

UNCITRAL Working Group III on ISDS Reform

Virtual Pre-Intersessional Meeting on the Use of Mediation in ISDS

Background Paper for Session 1 – Overcoming Challenges to the Use of Mediation in ISDS

Adrian Lai¹

Matthew Suen²

¹ Adrian Lai, Barrister, Des Voeux Chambers (Hong Kong), Deputy Secretary General of the Asian Academy of International Law (AAIL). AAIL is an independent and registered charitable body set up in Hong Kong to further the studies, research and development of international law in Asia. In 2018, AAIL has been granted observer status to UNCITRAL Working Group III. The views expressed in this background paper are personal only and do not necessarily reflect the views and positions of the co-organizers and any working groups of UNCITRAL.

² Matthew Suen (LLB)(CUHK)(PCLL Dist.)(CUHK), presently LLM candidate of Peking University, Beijing, Member of AAIL.

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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 civilized societies. It, broadly, refers to a process where the disputant parties attempt to reach an amicable settlement of the disputes with the intervention by 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 investor-State dispute context, particularly when such disputes usually involve complicated issues of facts and law.

Surprisingly, mediation has been seriously under-utilised in ISDS context and parties have quite often opted for arbitration as their primary means of dispute resolution (if bilateral negotiation fails). Such under-utilisation 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 arbitration process has 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 ISDS context and extensive discussion in the academia, government sector and the private sector (including legal practitioners).

Mediation became a focal point of the recently held 39th session of UNCITRAL Working Group III. General consensus has been reached to fostering the use of mediation. The authors have identified some frequently quoted challenges reportedly contributing to the lack of use of mediation in ISDS context and submit that none of them 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 (a) increase the stakeholders’ knowledge and confidence in using mediation as an ADR method; and (b) 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 the Working Group III of the UNCITRAL held on 9 November 2020.³ It aims at providing the audience with the relevant information on (a) the phenomenon of the lack of use of mediation in ISDS context; (b) the possible challenges to the use of mediation; (c) benefits of mediation; and (d) steps that have been (or can be) taken to make mediation a feasible option to the ISDS stakeholders.

III. MEDIATION – AN AWAKENED FORM OF DISPUTE RESOLUTION

(1) 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 3,000 BCE in Egypt).⁴ 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”).⁵ In modern times, these cultural values underpinning mediation being the preferred mode of conflict management still bear considerable significance in China’s legal system.⁶

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) encouraged mediation, or “settlement by love” as it

³ 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 thirty-eighth 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.

⁴ Jack J. Coe, Jr., “Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch” (2007) *Journal of Transnational Dispute Management* 4(1) 8; Jeswald W. Salacuse, “Is There a Better? Alternative Method of Treaty-Based, Investor-State Dispute Resolution” (2007) *Fordham International Law Journal* 31(1) 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.

⁵ 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” (2008) *Journal of International Arbitration* 25(4) 479, p 480.

⁶ Wang Guiguo, He Xiaoli, “Mediation and International Investment: A Chinese Perspective” (2012) *Maine Law Review* 65(1) 216, pp 221-225.

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.⁷

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.⁸ 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” in across different legal traditions because it is, in fact, available in many parts of the world.⁹

5. That said, it may not be correct to assume that mediation has been taking the predominant role throughout the history. For some reason, mediation at some point went into a “Rip van Winkle-like hibernation” or “Sleeping Beauty-like sleep” for centuries,¹⁰ and it is only in recent years that governments across the world have begun to embrace mediation as a viable alternative to domestic litigation.

(2) Modern mediation

6. *Mediation* can be defined as a method of dispute resolution, in which a neutral third-party (mediator) assists the disputant parties in negotiating a settlement of their dispute (and agreeing upon the terms of such settlement).¹¹ In the UN Convention on International Settlement Agreements Resulting from Mediation (the “**UN Mediation Settlement Convention**”),¹² 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.”

⁷ 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>

⁸ Jacqueline Nolan-Haley, “Mediation and Access to Justice in Africa: Perspectives from Ghana” (2015) 21 *Harvard Negotiation Law Review* 59, pp 61, 62, 97.

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

¹⁰ Above n.7, Lord Neuberger, para 3.

¹¹ Above n.4, Jack J. Coe, Jr, p 15; Jeswald W. Salacuse, pp 154, 173. Nancy A. Welsh, Andrea K. Schneider, “Becoming ‘Investor-State Mediation’” (2012) 86 *Penn State Journal of Law & International Affairs* 1(1) 86, p 89.

¹² 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 “facilitated negotiation”.¹³ On one hand, it is similar to adjudicative methods in that mediation requires intervention by a third party (i.e. mediator); on the other, it is distinctively different in that the mediator has no authority to impose his/her own solution to the parties. The hallmark of mediation is a voluntary, “collaborative process”,¹⁴ in which the disputant parties “retain control of the outcome” by reserving to themselves “their right to agree to or refuse a proposed settlement”.¹⁵

8. It is common usage to treat “conciliation” and “mediation” as interchangeable terms,¹⁶ not merely out of “convenience” but because it is difficult to “discern an authentic distinction between the two in practice”.¹⁷ Scholarly writing has criticised the “lack of clarity” in such a distinction.¹⁸ However, should “mediation” be given a broad definition as set out in paragraph 6 above, “conciliation” should clearly be categorised as mediation.¹⁹

9. While mediation can be pursued in “many styles” and by mediator “playing different roles”,²⁰ among all styles or approaches, the two styles of mediation which are of greater popularity can be identified: (1) evaluative mediation, and (2) facilitative mediation.²¹ 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

¹³ Above n 4, Jack J. Coe, Jr, p 14.

¹⁴ Above n 4, Jack J. Coe, Jr, p 15.

¹⁵ Above n 4, Jeswald W. Salacuse, p 157.

¹⁶ 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, Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (New York: Oxford University Press, 1999), pp 27, 29.

¹⁷ Above n 4, Jack J. Coe, Jr, p 14 (footnote 29).

¹⁸ Edna Sussman, “The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes” (2014) *Transnational Dispute Management* 11(1), p 3.

¹⁹ Above n 4, Jack J. Coe, Jr, p 14. 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, 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 4, Jeswald W. 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 4, Jack J. Coe, Jr, p 14 (footnote 30).

²⁰ 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 Schonewille, Fred Schonewill, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (The Hague: Eleven International Publishing, 2014).

²¹ Susan D. Franck, “Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide” (2014) *ICSID Review* 29(1) 66, p 72. There are other styles of mediation such as “transformative” (keeping the structure of the facilitative style but emphasizing the need of each party to recognize 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).

rights and obligations of the parties at variance.²² It takes a “right-based” approach: it give the parties “a more realistic prediction” of the eventual outcome of the contentious proceedings.²³ 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.²⁴ In the context of investor-state conflicts, some arbitral institutions offer evaluative mediation service in the name of “conciliation”:²⁵ ICSID even provides a distinct set of rules for conciliation conducted under its auspices.²⁶ Despite the mediator’s authority to make assessment on the merits and proposal of 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.²⁷

10. On the other hand, *facilitative mediation* takes an “interest-based” approach.²⁸ It focuses on the parties’ interests and objectives instead of the underlying dispute.²⁹ 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, (2) (re)formulating, exploring the viability of, and passing on the proposed solution emanated from a disputant party during “caucuses” (a series of *ex parte* meetings with disputant parties).³⁰ Mediators are often required to eliminate the various barriers, psychological, strategic and structural, to a compromise.³¹ Mediators often attempt to pursue “closeness with the parties” to establish rapport, build confidence and encourage candour between them.³² In facilitative mediation, it is not the mediator’s duty to give his opinion on the strengths of the parties’ respective cases.³³

(3) Mediation in revival in domestic context

11. Litigation (and arbitration) have gained the floor as the primary means of dispute resolution when mediation is in its dormancy. According to Lord Neuberger, professional mediation, let alone compulsory mediation, was virtually

²² Above n 4, Jeswald W. Salacuse, p 173.

