.
 - Preservation of transnational nature of investor-state disputes.
 - Would need to explore how to factor a similar mechanism into an inter-governmental structure, ensuring investors' fair access and needs.



[Slide 6]

3. Elements to consider as discussions move forward (2)

- Integration of mediation in a permanent court structure with all necessary guarantees to ensure efficacy and fairness of procedures:
 - Pool of readily available mediators with expertise in investor-state mediation different from that of adjudicators.
 - Code of Conduct to secure high ethical standards and of independence and impartiality as well as lack of undue interference.
 - Incorporation of necessary flexibilities : conduct, timeframes, conclusion...
 - Institutional and logistical support.



[Slide 7]

3. Elements to consider as discussions move forward (3)

- Ideas on possible moments for the conduct of mediation which bring different advantages:
 - Prior to litigation (to avoid risk of erosion of the investment relation).
 - During litigation (maximises efficiency):
 - Same adjudicating individual
 - Different mediating and adjudicating individuals
- Possibility that mediated solution benefit from enforcement mechanism attached to the multilateral investment court.



[Slide 8]

4. Conclusion

- A permanent court structure would bring much needed predictability and structure to mediation.
- The structure needs to be sufficiently broad and embed the necessary flexibilities so as to accommodate existing rules and best practices and preserve equality of arms while bringing added predictability and support to all actors involved.



[Slide 9]

Panellist



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With solid expertise in international business transactions and resolution of commercial and investment disputes arising from cross-border transactions, Professor Shin currently serves as Chairman of the Korean Commercial Arbitration Board's international division (KCAB INTERNATIONAL). Prior to that, he was a partner at Kim & Chang. Professor Shin is on the panel of arbitrators for major international institutions such as the Hong Kong International Arbitration Centre (HKIAC), the International Centre for Dispute Resolution (ICDR), and the International Centre for Settlement of Investment Disputes (ICSID); and he regularly sits in international commercial arbitrations and investment treaty arbitrations. Moreover, Professor Shin has chaired special commissions organised by the Ministry of Justice of Korea for the enactment of the Arbitration Promotion Act. He also participated in the task force commissioned by the Ministry of Justice for the amendment of the Arbitration Act of Korea.

The Potential for Arbitrators to Also Act as Mediators for Facilitating Settlement of Disputes

My topic focuses on the somewhat narrow issue of ‘the potential for arbitrators to also act as mediators for facilitating settlement of disputes’.

On the potential for arbitrators to also act as mediators for facilitating settlement of disputes, there seems to be a divide of perception based on cultural background as well as legal tradition of civil law and common law jurisdiction. In many civil law jurisdictions, in particular Asian countries, it is taken for granted that a judge or an arbitrator can act as a mediator in the same dispute resolution process. From an efficiency point of view, this approach could result in the most speedy and efficient resolution of disputes. However, common law jurisdictions seem to take a rather cautious approach to this notion.

In my view, there is a merit for an arbitrator to also act as a mediator for facilitating the settlement of investor-State disputes. However, in view of the perceived difficulties for State actors to use mediation in the investor-State dispute settlement (ISDS) framework, as mentioned by Francis, I would take a very cautious approach.

The experience and practice in commercial dispute resolution could be a good starting point for reference.

Even in a commercial context, diverging thoughts and practices exist, with arbitrators engaging with mediation to different degrees and on different levels with safeguard measures built-in to ensure the integrity of the process.

It has become a general trend in institutional arbitration rules to encourage arbitrators to facilitate an amicable settlement between the parties during the arbitral proceedings.

For instance, the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules refers to the possibility of considering the issues at a pre-hearing conference, with a view to reaching an amicable settlement.

The International Chamber of Commerce (ICC) Arbitration Rules in its Appendix provides that, as a case management technique to control time and cost, the arbitral tribunal can inform the parties that they are free to settle either by negotiation or through any form of amicable dispute resolution methods such as mediation under the ICC Mediation Rules.

The 2018 German Arbitration Institute (DIS) Rules go one step further. Article 26 states that ‘unless any party objects thereto, it is mandatory for the arbitral tribunal, to seek to encourage an amicable settlement of the dispute at every stage of the arbitration’. A special feature of the 2018 DIS Rules is Article 27.4, which provides that during the case management conference, ‘the arbitral tribunal shall discuss with the parties certain measures for increasing procedural efficiency’. One such measure is ‘providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto’. It is a kind of evaluative mediation.

Another approach is the one adopted in the Singapore International Arbitration Act and the Hong Kong Arbitration Ordinance.

Article 17 of the Singapore International Arbitration Act provides that an arbitrator may act as a mediator if all parties to arbitral proceedings consent in writing and until so long as no party withdraws its consent in writing. If an arbitrator acts as a mediator, the arbitral proceedings must be stayed. If the mediation fails, the arbitration proceedings resume with the arbitrator having acted as mediator continuing to serve as the arbitrator. The law further provides that ‘no objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section’.

The Singapore legislation requires the arbitrator to disclose confidential information obtained from one party during the mediation procedure to all other parties to the arbitration proceedings, before resuming the arbitral proceedings if the mediation fails. The Hong Kong Arbitration Ordinance takes a similar approach.

The China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules take a similar but somewhat bolder approach. With the consent of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate. Where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award.

A rather different approach is found in the ICSID Arbitration Rules, which do not include any provision as to whether an arbitrator could also act as a mediator. However, Rule 1 states that '[n]o person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the tribunal'. Thus, once an arbitrator has acted as a mediator, he/she may not serve as an arbitrator if the mediation fails and the arbitration procedure resumes.

In the context of ISDS cases, we need to carefully weigh potential benefits against potential risks of having arbitrators also act as mediators, in consideration of the obstacles identified as presenting serious difficulties to State parties and their officials in utilising mediation.

According to a recent study mentioned by Francis, those obstacles include (i) public perception and criticism against irregular dealings or even corruption behind the scenes, (ii) the demand for transparency, (iii) potential personal responsibility of the officials involved, (iv) stringent public scrutiny due to political pressure, and (v) the complicated decision process involving multiple stakeholders on the part of State parties.

Of course, the benefits of having arbitrators to act as mediators are obvious. Having arbitrators who are familiar with the disputes

and the parties' respective factual and legal positions to also act as mediators saves substantial time and costs. Accordingly, if mediation is successful, it would contribute to the efficient resolution of disputes between investors and States. Further, it would contribute to the restoration of peace and a long-term relationship between the parties to the dispute.

However, if the mediation fails and the arbitration has to resume, the potential risks involved in this approach should not be underestimated.

If mediation fails and arbitration has to resume, not all parties may be comfortable to have the same arbitrator who has acted as mediator continuing to act as arbitrator in the resumed arbitration proceedings. The foremost concern could relate to the doubt in the minds of the parties of the impartiality of such an arbitrator, who may have had caucused with one party and might have obtained confidential information during the mediation procedure. It would cast doubt on the integrity of the arbitration procedure itself.

To address this concern, both Singapore and Hong Kong legislation require that the arbitrator make a disclosure of such confidential information to all the other parties in the arbitration procedure. However, this could have a chilling effect on the parties, particularly on State parties and their officials.

However, due to those concerns or objection by the parties, if a new arbitrator is appointed when the arbitration procedure resumes, it could take more time and cost to ultimately resolve the disputes. Therefore, the additional costs and delay might outweigh the expected benefits.

In conclusion, I believe that the potential benefits of having arbitrators also act as mediators should not be easily dismissed. However, in order to maximise the potential benefits and reduce the associated risks and also to make State actors a bit more comfortable with the use of mediation, I would propose a rather cautious approach along the following lines.

First, it is preferable for arbitration rules to require or empower arbitrators to encourage settlement or mediation at various stages where the parties could be receptive to exploration of a settlement or mediation. Without such explicit provisions, arbitrators in general would be quite hesitant to even mention a settlement or mediation to the parties. This reluctance seems to be based on the concern that parties tend to read too much from such a mention and occasionally become suspicious of the bias of the arbitral tribunal, which could even thereafter trigger challenges against the arbitrators.

Second, I am not sure whether it would facilitate a settlement if arbitrators provide preliminary views on the strength or weakness of their respective cases to the parties in ISDS cases – even though the three members of the tribunal may be in consensus, unless both parties ask for the views.

Third, only if the parties agree that arbitrators are the most suitable mediators – given the particular circumstances of their case, at the request of both parties, the president of the arbitral tribunal or the sole arbitrator could act as mediator and conduct the mediation. The parties and the arbitrator, who agrees to act as mediator, should have a clear understanding that if mediation fails, he/she shall resign in principle from the arbitration proceedings.

If mediation fails, the arbitration procedures should resume with the appointment of a new president or sole arbitrator. At the time of resumption of the arbitration proceedings, after having reviewed the circumstances including potential concerns linked to the confidential information that the arbitrator obtained during the mediation, only if all the parties and the arbitrator – who acted as mediator – agree, should he/she serve as an arbitrator in the resumed arbitration proceedings. However, even in this case, there could be legal risks in the setting aside or enforcement procedures in national courts, depending on the legal tradition and culture of the national judiciary concerned.



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

**The Potential for Arbitrators to
Also act as Mediators for
Facilitating Settlement of Disputes**

Professor Hi-Taek Shin
Professor of Law (*Emeritus*), Seoul National University

[Slide 1]

Arbitrators acting as mediators? – Reaction might depend on legal tradition and cultural background

- Common law jurisdictions
 - rather unfamiliar
- Civil law jurisdictions, in particular Asian countries: taken for granted
 - Civil law judges routinely forcefully urge parties to settle.
 - They even propose their own settlement terms. (evaluative mediation)
 - Some parties tend to expect that the judges would propose a settlement package.



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

Different approaches (1): Arbitrators encourage amicable settlement of disputes

- **ICSID Arbitration Rules, Rule 21 Prehearing Conference**
 '(2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.'
- **ICC Arbitration Rules Appendix IV: Case Management Techniques**
 As an examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost.
 - (h) Settlement of disputes
 - (i) Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules



[Slide 3]

Different approaches (2): 2018 DIS Rules

- **Article 26 Encouraging Amicable Settlements**
 Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.
- **Article 27 Efficient Conduct of the Proceedings**
 27.4 During the case management conference, ...With a view to increasing procedural efficiency, the arbitral tribunal shall specifically discuss the following with the parties:

Annex 3

During the case management conference, the arbitral tribunal shall discuss with the parties the following measures for increasing procedural efficiency:

F. Providing the parties with a preliminary non-binding assessment of factual or legal Issues in the arbitration, provided all of the parties consent thereto.

Annex 4 (Expedited Proceedings)

In order to determine whether they should be applied;

(iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.

[Slide 4]

Different approaches (3): Arb-Med-Arb International Arbitration Act of Singapore

- **Article 17 Power of arbitrators to act as conciliator**
 - (1) if all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.
...
 - (4) No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section.



[Slide 5]

Different approaches (3): Arb-Med-Arb Hong Kong Arbitration Ordinance (Cap 609)

- **Article 33 Power of arbitrator to act as mediator**
 - (1) If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.
 - (2) If an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.
...
 - (5) No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section.



[Slide 6]

Different approaches (4): CIETAC Arbitration Rules

- **Article 47 Combination of Conciliation with Arbitration**

- (1) Where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings.
- (2) With the consents of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate.
- (7) Where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award.
- (8) Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consents of both parties, assist the parties to conciliate the dispute in a manner and procedure considers appropriate.



[Slide 7]

Different approaches (5)

- **ICSID Arbitration Rules, Rule 1.**

- (4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.



[Slide 8]

Factors to consider in ISDS context

Benefits

- Time and cost savings – efficiency in settlement of disputes
- Restoration of peace and relationship

Potential Concerns/Risks: When mediation fails and arbitration resumes

- Integrity of arbitration/mediation procedures – due process and associated legal risks
- Question on impartiality of arbitrators having acted as mediators
- Confidentiality concerns if the mediator obtained confidential information from the parties and such information is required to be disclosed in arbitration

Special consideration

- The obstacles identified for a State party to engage in mediation
- Public perception and criticism
- Transparency and accountability of officials involved
- Public scrutiny
- Complicated decision process involving multiple stakeholders



[Slide 9]

Cautious approach for ISDS cases warranted

- The importance of having clear provisions in arbitration rules requiring or empowering arbitrators to encourage settlement/mediation
- Arbitrators would feel comfortable to encourage settlement without worrying on perceived bias on the part of arbitrators.
- The parties need not speculate what's in the minds of arbitrators or be suspicious.
- Providing preliminary views on the strength or weakness of the case would not be desirable in the ISDS context.
- Only if all parties agree that the incumbent arbitrators are the most suitable mediators, the presiding arbitrator alone (if co-arbitrators are appointed by the parties) acts as mediator, with an understanding among the parties and the tribunal that if mediation fails, he/she resigns and a new arbitrator is appointed.
- If mediation fails, the arbitration process should resume with the appointment of a new president, thereby to avoid potential (i) complication arising out of 'confidential information' the mediator obtained from one party during mediation procedure; and (ii) controversy regarding impartiality of the arbitral tribunal.



[Slide 10]

SESSION IV:

The Way Forward
for Mediation as a
Reform Option for ISDS

BACKGROUND PAPER

Writer



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Background Paper

I. Executive Summary

This Paper first provides an overview of the discussion of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III so far on the use of mediation in investor-State dispute settlement (ISDS), then moving to briefly examine the potential of mediation as a voluntary and flexible dispute resolution tool that offers creative and forward-looking settlement arrangements for foreign investors and host jurisdictions. Promoting the greater use of mediation in ISDS disputes is however not without its obstacles. Some structural and policy impediments, particularly for governments, will need to be overcome in order for mediation to function as a viable ISDS reform option.

To unlock the potential of mediation and overcome the obstacles towards its greater use in ISDS, this Paper, with reference to the G20 Guiding Principles for Global Investment Policymaking, identifies and discusses, on a non-exhaustive basis, various possible tools on mediation that can be considered for incorporation into the ISDS reform solution to be developed by Working Group III.

These tools can broadly be grouped into three dimensions, namely:

- (i) Establishing facilitative frameworks at the treaty level (e.g. model treaty clauses and investment mediation protocols) and at the domestic institutional level to encourage the use of investment mediation;
- (ii) Overcoming the psychological barrier for government officials and investors in using mediation through capacity-building as well as education and promotion initiatives; and

(iii) Exploring the synergies of mediation with other possible ISDS reform options such as strengthening dispute prevention mechanisms and the establishment of an Advisory Centre on International Investment Law.

In discussing the various possible tools, this Paper refers to a number of innovative initiatives adopted by the Hong Kong Special Administrative Region (SAR) of the People's Republic of China (PRC) in promoting investment mediation. Some examples include the detailed investment mediation rules adopted the Investment Agreement under the Closer Economic Partnership Arrangement (CEPA) between Mainland China and the Hong Kong SAR, and the investment mediation training jointly offered by the Department of Justice of the Hong Kong SAR and various leading institutions such as the International Centre for the Settlement of Investment Disputes (ICSID), the International Energy Charter, and the Asian Academy of International Law.

Furthermore, apart from discussing the substantive tools on mediation, this Background Paper discusses how Working Group III may consider, from a practical standpoint, arranging its work so as to deliver results on the mediation-related work within a reasonable period of time. In this regard, this Paper mentions the possible use of other constructive, inclusive and transparent working methods such as experts groups and informal drafting groups to facilitate the progress of Working Group III in respect of mediation.

This Background Paper concludes on a positive and optimistic note. While much work still needs to be done in respect of further promoting its use, mediation certainly has a bright future ahead in the landscape of ISDS reform.

II. Introduction

1. The purpose of this Paper is to provide background information to facilitate the discussion of Session IV: The Way Forward for Mediation as a Reform Option for ISDS of the virtual pre-intersessional meeting of UNCITRAL Working Group III. It will first recap the

discussion of UNCITRAL Working Group III so far on the use of mediation in ISDS and examine the potential and obstacles for mediation to serve as a viable ISDS reform option. The Paper will then identify and discuss, on a non-exhaustive basis, various possible tools on mediation that can be considered for incorporation into the ISDS reform solution to be developed by Working Group III.

III. Background

2. ISDS reform has been a subject of much discussion in the international community in recent years. Ever since UNCITRAL embarked on probably one of its most ambitious projects through its Working Group III in 2017, its work on ISDS reform has been attracting an unprecedented level of attention from States, investors, relevant international organisations, arbitration and mediation institutions, professional associations, academic and other non-governmental organisations.¹ To contribute to the important work of Working Group III, the Hong Kong SAR of the PRC, which is one of the leading global investment hubs, also had its representatives joining in as members of the Chinese delegation, pursuant to the ‘One Country, Two Systems’ policy and the Basic Law.²

3. ISDS has been a dispute resolution mechanism with a rich history that has replaced the so-called ‘*gunboat diplomacy*’ in resolving international investment disputes. While ISDS is not free from criticisms and there are areas for further refinement, it continues to evolve in order to meet the need for a peaceful, depoliticised and rule-of-law-based dispute resolution mechanism that can have the trust of both

¹ See the website of Working Group III of UNCITRAL.
Available at https://uncitral.un.org/en/working_groups/3/investor-state

² Article 152 of the Basic Law provides that “[r]epresentatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People’s Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People’s Government and the international organization or conference concerned, and may express their views, using the name “Hong Kong, China”.

It is also worth noting that while the Hong Kong SAR is not a sovereign State, within the framework of ‘One Country, Two Systems’ and as provided for in the Basic Law, the Central People’s Government has authorised Hong Kong as a special administrative region to enter into, as of November 2020, 22 investment promotion and protection agreements (IPPs) with foreign economies, and all these IPPs contain the investment arbitration mechanism. Other than the representatives from the Government of the Hong Kong SAR, the Asian Academy of International Law, an independent and non-profit making body established in the Hong Kong SAR for furthering studies, research and development of international law in Asia, and the Hong Kong International Arbitration Centre have also participated in the work of Working Group III as observer delegations.

host jurisdictions and foreign investors in resolving international investment disputes.³

4. According to the latest figures of United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub, as of 31 December 2019, there have already been in total 1,023 known treaty-based ISDS cases.⁴ Ever since 1987, the number of ISDS cases per year continues to be on a general upward trend, and so far 120 countries and the European Union (EU) are known to have been respondents to one or more ISDS claims.⁵

5. It has been observed that in recent years, ISDS is facing a backlash and a legitimacy crisis, and most are interested in what the way forward for ISDS reform is. While investment arbitration is currently the predominant form of ISDS, ISDS is a broad concept that can encompass other forms of dispute resolution methods such as mediation and conciliation.

6. On the way forward, as suggested by Ms Teresa Cheng, SC, Secretary for Justice of the Hong Kong SAR of the PRC, in the 45th Alexander Lecture of the Chartered Institute of Arbitrators (CIArb), a ‘*double-helix*’ approach can be explored to decipher the order within the chaos in the evolution of ISDS.⁶ The ‘*double-helix*’ approach attempts to address both structural and non-structural reforms and encourages the complementary use of different types of dispute resolution mechanisms to broaden the options of ISDS. In particular, a strand of the ‘*double-helix*’ approach is to promote the greater use of investment mediation so as to give a new look and new life to ISDS.

³ See Teresa Cheng, SC, ‘The Search for Order Within Chaos in the Evolution of ISDS’, *ICSID Review* (2020), pp.1–19.

⁴ See the website of UNCTAD Investment Policy Hub.
Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁵ UNCTAD, *IIA Issues Note – Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019* (July 2020).
Available at <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>

⁶ See n.3, Cheng.

7. As a conceptual matter, while there have been discussions on the possible differences between ‘*mediation*’ and ‘*conciliation*’, for the purpose of this Paper, the broad concept of ‘*mediation*’ will cover ‘*conciliation*’ and the two terms may be used interchangeably.⁷

IV. Status of the Current Discussion on the Use of Mediation in ISDS in Working Group III

8. In 2017, UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of ISDS.⁸ As was made clear at the outset, the Working Group was to follow the UNCITRAL process and, when discharging the said mandate, was to ensure that ‘the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led with high-level input from all Governments, consensus-based and fully transparent.’⁹

9. Working Group III, in essence, has adopted a three-step approach to discharge its mandate through (i) identifying and considering concerns regarding ISDS; (ii) considering whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, developing any relevant solutions to be recommended to the Commission.¹⁰

⁷ The same views were held by Working Group II of UNCITRAL. In the report of Working Group II on the work of its 68th session (A/CN.9/934), para.16, it is stated that:

[T]he Working Group took note of, and approved the replacement of the term ‘conciliation’ by ‘mediation’ throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (see A/CN.9/WG.II/WP.205, para.5), which would be used when revising existing UNCITRAL texts on conciliation.

In paragraph 5 of Working Paper 205 of Working Group, it was explained that:

‘Mediation’ is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term ‘conciliation’ with the understanding that the terms ‘conciliation’ and ‘mediation’ were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term ‘mediation’ instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications.

⁸ See official records of the General Assembly, 72nd session, Supplement No. 17 (A/72/17), paras.263–264.

⁹ Note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement* (A/CN.9/WG.III/WP.142), para.3.

¹⁰ *Ibid.*

10. It is also notable that a broad discretion has been entrusted to Working Group III in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organisations with a view to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).¹¹

11. Much of the discussions in Working Group III are concerned with the reform of investment arbitration. That said, even in the very first formal session of Working Group III back in 2017, interest in the greater use of mediation for resolving ISDS disputes was expressed in the interventions of the delegations.¹² In particular, Part 1 of the Report of Working Group III for that session states the following in relation to mediation:¹³

31. The Working Group then considered whether work should be limited to arbitration or should include other types of existing ISDS mechanisms. Recalling its earlier discussion, there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration.

32. One view was that such alternative methods were an integral part of ISDS, might be mandatory under some investment treaties, might assist in identifying concerns and possible procedural solutions to concerns about arbitration in ISDS and so should be considered by the Working Group.

¹¹ *Ibid.*

¹² Among others, in the intervention of the delegation of the United States at the 34th session of UNCITRAL Working Group III, support to the greater use of mediation has been expressed.

¹³ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017)* (A/CN.9/930/Rev.1), paras.31–33, para.60.

33. [I]t was said that the work should first concentrate on identifying concerns regarding arbitration, and that other types of ISDS mechanisms could subsequently be considered as part of a holistic approach to addressing those concerns. From this perspective, States experience in domestic court mechanisms and sequencing issues, the relationship between arbitration, alternative dispute resolution mechanisms and court procedures, and State-to-State mechanisms, might inform the Working Group's considerations of solutions at the third stage of its mandate.

...

60. The extent to which experience from international commercial arbitral tribunals should guide an analysis of ISDS concerns was discussed.... [I]t was said that developments in arbitration practice regarding case management including matters such as time limits, cost ceilings and transparency, as well as encouraging mediation and other alternative dispute resolution mechanisms, could be taken into account by the Working Group at a later stage in its deliberations.

12. The topic of mediation has also been mentioned by various delegations from time to time in the formal sessions, intersessional meetings and side events of Working Group III. For example, according to the Report of Working Group III for its 36th session in 2018, the Working Group discussed a wide range of possible mechanisms to improve the efficiency of ISDS (in terms of duration and cost) that were being introduced by States and institutions, and among such mechanisms, reference was made to preventive or pre-emptive approaches and use of dispute resolution means other than arbitration, such as mediation.¹⁴

¹⁴ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session (Vienna, 29 October–2 December 2018)* (A/CN.9/964), para.118.