²³ Above n 4, Jeswald W. Salacuse, p 173.

²⁴ Above n 4, Jeswald W. Salacuse, p 173. Above n 4, Jack J. Coe, Jr, p 16.

²⁵ Above n 4, Jeswald W. Salacuse, p 172.

²⁶ ICSID, *The Rules of Procedure for Conciliation Proceedings*. Available at: <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>.

²⁷ Above n 4, Jeswald W. Salacuse, p 173.

²⁸ Above n 21, Susan D. Franck, p 73.

²⁹ Above n 21, Susan D. Franck, p 73.

³⁰ Above n 4, Jack J. Coe, Jr, p 15 (footnote 39).

³¹ Above n 4, Jeswald W. Salacuse, p 173.

³² Above n 20, Jack J. Coe, Jr, p 85.

³³ Above n 21, Susan D. Franck, p 74.

unheard of in the United Kingdom civil litigation when he was in private practice, and it only started regaining the long overdue attention in mid-1990s.³⁴

12. However, professional mediation has grown up very quickly since its revival. It has been gaining importance 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 costs sanctions if a party refuses to mediate.

(4) 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.³⁵ Such intervention is, as a matter of usage, further categorised into “conciliation” (*evaluative mediation*), “mediation” (*facilitative mediation*) and “good offices” according to the form such intervention takes.³⁶ These approaches to dispute resolution are considered to be interconnected.³⁷

14. On 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.”³⁸ (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 reduced in more recent times. On the

³⁴ Above n 7, Lord Neuberger, para 1.

³⁵ Above n 4, Jack J. Coe, Jr, p 13 (footnote 26).

³⁶ Above n 19, J.M. Merrills, p 26.

³⁷ 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, J.M. Merrills, p 199.

³⁸ Available at: <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>

multilateral treaty front, conciliation has clearly found its favour and become “almost a routine feature” of modern multilateral treaties.³⁹ 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).⁴⁰ Under Article 66 of VCLT, a party to such dispute may “set in motion the procedure specified in the Annex”. The Annex sets out in some detail on 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”.⁴¹

16. In some particular fields such as international trade, conciliation is a “favoured procedure” for settling conflicts.⁴² For instance, the *WTO Dispute Settlement Understanding* (DSU)⁴³ 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.⁴⁴

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 noting 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 General Assembly sponsored the *United Nations Model Rules for the Conciliation of Disputes between States* in its 50th session in 1995.⁴⁵

(5) Mediation in investor-State dispute context: a rarely seen animal

18. Despite the prominent place that mediation has gained in domestic dispute context and in inter-State dispute context, it is surprising that mediation has for a long period of time been forgotten in ISDS context and has been said to be “an animal rarely observed in the wild”.⁴⁶ Mediation “has been little used” in ISDS.⁴⁷

³⁹ See generally, above n 19, J.M. Merrills, pp 69-74.

⁴⁰ Above n 4, Jack J. Coe, Jr, p 13 (footnote 26).

⁴¹ Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

⁴² See above n 19, J.M. Merrills, p 70.

⁴³ Available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

⁴⁴ 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, Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* (Oxford: Oxford University Press, 2016), p 109. Above n 19, J.M. Merrills, p 199.

⁴⁵ GA Res. A/50/50 (1996). For further developments, see generally, above n 19, J.M. Merrills, pp 74-79.

⁴⁶ Bart Legum, co-chair of the IBA mediation subcommittee. Edward Machin, Investor-state mediation: BIT by BIT (5 November 2012). Available at <https://iclg.com/cdr/arbitration-and-adr/investor-state-mediation:-bit-by-bit>

⁴⁷ Above n 4, Jeswald W. Salacuse, p 177.

19. To date, ICSID has registered 13 conciliation cases, including 2 additional facility conciliation cases, with no case under the ICSID Fact-Finding Additional Facility Rules;⁴⁸ PCA has so far not “administered mediation proceedings based on a treaty”; neither the Energy Charter Secretariat (“ECS”) nor has the SCC “administered any investor-State mediation”.⁴⁹ The ICC has so far administered only one treaty-based mediation, which ended unsuccessfully due to “partial participation” of a party.⁵⁰ It has been reported that the Philippines had agreed to “conduct mediation” with French investors using the IBA Rules (defined below) to “avoid” full-blown arbitral proceedings; however, “little further is known of this case”.⁵¹

IV. AN OVERVIEW ON 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.⁵² The traditional criticisms of the (in)efficiency of arbitration in ISDS has called into question the legitimacy of that mechanism.⁵³ In light of the distrust ventilated by some governments and other bodies, mediation appears to have “regained its momentum”.⁵⁴

⁴⁸ ICSID stands ready to provide “administrative assistance” to support the disputing parties’ endeavours to “to resolve investment disputes through mediation at all stages of a dispute”. See: <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.

⁴⁹ *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.

⁵⁰ *Id.* See also, Alina Leoveanu, Andrija Erac, “ICC Mediation: Paving the Way Forward” in Titi/Fach Gómez, below n 52, pp 97-98.

⁵¹ 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) (“**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-meditation-paper-16-march-2020.pdf>; Luke Eric Peterson, “In an Apparent First, Investor and Host State Agree to Try Mediation Under IBA Rules to Resolve an Investment Treaty Dispute”, *IA Reporter* (14 April 2016). Available at: <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-meditation-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-meditation-and-arbitration/>.

⁵² Catharine Titi, “Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism” (Chapter 2) in Catharine Titi, Katia Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes* (Oxford: Oxford University Press, 2019) (Titi/Fach Gómez), p 21.

⁵³ Above n 4, Jack J. Coe, Jr, pp 8-10.

⁵⁴ Kun Fan, “Mediation of Investor-State Disputes: A Treaty Survey” (6 March 2020), *Journal of Dispute Resolution* (2020) (forthcoming), p 328. Available at: <https://ssrn.com/abstract=3549661>

21. Thus, having considered the Secretariat’s suggestions of possible future work on ISDS,⁵⁵ 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.⁵⁶

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 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 subjects 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.⁵⁷

24. At the first Inter-sessional 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:

⁵⁵ 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).

⁵⁶ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para 264.

⁵⁷ *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)”.

- (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 under-utilisation of mediation and that “efforts should be taken to increase their use”.⁵⁸

25. At its 36th session, the concern that mediation remained underused in ISDS was renewed.⁵⁹ WG III was called upon to consider ways to enhance its use. The Secretariat noted that ISDS imposed heavy financial burden on both the respondent States and the claimant investors,⁶⁰ and there were “increasing efforts” to highlight the importance of preventing of disputes (or their escalation) by way of mediation.⁶¹ 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.⁶² 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 2019.⁶³

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.⁶⁴ 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”.⁶⁵

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;

⁵⁸ *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.

⁵⁹ *Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS)*(A/CN.9/WG.III/WP.149), para 60.

⁶⁰ *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.

⁶¹ *Id.*, para 4.

⁶² The promotion of mediation was included as one of the “possible reform options” in the framework of discussions, see above n 59 (A/CN.9/WG.III/WP.149), Annex (in tabular form), p 20.

⁶³ David Ng, “Investment Mediation” in AAIL, *ISDS Reform Conference 2019 Proceedings: Mapping The Way Forward* (Hong Kong: AAIL, 2019), p 297, para 17.

⁶⁴ *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.

⁶⁵ *Possible reform of investor-State dispute settlement (ISDS)*(A/CN.9/WG.III/WP.166), para 42.

- (b) Policies as well as legal framework for encouraging mediation would be necessary to address some of the concerns of government officials in settling the disputes via mediation;
- (c) The use of mediation was not confined to pre-arbitration stage. Guidelines should be developed to encourage arbitral tribunals and disputant parties to explore mediation, together with other ADR methods, proactively; and
- (d) Capacity building and training of potential mediators and other stakeholders was a key aspect to the fostering 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 process; (2) parties' mutual desire for accord; and (3) the mediator's skills.⁶⁶

(1) Ineffective mediation legal framework under the 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 IIAs provide for "cooling-off period" in which the disputant parties are directed to attempt to search for an amicable settlement by negotiation, conciliation or mediation. While this presents an opportunity for the investor and the host State "to avoid arbitration", "specific and conducive language" is scarcely used in the IIAs to facilitate that process.⁶⁷ For instance, only very few dispute resolution clauses of 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

⁶⁶ E.g. Richard Haass, *Conflicts Unending: The United States and Regional Disputes* (New Haven, Conn.: Yale University Press, 1990).

⁶⁷ 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.

28 of the Investment Agreement for the COMESA Common Investment Area. (the “COMESA IA”).⁶⁸

31. The lack of clarity in mediation clauses under the IIAs has bred the 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.⁶⁹

32. The situation became worse when in the early days mediation rules were largely undeveloped or underdeveloped. Mediation or conciliation process in the early days were said to be “a nineteenth-century, cumbersome fact-finding exercise”,⁷⁰ and parties voted with their feet bringing the use of such process 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 the investor-State disputes.

(2) Unfamiliarity with and misperception of the use of mediation in ISDS

34. Since mediation is “little used” in ISDS, government officials, the 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 mediation (as opposed to arbitration or other adversarial forms of dispute resolution).⁷¹ They may not have knowledge to identify the proper person with adequate experience and credentials to act as mediator.⁷² Lawyers may be driven by “professional inclination” or “self-interest” and may suggest that mediation is “not effective” and is merely “delaying tactic”.⁷³

35. Both inadequate research and literature and practical guidelines contribute, in part, to such unfamiliarity. At present, it has been suggested that there ought

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ Above n 46, Edward Machin.

⁷¹ Above n 4, Jeswald W. Salacuse, p 178.

⁷² Above n 4, Jack J. Coe, Jr, pp 25-26.

⁷³ Jeswald W. Salacuse, “Mediation in International Business” in above n 4, Jacob Bercovitch, p 222. Above n 4, Jeswald W. Salacuse, p 178.

to be “concerted efforts” to launch an educational campaign on the use of mediation in investor-State disputes, particularly on these questions: “how they arise and evolve, what actions tend to exacerbate the conflicts, at what 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.”⁷⁴ In view of their unfamiliarity with, and misperception of, mediation, mediation remains to be an unlikely alternative that the disputant parties would choose to resolve their investor-State disputes. On this, 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.

(3) Strained relationship between the disputant parties

36. Some argue that quite often the relationship between investor and the host State has gone to the point of not being able to repair, and mediation is not going to work in the ISDS context.

37. The authors do not quarrel with the observation that parties’ lack of desire to settle their disputes can be an important factor contributing to the failure of *that* mediation. However, it does not explain the glaring under-utilisation of mediation in the ISDS context, when strained relationship is not a rare phenomenon in 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 problem associated with strained relationship of the parties can be to some extent ameliorated by skillful mediators, who are able to listen, to understand the parties’ respective concerns and interests, to reframe issues, and to intervene at the right moments.

(4) Desire to defer responsibility for decision-making to a third party

39. In a report published by the 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”.⁷⁵ A host State’s “affirmative decision to settle a claim” may involve “monetary sum” to

⁷⁴ Above n 4, Jeswald W. Salacuse, p 180.

⁷⁵ Seraphina Chew, Lucy Reed, 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>

be paid out of public funds.⁷⁶ This entails the risk of placing the relevant officials in politically difficult position if and when they are called upon to justify such use of “taxpayers’ money”.⁷⁷ As such, States often adopt a “wait-and-see” approach to any claims advanced by investors.⁷⁸ 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.⁷⁹ It may be of relative ease 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”.⁸⁰ Arbitral tribunals are used as “scapegoats” to absolve the States of responsibility for the unfavourable outcomes.⁸¹

40. The host States’ reluctance to conclude settlements is itself a matter into which it is necessary to enquire. The CIL Report further identified 3 “distinct fears” on the part of the decision-makers of the host States that may account for the “disinclination” to take responsibility for settlement:⁸²

- (a) *risk of allegations of or future prosecution of corruption*: the fear of government official that the settlement agreement he or she “signs off” 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.⁸³

- (b) *fear of criticism*: the wish of government to “avoid public criticism”, especially the kind that may cast governments of being “weak”, “puppets of foreign interest” or “corrupt”.⁸⁴ Investor-State disputes that “have political overtones” usually attract “significant media and popular attention”.⁸⁵ The possibility of incurring public wrath brews unease among government officials at the prospect of losing elections in

⁷⁶ *Id.*, p 16. Above n 4, Jack J. Coe, Jr, p 29.

⁷⁷ *Id.*, p 16.

⁷⁸ *Id.*, p 12.

⁷⁹ *Id.*, p 16.

⁸⁰ *Id.*, p 12.

⁸¹ “Mediation of Investor-State Conflicts” (2014) *Harvard Law Review* 127(8) 2543, p 2558.

⁸² Above n 75, Seraphina Chew, Lucy Reed, J Christopher Thomas QC, pp 13-14. Above n 4, Jack J. Coe, Jr, p 29.

⁸³ Barton Legum, “The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe’s ‘Toward A Complementary Use of Conciliation In Investor-State Disputes - A Preliminary Sketch’” (2007) *Transnational Dispute Management* 4(1), p 2. Above n 4, Jeswald W. Salacuse, p 178.

⁸⁴ Above n 81, p 2558.

⁸⁵ Above n 4, Jeswald W. Salacuse, p 184.

democratic systems of government, making them “even more averse” to the use of mediation.

- (c) *fear of incentivising other investors to make similar claims or adverse arbitral decisions*: the States’ fear, ***whether justified or not***, that a settlement may have “incentivising effect” is twofold: First, the States fear that it may set a “precedent” for other investors in analogous positions 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 issues in another investor-State dispute, some States still fear that an investor may refer to the settlement as a “precedent” or “admission” attempting to influence the views of the arbitral tribunal (or at least embarrassing or pressuring the State concerned).

41. It is important not to allow these concerns to grow disproportionately to obstruct the use of investment mediation. Government officials are agents of their States and they owe fiduciary duties to act in the States’ interest, including the duty to act responsibly in settling a dispute in the appropriate terms at the appropriate time. They are not doing their duties 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).

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 under-utilisation of mediation to resolve an investor-State dispute.⁸⁶

(5) Unique institutional characteristics of state actors

43. If no strategy or organised system for internal communications 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.⁸⁷ 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 (and the State’s approach in dealing with the dispute). Such “inter-agency process”

⁸⁶ Above n 49, para 44.