13. The topic of mediation has also attracted much interest in various intersessional regional meetings of Working Group III. For example, according to the Report of the first intersessional regional meeting in Korea in 2018, it was observed that:

The importance of dispute prevention (including a joint committee of the treaty parties) and other means of dispute resolution (including mediation) to reach an amicable settlement was highlighted. The use of cooling-off periods and mandatory consultations were also mentioned. With respect to mediation, it was noted that the ability for governments to settle might be limited particularly when compensation for damages were involved and the difficulties in coordination among relevant agencies within the government was mentioned. It was added that these tools were currently being under-utilized and efforts should be taken to increase their use, though it was also noted that unsuccessful attempts to settle could lengthen proceedings in some cases.¹⁵

14. With respect to the second intersessional regional meeting of Working Group III held in the Dominican Republic in 2019, it was reported that ‘regional attempts at creating a framework for mediation and arbitration were presented, including how to design a regional framework in a flexible manner and to tailor dispute resolution mechanisms, so as to accommodate the different views and needs of the participating States’.¹⁶

15. During the third intersessional regional meeting of Working Group III held in the Republic of Guinea in 2019, mediation was again a key topic of discussion and it was reported that:

¹⁵ See *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea* (A/CN.9/WG.III/WP.154), para.43.

¹⁶ See *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Dominican Republic* (A/CN.9/WG.III/WP.160), para.11.

The proposal to reform ISDS through the strengthening of dispute prevention measures such as mediation was mentioned by a large number of States in their written submissions to the Working Group. At present, the majority of international investment agreements already refer to “amicable settlement” or even, in some cases, explicitly to mediation, without specifying the approach that parties should adopt. The discussion focused on the organization within States that the use of mediation might require. For example, State representatives in a proceeding must have the appropriate authority to negotiate and conclude agreements on the State’s behalf and be duly mandated for that purpose, but must not be held liable as a result of the agreement. Lastly, a question was raised regarding whether the public interest and the related principle of transparency should apply in mediation proceedings, since the confidentiality of discussions is a key factor in achieving a successful outcome.¹⁷

16. Having completed the first two steps of its three-step mandate, Working Group III has now reached the third step of its mandate and is considering the various options of ISDS reform to be recommended to the Commission. Participation in Working Group III has been very active, with more than 400 delegates from around 106 States and 66 organisations having participated in its 38th session in January 2020.¹⁸ Despite the very wide scope of work undertaken by Working Group III on ISDS reform and the complexities of the issues involved, the progress of the Working Group, which has been characterised as a constructive, inclusive and transparent process, so far has been very impressive and it is expected to elaborate and develop multiple potential reform solutions simultaneously.¹⁹

¹⁷ See *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Guinea* (A/CN.9/WG.III/WP.183), para.34.

¹⁸ See ‘UNCITRAL Working Group on Investor-State Dispute Settlement (ISDS) Continues Work on Reforms’, *United Nations Information Service Vienna* (24 January 2020). Available at https://unis.unvienna.org/unis/en/press_releases.html

¹⁹ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eighth Session* (A/CN.9/1004/Add.1), para.4.

17. According to the UNCITRAL Secretariat, there is a wide-ranging consensus among States that ISDS reform is needed and numerous reform proposals have been submitted to Working Group III. The UNCITRAL Secretariat sees that the first task is to group the proposals and prepare a coherent roadmap for discussion.²⁰

18. It is contemplated that this roadmap has three levels, with the first level looking at alternative dispute resolution (ADR),²¹ first instance procedures (e.g. investment arbitration, State-to-State dispute settlement mechanism and domestic courts), and support to disputing parties (e.g. dispute prevention and ISDS advisory centres). At the second level, the roadmap will look at the appellate procedures (e.g. State-to-State appellate mechanism for dispute settlement, the establishment of a standing appellate body or appeal mechanism, and an appellate mechanism under the ICSID Convention). At the third level, more wide-ranging issues such as treaty interpretation and control mechanisms by States over such interpretation will be explored. As one can see, mediation, being a form of ADR, is high on the agenda in the roadmap of Working Group III in its consideration of ISDS reform options.

19. Moreover, it is of note that mediation has been expressly listed in the table of ISDS reform options in Working Paper 166 of the UNCITRAL Secretariat for Working Group III.²² For example, the Secretariat observed that mediation can facilitate the promotion of early settlement of disputes, particularly during the cooling-off period and, as a reform option, can be implemented as a stand-alone reform or in conjunction with other reform options.²³ In the aforementioned table of ISDS reform options, mediation is seen as being able to address the concerns over the cost and duration of ISDS proceedings and, thereby, the preservation of long-term relationships.²⁴ In this regard, the

²⁰ See 'An Update on UNCITRAL's Work on Expedited Rules and ISDS Reform', *Global Arbitration Review* (11 September 2020).

²¹ *Ibid.*

²² See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (Addendum) – Tabular Presentation of Reform Options* (A/CN.9/WG.III/WP.166/Add.1).

²³ *Ibid.*, pp.7–8.

²⁴ *Ibid.*

Secretariat noted the possibilities of development of relevant standard clauses on mediation for investment treaties, promotion of existing mediation rules for ISDS and establishment of relevant facilities if necessary.²⁵

20. In respect of the views of State delegations to Working Group III, it is worth noting that support on the greater use of mediation in resolving ISDS disputes has been observed in various written submissions of Working Group III's delegations.²⁶

21. In this regard, apart from making the suggestion of studying the important topic of establishing an appellate mechanism to ensure the correctness and predictability of ISDS awards, China's written submission has referred to the various merits of mediation in the context of ISDS and made the suggestion of actively exploring the effective use of mediation, given that Working Group III is considering various ISDS reform options.²⁷

22. A common theme of the written submissions which are supportive of the greater use of mediation in ISDS is that mediation is not meant to replace the use of investment arbitration. Rather, mediation is a process that can work hand-in-hand with arbitration in a complementary manner. Among others, the written submission of Thailand has highlighted the importance for there to be mediation rules specific to international investment agreements and ISDS, which could serve as a procedural framework to guide the disputing parties through the mediation process as well as for hybrid processes of mediation and arbitration.²⁸

²⁵ *Ibid.*

²⁶ See *Submission from the Government of Indonesia* (A/CN.9/WG.III/WP.156), para.19; *Submission from the European Union and Its Member States* (A/CN.9/WG.III/WP.159/Add.1), para.12; *Submission from the Government of Morocco* (A/CN.9/WG.III/WP.161), para.14; *Submissions from the Government of Thailand* (A/CN.9/WG.III/WP.162), para.24; *Submission from the Governments of Chile, Israel and Japan* (A/CN.9/WG.III/WP.163), p.7, annex I; *Submission from the Government of South Africa* (A/CN.9/WG.III/WP.176), paras.40–41; *Submission from the Government of China* (A/CN.9/WG.III/WP.177), p.5; *Submission from the Government of Mali* (A/CN.9/WG.III/WP.181), section F; *Submission from the Governments of Chile, Israel, Japan, Mexico and Peru* (A/CN.9/WG.III/WP.182), p.6; and *Submission from the Government of Turkey* (A/CN.9/WG.III/WP.197), p.2.

²⁷ See *Submission from the Government of China* (A/CN.9/WG.III/WP.177), p.5.

²⁸ See *Submission from the Government of Thailand* (A/CN.9/WG.III/WP.162).

23. When it comes to the process design for mediation in resolving ISDS disputes, it is understandable for there to be differences in views and approaches. For example, the written submission of Indonesia has raised the suggestion of introducing mandatory mediation as a requirement before resorting to investment arbitration in international investment agreements, in order to prevent an investment dispute from escalating into costly and relationship-damaging legal actions.²⁹ The subject of mandatory mediation in ISDS has been discussed in the academic community for quite some time, with some considering it to be a necessary step to get disputing parties to give a chance to try resolving disputes through mediation, while others consider that mandatory mediation may result in delays and costs in resolving disputes.³⁰

24. Apart from making suggestions on the process design of mediation, some written submissions have touched upon the idea of mediation to be offered in an institutional setting. For example, the written submission of South Africa has highlighted that arbitration institutions have a role to play in promoting the greater use of mediation in the context of ISDS disputes through providing and administering simple and flexible rules for ADR (including mediation), developing capacity, encouraging the inclusion of ADR experts in their lists, and providing logistical and secretarial support to disputing parties agreeing to engage in mediation.³¹

25. Furthermore, in the Scoping Study conducted by the Columbia Center on Sustainable Investment on *Securing Adequate Legal Defense in Proceedings under International Investment Agreements*, the question of whether ADR services (including mediation) should be offered by an Advisory Centre or other similar assisting institutions for ISDS

²⁹ See *Submission from the Government of Indonesia* (A/CN.9/WG.III/WP.156), paras.19–20.

³⁰ See *2020 QMUL-CCLAG Survey: Investors' Perceptions of ISDS* (May 2020), pp.24–25. Available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>

³¹ See *Submission from the Government of South Africa* (A/CN.9/WG.III/WP.176), para.49.

has been raised.³² The written submission from Turkey is also supportive of the idea for an Advisory Centre for ISDS to offer mediation services for investors and States to resolve their international investment disputes.³³

26. Interest in the greater use of mediation in the context of ISDS is not limited to State delegations in Working Group III. Various observer delegations of the Working Group have also expressed support to mediation.

27. For example, the written submission of the Corporate Counsel International Arbitration Group, which represents investors' interests, supports the greater use of mediation and conciliation in solving ISDS disputes. The submission refers to the experience of many investors who have successfully used mediation and conciliation to resolve difficult commercial disputes, in order to illustrate the point that there is no reason why similar results could not be achieved in the context of investment disputes.³⁴ Moreover, the United States Council for International Business, another observer delegation which represents investors' interests, has expressed an inclination towards prevention and ADR mechanisms in resolving ISDS disputes with States.³⁵

28. Professional organisations, such as the International Bar Association (IBA), have also made various useful suggestions on promoting the greater use of mediation in ISDS.³⁶ Various members of the Academic Forum on ISDS have published a concept paper to discuss the use of mediation in future ISDS cases.³⁷

³² See *Submission from the Governments of The Netherlands, Peru and Thailand* (A/CN.9/WG.III/WP.196).

³³ See *Submission from the Government of Turkey* (A/CN.9/WG.III/WP.197), p.2.

³⁴ See *Submission by the Corporate Counsel International Arbitration Group (CCLAG) to UNCITRAL Working Group III* (18 December 2019).

³⁵ See Catherine Kessedjian, Anne van Aaken, Runar Lie, and Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement', *Academic Forum on ISDS Concept Paper 2020/16*, (5 March 2020). Available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>, p.2. In the verbal intervention of United States Council for International Business for the 39th session of Working Group III, support was expressed by the delegation towards the use of mediation in resolving ISDS disputes.

³⁶ See IBA Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (November 2018), pp.43–49.

³⁷ See n.35, Kessedjian and others.

29. Non-governmental organisations (NGOs) such as the Columbia Center on Sustainable Investment have also observed that many States and other stakeholders are increasingly focusing on alternatives to investment arbitration, and mediation may provide a useful tool in advancing the long-term objectives of States, investors and other stakeholders, as well as achieving sustainable outcomes.³⁸

30. In light of the global COVID-19 pandemic, the 39th session of Working Group III in New York was postponed. Despite this, there is still much momentum in the discussion on the use of mediation in ISDS. In this regard, a webinar was co-organised by the UNCITRAL Secretariat and the ISDS Academic Forum on the role of mediation in ISDS, and various experts and practitioners shared their views on the existing legal framework and practice of mediation as well as its role in the future of ISDS.³⁹

31. To facilitate the discussion on the reform option of mediation, the Secretariat has also prepared a dedicated Working Paper, entitled *Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution*, which, among others, provides an overview on the use of mediation in ISDS and the various related proposals in the written submissions of the State delegations.⁴⁰

32. During the 39th session of Working Group III, as held in a hybrid mode on 5–9 October 2020, the Working Group for the first time had a dedicated section of the meetings allocated to the preliminary discussion of mediation. From the various interventions by the delegations of Working Group III, much optimism was expressed on the greater use of mediation in ISDS cases in a role complementary to the

³⁸ See Brooke Skartvedt Güven, 'Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes', *Columbia Center on Sustainable Investment* (3 January 2020). Available at <http://ccsi.columbia.edu/2020/01/03/investor-state-mediation-an-opportunity-to-advance-sustainable-outcomes/>

³⁹ See the website of the webinar (18 June 2020). Available at <https://uncitral.un.org/en/mediationwebinar>

⁴⁰ See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190) (15 January 2020).

use of investment arbitration.⁴¹ The Working Group noted the general support and interest among the delegations for the UNCITRAL Secretariat to pursue further work on mediation, with a view to ensure its effective use.⁴² While noting the various benefits of mediation as a dispute resolution tool for ISDS, the Working Group has also identified various structural, legislative and policy impediments, particularly for governments, to the greater use of mediation in ISDS and considered the way forward for mediation.⁴³

V. Potential of Mediation as a Viable ISDS Reform Option

33. Mediation is a form of dispute resolution that has a very long history and can be traced back to the earliest history of mankind. It has always been an integral part of Chinese legal culture.⁴⁴ The early history of modern use of mediation and conciliation can be traced to their use in inter-State dispute settlement, such as the Hague Convention on the Pacific Settlement of Disputes of 1899 and 1907, the Mixed Claims Commissions established under the Jay Treaty of 1794, Article 33 of the Charter of the United Nations, and the United Nations Convention on the Law of the Sea.⁴⁵

⁴¹ During the 39th session of Working Group III, many State delegations, including China, the United States, the European Union, India, Thailand, Indonesia, Korea, Israel, Mexico, Cameroon, Iran, Switzerland, Chile, Bahrain, Colombia, Singapore and Honduras, and other observer delegations such as the Asian Academy of International Law, the International Law Association, and the Center for International Investment and Commercial Arbitration, expressed positive views over the use of mediation in ISDS.

⁴² See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044, para.35).

⁴³ *Ibid.*

⁴⁴ See Wang Guiguo and He Xiaoli, 'Mediation and International Investment: A Chinese Perspective', *Maine Law Review*, 65, pp.215–236.

⁴⁵ See David Ng, 'Investment Mediation', in the *Proceedings of the ISDS Reform Conference 2019 – Mapping the Way Forward*, pp.292–295, which conference was organised by the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and Asian Academy of International Law (13 February 2019). See also Romesh Weeramantry and Brian Chang, 'Bibliography on Investor-State Conciliation and Mediation', *National University of Singapore Centre for International Law* (December 2020), for Project on Investor-State Conciliation (Working Paper 20/01). Available at <https://cil.nus.edu.sg/publication/bibliography-on-investor-state-conciliation-and-mediation/>

34. In the context of ISDS, the use of mediation and conciliation is a relatively recent phenomenon, with it being first conceptualised into the ICSID Convention Conciliation Rules back in 1967.⁴⁶ In modern times, rising interest in the use of mediation for ISDS is observed, with more and more international investment agreements including express provisions on mediation.⁴⁷

35. The benefits of utilising mediation in resolving ISDS cases have been extensively discussed in the academic literature and numerous studies for a long period of time.⁴⁸ In essence, mediation emphasises harmony and achieving win-win situations for the disputing parties. As compared with other dispute resolution methods, such as investment arbitration, investment mediation offers various unique benefits, such as providing host States and foreign investors with a high degree of autonomy, flexibility and consensual resolution options in resolving international investment disputes.⁴⁹ Mediation can also facilitate the disputing parties in reaching creative and forward-looking settlement arrangements that are based on the common interests and needs of the parties to the dispute, with the assistance of professional mediators.⁵⁰

⁴⁶ See <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>. It has also been previously reported that even before the creation of ICSID, investors and governments had requested the World Bank or its then President Eugene R. Black to perform conciliation and mediation functions, and one example is the 1958 dispute between Tokyo and French nationals who held bonds issued by the city (See Gabriel Bottini and Veronica Lavista, 'Conciliation and BITS' in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Brill, 20 May 2010), p.358, and Frauke Nitschke, 'The ICSID Conciliation Rules in Practice' in Catharine Titi and Katia Fach Gómez (eds.) *Mediation in International Commercial and Investment Disputes* (Oxford University Press), p.122.

⁴⁷ See e.g. the Investment Agreement for the COMESA Investment Area (2007), the ASEAN Comprehensive Investment Agreement, the Model BIT of Thailand (2012), Southern African Development Community Model BIT (2012), the Revised Unified Agreement for the Investment of Arab Capital in the Arab States (2013), the Model BIT of India (2016), the EU-Canada Comprehensive Economic and Trade Agreement (2016), the Hong Kong-Chile Investment Agreement (2016), the Model BIT of Netherlands (2019), the Hong Kong-Australia Investment Agreement (2019), and the Hong Kong-United Arab Emirates Investment Promotion and Protection Agreement (2019).

⁴⁸ See e.g. E. Sussman, 'The Advantages of Mediation and the Special Challenges to Its Utilization in Investor State Disputes', *Journal of Transnational Dispute Management*, 11(1) (January 2014), and n.45, Ng, pp.290–338.

⁴⁹ See n.45 Ng, pp.298–303.

⁵⁰ *Ibid.*, pp.298–299.

36. The following extract from the Final Award of *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, also testifies to the potential of mediation in ISDS:

[T]he Tribunal remarked that it had a sense “that a settlement in this case would be a good thing, in that the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case.” The Tribunal emphasised that it was not its role to “get involved in this in any way at all” but suggested that should the Parties desire to seek out somebody who might act as a mediator or reconciliator... The Tribunal noted that any such steps would be taken in parallel with the continuation of the case.⁵¹

37. In terms of statistics, the data at UNCTAD Investment Policy Hub shows that, as of 31 December 2019, among the total number of 1,023 known treaty-based ISDS cases, 20.6% of the cases were settled and 11.4% were discontinued.⁵² In respect to the statistics of ICSID, as of June 2020, for arbitration proceedings under the ICSID Convention and Additional Facility Rules, 35% of the disputes were settled or otherwise discontinued.⁵³ While there is no further breakdown of the aforesaid figures in terms of the percentages of cases that are settled or discontinued as a result of mediation having been deployed to resolve the ISDS cases, such statistics indicate that there is much room for the greater use of mediation to facilitate the amicable settlement of ISDS cases.

⁵¹ See final award for *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (7 December 2012), para.60.

⁵² Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁵³ See ICSID, *The ICSID Caseload – Statistics (Issue 2020-2)*, pp.13–14.

Available at <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>

38. More importantly, as discussed above, the ISDS reform option of mediation has enjoyed much support from a wide range of stakeholders (including States, investors, academics as well as NGOs) in UNCITRAL Working Group III, and it is an important subject that will be further explored by the Working Group. Moreover, according to the 2020 *QMUL-CCIAG Survey: Investors' Perceptions of ISDS*, 55% of the survey participants expressed positive views towards mediation, and 73% were positive towards treaty-based ISDS arbitration.⁵⁴

39. At the international level, the United Nations Convention on International Settlement Agreements Resulting from Mediation (UN Mediation Convention)⁵⁵ is also a new development that may provide some impetus for the further development of mediation as a dispute resolution mechanism for international disputes.⁵⁶

40. The UN Mediation Convention may apply to mediated settlement agreements resulting from international investment disputes to the extent of the reservations made by the relevant contracting States.⁵⁷ Some may argue that enforcement of internationally mediated settlement agreements should in practice rarely be necessary since parties who voluntarily settle their disputes would most likely comply with their settlement agreements.⁵⁸ In response to such views, as observed by Ms Teresa Cheng, SC, the key is that the UN Mediation Convention

⁵⁴ See n.30, *QMUL-CCIAG*, p.7.

⁵⁵ The UN Mediation Convention was open for signature on 7 August 2019 and has so far been ratified by six States.

⁵⁶ See the speech of Ms Teresa Cheng, SC, at the 2019 Colloquium on International Law on 'Synergy and Security: The Keys to Sustainable Global Investment', Session II: Dispute Resolution – The Global Dimension (15 August 2019).

⁵⁷ Article 8(1) (Reservations) of the UN Mediation Convention provides that '[a] Party to the Convention may declare that: (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention'.

⁵⁸ As observed by Ms Lucy Reed, under the UN Mediation Convention, a mediated international settlement agreement will be enforceable in domestic courts of contracting States not as a contract, which is generally the existing position in various jurisdictions, but as a new international mediated settlement category, and one can think about the UN Mediation Convention as one half of the New York Convention because the Convention only goes to the enforcement of mediated settlement agreements but not the enforcement of an agreement to mediate. (See Lucy Reed, 'To Explore How to Incentivise Host Governments and Investors to Utilise Investor-State Mediation', in the *Proceedings of the ISDS Reform Conference 2019 – Mapping the Way Forward*, pp.33–35, which conference was organised by the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and Asian Academy of International Law (13 February 2019)).

enhances the legitimacy of international mediation and encourages mediation to be more widely adopted by disputing parties around the world.⁵⁹ That said, so far only a few States have ratified the UN Mediation Convention, and it will certainly take some time before we know how much impact the Convention will actually have on mediated settlement and enforcement of mediated settlement agreements in the context of ISDS.⁶⁰

41. In considering the reform of ISDS, it is also important to take into account the implications of COVID-19 with regard to the performance of international investment agreements and the aftermath of this global crisis. In face of this unprecedented pandemic, which has been described as the worst global crisis since World War II, States have had to put into place various public health emergency measures, including compulsory quarantine measures and social distancing measures to prevent and suppress the outbreak. Some of those measures, such as city lockdowns, suspension of operations of various business establishments, and international travel restrictions, will no doubt have a serious impact on businesses and investments. In light of the severe economic and financial impact brought about by the COVID-19 pandemic, governments also have no choice but to take various economic measures to address budget deficits while also supporting industries.

42. As observed by UNCTAD, some of the policy responses taken by governments to address the COVID-19 pandemic and its economic fallout could create '*friction*' with existing obligations under international investment agreements.⁶¹ While the more recent international investment agreements usually contain an exception for measures necessary for protection of public health, earlier generation agreements very often contain no such exception.

⁵⁹ Under Article I(3) of the New York Convention, it is provided that '[w]hen signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'. Interestingly, unlike the New York Convention, the UN Mediation Convention does not provide for such specified reservations relating to the reciprocity of enforcement and recognition of mediated settlement agreements. Contracting States to the UN Mediation Convention are thus not permitted to make any reciprocity reservation. This may have implications that mediated settlement agreements made in a non-contracting State to the Convention may still be enforced in a contracting State of the Convention. See the speech of Ms Teresa Cheng, SC, at the 2019 Colloquium on International Law on 'Synergy and Security: The Keys to Sustainable Global Investment'; Session II: Dispute Resolution – The Global Dimension (15 August 2019).

⁶⁰ See n.58, Reed, p.35.

⁶¹ See UNCTAD, *IIA Issues Note – The Changing IIA Landscape: New Treaties and Recent Policy Developments* (July 2020). Available at <https://unctad.org/en/PublicationsLibrary/diacpcbinf2020d4.pdf>
See also UNCTAD, *World Investment Report 2020 – International Production Beyond the Pandemic*, pp.87–96.

43. In light of the COVID-19 pandemic, the Columbia Center on Sustainable Investment and its partner organisations went so far as to call for, both, an immediate moratorium on all arbitration claims by private corporations using international investment agreements against governments, and a permanent restriction on all arbitration claims related to government measures targeting health, economic, and social dimensions of the COVID-19 pandemic and its effects.⁶²

44. While it is not the purpose of this Paper to discuss the merits and rationality of the said proposed moratorium, one can foresee that investment arbitration cases against COVID-19 related measures, especially those that eventually result in adverse arbitral decisions against States, will cause political controversies and further exacerbate the legitimacy crisis of ISDS. Such controversies have been witnessed before in various ISDS cases, such as the series of investment arbitration cases related to the financial crisis of Argentina in 2001–2002,⁶³ the challenges by Philip Morris against the plain packaging measures adopted by Australia and Uruguay,⁶⁴ and the case filed by Vattenfall against Germany regarding the phasing out of nuclear power plants.⁶⁵ Against such background, mediation, with its various benefits as a non-adversarial dispute resolution tool may prove to be very useful in the amicable settlement of ISDS disputes amid the COVID-19 crisis.

45. As the saying goes, when there is a crisis, there lies an opportunity. As insightfully observed by Mr Wolf von Kumberg in his concept paper entitled ‘The Time for Investor State Mediation Has Come’,⁶⁶ the COVID-19 pandemic has created a situation in which ‘mediation

⁶² See ‘Call for ISDS Moratorium During COVID-19 Crisis and Response’, *Columbia Center on Sustainable Investment* (May 2020). Available at <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>

⁶³ See e.g. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic* (ICSID Case No. ARB/04/16), *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) and *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16).

⁶⁴ See *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) and *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12).

⁶⁵ See *Vattenfall AB and others v Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12).

⁶⁶ See Wolf von Kumberg, ‘The Time for Investor State Mediation Has Come’ (16 June 2020). Available at <https://quraysh.com/wp-content/uploads/2020/06/The-Time-for-Investor-State-Mediation-Has-Come-1.pdf>

can play a vital role in helping both investors and States to restructure their legal commitments and, in many cases, to maintain the investment in a different form or conclude it on agreed terms'. Mr von Kumberg further observes that arbitration has its limitations when it comes to the range of remedies that it can offer, and in any event, enforcing an arbitral award against a State that cannot pay, or seeks to avoid payment amid the pandemic, hardly makes good business sense.

VI. Obstacles that Need to Be Overcome for Mediation to Be a Viable ISDS Reform Option

46. Although the benefits of using mediation to resolve ISDS disputes have been widely recognised in various studies and academic writings, the numbers in terms of the reported use of mediation in ISDS disputes is significantly lower than that of the reported cases of treaty-based investment arbitration cases. While there are in total 1,023 known treaty-based ISDS cases as of 31 December 2019,⁶⁷ an empirical study by the Academic Forum on ISDS has identified 12 cases that have been reported under the ICSID conciliation rules⁶⁸ and ten other cases where mediation/conciliation has been attempted.⁶⁹

⁶⁷ See the website of UNCTAD Investment Policy Hub.
Available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁶⁸ These 12 cases are *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v Democratic Republic of Madagascar* (CONC/82/1), *Tesoro Petroleum Corporation v Trinidad and Tobago* (CONC/83/1), *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v Madagascar* (CONC/94/1), *TG World Petroleum Limited v Republic of Niger* (CONC/03/1), *Togo Electricité v Republic of Togo* (CONC/05/1), *Shareholders of SESAM v Central African Republic* (CONC/07/1), *RSM Production Corporation v Republic of Cameroon* (CONC/11/1), *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v Republic of Equatorial Guinea* (CONC(AF)/12/1), *Republic of Equatorial Guinea v CMS Energy Corporation and others* (CONC(AF)/12/2), *Xenofon Karagiannis v Republic of Albania* (CONC/16/1), *Société d'Énergie et d'Eau du Gabon v Gabonese Republic*, and *La Camerounaise des Eaux (CDE) v Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)* (CONC/19/1). The information on these ICSID conciliation cases is available at <https://icsid.worldbank.org/cases/case-database>

⁶⁹ See n.35, Kessedjian and others, pp.9–10. These ten cases are *Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), *Balkan Energy (Ghana) Limited v Republic of Ghana* (PCA Case No. 2010-7), *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Republic of Peru* (ICSID Case No. UNCT/18/2), *Italba Corporation v Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9), *KBR, Inc. v United Mexican States* (ICSID Case No. UNCT/14/1), *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), *Methanex Corporation v United States of America, Noble Energy, Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), *Olyana Holdings v Rwanda*, *Pan African Burkina v Burkina Faso*, and *Systara SA v Philippines*.

47. As observed in Working Paper 190 of the UNCITRAL Secretariat for Working Group III, alternative dispute resolution methods such as mediation are usually confidential and it is difficult to collect accurate data on their use.⁷⁰ The lack of empirical data in this regard has caused difficulties to the promotion of the greater use of mediation because government officials are generally conservative in nature and may feel uncertain and uncomfortable with trying mediation when the extent of its usage by users of ISDS is not clear.

48. In the current system of ISDS, arbitration is the default mode of dispute resolution for ISDS. In a recent survey of corporate executives, in-house counsel and lawyers on their experience with ISDS, 82% and 52% of the survey participants had, respectively, used institutional arbitration and *ad hoc* arbitration in ISDS, whereas only 14% and 7% of the survey participants had, respectively, used *ad hoc* mediation and institutional mediation.⁷¹ Critics and sceptics also often point to the relatively smaller number of known cases of successful investment mediation as compared with the number of investment arbitration cases, and the apparent reluctance of government officials in engaging in mediation to settle ISDS disputes to make their points that mediation does not work.

49. Some of the early works in the academic literature have examined the possible obstacles to the use of mediation in ISDS disputes. For example, as identified by Ms Edna Sussman, various obstacles may generally include (i) concerns over infringement of sovereignty; (ii) unpredictability of the result in investment arbitration; (iii) the involvement of multiple government agencies; (iv) practical difficulties in identifying all of the necessary participants in mediation; (v) budgetary constraints; (vi) need for legislative measures to resolve the disputes; (vii) government officials' preference for shifting the responsibility to an arbitral tribunal; (viii) concerns over time and expenses required for mediation; (ix) failure in the previous direct negotiations between the

⁷⁰ See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution*, (15 January 2020), (A/CN.9/WG.III/WP.190), para.43.

⁷¹ See *SIDRA International Dispute Resolution Survey: 2020 Final Report*, pp.16–19. Available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/6/index.html>

host jurisdiction and the investor; (x) difficulties in balancing demands for transparency with the need for confidentiality; (xi) concerns over enforcement difficulties; (xii) concerns of government officials over giving rise to bad publicity and bad precedents; and (xiii) the lack of personal stakes and incentives for government officials to engage in mediation.⁷²

50. A commentary by Mr Barton Legum has also highlighted that the involvement of multiple agencies in an ISDS dispute and the absence of or uncertainty over budgetary and legislative authorisation to settle a dispute through mediation is possibly a major obstacle to the greater use of mediation in ISDS.⁷³

51. In recent years, more and more empirical studies have been conducted to precisely identify the obstacles to the use of mediation and figure out how to encourage users of ISDS to attempt mediation. One very useful study in this regard is the survey report prepared by Ms Lucy Reed, Mr J. Christopher Thomas QC and Ms Seraphina Chew.⁷⁴ This empirical study is based on the responses from private counsel, institution representatives and academics with substantial personal experience in investment arbitration, with more than half of them having experience advising both investors and States. According to the said survey, at least from a perception standpoint, the majority (70%) of the survey participants consider that, as compared to the investor, the State is the party that is more reluctant to settle ISDS disputes.⁷⁵ Although whether this is in fact true may require further research, the survey has concluded that States do encounter unique considerations when it comes to settlement of ISDS disputes.⁷⁶

⁷² See e.g. Edna Sussman, 'Investor State Dispute Mediation: The Benefits and Obstacles, Contemporary Issues in International Arbitration and Mediation' in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Leiden, Martinus Nijhoff Publishers, 2010), pp.323–338.

⁷³ See Barton Legum, 'The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack J. Coc's "Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch"', *Journal of Transnational Dispute Management*, 4(1) (February 2007).

⁷⁴ See Seraphina Chew, Lucy Reed and J. Christopher Thomas QC, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes', *NUS Centre for International Law Working Paper 18/01*, (September 2018). Available at <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-state-disputes/>

⁷⁵ *Ibid.*, p.11.

⁷⁶ *Ibid.*, pp.5–6.

52. In a way, the aforesaid observation is further supported in the empirical findings of the *2020 QMUL-CCLAG Survey: Investors' Perceptions of ISDS*, which shows that while investors generally feel positive about investment arbitration, arbitration is rarely a preferred course of action for their organisations. This is because, in practice, they prefer amicable solutions that can preserve their relationships with States and the prospect of a mutually acceptable solution or settlement that is better aligned with the investor's own business objectives is seen as more appealing than going to a lengthy arbitration.⁷⁷ Investors are generally more receptive to the use of mediation in resolving ISDS disputes, and the commencement of arbitral proceedings is often used merely as a point of leverage to start or push forward a negotiation or a settlement or a measure of last resort.⁷⁸

53. In terms of the unique hurdles faced by States over the use of mediation in ISDS, the survey report prepared by Ms Lucy Reed, Mr J. Christopher Thomas QC and Ms Seraphina Chew has confirmed some of the observations in the academic literature. In particular, according to the survey report, the three most significant obstacles to settlement of ISDS disputes are (i) the desire of government officials to defer or avoid taking responsibility for concluding settlement agreements with investors; (ii) the ISDS case becomes a political concern or issue because of media (international and/or domestic) coverage, pressuring the State to take a firmer stance; and (iii) the fear of public or political criticism, which is also related to the fear of allegations of or future prosecution for corruption.⁷⁹

54. Apart from these three political factors, the issue of government structure, i.e. the involvement of multiple ministries and agencies with potentially competing perspectives and priorities and the difficulty in obtaining budgetary approval for settlement, has again been identified as an obstacle in the survey.⁸⁰

⁷⁷ See n.30, QMUL-CCLAG, p.8.

⁷⁸ *Ibid.* In the 39th session of Working Group III, it was mentioned that, statistically, in seven out of ten occasions after the investment arbitration, the foreign investors concerned chose to cease investing in the host jurisdictions.

⁷⁹ See n.74, Reed and others.

⁸⁰ *Ibid.*, p.2. In the survey, it is also stated that 'the unity of the State is a fiction in international law, for what is treated as a single entity is in reality a complex organisation comprising ministries, administrative and other agencies, legislatures, subnational authorities' (p.14).

55. Nevertheless, these obstacles are not insurmountable and the questions that Working Group III should focus on is how to overcome such hurdles. The relatively smaller number of cases of mediation in ISDS, as compared with investment arbitration, should probably be seen as a case of the disputing parties lacking familiarity with the mediation process, rather than the parties' perception of the success rates of mediation proceedings or the effectiveness of mediation as a dispute resolution tool.⁸¹ If one looks at the trajectory of the history of treaty-based ISDS, the option of investment arbitration between foreign investors and host jurisdictions first appeared in the Italy-Chad Bilateral Investment Treaty (BIT) in 1969, but it was not until the famous *AAPL v Sri Lanka* case in 1987 that a Hong Kong-incorporated company invoked for the very first time investment arbitration under the UK-Sri Lanka BIT.⁸² The use of mediation in ISDS disputes is a relatively new development; as such, a certain degree of patience is therefore necessary for mediation to prove its value as a useful dispute resolution tool in ISDS disputes and for its use to be further promoted internationally.

56. As already discussed above and evidenced in the discussions on the subject in Working Group III, the potential and value that mediation can bring to the practice of ISDS is well-recognised by States, investors, practitioners, academics as well as other stakeholders of ISDS. Various international organisations such as UNCITRAL, ICSID, UNCTAD and the International Energy Charter have also put in much effort and resources in promoting and facilitating the use of mediation in resolving ISDS disputes.

57. On the side of practitioners, as observed in the *2020 Harvard Investor-State Mediation Report*, while the conventional wisdom is that law firms are opposed to mediation, some international firms have managed to develop profitable models from mediated settlements and therefore those practitioners may not be the obstacle they were once perceived to be.⁸³

⁸¹ See Shu Shang, 'Implementing Investor-State Mediation in China's Next Generation Investment Treaties' in Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford University Press, 2019), pp.504–517.

⁸² See n.3, Cheng, pp.3–4.

⁸³ See ISDS Mediation Working Group, *Unlocking Values Through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes* (June 2020), p.8. Available at <https://quraysh.com/wp-content/uploads/2020/06/2020-ISDS-Mediation-Working-Group-Report-200616.pdf>

58. Overall speaking, there is a future for mediation and mediation has a promising prospect as an ISDS reform option, provided that the right strategies and approaches are deployed to effectively address the obstacles.

59. On how to overcome the obstacles, as observed by leading experts such as Professor Jack Coe Jr., one important question is how to make mediation become more routine and predictable despite its voluntary character. Professor Coe has further pointed out that the initial hurdle of convening the disputing parties and launching the mediation should not be underestimated.⁸⁴ In the context of commercial mediation, as observed, the data supports the expectation that mediation has worked exceedingly well, sometimes achieving miraculous results, and the same can be applied to ISDS disputes.⁸⁵

60. In order to overcome the obstacles to the greater use of mediation in ISDS, as insightfully observed by Professor Coe, it boils down to convincing government officials and investors to give mediation a chance, which would entail ‘a change of habits, a change of standard operating procedures, a change of expectations and, to some extent, how we define best practices in approaching [ISDS] disputes.’⁸⁶ This brings us to the very important question that this Paper seeks to discuss, which is the way forward.

VII. The Way Forward – Possible Components of ISDS Reform on Mediation

61. On the way forward, restoring and enhancing the legitimacy (both actual and perceived) of ISDS is a key consideration and this applies to mediation as a reform option. In this regard, the G20 Guiding Principles for Global Investment Policymaking, agreed-to at the G20

⁸⁴ See Jack J. Coe Jr., ‘To Explore the Relationship Between Investor-State Mediation and Investor-State Arbitration and How the Two Processes Can Complement with Each Other’, in the *Proceedings of the ISDS Reform Conference 2019 – Mapping the Way Forward*, pp.26–28, which conference was organised by the Department of Justice of the Hong Kong Special Administrative Region of the People’s Republic of China and Asian Academy of International Law (13 February 2019).

⁸⁵ *Ibid.*, p.26.

⁸⁶ *Ibid.*, p.27.

Ministerial Meeting in 2016, are particularly instructive on what the essential elements of such 'legitimacy' are,⁸⁷ and the relevant guiding principles are extracted as follows:

III. Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.

IV. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law.

62. With reference to the above mentioned G20 Guiding Principles, this Paper observes that the possible components that can be considered for incorporation into the ISDS reform on mediation could broadly be grouped into three dimensions, namely:

- (i) Establishing facilitative frameworks at the treaty level and at the domestic institutional level to encourage the use of investment mediation;
- (ii) Overcoming the psychological barrier for government officials and investors in using mediation through capacity-building as well as education and promotion initiatives; and
- (iii) Exploring the synergies of mediation with other possible ISDS reform options, such as strengthening dispute prevention mechanisms and the establishment of an Advisory Centre on International Investment Law.

⁸⁷ The text is available at <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>

63. The various tools discussed below are by no means exhaustive, and stakeholders of ISDS are most welcome to explore other creative and feasible tools to encourage the use of mediation in resolving ISDS disputes.

A. Facilitative Frameworks on Investment Mediation at the Treaty Level and the Domestic Institutional level

64. The lack of formal legal frameworks to support mediation and mediated settlement has been a major obstacle to the more effective implementation of mediation in ISDS.⁸⁸ As will be further elaborated below, the development of facilitative frameworks on investment mediation is necessary at both the treaty level and the domestic institutional level.

(i) The Use of Informal Experts Groups and Drafting Groups to Develop the Work on Mediation for Consideration by Working Group III

65. Before discussing the details and designs of the aforesaid facilitative frameworks on investment mediation, it is necessary for Working Group III to consider how the preparatory work can be conducted effectively and efficiently in practice. This is especially so when Working Group III has a rather wide range of ISDS topics to tackle and it is estimated by the UNCITRAL Secretariat that a period of ten years, beginning 2021, will be required for Working Group III to complete its work on the basis of two formal one-week sessions per year.⁸⁹

66. In order to deliver results within a reasonable period, in addition to formal sessions, Working Group III may have to resort to other constructive, inclusive and transparent working methods, such as intersessional meetings, conferences and seminars, experts groups and drafting groups, to further its work on the use of mediation in ISDS.

⁸⁸ See n.83, ISDS Mediation Working Group, p.8.

⁸⁹ Note by the UNCITRAL Secretariat, *Resources to Implement Work Programme with Respect to Investor-State Dispute Settlement (ISDS) Reform* (A/CN.9/1011) (6 May 2020), para.24.

67. As stated in Working Paper 158 of the UNCITRAL Secretariat on the options for implementing a Work Plan for Working Group III, greater use of informal consultations and drafting groups at the margins of Commission and Working Group sessions might enhance the use of meeting time for both the Commission and the Working Groups.⁹⁰ Under the UNCITRAL process, in developing texts, experts group meetings and drafting group meetings are often held in conjunction with Working Group sessions as a facilitative tool.⁹¹

68. With respect to experts groups, in preparing its work, the UNCITRAL Secretariat may seek the assistance of outside experts from different legal traditions, conduct *ad hoc* consultations with individuals or convene meetings of groups of experts in a particular field, as required. Such experts groups have been used before in UNCITRAL Working Group V (Insolvency Law), which also involved collaboration with the Hague Conference on Private International Law.

69. In this regard, it is further observed that the use of drafting groups has been productive in the development of UNCITRAL texts, such as the Model Law on Public Procurement and the UN Mediation Convention.⁹²

70. More importantly, the use of experts groups and drafting groups will be in line with the practice of Working Group III, which is that no decisions of the Working Group will be made outside the formal sessions, and the draft texts and other outcomes developed by the drafting groups will be submitted to the Working Group for consideration and discussion.

⁹⁰ Note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Information on Options for Implementing a Workplan* (A/CN.9/WG.III/WP.158) (25 January 2019), para.11.

⁹¹ See UNCITRAL Secretariat, *A Guide to UNCITRAL – Basic facts about the United Nations Commission on International Trade Law*, p.9.
Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf>

⁹² *Ibid.* See also note by the UNCITRAL Secretariat, *Resources to Implement the Work Programme with Respect to Investor-State Dispute Settlement (ISDS) Reform* (A/CN.9/1011) (6 May 2020), para.31.

71. Furthermore, the COVID-19 pandemic has already caused delays in the work of Working Group III and it will take some time before physical formal sessions can be resumed. To adjust to this ‘*new normal*’, while the use of online tools has, with reference to the experience of the 39th session of Working Group III, proved to be viable, the creative use of experts groups and drafting groups for developing mediation as an option for ISDS reform is also a valuable tool that is worth being considered by the Working Group.

(ii) Development of Model Treaty Clauses and ISDS-Specific Mediation Protocols for Incorporation into International Investment Agreements

72. The incorporation of mediation-related model treaty clauses and mediation protocols (i.e. mediation rules) into international investment agreements or similar arrangements is a more recent phenomenon.

73. According to an empirical study of the Academic Forum on ISDS, among the sample of 2,577 international investment agreements, approximately 627 (around 24%) of such agreements contain voluntary conciliation and/or mediation in their provisions on the cooling-off period.⁹³ From a purely legal standpoint, it is generally recognised that a lack of express reference to mediation in international investment agreements does not actually prevent the disputing parties of ISDS from agreeing to resort to mediation to resolve their disputes. However, at a stage when government officials, investors and other stakeholders have not yet become familiar with and used to resolving ISDS disputes through mediation, the lack of express treaty provisions and mediation protocols in international investment agreements is an issue that needs to be looked into.

⁹³ See n.35, Kessedjian and others.

74. As observed by Ms Anna Joubin-Bret in her article ‘Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules’, many existing international investment treaties provide for a ‘cooling-off’ period, during which the disputing parties are invited to find an amicable settlement to their disputes.⁹⁴ However, treaty practice varies as to the options that are available to the disputing parties for settlement of disputes during the cooling-off period and some treaties are silent about the methods and processes available to the parties.⁹⁵

75. It has been further pointed out by Ms Joubin-Bret that even for certain treaties that expressly provide for mediation, the rules are not sufficiently precise and are not clear on how mediation can take place and not clear on the sequence between mediation and arbitration, thus not being conducive to the use of investment mediation.⁹⁶

76. The idea with respect to the development of model treaty clauses and investment mediation protocols was also discussed at the 39th session of Working Group III, and the importance of guidance in the effective use of mediation during the cooling-off period for early resolution of ISDS disputes was also highlighted.⁹⁷ In this regard, the UNCITRAL Secretariat has been requested by the Working Group to work with interested delegations and organisations to develop or adapt rules for mediation in the ISDS context as well as model clauses for incorporation into international investment agreements (including model clauses for promoting effective use of mediation during the cooling-off period).⁹⁸

⁹⁴ Anna Joubin-Bret, ‘Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules’ in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill, 14 October 2015), p.154. According to the statistics of the Academic Forum on ISDS, among 3,127 known international investment agreements, around 2,183 clauses have been identified as ‘cooling-off clauses’.

⁹⁵ *Ibid.*, p.154.

⁹⁶ *Ibid.*, p.155.

⁹⁷ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.28.

⁹⁸ *Ibid.*

77. In designing the model treaty clauses and mediation protocols, the overriding key principles are that such provisions should enshrine the values of the rule of law (including fairness, impartiality and due process), have a strong emphasis on cost effectiveness and efficiency, and ensure the preservation of voluntariness and high degree of flexibility.⁹⁹ While it is observed that treaty provisions on investment arbitration are trending in terms of becoming more detailed and sophisticated in recent years, it is important to bear in mind that the function of a mediation protocol is to provide a framework for disputing parties and should serve as a guide or roadmap through the mediation process. As such, it would be undesirable for the mediation protocols to be overly detailed or complex.

78. One of the possible reference models of an ISDS-specific mediation protocol can be found in the investment mediation rules (CEPA Investment Mediation Rules)¹⁰⁰ for resolving investment disputes between the Government of the Hong Kong SAR and investors from Mainland China under the Investment Agreement of the Closer Economic Partnership Arrangement (CEPA Investment Agreement).¹⁰¹ While the nature of the CEPA Investment Agreement is an arrangement within one country, it contains provisions, such as fair and equitable treatment, full protection and security, and prohibition against performance requirements and illegal expropriation, which are commonly found in modern international investment agreements.

⁹⁹ See n.45, Ng, pp.317–319.

¹⁰⁰ The text of the CEPA Investment Mediation Rules can be found at <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>

¹⁰¹ The text of the CEPA Investment Agreement can be found at <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>
In terms of structure, there is a separate document to the CEPA Investment Agreement, entitled *Mediation Mechanism for Investment Disputes*, which sets out, among others, the mediation principles, conditions for submission of dispute to mediation, the provisions on the use of information and confidentiality and mediation settlement agreements. Such Mediation Mechanism is applicable to the disputes between Mainland investors and the Hong Kong SAR and those between Hong Kong investors and the Mainland. The CEPA Investment Mediation Rules are applicable to the relevant disputes between Mainland investors and the Hong Kong SAR, while a different set of mediation rules are applicable to the relevant disputes between Hong Kong investors and the Mainland.