⁸⁷ Above n 49, para 36. Above n 83, Barton Legum, p 2.

for evaluating and finally approving any settlement solution has been described to be “typically complex and burdensome”.⁸⁸

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.⁸⁹ First, the absence of a “specific budget allocation” to finance the use of mediation services may prevent the State from choosing to attempt mediation.⁹⁰ Secondly, the overall government budget may have made provision for payment in satisfaction of arbitral awards or judgments, but not for settlement of (*unproved*) investors’ claims.⁹¹

(6) Wrong timing: momentum of arbitral proceedings

45. The disputant parties may feel that once arbitration has been commenced, they have made “inflexible commitment” to arbitration,⁹² particularly by having “sunken resources” into prosecuting or defending those proceedings.⁹³ This is plainly not the case: e.g. the tribunal in *Achmea BV v. Slovakia*⁹⁴ 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” of their case, the parties lack incentive to negotiate let alone enter into any form of settlement.⁹⁵

VI. BENEFITS OF USE OF MEDIATION IN ISDS

46. Before discussing strategies to overcome the 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.⁹⁶

(1) Wider range of solutions open to the disputant parties

⁸⁸ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2011) (UNCTAD/WEB/DIAE/IA/2010/8), p 30.

⁸⁹ Above n 4, Jeswald W. Salacuse, p 178. Above n 75, Seraphina Chew, Lucy Reed, J Christopher Thomas QC, p 19.

⁹⁰ Above n 4, Jeswald W. Salacuse, p 178.

⁹¹ Above n 75, Seraphina Chew, Lucy Reed, J Christopher Thomas QC, p 19.

⁹² Above n 75, Seraphina Chew, Lucy Reed, J Christopher Thomas QC, p 22.

⁹³ 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

⁹⁴ *Achmea BV v. Slovakia*, PCA Case No. 2008-13, Final Award, 7 December 2012, para 60.

⁹⁵ Above n 75, Seraphina Chew, Lucy Reed, J Christopher Thomas QC, p 22.

⁹⁶ James M. Claxton, Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds? (2020) *Pepperdine Dispute Resolution Law Journal* (20) 78, p 83.

47. In arbitrations in ISDS context, arbitrators “must sit in a circumscribed universe”.⁹⁷ 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”.⁹⁸ Therefore, 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”.⁹⁹ On many occasions, it does not represent the “optimal”, “workable solution” which can otherwise be achieved by way of mediation.

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 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 of mediators, to frankly exchange their views and concerns, and through such exchanges common interests may be identified for parties to work on a win-win solution.

49. Thus, the use of mediation instead of arbitration in ISDS avoids “the risk of zero-sum outcomes”.¹⁰⁰ A mediated settlement adds a degree of flexibility which may better preserve the disputant parties’ interests.¹⁰¹ It can further take into account “the legitimate concerns of the various stakeholders”, for example: “what new commercial arrangements can be made to replace the one in dispute”, “how a project can be developed without harm to the environment and in a way that benefits the local community”.¹⁰² 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”.¹⁰³ This is illustrated in one of the successful mediation examples discussed below.

⁹⁷ Above n 18, Edna Sussman, p 7.

⁹⁸ Thomas W. Wälde, “Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation” (2006) *Arbitration International* 22(2) 205, p 207. Above n 4, Jack J. Coe, Jr, p 23. Above n 18, Edna Sussman, p 7. Above n 63, David Ng, p 305.

⁹⁹ Above n 4, Jeswald W. Salacuse, p 176. Above n 18, Edna Sussman, p 7.

¹⁰⁰ Above n 4, Jack J. Coe, Jr, p 15.

¹⁰¹ Above n 4, Jeswald W. Salacuse, p 176.

¹⁰² Above n 18, Edna Sussman, p 7.

¹⁰³ Above n 63, David 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.

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

(2) Conducive to preserving investor-State relationship

51. Underlying the investor-State dispute is “an intended long-time investment relationship”.¹⁰⁴ 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 are “very costly”.¹⁰⁵ 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.¹⁰⁶ Scholars have drawn attention to the likely adverse effect on these “relationship assets” brought about by adversarial methods of dispute resolution (such as arbitration).¹⁰⁷ Arbitration may, “by its process dynamics”, instigate hostility and animosity towards each other on the parts of both parties, making it “rarely feasible” to continue any business during or after the process.¹⁰⁸ In all, arbitration is principally means “to liquidate an economic relationship”, and “[n]either the aim nor the consequence of arbitration is to repair a broken business relationship”.¹⁰⁹

52. On the other hand, mediation may provide a more appropriate venue for resolving dispute in ISDS context. Given its “less contentious setting”,¹¹⁰ mediation “is more often likely” to preserve a working, successful relationship between the investor and the host State.¹¹¹ 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.¹¹² 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 the outcome.¹¹³

¹⁰⁴ Above n 4, Jeswald W. Salacuse, p 141.

¹⁰⁵ Above n 98, Thomas W. Wälde, p 207.

¹⁰⁶ Above n 18, Edna Sussman, p 7. Above n 98, Thomas W. Wälde, p 207.

¹⁰⁷ Above n 98, Thomas W. Wälde, p 207. Such relationship is, as the author puts it, “almost inevitably destroyed”.

¹⁰⁸ Above n 98, Thomas W. Wälde, p 207.

¹⁰⁹ Above n 11, Nancy A. Welsh, Andrea K. Schneider, p 87. Above n 4, Jeswald W. Salacuse, p 155.

¹¹⁰ Above n 18, Edna Sussman, p 8.

¹¹¹ Above n 4, Jeswald W. Salacuse, p 176.

¹¹² Above n 4, Jack J. Coe, Jr, p 15.

¹¹³ Above n 18, Edna 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.¹¹⁴ 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.¹¹⁵

(3) 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.¹¹⁶ For instance, in an ICSID arbitration,¹¹⁷ despite the apparent success of the investor's claim (having obtained a favourable arbitral award of about US\$17 million), the investor nevertheless considered the arbitral process to be "dissatisfying" for its considerable delay.¹¹⁸ Those proceedings spanned about 5 years from after the date of the Notice of Intent to the date of the award.¹¹⁹ On a review of 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) is 3.86 years.¹²⁰ Out of about 20% of cases resulting in an award,¹²¹ annulment of that award has been sought by one of the disputant parties,¹²² meaning that that duration may be further prolonged by 1.96 years on average.¹²³ If an award is

¹¹⁴ Jan K. Schäfer, "Alternatives to Investment Arbitration" (Chapter 11(I)) in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch, Yun-I Kim (eds) *International Investment Law* (C.H.BECK, Hart Publishing, Nomos, 2015), p 1192 (para 20).

¹¹⁵ *Id.*, p 1192 (para 20).

¹¹⁶ Above n 4, Jack J. Coe, Jr, pp 8-9. Above n 18, Edna Sussman, p 6.

¹¹⁷ *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1.

¹¹⁸ Above n 11, Nancy A. Welsh, Andrea K. Schneider, p 87.

¹¹⁹ See also, above n 4, Jack J. Coe, Jr, p 9 (footnote 6). The Notice of Intent was dated 30 December 1996, and the Award was rendered on 30 August 2000.

¹²⁰ Jeffery Commission, 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" (2020) 21 *Journal of World Investment & Trade* 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).

¹²¹ That percentage was an estimate in 2009 and may no longer be empirically valid. See also, above n 20, Jack J. Coe, Jr, p 79.