79. Investment mediation is the only available detailed mechanism for resolving investment disputes under the CEPA Investment Agreement.¹⁰² Should mediation fail to resolve the dispute, the disputing parties may resort to litigation in courts. The CEPA Investment Mediation Rules are administered by designated mediation institutions in the Hong Kong SAR¹⁰³ and such designated institutions respectively maintain a list of mediators.

80. The CEPA Investment Mediation Rules set out a basic framework for the disputing parties to work on and leave ample room for them to customise the mediation process in light of their preferences and the nature of the dispute.¹⁰⁴ Under those 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 process expeditiously and efficiently.¹⁰⁵

81. A distinguishing feature of the CEPA Investment Mediation Rules is that the default position is a mediation commission consisting of three mediators,¹⁰⁶ which is similar to the party appointment mechanism in investment arbitration. With their three-member mediation commission model¹⁰⁷ and robust qualification requirements vis-à-vis nomination of mediators,¹⁰⁸ the CEPA Investment Mediation Rules allow a greater diversity of mediators in terms of linguistics, cultures

¹⁰² See Articles 19–20 of the CEPA Investment Agreement.

¹⁰³ As of October 2020, The Hong Kong Mediation Council and the Mainland-Hong Kong Joint Mediation Center have been designated for administering the CEPA Investment Mediation Rules. Available at <https://www.tid.gov.hk/english/cepa/investment/mediation.html>. The lists of mediators are available at https://www.tid.gov.hk/english/cepa/investment/files/mediators_hkiac.pdf and https://www.tid.gov.hk/english/cepa/investment/files/mediators_mhjmcc.pdf

¹⁰⁴ Under Article 1(2) of the CEPA 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.

¹⁰⁵ See Article 3 of the CEPA Investment Mediation Rules.

¹⁰⁶ See Article 5(1) of the CEPA Investment Mediation Rules. As for the role of the mediation commission, it is set out under Article 8 of the CEPA Investment Mediation Rules.

¹⁰⁷ See Article 5 of the CEPA Investment Mediation Rules.

¹⁰⁸ The qualification requirements of mediators are set out in para.1.6 of the CEPA Mediation Mechanism, which states that '[t]he mediators shall have attained the relevant qualification in mediation, and shall have professional knowledge and experience in the fields of cross-border or international trade and investment and law, and shall remain impartial in resolving the investment disputes.'

and technical backgrounds to collaborate in the process,¹⁰⁹ potentially creating a greater balance in the team and facilitating the ‘*brainstorming*’ of creative settlement arrangements. Those may include, but are not limited to, the grant or renewal of a licence and the swapping of deals for other types of investment contracts or obligations.¹¹⁰

82. In the context of international investment agreements, it is observed that various such recent agreements concluded by the EU, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) have also included a detailed annex on the procedural rules related to mediation.¹¹¹

83. Moreover, various institutions have developed mediation or conciliation rules, some of which are general and some are specific to ISDS. One notable example is the ICSID Conciliation Rules (1967)¹¹² provided for in the ICSID Convention and in the Additional Facility (Conciliation) Rules. In this connection, a new set of mediation rules is also currently being developed by ICSID in the amendment exercise of its Rules and Regulations.¹¹³ The new mediation rules will complement ICSID’s existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings.¹¹⁴ UNCITRAL is also in the process of updating its Conciliation Rules (1980), as part of a newly developed framework on international mediation, and such

¹⁰⁹ In terms of the mediation process, the CEPA Investment Mediation Rules seek to ensure efficiency by introducing the mechanism of mediation management conference. See Article 9.

¹¹⁰ According to Article 12(2) of the CEPA 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 disputing 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 also para.4 of the CEPA Mediation Mechanism.

¹¹¹ The text of CETA is available at [https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:22017A0114\(01\)](https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:22017A0114(01))

¹¹² The text of the latest version of the ICSID Conciliation Rules is available at <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>

¹¹³ See <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>

¹¹⁴ See <https://icsid.worldbank.org/services-arbitration-investor-state-mediation>

updated Rules (and reportedly to be renamed as Mediation Rules) will be available for use in ISDS disputes.¹¹⁵ The Permanent Court of Arbitration (PCA) also has its Optional Conciliation Rules, which have been in effect for some time.¹¹⁶

84. In recent years, we also see the development of ISDS-specific mediation protocols such as the *ad hoc* Rules for Investor-State Mediation of the International Bar Association (IBA Mediation Rules) in 2012. It has been reported that the IBA Mediation Rules were applied for the first time in an ICSID conciliation case, *Republic of Equatorial Guinea v CMS Energy Corporation and others* (ICSID Case No. CONC(AF)/12/2),¹¹⁷ and has also been utilised in the ISDS dispute of *Systra SA v Philippines* under the France-Philippines BIT in 2016, with the leading arbitrator, Mr J. Christopher Thomas, reportedly chosen by the disputing parties as the mediator and the mediation administered by the ICC-ADR Centre.¹¹⁸

85. Besides, there are also currently the International Chamber of Commerce (ICC) Mediation Rules (2014)¹¹⁹ and the Stockholm Chamber of Commerce (SCC) Mediation Rules (2014),¹²⁰ which may be utilised for resolving ISDS disputes.

86. Following the 39th session of Working Group III, the UNCITRAL Secretariat has been tasked with preparing model clauses reflecting best practices on the amicable settlement or cooling-off period, including an adequate length of time and clear rules on how such period could be complied with.¹²¹ It is clear that promoting the effective use of mediation during the cooling-off period is important

¹¹⁵ See the note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190) (15 January 2020).

¹¹⁶ See Catherine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism' in Catherine Titi and Katia Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes* (Oxford University Press, 2019), pp.32–33.

¹¹⁷ See Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' *ICSID Review*, 33(2) (30 October 2018), p.466 and footnote 78.

¹¹⁸ See 'In an Apparent First, Investor and Host-State Agree to Try Mediation under IBA Rules to Resolve an Investment Treaty Dispute', *Investment Arbitration Reporter* (14 April, 2016).

¹¹⁹ See <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>

¹²⁰ See https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf

¹²¹ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.36.

but the potential of mediation at other stages of the disputes should also be considered. While early settlement of disputes is optimal in terms of savings in costs and duration, some disputes may only be able to be resolved at the latter stages.¹²² Disputing parties' views may change in light of the exchange of written pleadings, oral submissions during the hearings, and orders made by the arbitral tribunals as the case progresses. It is also of interest to note that there may also be opportunities to foster settlement through mediation even during the post-award phase.

87. Given the differences in preferences and views on the process design of mediation, optional provisions may be included in the model treaty clauses and the ISDS-specific mediation protocols to cater for features such as mandatory mediation prior to arbitration, disclosure requirement for third party funding and transparency requirements.

(a) Mandatory Mediation

88. During the 39th session of Working Group III, the desirability of mandatory mediation was discussed. Some delegations expressed reservations over mandatory mediation out of concern that not all ISDS disputes are suitable to be resolved through mediation and mandatory mediation may not sit well with the principle of voluntariness.¹²³ As a matter of treaty practice, only a few known international investment agreements have express provisions on mandatory mediation. For example, in the Hong Kong-United Arab Emirates Investment Promotion and Protection Agreement (IPPA) of 2019, there is an express provision allowing the host contracting Party to request for mandatory conciliation before the investor can submit a dispute to arbitration.¹²⁴

¹²² For example, in a case involving an African State and a major foreign investor of that State, while Judge Stephen M. Schwebel was not able to successfully mediate the dispute before the parties pursued arbitration, the dispute was settled by the parties at an advanced stage of the arbitral proceedings but before an award was issued. See Stephen M. Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?', *ICSID Review*, 22(2) (1 October 2007), pp.237–238.

¹²³ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.32.

¹²⁴ Article 8(3) of the Hong Kong-United Arab Emirates IPPA provides that '[w]hen required by the Contracting Party, if the dispute cannot be settled amicably within six months from the date of receipt of the written notice, it shall be submitted to the competent authorities of that Contracting Party or arbitration centres thereof, for conciliation'.

89. That said, mandatory mediation is not completely without its merits. According to the *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS*, it was found that the respondents of the empirical study would welcome a mandatory requirement to go through mediation before arbitration proceedings are commenced.¹²⁵

90. To have an informed consideration on the matter, it is necessary to recognise that mandatory mediation comes in many forms.¹²⁶ Mandatory mediation does not necessarily mean that the disputing parties are forced to go through the whole mediation process from start to finish.

91. In the discussion papers entitled *Efficiency, Decisions, and Decision Makers* prepared by CIArb for Working Group III, it is also observed that '[t]he movement to encourage the use of other alternative dispute resolution procedures prior to the initiation of ISDS arbitration claims may be more promising than expedited procedures in applicable rules sets'.¹²⁷ In this regard, CIArb has made a useful suggestion that a possible option is to require disputing parties to attempt mediation before filing a claim in ISDS, and that such requirements to mediate prior to filing a claim in ISDS can be incorporated into the provisions of international investment agreements.

¹²⁵ See n.30, QMUL-CCIAG.

¹²⁶ As pointed out by Professor Nancy A. Welsh, the most intrusive form of mandatory mediation is one which requires participation of the disputing parties in the entire mediation process. See Nancy A. Welsh and Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration', *Harvard Negotiation Law Review*, 18 (2013), p.129. However, there can be other forms of mandatory mediation, such as only requiring the disputing parties to consider the use of mediation, requiring the disputing parties to attend a case conference at which mediation will be discussed, requiring the disputing parties to first attend an initial orientation or mediation session and allowing such parties to determine afterwards as to whether they wish to continue the process. See Nancy A. Welsh, 'Mandatory Mediation and Its Variations' in Susan D. Franck and Anna Joubin-Bret (eds.), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (UNCTAD, 2010), pp.110–111.

¹²⁷ See *Discussion Papers – CIArb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers* (February 2019), pp.8–9. Available at https://www.ciarb.org/media/3480/ciarb-uncitral_discussion-papers.pdf

92. In light of the current insufficient understanding and experience over investment mediation, the form of mandatory mediation as suggested in CIArb's paper may be useful in encouraging the wider use of such mechanism.¹²⁸ This is also compatible with the principle of voluntariness as the disputing parties are free to withdraw from the mediation process. Besides, even if the mediation at the stage of the cooling-off period is unsuccessful, it may still have the benefit of eliminating areas of the dispute, narrowing the issues, and assisting the parties in gaining a better understanding of the case.¹²⁹

93. Furthermore, an alternative to a mandatory mediation clause is the so-called '*convening clause*', which provides for an independent third person to convene a meeting between the disputing parties to assist them in evaluating and choosing an appropriate dispute resolution process.¹³⁰

(b) The Use of Third Party Funding in Mediation

94. The practice of third party funding in ISDS has been a contentious issue. In the context of investment mediation, it has been reported by mediators that they have already seen third party funders, such as Harbour Litigation Funding, at the mediation table.¹³¹ The implications of the use of third party funding was first discussed in the presentation of Ms Teresa Cheng, SC, during the intersessional meeting of Working Group III in Korea. In designing the investment mediation protocol, it is necessary to take into account the potential implications associated with the use of third party funding in mediation (e.g. a conflict of interest between the mediators and the third party funders concerned).¹³² In the context of investment arbitration, one approach that is under consideration in the ICSID rule amendments

¹²⁸ See Melissa Hanks, 'Perspectives on Mandatory Mediation', *University of New South Wales Law Journal*, 35(3) (2012), p.951. See also n.136, Welsh and Schneider, p.132.

¹²⁹ See E. Sussman, 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes', *Journal of Transnational Dispute Management*, 11(1) (January 2014), p.8.

¹³⁰ See n.36, IBA, p.48.

¹³¹ See Geoff Sharp (Brick Court Chambers/Clifton Chambers), 'A New Seat at the Mediation Table? The Impact of Third Party Funding on the Mediation Process (Part 2)', *Kluwer Mediation Blog* (1 April 2017).

¹³² See n.45, Ng, p.335. See also n.35, Kessedjian and others, p.14.

exercise is to impose disclosure requirement on the use of third party funding.¹³³ This may also be an option for regulating the use of third party funding in mediation for ISDS disputes.

(c) Striking a Balance Between Transparency and Confidentiality in Mediation

95. Transparency remains a thorny issue for ISDS. In recent years, there has been an appreciable increase in process transparency and public scrutiny on investment arbitration.¹³⁴ However, confidentiality is considered to be an essential element in mediation in that it encourages parties to speak freely and openly during the mediation while ensuring the integrity of the process.¹³⁵ In this regard, this element of confidentiality can come into tension with the call for greater transparency in ISDS.¹³⁶

96. As observed in the 2020 Harvard Investor-State Mediation Report, transparency as an objective in ISDS would create problems, such as hindering efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that can lead to posturing and unproductive dialogue.¹³⁷ It is also noteworthy that Professor Jack Coe considers it important to explore how the policies supporting transparency can be addressed with respect to mediation, while acknowledging that investment mediation and investment arbitration are fundamentally different, so as to avoid rigid insistence that the two dispute settlement mechanisms should function with equivalent levels of transparency.¹³⁸

¹³³ See ICSID, *Proposals for Amendment of the ICSID Rules – Working Paper 4* (February 2020). Available at https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf

¹³⁴ See Jack J. Coe Jr., ‘Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch’, *Journal of Transnational Dispute Management*, 4(1), (February 2007), p.27.

¹³⁵ Shahla F. Ali and Odysseas G. Repousis, ‘Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?’, *Denver Journal of International Law and Policy*, 45(2), p.246.

¹³⁶ See Jack J. Coe Jr., ‘Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership’, *Kansas Law Review*, 54 (2006), p.1382.

¹³⁷ See n.83, ISDS Mediation Working Group, p.7.

¹³⁸ See n.134, Coe, p.27.

97. The CEPA Investment Agreement also provides flexibility in the confidentiality obligation¹³⁹ so as to accommodate the needs and policies of host governments on transparency in ISDS and public disclosure for individual cases.¹⁴⁰ For example, the CEPA Investment Mediation Rules provides that unless otherwise agreed by the disputing parties in writing, the confidentiality obligation shall not extend to the fact that the disputing parties have agreed to mediate or a settlement has been reached via the mediation.¹⁴¹

(d) Hybrid Use of Mediation and Arbitration

98. Given that mediation is a flexible mechanism that can be combined with the use of arbitration (whether as a multi-tiered dispute resolution procedure such as ‘*mediate first, arbitration next*’ or as parallel processes) to resolve ISDS disputes, the design of the ISDS-specific mediation protocol will need to take into account the possible use of such hybrid models. In this regard, Professor Jack Coe has suggested the possibility for States to include optional or elective Med-Arb protocols in international investment agreements, which set forth detailed hybrid processes designed to harness and coordinate flexibly the combined strengths of arbitration and mediation.¹⁴²

(iii) Guidelines and Manuals on the Use of Mediation in ISDS

99. While having well-designed model treaty clauses and mediation protocols on paper is an important step for promoting the greater use of mediation in ISDS, users, mediators and practitioners of investment mediation need to know, especially in the initial stages, how to utilise the aforesaid mediation-related instruments to resolve

¹³⁹ See Article 11 of the CEPA Investment Mediation Rules. See also para.3 of the CEPA Mediation Mechanism.

¹⁴⁰ For example, in the standard contract of the Government of the Hong Kong SAR, 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.

¹⁴¹ See Article 11(4)(a) of the CEPA Investment Mediation Rules. Article 11(4)(b)(i) of the CEPA Investment Mediation Rules further provides that 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.

¹⁴² See n.84, Coe, p.27.

ISDS disputes in practice. In this regard, guidelines and manuals on the use of mediation in ISDS will be highly beneficial, especially for users of ISDS, in raising awareness and enhancing familiarity with investment mediation as well as guiding them through the mediation process.

100. In the context of ISDS, there are some previous examples of guidelines and manuals at the international level that have been useful for users of ISDS (especially government officials), such as the *International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules* (2012)¹⁴³ and the *Handbook on Obligations in International Investment Treaties* (2020) of APEC.¹⁴⁴

101. With reference to the aforesaid initiatives, Working Group III may wish to consider the publication of guidelines and manuals to accompany the development of facilitative frameworks on investment mediation, as a tool for the promotion of the greater use of mediation.

102. One interesting example for reference is the Guide on Investment Mediation adopted by the Energy Charter Conference (ECC) on 19 July 2016.¹⁴⁵ The Guide is a shining example of combined efforts at the global level to promote the use of mediation, as the Guide was prepared with support of the International Mediation Institute (IMI), ICSID, SCC, ICC, UNCITRAL and PCA.¹⁴⁶

¹⁴³ The Handbook is available at <https://www.apec.org/Publications/2013/05/International-Investment-Agreements-Negotiators-Handbook-APECUNCTAD-MODULES>

¹⁴⁴ The Handbook is available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/apec_handbook_on_obligations_in_iit.pdf

¹⁴⁵ The Guide on Investment Mediation is available at <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>. See also M. Appel and J.M. Tirado, 'Investor-State Mediation – New Tools for Policy Makers', *Journal of Transnational Dispute Management*, 17(2) (February 2020).

¹⁴⁶ See <https://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/>

103. The Guide has been endorsed by the ECC as a helpful and voluntary instrument to facilitate the amicable resolution of investment disputes, and the ECC has also encouraged its contracting parties to consider the use of mediation on a voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution, as well as to consider the good offices of the Energy Charter Secretariat.¹⁴⁷ The ECC further ‘welcomed the willingness of the Contracting Parties to facilitate effective enforcement in their Area of settlement agreements with foreign investors in accordance with the applicable law and the relevant domestic procedures’.

104. Unlike the ICSID Convention, the Energy Charter Treaty (ECT) does not have its own sets of conciliation and mediation rules. Its Guide on Investment Mediation nevertheless still provides a useful explanatory document that could be voluntarily used by governments and companies to take a decision on whether to engage in mediation and how to prepare for such a procedure. In terms of contents, the Guide has a comprehensive coverage, ranging from:

- (i) Explaining the mediation process in general (e.g. the nature of mediation, basic principles and rules of the mediation proceedings, the major steps in mediation, and barriers to settlement);
- (ii) Providing facilitative tips (e.g. how to prepare for each step of mediation; the factors that should be considered in assessing the usefulness of mediation for a particular dispute; how mediation can function as part of the ECT dispute resolution mechanisms, including during the three-month cooling-off period under Article 26.1 of the ECT and after the three-month cooling-off period under Articles 26.3 and 26.4 of the ECT; selection of mediators and seats of mediation; and how to handle the confidentiality during the mediation process); and

¹⁴⁷ See the Preamble of the Guide on Investment Mediation.

(iii) Elaborating on the role of the Energy Charter Secretariat and other institutions in respect to the mediation process (e.g. helping to secure the agreement of disputing parties to participate in the mediation process, facilitating information on costs, assisting with the selection of qualified mediators, and administration of the proceedings).

(iv) Code of Conduct on ISDS Mediators

105. In the context of Working Group III, the UNCITRAL and ICSID Secretariats have jointly developed a draft Code of Conduct for Adjudicators for ISDS for consideration by the Working Group.¹⁴⁸ The draft Code of Conduct provides applicable principles and detailed provisions addressing matters, such as independence and impartiality and the duty to conduct proceedings with integrity, fairness, efficiency and civility.

106. In respect of mediation in ISDS, apart from the issue of qualification of mediators, a code of conduct on mediators is also essential for ensuring the legitimacy and credibility of investment mediation. After all, government officials, investors and other stakeholders of ISDS can only place their trust and confidence in a dispute resolution method if that is aligned with the principles of the rule of law.¹⁴⁹ In this regard, while there are some existing general codes of conduct and guidelines, such as the JAMS (Judicial Arbitration and Mediation Services, Inc.) Mediators Ethical Guidelines and the IMI Code of Professional Conduct, the Working Group III may wish to consider the development of a code of conduct specifically for mediators of ISDS disputes.

¹⁴⁸ The draft Code of Conduct for Adjudicator in Investor-State Dispute Settlement is available at <https://uncitral.un.org/en/codeofconduct>

¹⁴⁹ See n.45, Ng, p.325.

107. Some recent international investment agreements have sought to address the issue by providing that the code of conduct on arbitration applies, *mutatis mutandis*, to mediators.¹⁵⁰ Nevertheless, due to the differences in the respective roles between arbitrators and mediators, the considerations over the design of the code of conduct on mediators should presumably be different from those for the code of conduct on arbitrators.

108. In this regard, the CEPA Investment Mediation Rules have set out a very comprehensive code of conduct for mediators.¹⁵¹ In particular, it is provided that each mediator shall be independent and impartial and shall mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.¹⁵²

109. A code of conduct for mediators however cannot be without ‘teeth’. One thorny issue concerns how to enforce and ensure compliance with the code of conduct and what consequences will be faced by mediators if they are found to be in breach of the code of conduct. If the disputing parties notice that the mediator concerned is in violation of the code of conduct during the mediation process, it is clear that they can dismiss such a mediator due to the inherent nature of mediation as a voluntary process. However, if the breach of code of conduct is only discovered after the mediation proceedings, the disputing parties may be left without any redress or remedies. In such a scenario, not only have the time and resources of the disputing parties been wasted, but also that the mediated settlement agreements reached may be tainted by the violations of the code of conduct and may not be enforceable.¹⁵³

¹⁵⁰ See e.g. para.21 of Annex 29-B (Code of Conduct for Arbitrators and Mediators) of the EU-Canada Comprehensive Economic and Trade Agreement and para.20 of Annex 11 (Code of Conduct for Arbitrators and Mediators) of EU-Singapore Investment Protection Agreement.

¹⁵¹ See Article 7 of the CEPA Investment Mediation Rules. For example, Article 7.3 of the CEPA Investment Mediation Rules reads that ‘[t]he mediator shall ensure that he has the capacity to conduct the mediation and avoid his performance (whether in the preparation or in the course of mediation) from being affected by his own financial, business, professional, family or social relationships or responsibilities’. See also para.1.6 of the CEPA Mediation Mechanism.

¹⁵² See Article 7.1 of the CEPA Investment Mediation Rules.

¹⁵³ For example, under Article 5(1)(c) and (f) the UN Mediation Convention, two relevant grounds of refusal of granting relief for enforcement of international mediated settlement agreements are:

- (c) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
- (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

Depending on the circumstances, the ground of refusal under Article 5(2)(a) of the UN Mediation Convention, which provides that ‘[g]ranteeing relief would be contrary to the public policy of [the Party to the Convention where relief is sought], may also be relevant.

110. While mediators can generally be expected to perform their roles in accordance with the applicable code of conduct, incidents of violation of the code of conduct (especially when there are no consequences or disciplinary actions attached to such violations) will have implications beyond the interests of the disputing parties. It is inevitable that such incidents will seriously undermine the trust and confidence in the use of mediation in ISDS, and hence its legitimacy.

111. The enforcement and the monitoring of mediators' compliance with the code of conduct is a matter that can be more effectively dealt with under an institutional setting or where there are independent and professional accreditation bodies for ISDS mediators.

112. Under an institutional setting, the relevant body would generally maintain a roster of qualified mediators, and in the scenario that there is a violation of the applicable code of conduct by a mediator, the relevant institution can impose disciplinary actions against the mediator concerned (including the possibility of striking out the mediator from the roster for actions that constitute the most serious breaches of the code of conduct).

113. So far, there is no such specific accreditation scheme for ISDS mediators. If one is to be established, the relevant accreditation body can similarly enforce the code of conduct by way of disciplinary action (including the removal of the accreditation of the mediator concerned).¹⁵⁴

(v) Development of Guides on Establishing and Refining Domestic Institutional Framework to Facilitate the Use of Investment Mediation by Government Officials

114. The existence of a facilitative framework at the treaty level by itself is not sufficient to address the situation of the underutilisation of mediation in ISDS. This is because a domestic institutional framework

¹⁵⁴ A similar mechanism is the Professional Conduct Assessment Process for IMI Certified Mediators. Available at <https://imimediation.org/practitioners/professional-conduct-assessment-process/>

is also essential to empower, incentivise, regulate and facilitate the use of mediation by government officials in resolving ISDS disputes. As discussed above and observed too in Working Group III, the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal uncertainty placed on the shoulders of officials involved in such settlement and the procedural dilemmas related to ensuring that the necessary approval process is set up (including the necessary authority for the negotiators to agree to a settlement), have all resulted in impediments to the greater use of mediation in ISDS.¹⁵⁵

115. The aforesaid observations echo the findings in the survey conducted by the Energy Charter Secretariat among members and observers to the International Energy Charter. In that survey, it was observed that government representatives are concerned with the absence of clear domestic legal frameworks for addressing ISDS disputes.¹⁵⁶ Such absence created ambiguity regarding authority to even engage in negotiation or mediation as well as additional fears surrounding the potential abuse of power, possible allegations of corruption and the absence of funding.

116. During the roundtable session of the first intersessional meeting of Working Group III in Korea in 2019, Ms Anna Joubin-Bret raised the idea that governments should consider establishing institutional mechanisms internally for handling and making decisions for investment mediation cases. As a step further, Working Group III did in its 39th session request the UNCITRAL Secretariat to prepare guidelines and best practices covering the organisational aspects that States might need to consider at the national level to minimise structural or policy impediments to the use of mediation and the representation of the public interest in mediation.¹⁵⁷

¹⁵⁵ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.29.

¹⁵⁶ See n.145, Appel and Tirado, p.2.

¹⁵⁷ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.39.

117. In respect of developing guides on establishing and refining domestic institutional framework to facilitate the use of investment mediation by government officials, the Model Instrument on Management of Investment Disputes adopted by the ECC in 2018 provides a useful reference model.¹⁵⁸ The Model Instrument is the result of consultations with government officials and international organisations involved in investment disputes,¹⁵⁹ and is an instrument developed by the Energy Charter Secretariat to be one that could be voluntarily utilised by States – either by way of implementing a domestic ISDS dispute resolution framework or in terms of serving as guidance concerning the practical and legal issues that should be considered in implementing a comprehensive conflict management plan for investment disputes.¹⁶⁰

118. The Model Instrument is comprehensive in its scope, covering not only treaty-based ISDS, but also contract-based ISDS.¹⁶¹ It seeks to address a wide range of practical issues, including tasks, powers, decision making, information sharing, financial considerations, coordination among government agencies, relevant organisations and individuals and representation of the government in the resolution of international investment disputes.¹⁶² It is of interest to note that the Model Instrument has put forward the concept of ‘*Responsible Body*’ (which can adopt a single ministry model or an inter-institutional commission model). Such a designated ‘*Responsible Body*’ will be the central focal point for ISDS disputes and will be entrusted with sufficient competence to conduct the dispute settlement process from the very beginning (amicable settlement) until the very end (enforcement), as well as being given the exclusive authority as the sole legitimate representative in relation to the investor and the arbitral tribunal.¹⁶³

158 The Model Instrument on Management of Investment Disputes is available in several languages at <https://www.energychartertreaty.org/model-instrument/>. A comment on the Model Instrument is available at in A. Carballo Leyda, ‘Model Instrument for Management of Investment Disputes’ in J. Chaisse, L. Choukroun, and S. Jusoh (eds.) *Handbook of International Investment Law and Policy* (Singapore, Springer, 2019). Available at https://link.springer.com/referenceworkentry/10.1007%2F978-981-13-5744-2_19-1

159 See <https://www.energychartertreaty.org/model-instrument/>

160 See n.145, Appel and Tirado, p.2.

161 *Ibid.*, p.3.

162 See Article 2 of the Model Instrument.

163 See Article 10 of the Model Instrument and its Explanatory Note, p.23.

119. The Model Instrument has a specific part on the use of mediation (see Articles 22–24).¹⁶⁴ Among others, it emphasises the importance of ADRs and encourages the use of mediation by governments to resolve ISDS disputes and provides guidance on assessing the usefulness of ADRs in particular disputes. The Model Instrument also seeks to address the domestic institutional issue by providing that the ‘*Responsible Body*’ will be entrusted with managing the use of mediation in resolving the ISDS disputes and possess sufficient authority in reaching settlements with investors.¹⁶⁵ Furthermore, the Model Instrument requires an early and independent assessment of the dispute to ascertain the most effective course of action, including mediation. It also provides policy options on how to balance the transparency-confidentiality requirements.

¹⁶⁴ The relevant provisions of the Model Instrument read as follows:

Article 22

Alternative Dispute Resolution Methods

1. The importance is hereby recognised of Alternative Dispute Resolution (ADR) methods such as negotiation, conciliation and mediation, which allow a more agile, efficient, and effective resolution of disputes. [x] shall prioritise the use of ADR methods.
2. [x] shall make all reasonable efforts to provide for the use of conciliation, mediation and other ADR methods in its International Investment Agreements and Investment Contracts, as an additional mechanism to be used prior to, during or after the submission of disputes to international arbitration.
3. Any consultations, negotiation, conciliation, mediation, good offices and other ADR methods that may be used to resolve disputes arising in relation to International Investment Agreements shall be managed by the Responsible Body, including matters relating to contracting of legal counsel, experts and external advisers in accordance with the regulations in force governing public procurement, among others. The corresponding expenses shall be met in accordance with the terms of Article 19 of this Instrument.
4. The Responsible Body shall have settlement authority for the purposes of the negotiation and conclusion of settlement agreements with foreign investors on behalf of [x] and foreign investors shall be entitled to rely on the Responsible Body having that authority on behalf of [x].

Article 23

Assessing the Use of Amicable Dispute Settlement Mechanisms

In order to assess the usefulness of amicable dispute settlement mechanisms with foreign investors for a particular dispute, the Responsible Body may consider, among other issues, whether:

- (a) the monetary costs of pursuing international litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- (b) the effect of an international decision against [x] becoming public;
- (c) a fast resolution is of the utmost importance;
- (d) maintaining a relationship is more important than the formal outcome, as well as the likelihood of continuing such relationship in case of settlement;
- (e) matters of fundamental principle are at stake;
- (f) both parties can involve their respective decision-making authorities;
- (g) a foreign investor would seek some non-monetary relief;
- (h) neither side is certain that it will prevail in litigation or arbitration;
- (i) the dispute can have an impact on the reputation of the State; and
- (j) the investment has an important impact on the economy or security of [x].

Article 24

Dispute Resolution Clauses Included in International Investment Agreements and Contracts

All reasonable efforts shall be made to ensure that every dispute resolution clause includes, as a minimum, a period for consultation, negotiation, mediation or any other amicable dispute settlement mechanism between the parties before the dispute may be submitted to international arbitration or a competent international tribunal.

¹⁶⁵ See the Explanatory Note of the Model Instrument, pp.29–30.

120. Additionally, the ECT's Guide also touches upon the issue of domestic institutional framework, in particular on government officials' concerns over allegation of corruption while reaching a settlement with investors. The Guide states that:

[H]eightedened expectations of confidentiality in mediation limit the ability of states to disclose and explain mediated settlements publicly. The state party may therefore wish to define an internal monitoring mechanism that requires the state's representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposal that may have been made by the mediator. Such documentation strengthens the legitimacy of the settlement in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness of concessions or payments to the other party. This also facilitates to rebuttal potential allegations of corruption over the settlement agreement.¹⁶⁶

121. With respect to the development of domestic facilitative framework on the use of mediation in resolving ISDS disputes, it is necessary to take into account the circumstances of each jurisdiction, such as the political and government structure as well as the administrative policy, practices and culture. In this regard, the ECT Model Instrument is also sensitive to such domestic dimensions. According to the Explanatory Note attached to the Model Instrument, a State should take into account its specific administrative needs and particularities in implementing the Model Instrument.¹⁶⁷ Furthermore, the Explanatory Note makes it clear that the State may need to modify or leave out some of the provisions of the Model Instrument and consider whether complementary amendments to other domestic laws or regulations should be instituted to ensure coherence in the legal framework.¹⁶⁸

¹⁶⁶ See ECT Guide on Investment Mediation, Part 10.C.

¹⁶⁷ See the Explanatory Note to the Model Instrument, pp.17–18.

¹⁶⁸ *Ibid.*

122. Other than establishing domestic institutional frameworks such as the approach advocated in the Model Instrument, some jurisdictions have used pledges to advocate for the greater use of mediation. For example, in the United Kingdom, the Lord Chancellor's March 2001 Pledge committed government departments and agencies to considering and using ADR in all suitable cases where the other party accepts it.¹⁶⁹ In the Hong Kong SAR, the Government is committed to promoting the development of mediation locally, regionally and internationally through the '*Mediate First*' Pledge, which was launched in 2009. The '*Mediate First*' Pledge is a statement of policy aimed at encouraging greater use of mediation as a flexible, creative and constructive approach to resolving disputes. Companies and trade organisations are encouraged to sign the Pledge to signify their willingness to first explore the use of mediation in the course of their operations before resorting to other means of dispute resolution, such as litigation.

B. Overcoming the Psychological Barrier in the Use of Mediation

123. While having facilitative frameworks on paper regarding the use of mediation for resolving ISDS disputes is useful, it ultimately falls on government officials and investors to decide whether to engage in mediation. As observed by the IBA in its report, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018), the existing situation remains that government officials and corporate executives tend to lack knowledge and experience with respect to mediation in ISDS.¹⁷⁰

124. In order to make mediation a successful and effective ISDS reform option, it is therefore essential and of paramount importance for the users of ISDS to overcome the psychological barriers to the use of mediation, and the initiatives discussed below may have a pivotal role to play in this regard.

¹⁶⁹ See n.145, Appel and Tirado, p.3.

¹⁷⁰ See n.36, IBA, pp.43–44.

(i) Training and Capacity-Building

125. Education is a fundamental part in the promotion of the greater use of mediation in ISDS. This is also recognised by Working Group III, which considers that capacity-building and training is a key aspect in raising awareness on mediation among stakeholders and incentivising both investors and government officials to actively engage in mediation.¹⁷¹ There are two aspects here, namely training and capacity-building for mediators and similarly for users of ISDS (e.g. government officials, investors and practitioners).

126. With respect to users of ISDS, as discussed above, a lack of familiarity with mediation among them has created psychological barriers to the use of this dispute resolution method. Worse, some may not even be aware of the existence of mediation as an alternative to investment arbitration. Users of ISDS may also have some misunderstandings over mediation. For example, some government officials and investors may consider that making the request for initiating mediation will be perceived as a sign of weakness, and the use of mediation will only prolong the dispute resolution process and waste resources. Some legal practitioners may even connote ADR as an '*Alarming Drop in Revenue*'.¹⁷² These highlight the need for strengthening education of the users of ISDS, which is the first dimension of capacity-building and training.

127. With regard to the second dimension, a mediator is certainly a crucial component in the mediation process and his/her professional assistance to the disputing parties is what distinguishes mediation from direct negotiation and settlement between the disputing parties. It is natural therefore that users of ISDS will only put their faith into mediation if this process is conducted by professional mediators with the necessary qualifications, experience and skills.

¹⁷¹ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.30.

¹⁷² See n.74, Reed and others, p.24.

128. At the basic level, just as is the case for arbitrators, mediators of ISDS disputes have to be knowledgeable about public international law and international investment law.¹⁷³ That said, mediators need to be able to command unique skill-sets that are different from those of arbitrators, whose role is to adjudicate the cases in accordance with the relevant international investment agreements (including the applicable laws) and the facts of the cases.¹⁷⁴ In particular, it is important for mediators to possess skills such as the ability to understand and deal with a wide variety of emotional, psychological, organisational, political, and process issues that obstruct the disputing parties to understand each other better.¹⁷⁵ In the insightful words of Professor J. W. Salacuse, ‘the resources and experience of a deal-making investment banker are probably much more germane to the mediation of an investor-State dispute than are the talents of a litigator’.¹⁷⁶

129. Moreover, as observed by ICSID, while currently there are some experts who specialise in investment mediation, there is a much larger pool of professional mediators who have not applied their skills to international investment disputes yet, as well as experts of investment arbitration who may be less familiar with the specific techniques and approaches of a successful mediation.¹⁷⁷ This illustrates that much work needs to be done in terms of capacity-building and training to bridge the aforesaid knowledge gaps in order to further unlock the potential of mediation in ISDS.¹⁷⁸

130. In terms of training and capacity-building on the use of mediation of ISDS, the Department of Justice of the Hong Kong SAR has been a pioneer in Asia in partnering up with leading institutions, such as ICSID, the International Energy Charter, the Centre for Effective Dispute Resolution and the Asian Academy of International Law to

¹⁷³ See n.45, Ng, p.325.

¹⁷⁴ *Ibid.*

¹⁷⁵ See J. W. Salacuse, ‘Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution’, *Journal of Transnational Dispute Management*, 6(1) (March 2009), p.441.

¹⁷⁶ *Ibid.*

¹⁷⁷ See ‘ICSID’s Role in Advancing Investor-State Mediation’, *Global Arbitration Review* (24 July 2019).

¹⁷⁸ *Ibid.*

offer its flagship Investment Law and Investor-State Mediator Training Courses. Since 2018, two rounds of Courses have been held, with a view to building up a pool of investment mediators specialised in handling international investment disputes and promoting the use of investment mediation among government officials and practitioners.

131. The Courses have a comprehensive coverage of topics in that it covers not only substantive knowledge of international investment law but also various topical issues on investment mediation, ranging from the conceptual framework, specific process consideration and design options, co-mediation, intercultural competency, stakeholder analysis and mapping, and conduct of mediation to the ethics of mediators. To ensure that the participants are well-equipped in utilising and conducting mediation in practice as they complete the Courses, an approach of '*Learn, Train and Practice*' has been adopted. In this regard, coaching days have been conducted by a line-up of experienced practitioners and academics in the field during the Courses to engage participants through role-play in an investment mediation setting and let them have a first-hand experience of the process.

132. The two rounds of Courses were very well-received, with a total of over 90 participants from over 26 countries around the world, including government officials as well as legal and mediation practitioners from Mainland China, Member States from the Association of Southeast Asian Nations (ASEAN), the Middle East, Africa and Europe. The Department of Justice of the Hong Kong SAR will continue to partner up with leading international and regional institutions to offer the Investment Law and Investor-State Mediator Training Courses in the near future, and thereby contribute to the momentum in the greater use of mediation in ISDS.

(ii) Establishing an Online Information Portal to Share
Experience and Best Practices on Mediation in ISDS

133. Given that the work on investment mediation has been undertaken by various institutions and individual jurisdictions simultaneously, it is currently a time-consuming exercise for government officials,

investors and practitioners to keep track of the developments in mediation and the latest best practices on mediation. As discussed above, academics have also expressed difficulties in finding empirical data on the use of mediation in ISDS cases.

134. According to the UNCITRAL Secretariat, it is considered that further discussion and consultation is required in order to identify what is missing from the current system with respect to mediation and what the future reforms should focus on.¹⁷⁹ During the 39th session of UNCITRAL Working Group III, the importance of having a systematic and organised way to share experiences and information on mediation was highlighted. In this regard, an online information portal may be a useful tool that is worth consideration by Working Group III.¹⁸⁰

135. A user-friendly online information portal can provide a ‘*one-stop shop*’ that consolidates the latest developments, news and information as well as other resources such as know-how, guidelines, best practices, model treaty clauses, investment mediation model protocols and other facilitative instruments on the use of mediation in ISDS. Such an online information portal can facilitate the identification of ‘*gaps*’ in the existing work on the promotion and practice of mediation for ISDS disputes. In respect of an online information portal in the context of ISDS, the UNCTAD Investment Policy Hub is a prime example¹⁸¹ and to some extent, the website of Working Group III serves a similar function.¹⁸² As such, one may either expand upon the existing platforms or establish a specialised one to perform the function of an online ‘*all-in-one*’ information portal on the use of mediation in ISDS.

¹⁷⁹ See n.20.

¹⁸⁰ In fact, it is also noted that Working Paper 190 of the UNCITRAL Secretariat briefly mentions the idea of developing a comprehensive database on dispute prevention and mitigation. See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190) (15 January 2020), para.26.

¹⁸¹ The Investment Policy Hub of UNCTAD can be accessed at <https://investmentpolicy.unctad.org/>

¹⁸² The website of UNCITRAL Working Group III can be accessed at https://uncitral.un.org/en/working_groups/3/investor-state

136. One important feature of the online information portal is to provide a database on mediation cases in ISDS. Ms Anna Joubin-Bret has previously suggested that the administration of mediation proceedings is essential to build trust in mediation in ISDS and it is useful to disseminate success cases.¹⁸³ A similar suggestion was also made by Ms Lucy Reed. In Ms Reed's view, the publication of instances of investor-State mediations with sensitive and confidential information redacted would allow the users of ISDS to see what kind of disputes were able to be settled via mediation and what kind of settlements were achieved.¹⁸⁴ This, in particular, can help alleviate government officials' concerns and anxiety over the use of mediation since they can see, both, that they are not pioneers at risk as well as the range of remedies that can be obtained through mediation (as compared with the 'win-lose' or even 'lose-lose' situation that may result in the context of investment arbitration). In this regard, it is clear that successful investment mediation cases will likely have a 'snowball effect' of encouraging and incentivising its greater use in practice.¹⁸⁵

137. Other contents of the online information portal may include a bibliography of literature on the use of conciliation and mediation in ISDS disputes¹⁸⁶ as well as list of events related to the use of mediation in ISDS.

(iii) Colloquia, Conferences, Seminars, ISDS Mediation Competitions and Publications

138. It has generally been observed that investor-State conciliation and mediation are less frequently the subject of considered examination compared to investor-State arbitration, with fewer books, monographs and edited volumes dedicated to the topic.¹⁸⁷ This shows the need to explore other avenues and channels to disseminate information on the use of mediation in ISDS and encourage discussion and research on the subject.

¹⁸³ See Anna Joubin-Bret, 'Recent Trends in Investor-State Disputes: An Update on Mediation and Conciliation', presentation slides for Energy Charter Treaty Conference (21 November 2014).

¹⁸⁴ See n.58, Reed, pp.32–35.

¹⁸⁵ See n.45, Ng, p.315.

¹⁸⁶ One example is n.45, Weeramantry and Chang.

¹⁸⁷ *Ibid.*, p.7.

139. Working Paper 190 of the UNCITRAL Secretariat has also raised the question of how mediation, conciliation and other forms of ADRs could be promoted and more widely used. In this regard, one useful way to address this is to organise conferences, seminars, experts groups and other promotion activities, such as an ISDS mediation competition for university students. These activities can raise awareness among stakeholders on the use of mediation in resolving ISDS disputes, facilitate the exchange of knowledge, information and practices with respect to mediation, and provide a forum to explore cutting-edge issues on investment mediation.

140. Moreover, the findings and ideas discussed in these activities can be compiled into publications to further the dissemination of information and knowledge on the use of investment mediation globally in the future and enhance the continuity in mediation-related promotion work.

141. Back in 2010, UNCTAD organised the Joint Symposium on International Investment and Alternative Dispute Resolution in Lexington, Virginia in which more than 30 leading scholars and practitioners explored various topical issues related to investor-State conciliation and mediation as well as their interplay with dispute prevention policies. The contributions were subsequently edited and compiled by Ms Susan D. Franck and Ms Anna Joubin-Bret into a conference proceedings, which contains much valuable knowledge and insights on the subject.¹⁸⁸ Similarly, under the auspices of the Organisation for Economic Co-operation and Development (OECD), a series of symposia on investment mediation have also taken place.¹⁸⁹

142. Another interesting example is the ISDS Reform Conference 2019 – Mapping the Way Forward, which contained a dedicated session on the use of mediation in ISDS, co-organised by the Department of Justice of the Hong Kong SAR and the Asian Academy of International

¹⁸⁸ The conference proceedings are available at https://unctad.org/en/Docs/webdiaeia20108_en.pdf

¹⁸⁹ See A. F. M. Maniruzzaman, 'Investor-State Dispute Settlement by ADR – An Appraisal of the Recent Trends', *Journal of Transnational Dispute Management* (December 2018), p.1.

Law. The speakers' presentations and background papers prepared by ISDS practitioners in Hong Kong were subsequently compiled into a conference proceedings¹⁹⁰ and distributed by the Asian Academy of International Law to the delegations during the 38th session of UNCITRAL Working Group III to facilitate knowledge and experience sharing. In Hong Kong, there is also the annual Mediation Lecture in the Legal Week each year and leading experts such as Professor Jack J. Coe Jr. and Mr Mark Appel have been invited to deliver the Mediation Lectures, which have also touched upon the topics related to the use of mediation in ISDS.

143. The types of initiatives discussed above not only provide a forum outside the formal meetings of the Working Group for exchange of ideas and proposals among the stakeholders of ISDS reform, but also enhance the understanding and acceptance of the public regarding the use of mediation by government officials to reach settlements with foreign investors, which is important for ensuring the perceived legitimacy of mediation as a ISDS dispute resolution tool. It is also expected that these initiatives can inspire further research streams into various innovative topics on the use of mediation in ISDS, such as studying what best practices and approaches in international commercial mediation can be adapted to international investment mediation, the lessons for international investment mediation from the successful use of mediation in resolving public and contractual disputes between host governments and foreign investors¹⁹¹, and the role of 'LawTech' in facilitating the use of mediation.

144. Besides, to promote the wider use of mediation in ISDS, apart from capacity-building and training, other initiatives for grooming future talents in the field is also an important consideration. Currently, there is the annual ICC International Commercial Mediation Competition. A similar global mediation competition can be organised for

¹⁹⁰ The conference proceedings of the ISDS Reform Conference 2019 are available at <https://www.aail.org/wp-content/uploads/2020/07/2019-ISDS-Conference-Proceedings-eBOOK.pdf>

¹⁹¹ One example is the successful mediation by Professor Thomas Wälde in the energy dispute between the Swedish State-owned company, Vattenfall, and the Polish State-integrated energy company, PSE.

ISDS to generate interest among university students on investment mediation, facilitate intellectual exchanges among practitioners, academics and participating students as well as illustrate how investment mediation can be conducted in a simulated setting.

C. Explore the Synergies of Mediation with Other Possible ISDS Reform Options

145. Mediation should not be a subject to be considered in isolation of other reform options. In fact, in light of the inherent nature of mediation as a flexible, highly customisable and consensual form of dispute resolution method, it can function effectively in combination with other possible ISDS reform options. For example, mediation can be an option that the disputing parties can choose to make use of in the context of an ISDS appellate mechanism. The synergy and interface of mediation with other possible ISDS reform options is a subject that Working Group III may wish to explore and capitalise on.