¹²² 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>

¹²³ Above n 120, Jeffery Commission, Rahim 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:

annulled, the estimates were that additional 4 years of arbitral proceedings are to be expected.¹²⁴ On review of 84 publicly accessible arbitrations under the UNCITRAL Arbitration Rules (up to 2017), the average duration of proceedings is 3.99 years.¹²⁵ Further, even if international treaties such as the New York Convention have laid down a solid ground for enforcement of arbitral awards, the enforcement process remains largely a matter of domestic legal process proceeded in accordance with the domestic procedural rules of different jurisdictions in which the award is enforced, and the process(es) “may take several years”, depending on the levels of “appellate review stages” available in a particular legal system.¹²⁶

55. Also, arbitrations in ISDS have been described by academics as “inordinately costly”.¹²⁷ The dynamics in arbitration “tend to lead to ever-escalating costs”.¹²⁸ 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”.¹²⁹ In the ICSID arbitration referred to earlier, the legal costs (on the claimant’s side alone) associated with the proceedings ran as high as US\$4 million, while the sum recoverable was roughly 20% of the amount assessed by the claimant’s expert.¹³⁰ It was reported in 2012 that the costs (including the parties’ legal fees and tribunal expenses) of arbitration in ISDS had already “exceeded [US]\$8 million per party per case”.¹³¹ Up to 31 May 2017, in respect of party costs, “mean claimant-party costs now stand at US\$6 million”, and “mean respondent-party costs at US\$4.9 million”.¹³² In respect of tribunal costs, ICSID and UNCITRAL

<https://icsid.worldbank.org/sites/default/files/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>

¹²⁴ That duration was an estimate in 2009 and may no longer be empirically valid. See, above n 20, Jack J. Coe, Jr, p 79.

¹²⁵ Above n 120, Jeffery Commission, Rahim Moloo, p 194 (para 10.34).

¹²⁶ 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 an ordinary arbitral award; and (b) there may be recognition and enforcement issue in States which are not parties to the UN 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.

¹²⁷ Above n 18, Edna Sussman, p 6.

¹²⁸ Above n 98, Thomas W. Wälde, p 210.

¹²⁹ Above n 4, Jack J. Coe, Jr, p 15 (footnote 38)

¹³⁰ Above n 4, Jack J. Coe, Jr, pp 9-10 (footnote 8).

¹³¹ David Gaukrodger, Kathryn Gordon “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community” (2012) *OECD Working Papers on International Investment*, 2012/03, OECD Publishing, 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.

¹³² The figures were compiled on a review of 177 cases for claimants and 169 cases for respondents. See, Matthew Hodgson, Alastair Campbell, “Damages and costs in investment treaty arbitration revisited” *Global Arbitration Review* (14 December 2017).

tribunal costs are on average US\$920,000 and US\$1,089,000 respectively.¹³³ All these costs associated with arbitration in ISDS can be “extremely heavy”,¹³⁴ and may impose “significant burden on public finances”,¹³⁵ in particular, for developing countries.¹³⁶ 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,¹³⁷ the costs of pursuing or resisting the enforcement of an arbitral award may multiply.

56. The use of mediation provides “cheaper and less time-consuming” alternative to arbitrations”.¹³⁸ It has been suggested that in the case that mediation is pursued, even “very complex” cases can be resolved in “a few sessions”.¹³⁹ Since mediation is, unlike arbitration, not “pleadings-intensive or dependent on adducing full proofs”, it can produce results with greater speed.¹⁴⁰ On average, the duration of the five concluded conciliations under ICSID was 16 months.¹⁴¹ Further, the earlier a compromise is canvassed and reached, the more legal costs which are bound to arise at the later stages of arbitral proceedings can be avoided.¹⁴² 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”.¹⁴³

(4) Greater control over its outcome

57. Parties to ISDS often have to lower their expectations as to “outcome predictability” because similar investor-State cases may produce different outcomes for an array of reasons, typically including: the arbitral tribunals are “*ad hoc adjudicators*”; factual aspects of a particular case are hotly contested; and in turn, affecting the applicability of some legal principles which are “highly fact dependant”.¹⁴⁴ It has been suggested that disputant parties often unrealistically “over-estimate their chances of success”,¹⁴⁵ and the arbitral award

¹³³ *Id.* See also, Academic Forum on ISDS (Working Group 1), above n 126.

¹³⁴ Above n 4, Jeswald W. Salacuse, p 143.

¹³⁵ 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.

¹³⁶ Above n 4, Jeswald W. Salacuse, p 142.

¹³⁷ Albert Jan van den Berg, “Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions” (2019) *ICSID Review* 1, p 13. Michael Faure, Wanli Ma, “Investor-State Arbitration: Economic and Empirical Perspectives” (2020) 41 *Michigan Journal of International Law* 1, p 16. The authors repeat the caveat made in n 126 above.

¹³⁸ Above n 4, Jeswald W. Salacuse, p 176.

¹³⁹ Above n 18, Edna Sussman, p 6.

¹⁴⁰ Above n 20, Jack J. Coe, Jr, p 86.

¹⁴¹ Above n 20, Jack J. Coe, Jr, p 79.

¹⁴² Above n 18, Edna Sussman, p 7.

¹⁴³ Above n 18, Edna Sussman, p 7.

¹⁴⁴ Above n 4, Jack J. Coe, Jr, p 22.

¹⁴⁵ Above n 98, Thomas W. Wälde, p 209.

they receive may turn out to be a disappointment: of all concluded cases, roughly 37% were decided “in favour of the host State”, and 29% in favour of investors “with monetary compensation”;¹⁴⁶ with the rate of recovery at merely about 32%.¹⁴⁷ While arbitral awards are “imposed” outcomes;¹⁴⁸ in mediation, by definition, the parties “preserve their control over the outcome” and any resultant mediated settlement is “voluntary”.¹⁴⁹

(5) More manageable caseload for host States

58. If and when the momentum to settle a particular case has been created by mediator, that case can be concluded with the energy of host State unleashed to focus on other disputes.¹⁵⁰ It can consequently divert its resources to defend the proceedings in which it considers its defence to be meritorious and which deserves “an adjudicated result”.¹⁵¹

(6) Greater confidentiality and avoiding an unfavourable precedent

59. Investors-state disputes are “political” and public policy-based in nature.¹⁵² A “high profile investor-state arbitration” may be understood by other investors as a “negative reflection on the investment climate” in the host State.¹⁵³ For investors, not only may such publicity have an adverse impact on their “business reputation”, they also run the risk of disclosure of their trade secrets.¹⁵⁴ The disclosure or publication of awards or other documents that may be required in investor-State arbitration may draw political or corporate backlash for the host State or investor.¹⁵⁵ 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”.¹⁵⁶ The broad confidentiality allows the parties to air their respective concerns “candidly and openly” without compromising their positions at subsequent stages of arbitral proceedings.¹⁵⁷

¹⁴⁶ 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>

¹⁴⁷ Above n 132, Matthew Hodgson, Alastair Campbell.

¹⁴⁸ Above n 4, Jack J. Coe, Jr, p 29.

¹⁴⁹ Above n 81, p 2549.

¹⁵⁰ Above n 4, Jack J. Coe, Jr, p 23.

¹⁵¹ Above n 4, Jack J. Coe, Jr, p 23.

¹⁵² Above n 4, Jeswald W. Salacuse, p 141.

¹⁵³ Above n 4, Jeswald W. Salacuse, p 146.

¹⁵⁴ Above n 4, Jeswald W. Salacuse, p 177. Above n 4, Jack J. Coe, Jr, p 23.

¹⁵⁵ 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>

¹⁵⁶ Above n 4, Jeswald W. Salacuse, p 177. Above n 18, Edna Sussman, p 7.

¹⁵⁷ Above n 81, p 2556.

60. The confidentiality issue is worth some elaborated discussion. It has been taken for granted that “confidentiality” attached to mediation proceedings is an “important feature” of mediation.¹⁵⁸ 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.¹⁵⁹ 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 literature):

- (a) Transparency in ISDS is now considered “desirable” as the “involvement” of a sovereign State in hybrid (if not apparently private) proceedings and its “public interest” are at stake; and transparency measure are intended to “enhance public acceptance” of the ISDS system generally.¹⁶⁰
- (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.¹⁶¹ Increased transparency is said to be antithetical to the utility of mediation process by undermining the “environment” in which it operates.¹⁶² In 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 “draw backlash” politically.¹⁶³
- (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 ISDS context.¹⁶⁴
- (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

¹⁵⁸ Chester Brown, Phoebe Winch “The Confidentiality and Transparency Debate in Commercial and Investment Mediation” in Titi/Fach Gómez, above n 52, p 321.

¹⁵⁹ Shahla F. Ali, Odysseas G. Repousis, “Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?” (2017) 45 *Denver Journal of International Law & Policy* 225. For discussion on the rise of transparency in ISDS generally, see pp 241-246. See also, above n 158, Chester Brown, Phoebe Winch, pp 323-328.

¹⁶⁰ Above n 158, Chester Brown, Phoebe Winch, p 324.

¹⁶¹ Above n 158, Chester Brown, Phoebe Winch, pp 328-329.

¹⁶² Above n 158, Chester Brown, Phoebe Winch, p 329.

¹⁶³ Above n 82, p 2556.

¹⁶⁴ *Id.*

(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.¹⁶⁵ 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 the confidentiality, or disclosure is required by law, or such information is already in the public domain. Importantly, the confidentiality obligation extends to existence of mediation itself (subject to parties' waiver).¹⁶⁶ Similar approach is taken under the Mainland-HKSAR CEPA IA (defined below) in that mediation process shall remain confidential subject to parties' waiver.¹⁶⁷

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 tribunal is expected not only to determine the complaints but also state its reasoning arriving at the determination. For the host State, a published decision resulting from arbitration may have the effect of significantly impeding its ability to regulate.¹⁶⁸ 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, that State may be “named respondent repeatedly” by other investors pursuing further claims challenging the same or similar measure(s).¹⁶⁹ 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.¹⁷⁰ On the other hand, in

¹⁶⁵ Rule 10 of the IBA Rules.

¹⁶⁶ Above n 68, 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.

¹⁶⁷ Rule 3.1 of the Mediation Mechanism for Investment Dispute under the Mainland-HKSAR CEPA IA. Under the arrangement, an investor, depending whether it is a Mainland investor or a HKSAR 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 HKSAR 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.

¹⁶⁸ Above n 4, Jeswald W. Salacuse, p 141.

¹⁶⁹ Above n 4, Jeswald W. Salacuse, p 141. Above n 4, Jack J. Coe, Jr, p 22.

¹⁷⁰ 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

the context of mediation, the host State need not run the risk of creating an unsatisfactory, unfavourable precedent,¹⁷¹ possibly creating the risk of a “regulatory chill” on legitimate government policy-making.¹⁷²

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 settlement.¹⁷³

(1) *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 US\$143 million between *Tesoro Petroleum Corporation* and *the State of Trinidad and Tobago*. A detailed account of the conciliation proceedings has been given in an article published by Mr Lester Nurick and Prof Stephen J. Schnably.¹⁷⁴

(a) Factual background to the dispute¹⁷⁵

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.

65. The parties executed a number of documents, including (1) the “Heads of Agreement”,¹⁷⁶ a document that sets out comprehensively the terms of the joint

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

¹⁷¹ Above n 4, Jack J. Coe, Jr, p 22. Above n 4, Jeswald W. Salacuse, p 177.

¹⁷² 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

¹⁷³ Gabriele Ruscalla “Latest development in conciliation and mediation in investor-state disputes” in João Bosco Lee, Flavia Mange (eds) (2019) *Revisita Brasileira de Arbitragem* 16(63) 96, pp 106-109.

¹⁷⁴ Lester Nurick, Stephen J. Schnably, “The First ICSID Conciliation: *Tesoro Petroleum Corporation v. Trinidad and Tobago*” (1986) *ICSID Review - Foreign Investment Law Journal* 1(2) 340.

¹⁷⁵ *Id.*, pp 343-345.

¹⁷⁶ 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

venture”, and (2) 10 “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 5 years of its operation. After that 5-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.”

68. During the first 5 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 the fiscal year of 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:

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.”

- (a) In response to the second round of OPEC price increases in 1979, the Government made clear in 1980 that it intended to impose a new petroleum tax, which was actually 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 for that 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 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 to 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 percent of net earnings under the Heads of Agreement, and that the Government was in breach of the parties' agreement by failing to procure its appointees on the Trinidad-Tesoro board to vote in favour of recommending dividends.

(b) 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 and the parties and attached a copy of the Heads of Agreement and the side letters. On 26 August 1983, the Secretary-General notified the parties that the Request was registered.¹⁷⁷

(c) Appointment of the conciliator¹⁷⁸

72. The parties agreed to have a *single* conciliator, and to negotiate directly between themselves in 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

¹⁷⁷ Above n 174, Lester Nurick, Stephen J. Schnably, p 345.

¹⁷⁸ *Id.*, pp 345-346.

“highly distinguished and experienced British judge”, who 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.

(d) Procedural conference¹⁷⁹

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: language, 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 2 months thereafter).
- (c) Tesoro to file a Reply Memorial by 16 July 1984 (within about 1 month thereafter).

(e) 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 and the financial advisability of investing in petroleum-related or other suitable investment products.

¹⁷⁹ *Id.*, pp 346-347.

- (b) what effect should be given to a shareholders' agreement on the declaration of dividends in 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".¹⁸⁰

(f) Status conference¹⁸¹

79. On 23 July 1984, a "status conference" was held in Washington D.C. 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".

(g) Conciliator's recommendation¹⁸²

80. On 5 February 1985, Lord Wilberforce issued a recommendation,¹⁸³ 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."¹⁸⁴

¹⁸⁰ *Id.*, p 347 (footnote 36).

¹⁸¹ *Id.*, pp 347-348.

¹⁸² *Id.*

¹⁸³ 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/Fach Gómez, above n 52, pp 124, 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, Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd Ed) (Cambridge: Cambridge University Press, 2009), p 448 (para 20).

¹⁸⁴ 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, Frauke Nitschke, "The ICSID Conciliation Rules in Practice" in Titi/Fach Gómez, above n 52, p 141.

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;
- (b) a detailed analysis of the merits of the parties' arguments;
- (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".

(h) Parties' further negotiations – "ping-pong"

82. The parties then proceeded to negotiations between 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.¹⁸⁵

(i) 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 to the "final settlement" of paying dividends amounting to US\$143 million.¹⁸⁶

(j) 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 US\$11,000.¹⁸⁷

85. *In terms of length of time*:

¹⁸⁵ *Id.*, p 348.

¹⁸⁶ *Id.*, pp 348-349.

¹⁸⁷ *Id.*, p 343.

- (a) It took less than 2 years to complete the conciliation (from the constitution of the conciliation commission to the issuing of the conciliator's report) in this dispute.¹⁸⁸
- (b) It has been observed that the decision to have a *sole* conciliator instead of a commission consisting of 3 or more conciliators may have “significantly expedited the commencement of the proceedings”.¹⁸⁹ By the time of 1985, it typically took from 5 to 13 months to constitute the tribunal consisting of 3 arbitrators in ICSID arbitrations.¹⁹⁰ In 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.¹⁹¹

(2) 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) is the Polish state integrated electricity company. It arose out of a long-term arrangement surrounding a “SwePol” interconnector and a 20-year commitment to purchase electricity. A detailed note has been published by Professor Thomas W. Wälde.¹⁹² Whilst strictly speaking it is not a typical investor-State dispute based on an IIA, it provides valuable reference value for it demonstrated the meticulousness and at the same time the flexibility in the mediation process; as well as the creative outcome which the parties had achieved.

(a) Factual background to the dispute¹⁹³

87. Vattenfall targeted the Polish market as part of its international, expansionist strategy of building EU market share by acquisition. PSE was then engaged in a restructuring to comply with the EU single energy markets requirements. Polish electricity is coal-based with coal mined from the major coal mining areas in Poland. Coal mining involves “significant locally concentrated employment” in Poland. Therefore, trade unions and coal miners had a considerable influence on government policy.