146. As noted in Working Paper 190 of the UNCITRAL Secretariat, the question of strengthening ADR mechanisms is closely connected to the reform option of establishing the proposed Advisory Centre on International Investment Law.¹⁹² Furthermore, mediation, if effectively used, can avoid the escalation of international investment disputes to the investment arbitration or litigation stage, and can therefore have the potential of being seamlessly incorporated into dispute prevention mechanisms.

¹⁹² See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution* (A/CN.9/WG.III/WP.190) (15 January 2020), para.47.

(i) Provision of Mediation Services by the Proposed Advisory Centre on International Investment Law

147. The establishment of an assistance mechanism known as the Advisory Centre on International Investment Law is an ISDS reform that has received general support in Working Group III.¹⁹³ The exact design of the Advisory Centre is still under consideration by the Working Group, and one of the reference models is the Advisory Centre on WTO Law.

148. Relevant to this Paper is the question of the possible role that such an Advisory Centre can play in respect to mediation. During the 39th session of Working Group III, it was suggested that the Advisory Centre, if established, could play a role in compiling and sharing information on best practices with respect to mediation.¹⁹⁴

149. Apart from the aforesaid, as mentioned in Working Paper 168 of the UNCITRAL Secretariat, one question that the Working Group may also wish to consider is whether the proposed Advisory Centre will offer mediation-related services.¹⁹⁵ In this regard, as discussed by Mr Charlie Garnjana-Goonchorn from the Thai delegation in his presentation for the UNCITRAL Working Group III webinar,¹⁹⁶ the Advisory Centre on International Investment Law can take up various roles in promoting and facilitating the use of mediation in ISDS, including explaining to the disputing parties how mediation works, conducting unbiased assessment on or evaluating the feasibility of mediation, curating a list/roster of mediators, administering mediation proceedings (including drafting settlement agreements) and providing a platform to exchange best practices.

¹⁹³ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session (Vienna, 14–18 October 2019)* (A/CN.9/1004) (23 October 2019), para.28. See also Karl P. Sauvant, 'An Advisory Centre on International Investment Law', *Academic Forum on ISDS Concept Paper 2019/14* (10 September 2019). Available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>

¹⁹⁴ See *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020)* (A/CN.9/1044), para.34.

¹⁹⁵ See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Advisory Centre* (A/CN.9/WG.III/WP.168) (25 July 2019), paras.21–22.

¹⁹⁶ See presentation slides of Charlie Garnjana-Goonchorn (Department of Treaties and Legal Affairs, MFA Thailand) (21 April 2020). Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/cn/ac_webinar_thailand_en.pdf

150. At the same time, Mr Charlie Garnjana-Goonchorn has insightfully pointed out a number of practical questions that need to be addressed if the Advisory Centre is to offer mediation services. Given that the scope of services to be offered by the Advisory Centre will have implications in terms of workload and budget, there will be questions raised as to whether mediation services should be offered right at the start of the establishment of the Advisory Centre or should be included later as an expansion of capacity, and also how such services are to be funded.¹⁹⁷

151. Furthermore, as discussed in Working Paper 168, it is also necessary to consider how the Advisory Centre would handle potential conflicts of interest that might arise where it might be involved in both the provision of ADR services and legal defence services.¹⁹⁸

(ii) Synergy Between Investment Mediation and Dispute Prevention Mechanism

152. A dispute prevention mechanism is a tool closely related to the use of mediation, if one takes a holistic view of the process of ISDS. Working Group III recognises that there is a conceptual distinction between the two, with a dispute prevention mechanism being in the pre-dispute phase and mediation being in the post-dispute but possibly pre-arbitration phase. Nevertheless, a dispute prevention mechanism and mediation can sometimes work in combination with each other in a complementary manner. In this regard, the potential synergy between investment mediation and dispute prevention mechanisms is something that may be worth being explored by Working Group III.

153. As discussed in the literature over the years, various dispute prevention policy models have been identified.¹⁹⁹ Some examples include Peru's Special Commission established under its State System of Coordination and Defense in International Investment Disputes,

¹⁹⁷ *Ibid.*

¹⁹⁸ See note by the UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Advisory Centre* (A/CN.9/WG.III/WP.168) (25 July 2019), para.22.

¹⁹⁹ See n.45, Weeramantry and Chang, pp.22–24.

which serves as a designated State agency in handling ISDS disputes; the Colombia model with a high-level inter-ministerial body established to develop and coordinate measures to prevent and manage investment disputes (which include deciding whether to resort to mediation and adopt a mediated settlement agreement); and Korea's Office of Foreign Investment Ombudsman (OFIO), which hears and attempts to resolve investors' grievances.

154. Of interest to this Paper is how such dispute prevention policy models can be synergised with mediation. One clear example would be for an ombudsman to also deploy mediation to facilitate the amicable resolution of ISDS disputes. As suggested by Professor Hi-Taek Shin, the OFIO may function as one agreeable avenue for both government officials and the foreign investors to explore an ADR while avoiding the bitter legal battle that would ensue if investment arbitration were used.²⁰⁰

155. The practice of the International Finance Corporation's (IFC) Compliance Advisory Ombudsman, which is the independent accountability mechanism for IFC and the Multilateral Investment Guarantee Agency (MIGA), has also provided some reference value on how to combine the use of dispute prevention and mediation. It has been reported that the said international organisation has already made use of mediation to resolve investment-related disputes related to IFC/MIGA projects between investors and local communities.²⁰¹

156. In fact, the Model Instrument developed by the Energy Charter Treaty also takes a holistic approach with respect to dispute prevention and mitigation.²⁰² Apart from the provisions on mediation discussed above, the Model Instrument recognises the importance in 'preventing and managing foreign investment disputes before formal dispute resolution becomes necessary, by facilitating efficient and coordinated

²⁰⁰ See Hi-Taek Shin, 'An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution' in Susan D. Franck and Anna Joubin-Bret (ed.), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (UNCTAD, 2010), pp.97–101.

²⁰¹ See n.38, Güven.

²⁰² See the statement of the Energy Charter Secretariat, *Investment Mediation and Dispute Prevention*, made at the October meeting of UNCITRAL Working Group III. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ecs_statement_-_en.pdf

inter-institutional actions; and to effectively and efficiently resolving such disputes.²⁰³ The Model Instrument also contains a specific article on an early alert mechanism to facilitate the exchange of information within the government, e.g. via an online preventive platform, on the relevant international agreements with dispute resolution provisions and notifications to the Responsible Body on the potential investment disputes with foreign investors.²⁰⁴

VIII. Conclusion

157. As recognised by Working Group III, mediation is not a '*panacea*' that addresses all the concerns of ISDS. It is inevitable that even with the best mediators in the world, some disputes cannot be amicably resolved through mediation, particularly, when disputing parties have inflexible demands and are uncooperative with mediators or the relationship between the disputing parties is beyond repair.²⁰⁵

158. Nevertheless, as discussed above, it appears evident that the time is ripe for promoting the greater use of mediation in resolving ISDS disputes. One is also optimistic that the work on mediation will be further developed in the future formal sessions of UNCITRAL Working Group III, including at its intersessional meeting on the subject in the Hong Kong SAR, PRC, in 2021.

²⁰³ See the Preamble to the Model Instrument.

²⁰⁴ See Article 8 of the Model Instrument and the Explanatory Notes, p.22.

²⁰⁵ See n.45, Ng, p.338.

SESSION IV:
The Way Forward
for Mediation as a
Reform Option for ISDS

Moderator



Anna Joubin-Bret

The Secretary

United Nations Commission on International Trade Law

Ms Anna Joubin-Bret is the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) and the Director of the International Trade Law Division in the Office of Legal Affairs of the United Nations, which functions as the substantive secretariat for UNCITRAL. She is the 9th Secretary of the Commission since it was established by the United Nations General Assembly in 1966. Prior to her appointment on 24 November 2017, Ms Joubin-Bret practiced law in Paris, specialising in International Investment Law and Investment Dispute Resolution. She focused on serving as counsel, arbitrator, mediator and conciliator in international investment disputes. She served as arbitrator in several International Centre for Settlement of Investment Disputes (ICSID), UNCITRAL and International Chamber of Commerce (ICC) disputes. Prior to 2011 and for 15 years, Ms Joubin-Bret was the Senior Legal Adviser for the United Nations Conference on Trade and Development (UNCTAD). She edited and authored seminal research and publications on international investment law, notably the *Sequels to UNCTAD IIA Series*, and co-edited with Jean Kalicki a book titled *Reshaping the Investor-State Dispute Settlement System* in 2015. Ms Joubin-Bret holds a postgraduate degree (DEA) in Private International Law from the University of Paris I Panthéon-Sorbonne, a Master's Degree in International Economic Law from the University of Paris I and in Political Science from Institut d'Etudes Politiques. She was Legal Counsel in the legal department of the Schneider Group, General Counsel of the KIS Group and Director-Export of Pomagalski S.A. She was appointed judge at the Commercial Court in Grenoble (France) and was elected Regional Counsellor of the Rhône-Alpes Region in 1998.

Panellist



Alejandro Carballo-Leyda

General Counsel and Head of Conflict Resolution Centre
International Energy Charter

Alejandro Carballo-Leyda (LL.B. with Economics, Certificate on international conflicts, LL.M., Ph.D. in international law, Harvard Program on Negotiation, Centre for Effective Dispute Resolution [CEDR] accredited mediator) is the General Counsel of the International Energy Charter and Head of its Conflict Resolution Centre, which provides good offices and mediation support to investors and governments. He coordinated the Guide on Investment Mediation (2016), the amendment to the energy transit conciliation rules (with a commentary), the Model Instrument on Management of Investment Disputes (2018) and the first training for investment mediators. Currently, he supports several countries in developing their internal instrument on managing investment disputes. Previously, Alejandro advised States and private clients on a wide range of public and private international law issues. He edited the book *Asian Conflict of Laws* (Wolters Kluwer, 2015) and participated in the working groups of the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (2010 ed.) and Hague Principles on Choice of Law for International Contracts.

Tools for Promoting the Greater Use of Mediation by States in ISDS

First of all, I would like to recommend the very useful Background Paper prepared by David Ng,¹ which provides an excellent introductory overview on the way forward for mediation in investment disputes. While my topic aims to identify the tools for promoting the use of mediation by States in investment disputes, let me clarify upfront that most of those tools are also relevant to companies; in sum, there can be no mediation without the active engagement of both parties.

In 2014, the Energy Charter Secretariat was mandated to assist with good offices, mediation and conciliation as well as provide neutral, independent legal advice and assistance in dispute resolution. In the years since, the Secretariat has been particularly active in facilitating the effective use of investment mediation. As a first step, the Secretariat organised several roundtables with representatives from governments and industry to understand their opinions and experiences regarding amicable settlement mechanisms. The tools mentioned below could be useful to help to overcome the main challenges identified in those interactive roundtables and consultations, which were the lack of awareness and effective implementation of the existing frameworks.

Raising awareness among the relevant stakeholders – the lack of knowledge frequently results in a lack of confidence and trust

(a) *Capacity-building*: The Energy Charter Secretariat in cooperation with CEDR (Centre for Effective Dispute Resolution), IMI (International Mediation Institute) and ICSID (International Centre for Settlement of Investment Disputes) has organised several trainings, workshops and seminars for government officials and industry on the specific topic of investment mediation.

¹ David Ng, 'The Way Forward for Mediation as a Reform Option for ISDS', Background Paper prepared for this session.

(b) Guide on Investment Mediation (2016)

In 2016, the Energy Charter Conference² endorsed the Guide on Investment Mediation (CCDEC 2016 12) as a helpful tool to facilitate the amicable resolution of investment disputes. The Guide was prepared by the Secretariat with the support of several intergovernmental organisations and international dispute resolution bodies. These included ICSID, SCC (Arbitration Institute of the Stockholm Chamber of Commerce), ICC (International Chamber of Commerce), International Court of Arbitration, PCA (Permanent Court of Arbitration), UNCITRAL (United Nations Commission on International Trade Law), CEDR and IMI.

The Guide aims at having an explanatory document that could be used as a reference by governments and companies to understand better how investment mediation works, so as to be able to take a more informed decision on whether to choose the path of mediation and, if so, how best to prepare for it. Among other things, it clarifies what an investment mediation is and how it fits within the different dispute resolution mechanisms, the different rules available for conducting an investment mediation, the role of the party and its legal representatives, and the major steps in the mediation process (including suggestions for the selection of mediators).

The Guide further provides facilitative tips for assessing the usefulness of mediation for a given dispute, proposing it to the other party, and preparing for the mediation (including logistics, team composition and documentation needed). Finally, the Guide also elaborates on the supporting role of the institutions, such as the Energy Charter Secretariat, for example, in helping to secure the agreement of parties to participate in the process; reinforce the confidence or trust from all

² The Energy Charter Conference monitors the implementation of the Energy Charter Treaty (ECT), which is a unique sector-specific (energy) multilateral treaty establishing legal rights and obligations concerning a broad range of issues such as investment, trade, transit, competition, the environment, access to capital markets and transfer of technology. As of 1 February 2019, the ECT has 56 signatories and contracting parties, including the European Union. In addition, almost 50 States and regional intergovernmental organisations from all over the world are observers.

the stakeholders; assist the parties to overcome initial procedural hurdles (such as the place for the meeting or securing visas); administer the proceedings; help to identify candidates well-qualified to serve as a mediator in the given dispute; facilitate information sharing on costs that would help parties to secure the necessary funding on time, etc.

Effective implementation of the existing framework

(a) *Clear domestic legal framework*: Model Instrument (2018)

In 2017, the Secretariat conducted a survey and analysed the domestic legislation of several members of the Energy Charter Conference to identify the potential obstacles and concerns that may hinder the effectiveness of investment mediation. The main findings showed that the biggest concern for most government officials was the lack of a clear domestic legal framework. This, in turn, tended to result in (1) ambiguous authority to settle or even to enter into discussions with foreign investors (in most cases, the State agency dealing with an investment dispute had to rely on *ad hoc* authorisations); (2) fear of possible allegations of corruption and abuse of power leading to civil or criminal liability; and (3) lack of funding for the overall process. The survey and research findings also pointed to the negative impact felt due to the absence of an early, independent assessment of the dispute to ascertain the most effective course of action, including the possibility of solving the dispute by negotiation or mediation.

In 2018, the Secretariat developed a Model Instrument for Management of Investment Disputes based on discussions with international institutions and government officials dealing with investment dispute resolution, as well as some existing frameworks in countries from Europe, Asia and Latin America (particularly from countries who had experience of several investment disputes). An initial workshop to discuss a preliminary draft with government officials from several countries, the World Bank, UNCITRAL, AALCO (Asian-African Legal Consultative Organisation) and UNCTAD (United Nations Conference on Trade and Development) was held by the Secretariat in Brussels on 6 July 2018. Additional discussions were conducted by the

Secretariat during the UNCITRAL Trade Law Forum on 11 September 2018 in Korea, at a seminar on investment dispute resolution organised by AALCO on 20 October 2018 in Tanzania, and at a seminar on 3 December 2018 in Washington, D.C. which included the participation of the World Bank and ICSID.

The aim of the Model Instrument is to provide guidance to States seeking to implement or update their own domestic legal and institutional frameworks concerning the management of investment disputes, including making effective use of negotiation, mediation and conciliation. It endeavours to cover as many practical issues and challenges as possible, based on the experiences and needs highlighted by government officials and provides States with several policy options with which they can best fit their needs, taking into account their specific organisational, cultural and legal particularities. The Model Instrument also covers prevention of disputes and provides for an early alert mechanism.

The most significant features of the Model Instrument that are relevant to facilitating the effective use of investment mediation are:

- (i) *Establishment of a responsible body to coordinate.* International investment disputes are usually complex and rarely involve a single public entity, so proper preparation and internal coordination are crucial to managing these disputes effectively;
- (ii) *Clear and express legal basis for negotiation and mediation* with foreign investors. This should include the authority to settle as well as identify the relevant mechanisms for addressing the related financial issues;
- (iii) *Early, independent assessment of the dispute* to ascertain the most effective course of action, including mediation;
- (iv) *Dealing with the tension between confidentiality and transparency* requirements. Investment disputes and their resolution are a matter of public interest and

attract public, political and media interest, so an early strategic communications plan is essential; and

(v) *An organised, centralised and consistent online database* of previous problems, conflicts and disputes, together with the reaction to them and sorting which solutions worked.

On 23 December 2018, the Energy Charter Conference recommended the Model Instrument to its members, considering that it will assist States in enhancing their management of investment disputes. The Energy Charter Secretariat already provides technical assistance and capacity-building for governments willing to implement their legal framework for managing investment disputes. During 2019, the Secretariat also conducted additional consultations with industry to draw up a similar instrument to manage investment disputes. While it is becoming increasingly more frequent for big companies to have alternative dispute resolution (ADR) policies for commercial disputes, these typically fail to address the particular characteristics of an investment dispute.

(b) *Updating the applicable rules for investment mediation:* On 28 February 2020, ICSID released its latest working paper with proposed amendments to its procedural rules for resolving international investment disputes.³ It contains a proposal for a first-ever ICSID institutional rules for investor-State mediation. Similarly, UNCITRAL is in the process of updating its rules on conciliation or mediation and its notes on organising mediation proceedings.

³ International Centre for Settlement of Investment Disputes, *Proposal for Amendment of the ICSID Rules – Working Paper #4*, 1 (February 2020). Available at <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>

(c) *Training investment mediators*: In 2017, the Secretariat co-organised in Washington, D.C. the first training for investment mediators together with ICSID, IMI and CEDR. It was followed by training sessions in 2018 and 2019 in Paris and Hong Kong, as well as the first virtual edition in 2020. The main objective of the training was to build the capacity of prospective investment mediators, counsel and government officials.

(d) *Enforcement*: In 2016, when endorsing the Guide on Investment Mediation, the Energy Charter Conference had already welcomed the willingness of the contracting parties to facilitate effective enforcement in their area of settlement agreements with foreign investors in accordance with applicable law and the relevant domestic procedures. The United Nations Singapore Convention on International Settlement Agreements Resulting from Mediation entered into force in September 2020, with 47 signatories and six contracting parties. The Convention will facilitate enforcement of settlement agreements entered into with a State party, unless the State has entered a reservation under Article 8.a excluding the application of the Convention to settlement agreements concluded by that State or any of its governmental agencies (or person acting on behalf of a governmental agency). Currently, two contracting parties have notified such a reservation.⁴

⁴ 'Status: United Nations Convention on International Settlement Agreements Resulting from Mediation', *UNCITRAL*. Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

Panellist



Charlie Garnjana-Goonchorn

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Dr Charlie Garnjana-Goonchorn joined the Ministry of Foreign Affairs in 2007. He started his career working at the Treaty Division overseeing various aspects of Thailand's treaty making process. While serving at the Permanent Mission of Thailand to the United Nations in Geneva, he was in charge of extensive areas of work, including those within the purview of the World Health Organization and the United Nations Conference on Trade and Development. Since returning to Thailand in 2017, he has played a key role in several international disputes involving the Royal Thai Government, in addition to providing legal advice related to international trade, investment treaties, dispute settlement mechanisms and arbitration. Dr Garnjana-Goonchorn received his LL.B. and LL.M. from the London School of Economics and Political Science and Ph.D. from the University College London.

Provision of Mediation Services by an Advisory Centre on International Investment Law

At the outset, let me highlight several general points. The perspective from which I come from is a government perspective. In particular, an internal counsel, i.e. an internal legal advisor's perspective of a government; thus, it will be very different from that of an external counsel, academia and other people in general.

Thailand supports the establishment of an Advisory Centre strongly, partly due to our experience with the Advisory Centre on WTO Law (ACWL) from the World Trade Organisation (WTO) context. We have found their work to be very good and at a very low cost. It has helped us a lot, actually, to understand WTO law and to help us in the cases involving WTO law. We have indicated this in many of our papers. Obviously, we understand that the concept of establishing a Centre is easier said than done. There are many things that need to be ironed out and details which need to be discussed.

In this context, in addition to the obvious work of the Advisory Centre – I will call it an Advisory Centre on International Investment Law (ACIIL), regarding litigation, I would like to explore today the topic of mediation. Several good points were already made by other panellists, in particular on the importance of mediation in the investor-State dispute settlement (ISDS) context. It is also great to see the developments on mediation being done by the International Centre for Settlement of Investment Disputes (ICSID) and the Energy Charter.

I would like to point out that the impediments to the use of mediation depend a lot on the State and the legal culture of that State, which I will outline in just a minute. Another point which I would like to make is that mediation is not just good on its own account – mediation is also good at helping the arbitration process. So, in Thailand, we have very much benefited from the Med-Arb-Med and the Arb-Med-Arb process. Mediation as a tool to help arbitration is also very important.

That's an overview of my talk today, so I will outline the impediments to the greater use of mediation in ISDS, the possible role of the Advisory Centre in advancing mediation, and the potential limitations of the Centre and the way forward. This is key, I think, to the success of mediation. Why hasn't mediation been more popular? The first point is that there is very much a lack of familiarity and know-how with regards to mediation. Why? Because in a State, there are many agencies involved. This was highlighted before, but I would like to highlight it a bit more. For example, at the Ministry of Foreign Affairs in Thailand, other than international law experts, there are domestic law experts, line agencies, engineers as well as people involved in a particular case which legal experts have very limited knowledge of mediation.

You see litigation in the movies but you don't see mediation in the movies. It is something that they are not used to. Once you mention the concept of mediation at the committee table or in an internal meeting, people will think, 'What's that? What does that involve? What's going on?' That's certainly the case of a lack of familiarity. This is the case in many States – the legal mechanism for States is especially geared towards litigation. It is not geared towards mediation.

For example, the typical public prosecutor will not be involved in mediation, at least in my experience, on a regular basis. They are geared to carry out aggressive litigation. That's their job. When you mention something that they are not familiar with, then it's only natural that it's not taken up. The second point which I would like to highlight is a third party settlement versus an agreed settlement. The point is this: arbitration is a third party form of settlement; so, it's clean. In addition to the point that was made earlier, it is that you can also blame a third party for the outcome. It is also much cleaner than mediation – clean in the sense that in mediation, a lot of internal mechanisms need to be involved, right? And it's a lot of going backwards and forwards in contrast to the litigation process, which is pretty much a one-way street or a one-way and then a return. It depends on how many submissions you have, I suppose, but mediation is very detailed and it requires a lot of minor handling for the agencies involved. I don't think a lot of people like that. And then there's

the agreed settlement option. The agreed settlement option involves a lot of tiny details.

The next point is the fear of criticism. A lot of people who don't work for the government often think that the government is a single unit measured in terms of timelines. So, what a previous government did in the past, the incumbent government supposedly agrees with it or takes responsibility for it. In countries with political climates which are not stable, this is certainly not the case. So, the person or people who issued the measure in dispute in many circumstances is or are not the same person or people now doing the litigation – or at least at the political level. So that's a problem that we have to deal with.

Also, if you strike a deal with the claimants, how can you answer questions on subsequent allegations of corruption? Was there under-the-table dealing between government officials and the investor? If you're the typical government official, it is perhaps easier to be risk-averse, to say, 'Oh, I'm not going to take this option and just let the arbitration decide. Why risk it?'

The last point, which I would like to outline, and which I don't think was mentioned today, is that with regard to mediation there is no guaranteed outcome. For arbitration, there is. You either lose or win. But for mediation, it might be just money, time and effort wasted. If you say to your superior or boss, 'I'd like to suggest a mediation, sir'. And they ask you, 'Can you guarantee a positive outcome?' The good lawyer will certainly say, 'No, I cannot'. There is a potential of a better outcome, but there is no potential of a guaranteed outcome. Then they will ask you, 'How much will it cost you in legal fees?' Then you say, 'Maybe a couple of million'. And the sensible man would probably say, 'Well, maybe it's better to save that money and put that in arbitration'. That's one line of thinking which I think is faced by many internal counsel within the government.

Now, moving on to the Advisory Centre, it is important to highlight that there is a lot of work already done on this front. So, there's no point repeating work that's already been done. ICSID has

held training workshops and the Energy Charter has guidelines on mediation – they have done very good work and so is the International Bar Association’s Mediation Rules. We can also build on the ICSID rules that Madame Secretary mentioned earlier on at this Meeting, i.e. the 2020 Rules. All this very good work is being done in the area of mediation. But I think the fear of mediation for States, or the hesitancy, is still there.

So, how can the Advisory Centre help to address this issue? I’ve divided the role of the Advisory Centre into three categories. [Slide 5] The left column is the role that they can play before States decide to join the mediation. What can they do? The Advisory Centre has a very important role to play and this hasn’t been done before. It could be the first – let me call it – neutral body on this issue, because previously you had law firms, you had counsel, but they’re not seen to be neutral in the sense of an Advisory Centre, or at least not as neutral anyway because the arguments provided could be the usual arguments of lawyers wanting to charge more and advise.

Regarding the left column, what could an Advisory Centre do? The Centre could explain to government officials of all departments, and more importantly, the line agencies as to what exactly is mediation? What does it involve? And what are the advantages and disadvantages of mediation as compared to arbitration? I believe that if the advantages are highlighted enough for government officials, this would be the preferred route. Obviously, this has not so far been the case. For many States, arbitration is still their preferred route for the reasons that I’ve previously highlighted. And also, what are the aspects of the process that States should take into consideration, i.e. what are the internal mechanisms that need to be set up for mediation?

A lot of States don’t have internal mechanisms that are geared towards mediation. A lot of our decision-making processes are geared towards arbitration and general litigation, but not mediation. Also, highlighting the point that I’ve made earlier regarding a third party settlement versus an agreed settlement – obviously, the decision-making process needs to be different in order for it to enable officials to work most efficiently and without being blamed retroactively.

Now, the second column which I would like to highlight is the role of the Centre during the decision-making process. What the Centre can do is to obviously take the neutral stance again and it can provide an evaluation of the case. This could include whether a mediation is likely to be successful and work can be provided on the nitty-gritty of mediation, such as who is a good mediator at the very outset, when the States are trying to figure out whether the mediation process is for them or not.

The third role that the Advisory Centre can play is once the States have agreed to mediate. Now, there is a process which can fill the vacuum, which I mentioned earlier, about the know-how. The internal organisation of the State, how it should work, how mediation works, how we can present the material without prejudice, the concept of confidentiality which is dear to many States and transparency – and also finding the balance. I think a very important aspect is providing useful relevant information to a State on who is a good mediator to suit its particular interest in a given mediation.

These are the issues where an Advisory Centre can help States. But the Advisory Centre's help on mediation is not without its problems. What are the limitations? First of all, it's always the classic dilemma of cost versus scope. For the moment, as you probably all know, ACWL is not very big. And if the ACIL was to offer services to extend to mediation as well, what would be the cost and who is going to pay for it? Especially at the initial start-up stage.

Regarding the quality of service, mediation requires a different skill set from that of arbitration or litigation in general. You need experts on this, right? Can the staff of the Advisory Centre be trained in mediation? To what extent should resources be pulled away from what I assume to be the core competence of the Advisory Centre, which would be litigation, towards mediation? Now that's a question that needs to be addressed. Trust and reliability too need to be established and it will take some time. An Advisory Centre will work well if it enjoys the trust and the dependability from States. To what extent can that be done and for how long, this too needs to be addressed. That's another limitation of the Advisory Centre which needs to be worked on.

If the Advisory Centre is to expand its scope, as discussed in many fora, for other people, investors and developed countries, the question arises as to what extent there is a conflict of interest. What scope of work should the Advisory Centre have towards investors and towards the States? Those are my points. I haven't answered a lot of questions, I'm afraid. I've raised more questions which need to be addressed in the work of the Working Group, but I think they are valid questions in the context of the Advisory Centre.



UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting
The Use of
Mediation
in ISDS

**Provision of Mediation
Services by an Advisory Centre on
International Investment Law**

Dr Charlie Garnjana-Goonchorn
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Ministry of Foreign Affairs, Thailand

[Slide 1]

Overview

- Impediments to greater use of mediation in ISDS
- Role of an Advisory Centre on International Investment Law (ACIIL) in advancing mediation
- Potential limitations and way forward

[Slide 2]

1 | Why hasn't mediation been more popular?

From the perspective of government officials in the context of Investor-State disputes:




- Lack of familiarity and know-how
- Third party settlement vs agreed settlement
- Fear of criticism/blame or allegation of corruption
- No guaranteed outcome – risk of wasted time, money and effort



Hesitation to commit to the process/outcome

[Slide 3]

2 | Possible scope of services of an Advisory Centre: Existing Support





ICSID International Centre for Settlement of Investment Disputes
WORLD BANK GROUP

Services

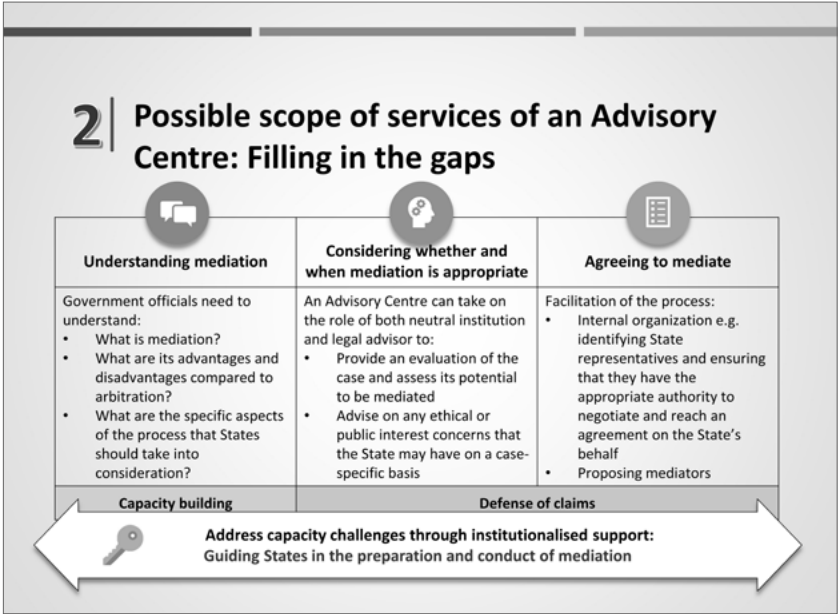
Overview Arbitration Mediation & Conciliation Fast Track Proceedings Appointments & Challenges Administrative Registry Hearing Facilities

Investor-State Mediation

As the world's leading institution devoted to international investment dispute settlement, ICSID supports investor-State mediation through the provision of services to parties, the development of rules of procedure for mediation, and the organization of events and training courses.



[Slide 4]



[Slide 5]

3 | Potential limitations of the Advisory Centre

- **Funding and scope of services**
 - Capacity building services potentially can be offered to wider scope of beneficiaries, but this will depend on funding
- **Quality of services**
 - Mediation requires different skills-set compared to arbitration even for counsel → expertise may be lacking in the beginning
 - Staff should include mediation expert
- **Trust and reliability**
 - Very important consideration for States
 - Any assistance mechanism should appear neutral and independent as well as demonstrating cultural competence
- **More issues to be considered if investors are included as beneficiaries of the Advisory Centre,** e.g. defining 'entitled investor', stakeholder conflicts of interest

[Slide 6]

Panellist



Dinay Reetoo

Acting Assistant Parliamentary Counsel

Attorney-General's Office, Mauritius

Dinay Reetoo (LL.B. Hons, Warwick, BVC Nottingham Law School and member of the Honourable Society of the Middle Temple) joined the Attorney-General's Office of Mauritius in 2004. He has served in different capacities and presently holds the post of Acting Assistant Parliamentary Counsel. Dinay's work is primarily focused on legislative drafting. He also provides legal advice to Government and statutory bodies. Dinay has a keen interest in international law and also holds a postgraduate diploma in Law of the Sea from the University of Wollongong, Australia. Dinay is deeply interested in international dispute settlement and has been involved in regional discussions, on behalf of Mauritius, in the field of international dispute settlement at the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) level. Dinay is the current co-chair of the Piracy Legal Forum of the Contact Group on Piracy off the Coast of Somalia. Since 2015, Dinay has been a member of the Law Reform Commission of Mauritius. Dinay has also served, since 2009, as a board member of the Medical Council of Mauritius. He is also the Chairperson of the Co-operative Tribunal. Dinay has recently been appointed as a member of the Information and Communication Technologies Authority in Mauritius.

Capacity Building and Training in Enhancing the Role of Mediation in ISDS

There's a lot of scope for capacity-building in enhancing the use of mediation in investor-State dispute settlement (ISDS) internationally. We can see that this could be useful in three main areas. That is, mediation can be an alternative to arbitration. It can also be used alongside arbitration. And we have to bear in mind that it can be used in comparison to arbitration, and that is the issue that has been alluded to throughout today. This is an area which has not gained international acceptance, and we've had expert views of Alejandro and Charlie in this regard and even earlier a distinguished panellist shared his experience on this issue.

What is the state of play right now in relation to mediation? I think we are living in extremely interesting times. One of the articles that I came across while preparing for this presentation is one by Charalampos Giannakopoulos from the Centre of International Law, which is titled 'Investor State Arbitration Meets Mediation: The View from UNCITRAL' dated 1 October 2020. We learn from this article that we have a rising interest globally for alternative dispute resolution (ADR) in investor-State disputes. Indicative examples from investment treaty-making confirm this interest, including the United States-Mexico-Canada Arrangement (USMCA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the European Union's (EU's) investment agreements with Canada, Singapore and Vietnam, the China-Hong Kong Closer Economic Partnership Arrangement (CEPA) and also the Energy Charter Conference, each of which adopted a guide on investment mediation to facilitate the parties in deciding whether or not to offer mediation and to inform them how to prepare for it.

My next point relates to the changing landscape of mediation laws, and we have heard before that mediation as a tool in investor-State dispute settlement (ISDS) has changed and different rules have been developed by the International Chamber of Commerce (ICC), the

International Bar Association (IBA), the Energy Charter Conference, the International Centre for Settlement of Investment Disputes (ICSID), and the United Nations Commission on International Trade Law (UNCITRAL). It is my point that without formal training and capacity-building of stakeholders in that area, it is unlikely that States would be willing to resort to mediation as a means of settling investor-State disputes. It is only with training of government officials and those who negotiate treaties that mediation is likely to emerge as a real alternative to arbitration or as a method of dispute resolution, which can seamlessly be used along-side arbitration to resolve investor-State disputes.

We have bilateral investment treaties (BITs) which have mediation clauses, and the role of training of government officials in mediation is crucial. Government officials can be used to renegotiate some of the clauses of these BITs. What we can do in terms of encouraging State officials to negotiate these treaties would be to put forward some of the advantages of mediation which include, but are not limited to, foremost, the cost effectiveness and time effectiveness of mediation as a means of dispute resolution, which is also a tool for preventing disputes from emerging or escalating.

Here, probably we have a cultural issue as well to deal with. States from the Eastern part of the world, such as Hong Kong, China, India and also some African States, are more likely to prefer mediation than arbitration. Certainly, in the event a formal dispute is triggered, mediation may assist parties to narrow down issues because if we use mediation in that way, it is probable that we can cut down the costs of arbitration so long as arbitration comes after we have narrowed down the issues via mediation. Another advantage of mediation is that it provides flexibility and autonomy to the disputing parties. But without capacity-building, without education in such areas, it is difficult to envisage States and State officials, as Charlie alluded to, going into this because there would be mistrust, there would be concerns about corruption, and there would be concerns about capacity and accountability. I will come back to these later.

I came across a very interesting citation in a case which pertains to arbitration in 2012 and that is the Achema and the Slovak Republic [*Achema B.V. (formerly Eureko B.V) v The Slovak Republic*], Permanent Court of Arbitration (PCA) Repository No. 2008-13, Final Award 60 (7 December 2012). I thought I'd share that with you, since it is not customary in arbitration to refer to the need for mediation or the usefulness of mediation. This is what we can read in the award and this is what the arbitrators had to say, 'a settlement on this case would be a good thing, in that the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case.... [S]hould the Parties desire to seek out somebody who might act as a mediator or conciliator, the Secretary-General of the PCA might be in a position to assist'.

I felt that this case is quite significant because we do not have bigger institutions than the PCA in terms of investment arbitration. And coming from the PCA, these are strong words indeed and this shows the kind of dynamic situation in which we are right now. For a number of years, mediation has not been taken seriously. I think now there is a move to take it seriously. It's just a question of degree – as in what kind of influence and role it will have in investor-State disputes. We are still in the early days, in my view.

Now I will turn to the context in which we can use mediation. These include:

- Changes in investment incentive measures;
- Termination or interference of a contract by the State;
- Revocation of licences or permits; and
- Unexpected tariffs or taxation.

Investor-State mediation also involves international investment law issues, such as:

- Expropriation;
- Alleged breach of the 'fair and equitable' provision in the contract between the investor and the State; and
- Interpretation of investment treaties.

I think that both arbitration and mediation are equally applicable as a means of dispute resolution.

One interesting development which I think might be a watershed is the Singapore Convention. The Singapore Convention might actually trigger those practices in my own country. Mauritius was one of the 46 signatories to the Singapore Convention, and this Convention would apply to settlements in an ISDS context.

However, I could foresee one difficulty there and that relates to the reservations that States could make. The negotiators granted States the right to make a reservation to the effect that a State ‘shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration’. If that reservation becomes the rule, I don’t think we have much of a future for the Convention. So, a lot of work needs to be done in this regard.

So, we really need to sell the usefulness of the Singapore Convention and to encourage States to use it just as much as the New York Convention is being used. Because at the end of the day, we can have mediated agreements but if they cannot be enforced, I don’t think we are getting anywhere. In terms of the use of the Singapore Convention with regard to capacity-building, I think we are quite lucky that now UNCITRAL has started to work on this front, especially in the context of the ISDS reform process undertaken within UNCITRAL. In my view, it has the capacity to foster a culture for the creation of rules or for capacity-building for the Advisory Centre to just change how mediation is perceived among States.

That can significantly enhance compliance with settlement agreements and help avoid the expression of reservations to the Singapore Convention – although that would require a lot of marketing, a lot of hard work, a lot of capacity-building. This is not only at the level of State officials, we have different political realities in all countries to contend with. You can convince governments but you also have to convince the opposition parties, because once you have a mediated

agreement, that is going to be challenged nationally by the local opposition. And we need to get their buy-in as well.

Mediation as a means of dispute resolution must be mainstreamed amongst government officials. Right now, it is something that we talk about informally but not many people are aware about it. We need to make it internationally acceptable as a means of dispute settlement in the ISDS context. If mediation is to be used as a means of dispute resolution that is effective, it is crucial to ensure that those who use mediation on behalf of the State are properly trained, and that they use mediation effectively and, above all, are accountable.

In this context, it is very useful that the International Bar Association (IBA) Rules for Investor-State Mediation, Appendix B (of the IBA Rules) sets out the qualifications required for a mediator and that shows that this is slightly different from arbitration. You need experience in dealing with governments, you need experience as a mediator, you need mediation training, including accreditation by an internationally recognised organisation. You need experience in some forms of dispute resolution. You also need experience to deal with parties on the rationalities of the dispute which are at stake. And that requires a knowledge of different cultures too.

When we talk about capacity-building, we need to remove barriers to the adoption of mediation as a means of resolving ISDS disputes. Many countries may not have legislative impediments to implement mediation nationally but they will still be reluctant to go for mediation for at least the following reasons. They will need to prove to their citizens that they are acting in the best interests of the country. The fact that it is easier for them to pay up money because there is a binding decision against them, against the State that is, instead of giving money out willingly to pursue mediation – this was alluded to by Charlie earlier on.

Confidentiality is also an important issue in the mediation process. Sometimes, parties in arbitration would agree to make the decision public. In mediation, the trend is to keep it confidential between the parties. If we have to make mediation mainstream among

States, we have to ensure that there's accountability at the parliamentary level, i.e. at the domestic State level in relation to disputes which have been settled. And for this we have to look beyond training and capacity-building.

And then if we train and we do capacity-building, that will help to institutionalise mediation and it will introduce a degree of internal monitoring and transparency in a process that normally is conducted under complete confidentiality. The advantage of it could be helping facilitate settlements by reducing the chances of dilatory tactics by third parties, and alleviate the fear of allegations of corruption or fears of negative publicity.

Furthermore, it is my view that integrating mediation through an educative process should be projected as an integral part of ISDS reform. This would make it easier for States to accept responsibility for a proposed settlement rather than regarding such a move as an unacceptable concession. For this to happen in practice, we need to train State officials, we also need to train members of the opposition parties, and we need to train non-governmental organisations (NGOs) who might have concerns about the way that a State settles disputes.

I will move to the next point, which is internal mapping of international agreements and mediation. And that exercise interestingly mapped 2,577 international investment agreements (IIAs) and that shows that not fewer than 627 treaties contain a provision for voluntary ADR – which would refer to consensual mediation. There was no treaty containing a provision for compulsory ADR while 1,813 treaties contain no provision, and two treaties were inconclusive.

There's a lot of work here in terms of treaty renegotiation which can be done. Then again, that is a big debate. How far do countries want to push towards renegotiating their BITs? How far are investors willing to engage in that process? That is quite complicated, in my view. In relation to the role of training and capacity-building to promote investor-State mediation in practice, it is important to highlight that training can assist in overcoming the barriers that government officials

and investors face in using mediation as a means of settlement of ISDS disputes – given that investors are the other important side of the coin. I mean, we might convince government officials to use mediation to resolve ISDS disputes but if investors do not trust that mechanism, we are not getting anywhere.

We can use training to educate government officials on the use of mediation alongside arbitration in the context of ISDS disputes. We can train government officials to ensure that they can develop their treaty clauses based on mediation and mediation protocols. We can train government officials to ensure that BITs are renegotiated so that these treaties can be used to allow for mediation.

A quick quote from Sir Anthony Clarke. He pushed for civil justice reform but I think his words are also appropriate in the context of promoting mediation for investor-State disputes:

It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not.

This applies very much to mediation. We should be doing more to encourage States and litigants to use mediation to settle their international disputes on investment.

How difficult is the task of the mediator? Let's turn to Irena Sargsyan who wrote the following in *International Mediation in Theory and Practice: Lessons of Nagorno-Karabakh*:

In commenting on the role of mediators, American practitioner Arthur Meyer noted that:

The task of the mediator is not an easy one. The sea that he sails is only roughly charted, and its changing contours are not clearly discernible. He has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing at most of few guiding stars, and depending on his personal powers of divination.

Mediation is a part of a more complicated process that involves numerous variables, and indeed becomes a variable itself in determining the final outcome of the more extensive process of conflict resolution. Consequently, it is very difficult to evaluate mediation in terms of success and failure. There is little consensus in the theory of mediation on what constitutes successful mediation. However, certain criteria to facilitate evaluation are suggested by scholars and practitioners who have attempted to subject mediation to systematic analysis.

This neatly sums up where we are at the moment. While we have Anna here who is an authority in the field of international arbitration, I would struggle to list out the names of the top international practitioners in mediation. I can think of Alejandro Carballo-Leyda, James South and Frauke Nitschke. This is the young generation. I mean, we need time to see the proliferation and distribution of academic articles on the topic of mediation, we need time to create a practice of mediation of ISDS disputes, we need time to create consistent rules which apply to mediation in the ISDS context. We need the general acceptance of this means of dispute resolution and that, in itself, would require a change in mindset from governments, a change in mindset from investors, and there is a lot of education and capacity-building that has to be done before we reach that point.

In conclusion, the use of mediation in ISDS requires a paradigm shift. It is up to States and investors to decide how useful and cost-effective mediation is. There is a need to develop and publish guidelines on the use of mediation in the ISDS context. There is a paucity of academic literature on the use of ISDS in the ICSID context. And more academic literature would certainly contribute to making mediation more acceptable to States, because when politicians have to defend it, it would be useful for them to refer to renowned academics and practitioners – only then can they use mediation as a means that is seen as internationally accepted to settle disputes.

We also have to realise that beyond the usefulness and cost-effectiveness of mediation, it is important to ensure that there are transparent rules for mediation, as many countries as possible accede to the Singapore Convention, and as many countries as possible do not express reservations while acceding. Without training and capacity-building in the use of mediation in the context of these disputes, its use is likely to remain limited on its own. It can be used as an adjunct to arbitration right now. Maybe I'm not so optimistic about it right now. I think we have started the work but much more work is needed before we can mainstream mediation in the context of ISDS.

And, finally, I hasten to add that my views, that is the views expressed in this presentation do not bind my Attorney-General's Office or the Government of Mauritius. Thank you very much for your attention.



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The Use of
Mediation
in ISDS


**Capacity Building and
Training in Enhancing the
Role of Mediation in ISDS**

Mr Dinay Reetoo
Acting Assistant Parliamentary Counsel
Attorney-General's Office, Mauritius

[Slide 1]

**Capacity Building and Training in
Enhancing the Role of Mediation in ISDS**

- Mediation can be an alternative to arbitration.
- Mediation can be used alongside arbitration.
- Mediation, as compared to arbitration, is an area which has not gained international acceptance.



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Virtual Pre-Inter-Sessional Meeting
The Use of
Mediation
in ISDS

[Slide 2]

Charalampos Giannakopoulos (Centre for International Law)

'Investor-State Arbitration Meets Mediation: The view from UNCITRAL'

1 October 2020

'There exists a rising interest globally for alternative forms of dispute resolution (ADR) for investor-state disputes. Indicative examples from investment treaty-making confirm this, including the USMCA, CPTPP, the EU's investment agreements with Canada, Singapore, Vietnam, ACIA and the China-Hong Kong CEPA (which altogether eschews investor-state arbitration in favour of, among others, mediation).

Further, in 2016, the Energy Charter Conference adopted a Guide on Investment Mediation to facilitate the ECT parties in deciding whether to opt for mediation and to inform them about how to prepare for it.'



[Slide 3]

Changing Landscape on Mediation Rules

- The applicability of mediation as a tool in ISDS disputes has changed as rules on mediation have been developed by
 - (a) The International Chamber of Commerce
 - (b) The International Bar Association
 - (c) The Energy Charter conference
 - (d) ICSID
 - (e) UNCITRAL
- Without formal training and capacity building of stakeholders by experts in the field, it is unlikely that parties and States will be willing to resort to mediation as a means of settling dispute.
 - It is only with training of Government officials and those who negotiate treaties that mediation is likely to emerge as a real alternative to arbitration or as a method of dispute resolution which can seamlessly be used alongside arbitration to resolve investor/State disputes.