¹⁸⁸ *Id.*, p 349 (footnote 40). Above n 4, Jeswald W. Salacuse, p 174.

¹⁸⁹ Above n 174, Lester Nurick, Stephen J. Schnably, p 346.

¹⁹⁰ *Id.*, p 351-353 (Appendix).

¹⁹¹ *Id.*, p 346.

¹⁹² Above n 98, Thomas W. Wälde, p 210.

¹⁹³ *Id.*

88. In the mid-1990s, the parties decided to establish a “SwePol” submarine interconnector. It consisted of two cables, one main cable, and a smaller reverse cable which both were then “technologically very advanced and specialised”. The SwePol interconnector connoted a significant improvement in Poland’s energy security, and accommodated Poland’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 US\$300 million.
- (b) This sum was to be repaid by a commitment on the part of PSE to purchase electricity at 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. Sweden joined the European Union (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 precipitous decrease in electricity prices. The long-term fixed-price purchase commitment had been 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”.¹⁹⁴

(b) Parties’ unsuccessful negotiations

91. The parties had between themselves several rounds of negotiations which did not result in any settlement. Nevertheless, it has been observed that during those negotiations “elements pointing towards a constructive solution” had been identified:¹⁹⁵

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

¹⁹⁴ Above n 173, Gabriele Ruscalla, p 107.

¹⁹⁵ Above n 98, Thomas W. Wälde, p 219.

- (b) PSE eventually refuse 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 US\$1 billion for breach of 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.¹⁹⁶

(c) Parties' search for a competent mediator¹⁹⁷

93. In this case, the appointment of 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 well-known international engineering/electricity consulting firms, leading business consulting firms, 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".¹⁹⁸

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 "standardised report-writing and presentation-making service": they required "an *individual* mediator" 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 element of success fee, which hinges upon (1) the conclusion of a deal within a specified time (2) which is capable of being "tracked back to

¹⁹⁶ For an analysis of the strategic considerations of the parties, see above n 98, Thomas W. Wälde, pp 220-222.

¹⁹⁷ *Id.*, pp 222-223

¹⁹⁸ *Id.*, p 222.

the mediation process” and “to the renegotiation proposal to be made by the mediation team”.

96. The mediation team finally selected by the parties consisted of one sole mediator (Prof Thomas W. Wälde) and three senior specialists in electricity regulatory economics, electricity engineering and financial analysis.¹⁹⁹

(d) “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:²⁰⁰

- (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 the capacity as mediator) had “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 had 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 -

¹⁹⁹ *Id.*, p 223

²⁰⁰ *Id.*, pp 223-224

in an informal setting Lunches, dinners, drinks were the preferred context following more formal, office-based interviews.”

99. The mediator succinctly discerned the salient benefits of these informal meetings and consultations:²⁰¹

- (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”, 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) 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 Prof Wälde’s experience, “mediation cannot succeed without development of a ‘positive current’”.

(e) Several “strategic turns”

100. In the instant case, the mediator has identified “several strategic turns” that had taken place during mediation:²⁰²

- (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 “reason for previous obstruction”). There is inherent in the logic of mediation a “natural parallelism” meaning that if one party moves (e.g. offer 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” in the process.

²⁰¹ *Id.*, pp 223-225

²⁰² *Id.*, pp 225-226

- (b) Another key turn occurred through consultation 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 are divided into the following steps:²⁰³

- (a) *Searching for cultural traits in both Swedish and Polish business practices and for particular problems in the interaction of Swedish and Polish business people:* 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 both by the regulatory-deal-making and the technical-financial teams together.*
- (c) *Preparing a series of formal papers consisting of a “Joint History” and “Assessment of Each Party’s Particular Situation”.*
- (d) *Series of “shuttle-missions” where the case assessments and the outlines of the proposal were presented internal meetings of 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 practical and acceptable on both sides”, and more subtly, “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”.

(f) 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 deliberately and were of significance to the mediation process:²⁰⁴

- (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

²⁰³ *Id.*, pp 226-228

²⁰⁴ *Id.*, pp 228-229

relatively isolated location”. The venue was intended to help the participants focus on the mediation without distraction.

- (b) *Agenda, rules of engagement, roles of participants*: The mediator prepared the agenda (on the basis of the 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 “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 would not result in a concluded deal, and (2) “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 is, 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 in the past as “adversaries” Eventually a “compromise solution” was preferred with the mediator’s effort at “re-education” of the “one trouble-maker who was present” and “turned out to be more a lamb than a lion”.

(g) Conduct and outcome of the mediation meeting²⁰⁵

103. Prof Wälde described his varying role in the capacity as mediator during the two-day mediation meeting (with a day reserve): from that of a “central player” evolving into that of a “friendly adviser” as the parties “managed to interact constructively”.²⁰⁶ He further stressed the importance of organising social interaction (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 3 to 4 months the parties continued with their negotiations (in which the mediator’s team had “little involvement”), resulting in a final, detailed deal agreeable to both sides.

²⁰⁵ *Id.*, pp 230-231

²⁰⁶ This conversely illustrates the observation made in above n 4, Jeswald W. Salacuse, p 155, that as the disputant parties move from negotiation to mediation they “increasingly lose control” and the “third party increasingly intrudes”.

106. The outcome was seen to be a success to all stakeholders. In the postscripts of the mediator, it is recorded that the original contesting parties have 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 the success.

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

(3) 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 US\$395.5 million (with only \$59.5 million to be disbursed) in settlement of the its claim in the region of US\$973.2 million.²⁰⁷ It represents full and final “settlement of all the existing disputes to date”.²⁰⁸

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; which process ended with an “international mediation” under the ICC Mediation Rules, presided by Mrs. Mercedes Tarrazón, a “renowned international mediator”.²⁰⁹ The mediation took the form of “several sessions” between January and March 2020.²¹⁰ The mediator “guided the parties in extensive discussions” that analysed “their different positions”, “the advantages and disadvantages of reaching an agreement through mediation versus subjecting the dispute to a lengthy and costly arbitration process”.²¹¹ It

²⁰⁷ Cosmo Sanderson, “Billion-dollar Odebrecht dispute settled through mediation” *Global Arbitration Review* (18 March 2020). See also, below n 211, Businesswire.

²⁰⁸ “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/>

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Businesswire, “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)” (17 March 2020) Available at: <https://www.businesswire.com/news/home/20200317005791/en/The-Dominican-Government-and-the->

remains to be seen whether further information will be published so as to shed further light on how the mediation succeeded.

VIII. OVERCOMING CHALLENGES IN USING MEDIATION IN ISDS CONTEXT

(1) 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 time: there are a rising number of international investment agreements (IIAs) in which mediation has been included as a part of their dispute resolution clauses.²¹² Figures in 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, include mediation or conciliation as a part of their ISDS mechanisms.²¹³

(a) On treaty level: mediation provision

111. It is observed that the “integration of mediation into ISDS systems” is becoming more frequent on treaty level: (1) There are treaties providing for “cooling-off periods” that (a) contain an express invitation to the disputant parties to attempt mediation, or (b) remain silent on what method (or whether mediation) is available to facilitate amicable settlement of their disputes. (2) 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.²¹⁴

112. These are typical examples of IIAs or multilateral treaties (with investment provision) that encourage the use of mediation in ISDS by way of a “reference”

Odebrecht-Tecnimont-Estrella-Consortium-Reach-Agreement-to-Settle-All-Existing-Disputes-and-Guarantee-Completion-and-Final-Delivery-of-the-Coal-Fired-Central-Termoelectrica-Punta-Catalina-Project-CTPC

²¹² Above n 54, Kun Fan, p 328.