[Slide 4]

Bilateral Investment Treaties and Mediation Clauses

Capacity building in mediation may contribute to highlight the following advantages of mediation as a means of addressing Investor/State disputes:

- Cost effectiveness and time-effective means of dispute resolution
- Tool for preventing disputes from emerging or escalating to formal investment disputes
- In the event a formal investment dispute is triggered, mediation may assist the parties to narrow down the key issues in disputes
- Flexibility and autonomy to disputing parties



[Slide 5]

Mediation creeping into arbitration disputes? Training in mediation may assist parties in seeing beyond arbitration as a means of dispute resolution in the ISDS context

In an arbitration between **Achema and the Slovak Republic [Achema B.V. (formerly Eureko B.V) v The Slovak Republic, PCA Repository No 2008-13, Final Award 60 (7 Dec 2012)]**, the tribunal made an uncanny remark to the parties at the close of the hearing on the merits:

‘[A] settlement on this case would be a good thing, in that the aims approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case... should the Parties desire to seek out somebody who might act as a mediator or reconciliator, the Secretary-General of the PCA might be in a position to assist.’

Source: Pepperdine Dispute Resolution Law Journal, Volume 20 issue 1, Article 4, page 6.



[Slide 6]

The nature of ISDS disputes to which mediation may apply and the need for capacity building and training to highlight the potential areas where mediation may be useful

Investor-State mediation often includes but is not limited to the following public law dimensions:

- Changes in investment incentive measures
- Termination or interference of a contract by the State
- Revocation of licences or permits
- Unexpected tariffs or taxation

Investor-State mediation also involves international investment law issues such as:

- Expropriation
- Alleged breach of the 'fair and equitable' provision in the contract between the investor and the state
- Interpretation of investment treaties



[Slide 7]

Singapore Convention

- The Singapore Convention may potentially be a watershed moment in mainstreaming of mediation. It is crucial for the success of the Singapore Convention that as many States as possible sign up to it without reservations. Only training and capacity building in relation to the potential benefits of the Singapore Convention will make it more popular among States.
- Enforceability of agreements which are subject to mediation.
- UNCITRAL amended Model Law on Mediation will also greatly assist in making mediation more popular.
- These developments in the field of mediation require capacity building and training for them to gain general acceptance amongst States and investors.



[Slide 8]

Singapore Convention and State Practice and Training

- The 2018 Singapore Convention on International Settlement Agreements (already alluded to above) applies to settlements in an ISDS context.
- However, the negotiators granted States the right to make a reservation to the effect that a State 'shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.'



[Slide 9]

Singapore Convention

- Enables mediated settlement agreements to be enforced and invoked internationally, so long as the requirements of the Convention are met.
- It is the equivalent of the New York Convention on arbitral awards.
- It responds to one of the key obstacles which may have been raised against the use of mediation as a means of dispute resolution in the context of ISDS.



[Slide 10]

Singapore Convention

- That perceived obstacle is that the outcome of mediation cannot be enforced internationally in the same way as an arbitral award can.
- Only training and capacity building in the field of mediation will contribute to shed light on the potential advantages of mediation and demystify it as an effective means of dispute resolution.



[Slide 11]

Singapore Convention and Training

- The ISDS reform process undertaken within UNCITRAL has the capacity of fostering a culture through the creation of rules or through the capacity building of the Advisory Centre to change perceptions of States and significantly increase compliance with settlement agreements and by avoiding expressing any reservations to the Singapore Convention.



[Slide 12]

Training of State Officials in Mediation

Mediation, as a means of dispute resolution, must be mainstreamed among Government officials in order to make it internationally acceptable as a means of dispute resolution in the ISDS context.

If mediation is to be used as an effective means of dispute resolution it is crucial to ensure that those who use mediation on behalf of the State are properly trained, use mediation effectively and, above all, are accountable.



[Slide 13]

Training in Mediation : The IBA Rules for Investor-State Mediation (Appendix B) (Qualification as Mediator)

- Experience in dealing with Governments
- Experience as mediator
- Mediation training, including any accreditation as a mediator by an internationally recognized organization
- Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes



[Slide 14]

Training in Mediation : The IBA Rules for Investor-State Mediation (Appendix B) (Qualification as Mediator)

- Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue
- Experience in dealing with governments
- Experience as mediator in cross-cultural disputes
- Experience in dealing with parties of the nationalities at issue
- Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating

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Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

[Slide 15]

Capacity Building: Removing Barriers to Adoption of Mediation as a means of Resolving ISDS Disputes

Countries may not have any legislative impediments, but still will be reluctant to go to mediation for at least the following reasons:

- (a) The need to prove to the citizens that they are acting in the best interests of the country
- (b) The fact that it is easier for them to pay money out because there is a binding decision against the State instead of them giving money out willingly after an obscure process
- (c) Heightened confidentiality of the mediation process

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Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

[Slide 16]

Capacity Building: Removing Barriers to Adoption of Mediation as a means of Resolving ISDS Disputes

Way forward

- If mediation is to be used by States as a means of settling ISDS disputes, there needs to be accountability at Parliamentary/State level in relation to disputes which have been settled. Training and capacity building in mediation are crucial for lawmakers to accept the use of mediation as a means of resolving ISDS disputes.



[Slide 17]

Training and Capacity Building as a Condition Precedent to Institutionalisation of Mediation as a means of Dispute Resolution

- Institutionalising mediation in a reformed ISDS regime could have certain advantages in terms of facilitating settlements.
- A 2018 survey indicates that commonly reported obstacles to settlements from the state's standpoint principally include a general unwillingness to assume responsibility for voluntary settlements, the politicisation of disputes, negative publicity, and the fear by government officials of being subjected to allegations for corruption or prosecution.



[Slide 18]

Training and Capacity Building as a Condition Precedent to Institutionalisation of Mediation as a means of Dispute Resolution

- Institutionalisation would introduce a degree of internal monitoring and transparency in a process that is often conducted under complete confidentiality. This could help facilitate settlements by reducing the chances of dilatory tactics by a bad faith party and by alleviating the fear for allegations of corruption and for negative publicity.
- Furthermore, integrating mediation throughout the adjudicative process may serve to project it as an integral part of reformed ISDS. This may make it easier for States to accept responsibility for a proposed settlement rather than regarding such a move as an unacceptable concession. For this to happen in practice, the importance of capacity building among stakeholders cannot be overstated.



[Slide 19]

Training and Use of Mediation as a ‘Cooling Off Mechanism’

- The UNCTAD Paper titled ‘Investor-State Disputes: Prevention and Alternatives to Arbitration’ explains that IIAs usually specify a ‘cooling-off period’ to encourage negotiation before parties can initiate formal arbitration procedures.
- Conciliation is also regularly mentioned as an option, often next to arbitration. Brief reference to non-binding third party procedures is hence common in IIAs. It contains no more specific data.
- Cooling off periods can thus be a vessel which may contain mediation or conciliation or cooling off periods can stand next those mechanisms. With such papers, capacity building and training though will be enhanced and may contribute to make mediation popular as a means of settling ISDS disputes.



[Slide 20]

UNCTAD Mapping of International Agreements and Mediation

An UNCTAD database of 2577 mapped International Investment Agreements search shows:

- 627 treaties containing a provision for Voluntary ADR (conciliation / mediation)
- No treaty containing a provision for Compulsory ADR (conciliation / mediation)
- 1813 treaties containing no provision
- 2 treaties inconclusive

Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16, 5 March 2020.



[Slide 21]

Role of Training in Promotion of Investor/State Mediation Practice

Overcoming barrier on the part of Government officials and investors in using mediation as a means of settlement of ISDS disputes

- Use of training to educate Government officials on the use of mediation alongside arbitration in the context of ISDS disputes
- Development of model treaty clauses on mediation and mediation protocols
- Ensuring re-negotiation of bilateral investment treaties to ensure that these treaties allow for mediation



[Slide 22]

Pushing for Mediation in ISDS context requires Training and Capacity Building

Below is an excerpt from a speech by Sir Anthony Clarke. He pushed for civil justice reform, but I think his words are also appropriate in the context of promoting mediation for Investor/State disputes:

‘It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it.

Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not. Perhaps it is now time to take the horse to the trough. We should be doing more to encourage litigants to use mediation to settle their ISD. The more we do, the more likely they are to settle their disputes that way.’

UNCITRAL
Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

Source: Mediation of Investor-State Disputes: A Treaty Survey, Journal of Dispute Resolution. Volume 2020, Issue 2, Article 8. (Kun Fan)

[Slide 23]

Capacity Building as a Condition Precedent to Demystify the use of Mediation as a means of Resolving ISDS Disputes

In commenting on the role of mediators, American practitioner Arthur Meyer noted that:

- The task of the mediator is not an easy one. The sea that he sails is only roughly charted, and its changing contours are not clearly discernible. He has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing at most of few guiding stars, and depending on his personal powers of divination.
- Mediation is a part of a more complicated process that involves numerous variables, and indeed becomes a variable itself in determining the final outcome of the more extensive process of conflict resolution. Consequently, it is very difficult to evaluate mediation in terms of success and failure. There is little consensus in the theory of mediation on what constitutes successful mediation. However, certain criteria to facilitate evaluation are suggested by scholars and practitioners who have attempted to subject mediation to systematic analysis.

UNCITRAL
Working Group III
Virtual Pre-Intercessional Meeting
The Use of
Mediation
in ISDS

[Slide 24]

Conclusion

- Use of mediation in ISDS disputes requires a paradigm shift. It is up to States and investors to decide how useful and cost-effective mediation is to them.
- There is a need to develop and publish guidelines on the use of mediation in the ISDS context.
- Academic articles on the use of mediation in the ISDS context would also contribute to raise awareness about the potential availability of mediation amongst States and investors.
- Beyond the usefulness and cost effectiveness of mediation is important to ensure that there are transparent rules for mediation and that as many countries as possible are party to the Singapore Convention. The key to getting mediation internationally acceptable is the fact that agreements must be enforceable.
- Without training and capacity building the use of mediation in the context of ISDS disputes is likely to remain limited.



***** The views expressed in this presentation are mine only and do not bind the Attorney-General's Office of Mauritius or the Republic of Mauritius.**

[Slide 25]

CLOSING REMARKS

Closing Remarks



Teresa Cheng GBS SC JP

Secretary for Justice

Hong Kong Special Administrative Region of
the People's Republic of China

Ms Teresa Cheng, SC, 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, Ms Cheng was a Senior Counsel in private practice, a chartered engineer, a chartered arbitrator, and an accredited mediator. She was frequently engaged as arbitrator or counsel in complex international commercial or investment disputes. Ms Cheng was one of the founders and Chairman of the Asian Academy of International Law. Apart from being a Past Chairperson of the Hong Kong International Arbitration Centre, Ms Cheng is also a Past Vice President of the International Council of Commercial Arbitration and a Past Vice President of the ICC International Court of Arbitration. In 2008, she became the first Asian woman elected through a global election as President of the Chartered Institute of Arbitrators. She served as Deputy Judge/Recorder in the Court of First Instance of the High Court of Hong Kong from 2011 to 2017. She 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. Ms Cheng is a Fellow of King's College in London, and was the Course Director of the International Arbitration and Dispute Settlement Course at the Law School of Tsinghua University in Beijing.

The Hong Kong Special Administrative Region (SAR) is most honoured to have the opportunity to co-organise with the United Nations Commission on International Trade Law (UNCITRAL) and the Asian Academy of International Law (the Academy) today's pre-intersessional meeting for Working Group III to contribute to the discussion on the use of mediation in investor-State dispute settlement (ISDS). This virtual pre-intersessional meeting, a first of its kind, is our featured event of the year 2020, following our flagship Hong Kong Legal Week and the annual Mediation Lecture we had last week.

We would like to especially thank the Central People's Government and UNCITRAL for supporting this pre-intersessional meeting. This is in fact the first time for the Hong Kong SAR to organise an event for a Working Group of UNCITRAL. This indeed reflects our innovative aspect of the 'One Country, Two Systems' policy and the Basic Law under which representatives of the Hong Kong SAR participate in the work of UNCITRAL as members of the Chinese delegation.

As I have previously discussed in the Chartered Institute of Arbitrators' Alexander Lecture, entitled 'The Search for Order within Chaos in the Evolution of ISDS', the development of mediation is one of the two strands in the '*double helix*' approach for the evolution of ISDS.

We are pleased to see that the greater use of mediation is a reform option that has attracted much interest and support among delegations of Working Group III, especially in its 39th session recently held in October.

Different interesting ideas and suggestions have been expressed by various national and observer delegations in developing investment mediation. The task at hand is how to ride on the momentum and synthesise these ideas and suggestions into a set of comprehensive and practical ISDS reform solutions on mediation.

Much has been said on the benefits of investment mediation. Evidently, it provides a flexible and voluntary dispute resolution mechanism that allows foreign investors and host jurisdictions to resolve

their investment disputes through creative and forward-looking settlement arrangements and preserve their long-term relationships.

Various structural and policy impediments to the greater use of mediation in ISDS nevertheless exist. A number of studies and the experience of the speakers suggest that, as compared with investors, governments may face some unique challenges such as a lack of familiarity with mediation and the absence of facilitative frameworks at the domestic and treaty levels for the use of mediation.

In Panel Session I, we have heard the experience of a broad spectrum of actors in the area of ISDS, ranging from international organisations, government officials, practitioners to academics, in seeking to overcome challenges to the use of mediation in ISDS. The range of options is diverse, which may even include an opt-in style multilateral instrument.

At a bilateral level, one must not forget the possibility of a pre-dispute and post-dispute agreement to mediate. In the case of the Investment Agreement under the Closer Economic Partnership Arrangement (CEPA) between the Mainland and the Hong Kong SAR, a pre-dispute mediation clause provides for dispute resolution. Given that mediation is entirely consensual, with enough knowledge, parties may still be able to opt-in to use mediation even after the dispute arises.

Panel Sessions II and III can perhaps be best viewed together.

On the process design of a multi-tiered or hybrid dispute resolution mechanism, as explored in the Panel Sessions, there is no limit to creativity.

Mediation can be used alone or combined with arbitration to form a multi-tiered dispute resolution process. One example is the 'Mediation First, Arbitration Next' model that the Hong Kong SAR adopts in its Financial Dispute Resolution Centre and the recent COVID-19 Online Dispute Resolution Scheme of eBRAM.

As discussed in the presentation by Ronald – Mr Ronald Sum, Head of Dispute Resolution (Asia), Addleshaw Goddard LLP – the CEPA Investment Mediation Rules may be a suitable model for the Working Group to look at in developing a set of protocol that can be incorporated into international investment agreements.

The idea of a permanent investment court to foster mediation is also a possibility. The permanent investment court would entail a radical revolution of the ISDS system and the desirability of such revolution, as opposed to a natural evolution of ISDS, is probably a matter to be better discussed and carefully examined on another day. In any event, today's discussion illustrates that mediation is a mechanism that works well in any setting, whether in a multi-tiered or hybrid dispute resolution mechanism.

There is a lot of food for thought as there is in fact an infinite number of ways to tailor-make a process using mediation as an essential ingredient. I tend to think that catering for a number of set rules of the multiple iterations may not be all that practical and perhaps a mediation protocol or a protocol for a multi-tiered or hybrid process may be the way to go.

Ideally, a mediation protocol should enshrine values of rule of law and set out a basic and highly customisable framework that can be adapted to the disputing parties' preferences and the nature of the particular disputes. Such mediation protocol should also place strong emphasis on cost efficiency and adhere to the principle of voluntary participation. In the context of investment mediation, the protocol will also need to strike the right balance between transparency and confidentiality.

In Panel Session IV, a summary on the way forward for mediation as an ISDS reform option seems to be focused on three main directions, which are 'getting the frameworks right,' 'overcoming psychological barriers through education' and 'unlocking mediation's synergy with other ISDS reform options'.

‘Getting the frameworks right’ is essential for empowering, incentivising, regulating and facilitating the use of mediation by government officials and investors in resolving ISDS disputes.

There are two dimensions to such frameworks, one being the treaty level and another being the domestic level. At the treaty level, it is mainly concerned with the development of model treaty clauses on mediation and investment mediation protocols for international investment agreements to provide a roadmap to guide the disputing parties in their use of mediation. At the domestic level, we have heard the useful sharing by Alejandro – Dr Alejandro Carballo-Leyda, General Counsel and Head of Conflict Resolution Centre of the International Energy Charter – regarding the Model Instrument on Management of Investment Disputes developed by the Energy Charter Secretariat, which sheds light on how governments may establish or refine their domestic institutional frameworks to facilitate, amongst others, the use of mediation for resolving ISDS disputes.

To overcome the psychological barriers for disputing parties over the use of mediation in ISDS, ‘education, education and education’ is the very key, and the target audience must include government officials.

Since 2018, the Department of Justice (DoJ) has partnered up with leading institutions such as the Academy, the International Centre for Settlement of Investment Disputes (ICSID) and the International Energy Charter to offer its flagship Investment Law and Investor-State Mediator Training Courses. The two rounds of courses were attended by over 90 participants from over 26 countries around the world, including government officials as well as legal and mediation practitioners. We are indeed pleased to have one of our alumni, Mr Dinay Reetoo – Acting Assistant Parliamentary Counsel, Attorney-General’s Office, Mauritius – joining us today to speak on the subject of mediation and share his experience in putting mediation into practice in his work for the Mauritian government after completing the course.

The DoJ will continue to offer the capacity-building courses on investment mediation in the near future, with the next round to be held in 2021.

Apart from mediation, Working Group III is also looking at various other ISDS reform options. Given the inherent nature of mediation as a flexible mechanism, one can see that there is room for exploring the potential synergy of mediation with other reform options such as an ISDS appellate mechanism, dispute prevention mechanisms as well as the establishment of an Advisory Centre on International Investment Law as discussed in the presentation by Charlie – Dr Charlie Garnjana-Goonchorn, Counsellor of the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand.

Following today's pre-intersessional meeting, probably there are a lot of ideas on the plate of the UNCITRAL Secretariat with respect to what the Working Group may work on with respect to mediation.

Having good ideas on paper is however not enough and it is also crucial to consider how the Working Group can practically achieve progress in its work on mediation within a reasonable period of time, especially when the Working Group does have a wide range of ISDS reform issues to tackle.

During the 39th session of Working Group III, the Chinese delegation mentioned the possibility for the Working Group to resort to other constructive, inclusive and transparent working methods to develop the work on mediation, in addition to its formal sessions. As a preliminary idea, the use of informal drafting groups or experts groups may be an option worthy of being considered, especially for developing the texts on model treaty clauses and investment mediation protocols as well as the relevant guidelines.

Informal drafting groups or experts groups are tools that have previously been utilised in UNCITRAL processes. Such informal groups allow different stakeholders to draw on their best practices, experience and knowledge to collaborate in crafting the work on investment mediation for consideration by Working Group III. Given the support enjoyed by mediation in the Working Group, the use of drafting groups or experts groups can expedite the work on mediation, while sticking with the work mode of Working Group III

where no decision of the Working Group will be made outside its formal sessions.

We hope that today's pre-intersessional meeting manages to facilitate Working Group III in its consideration of how to further unlock the potential of mediation as an ISDS reform option.

To contribute to the process of Working Group III, the insights in today's discussion and the Background Papers prepared by the various practitioners from Hong Kong will be crystallised into a Proceedings, which will subsequently be made available to the Working Group.

While we cannot meet in person today due to the COVID-19 pandemic, we are pleased to report that the use of technology allows us to make this event accessible live online and reach out to 74 countries/regions with around 530 registrants. In this regard, it is also worth mentioning that the Hong Kong SAR actively supports the greater use of technology in international trade and the DoJ Project Office for Collaboration with UNCITRAL has officially opened in the Hong Kong Legal Hub to work on this area.

Hopefully, the world will soon recover from the pandemic. We look forward to welcoming you all in person here in the Hong Kong SAR at the next intersessional meeting in 2021.

EVENT PROGRAMME

OPENING CEREMONY	
Li Yongjie	
Anna Joubin-Bret	
SESSION I: OVERCOMING CHALLENGES TO THE USE OF MEDIATION IN ISDS	
Moderator	Shane Spelliscy
Panellists	Justin D’Agostino <i>A Practitioner’s Perspective on Overcoming Challenges to the Greater Use of Mediation for ISDS</i>
	Meg Kinnear <i>The ICSID Perspective on Mediation of Investment Disputes</i>
	Jaemin Lee <i>Settling Investment Disputes Through Mediation – Korea’s Experience and Challenges Ahead</i>
	Mairée Uran Bidegain <i>Encouraging Mediation Through a Multilateral Instrument on ISDS Reform</i>

SESSION II: MULTI-TIERED DISPUTE RESOLUTION PROCESS (MEDIATION PROTOCOL)	
Moderator	Anthony Neoh QC SC JP
Panellists	Wolf von Kumberg <i>Integration of Mediation and Arbitration in a Multi-Tiered Dispute Resolution Process</i>
	Jack J. Coe Jr. <i>Concurrent Co-Mediation Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution</i>
	Ronald Sum <i>Innovation of the Investment Mediation Rules under the CEPA Investment Agreement</i>

SESSION III: HYBRID MODELS FOR RESOLVING INTERNATIONAL INVESTMENT DISPUTES	
Moderator	Natalie Morris-Sharma
Panellists	Barton Legum <i>Legal Issues Presented by Hybrid Models of Mediation and Arbitration in ISDS</i>
	Francis Xavier SC <i>The Use of Mandatory Mediation in a Hybrid Dispute Resolution Model</i>
	Cao Lijun <i>Chinese Perspective and Experience on the Use of Hybrid Models</i>
	Blanca Salas-Ferrer <i>The Views of the European Union and Its Member States on the Functioning of Mediation in the Context of a Multilateral Investment Court</i>
	Hi-Taek Shin <i>The Potential for Arbitrators to Also Act as Mediators for Facilitating Settlement of Disputes</i>

SESSION IV: THE WAY FORWARD FOR MEDIATION AS A REFORM OPTION FOR ISDS	
Moderator	Anna Joubin-Bret
Panellists	Alejandro Carballo-Leyda <i>Tools for Promoting the Greater Use of Mediation by States in ISDS</i>
	Charlie Garnjana-Goonchorn <i>Provision of Mediation Services by an Advisory Centre on International Investment Law</i>
	Dinay Reetoo <i>Capacity Building and Training in Enhancing the Role of Mediation in ISDS</i>
CLOSING REMARKS	
Teresa Cheng GBS SC JP	



With the support of the Central People's Government of the People's Republic of China, UNCITRAL Working Group III Virtual Pre-Intersessional Meeting, being the first of its kind, was jointly organised by the United Nations Commission on International Trade Law (UNCITRAL), the Department of Justice of the Hong Kong Special Administrative Region and the Asian Academy of International Law. Under the theme 'The Use of Mediation in ISDS', it facilitated the sharing of information and experience in investment mediation by government officials, practitioners and academics, contributing to the discussion of Working Group III as it considered the way forward regarding the development of mediation as an investor-State dispute settlement (ISDS) reform option.

This publication is a collection of presentations given at the Meeting and papers contributed by a number of practitioners, covering a wide range of topics on the use of mediation in ISDS.

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