²¹³ *Id.*, 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/iia-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.

²¹⁴ *Id.*

to such means.²¹⁵ These references are “neither precise when and how mediation can take place nor conducive to mediated settlement”:²¹⁶

- (a) *The Investment Agreement between 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*.”²¹⁷

- (b) *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (2018) (CPTPP), a free trade agreement amongst 11 States with investment provisions in Chapter 9 of the Trans-Pacific Partnership incorporated (with exceptions), provides specifically in its 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*.”²¹⁸

113. There are some examples of IIAs or multilateral treaties (with investment provision) “singl[ing] out” mediation as an available option “at all times” and whether or not arbitration is underway.²¹⁹

- (a) *The Association of South East Asian Nations (ASEAN) Comprehensive Investment Agreement* (2009) in its Article 30 provides, in “generic terms”,²²⁰ for the possible use of conciliation at any stage, and such

²¹⁵ *Id.*, p 334.

²¹⁶ Above n 67, Anna 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.

²¹⁷ Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5413/download>

²¹⁸ Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/download>

²¹⁹ Above n 67, Anna Joubin-Bret, p 155.

²²⁰ Above n 67, Anna Joubin-Bret, p 155. The relevant Article provides:

**“Article 30
Conciliation**

conciliation may continue when the arbitral procedures under Article 33 are in progress. Such conciliation is “without prejudice” to the disputant parties’ rights.²²¹

- (b) *The COMESA IA* contains provisions in its 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 nature further features 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”.²²²

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) (CEPA Investment Agreement)²²³ (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 arbitration.²²⁴

- (a) Hong Kong or Mainland investors may submit an investment dispute to a mediation institution of 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.²²⁵
- (b) The two sides have also established the *CEPA Mediation Mechanism* applicable to mediation conducted under the Mainland-HKSAR CEPA IA.²²⁶ In respect of disputes involving Mainland investors, a distinct set of comprehensive procedural rules, the *Mediation Rules for Investment Dispute*, is also applicable.²²⁷

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.”

²²¹ Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3095/download>

²²² Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download>

²²³ Available at: <https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html>

²²⁴ Above n 63, David Ng, p 305.

²²⁵ 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>

²²⁶ Available at: <https://www.tid.gov.hk/english/cepa/investment/files/mediation.pdf>

²²⁷ Available at: <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>

The Mainland-HKSAR CEPA IA is a *prime example* and a pioneer in riding the rise in the use of mediation to resolve investment disputes. While no statistics have been published so far on the use of mediation, the authors are 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 does not adversely affect the stakeholders' willingness to engage in serious mediation process.

115. The recent trend of incorporating more sophisticatedly drafted mediation clause is often accompanied by tailor-made, comprehensive mediation rules.²²⁸ For instance:

- (a) Under the Mainland-HKSAR CEPA IA, the “Mediation Mechanism” which sets out the procedural framework for of 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.²²⁹

(b) 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.²³⁰ These developments were followed, in 2014, by both the ICC Mediation Rules,²³¹ and SCC Mediation Rules,²³² albeit these rules are not made specifically for investor-State disputes.

²²⁸ Above n 54, Kun Fan, pp 336-337.

²²⁹ 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>

²³⁰ Nancy Welsh, Andrea Schneider, “The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration” (2013) 18 *Harvard Negotiation Law Review* 71, p 83.

²³¹ Available at: <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>

²³² Available at: https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf

117. The development of mediation rules for ISDS is accompanied by joint effort of education. The Energy Charter Conference, with the support of International Mediation Institute, ICSID, SCC, ICC, UNCITRAL and PCA, endorsed the “Guide on Investment Mediation” in 2016.²³³ The Guide serves as “a helpful, voluntary instrument” (a) explaining the mediation process in general, (b) giving facilitating tips; and (c) explaining the role of the ECS and other institutions.

118. At a broader level, international effort was 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 of the mediation process and to aim 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 framework and policies.

(c) 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 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 for 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), in particular when an existent dispute is seen to be 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).²³⁴

²³³ International Energy Charter, “Conference endorses Guide on Investment Mediation” (1 August 2016). Available at: <https://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/>

²³⁴ 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,

120. Another instrument is the UN Mediation Settlement Convention, which came into force on 12 September 2020.²³⁵ The Working Group agreed that mediated settlement agreements for investment disputes “should not be excluded from the scope” of the Convention,²³⁶ 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 8.²³⁷ 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 ISDS process, and “clarity to the contracting parties” by clarifying which is the proper State entity with whom they should mediate.²³⁸
- (b) The second alternative would permit the Convention to be applied “on a case-by-case basis”.²³⁹ This may arm the State with a “powerful new bargaining chip”: an “offer of finality” where the reciprocal exchange in favour of the State “justifies giving the investor the added insurance of an enforceable settlement”.²⁴⁰

As of the time of this paper (October 2020), out of the 6 contracting States which have ratified or approved the Convention, 3 States have made reservations to exclude mediated settlement agreements from application if the States (and/or their agencies) are parties to such agreements.

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).

²³⁵ As of the date of this paper (October 2020), there are 53 signatories, of which 6 have ratified or approved the Convention.

²³⁶ *Note by the Secretariat: International commercial mediation: draft convention on international settlement agreements resulting from mediation* (A/CN.9/942), p 12 (para 20).

²³⁷ *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 6 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.

²³⁸ Mark E. Appel, “A ‘Done Deal’ For States And Investors? The New UNCITRAL Convention on International Settlement Agreements Resulting From Mediation” (2018) 1(2) *The Journal of Enforcement of Arbitration Awards* 1, pp 11-12.

²³⁹ *Id.*, p 12.

²⁴⁰ *Id.*

(2) 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 of mediation. The ECS's Guide on Investment Mediation has provided a handy reference to the stakeholders in understanding investment mediation. In addition, education can be, and in fact has been, taken in various forms such as seminars and colloquia attended by stakeholders, roundtables and dialogues with government officials. On this, 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).

(3) 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.”²⁴¹

124. In September 2016, IMI developed a set of “competency criteria” for investor-State mediators.²⁴² An investor-State mediator is expected to have knowledge and experience in (a) understanding of investor-State issues; (b) mediation; (c) different forms of negotiation, mediation and conciliation; (d) arbitration and adjudication; (e) intercultural competency; and (f) other competencies such as technical competency, case management skills and familiarity with other issues such as third-party funding etc.

125. The authors understand that many institutions such as ICSID, CEDR, ECS and IMI have been organizing workshops and structured training programmes tailored for investor-State disputes. In addition to the efforts of institutions, the Hong Kong SAR, through its Department of Justice, has been a pioneer to organize (jointly with ICSID, CEDR, ECS and AAIL) investment mediator

²⁴¹ Arthur S Meyer, “Functions of the Mediator in Collective Bargaining” (1960) *Industrial and Labour Relations Review* 13 160.

²⁴² International Mediation Institute, *IMI Competency Criteria for Investor-State Mediators* (19 September 2016). Available at: <https://imimediation.org/about/who-are-imi/ism-tf/>

training to the mix of government officials (coming from Asian jurisdictions) and private practitioners since 2018.

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

(4) 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 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 to adopt the most appropriate, or even a mixed, style in conducting mediation. A skilled mediator can even change the style in adapting any changes happened in the course of mediation.

128. An aspect of flexibility is conferring the power on the investment mediator to make a “mediator’s proposal” at the appropriate juncture of mediation – usually when there is a lack of progress in mediation. A “mediator’s proposal” is a settlement proposal that the mediator makes to all parties, and each party is requested to accept or reject it, on 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, it is noted that the investment mediator under the EU-Vietnam FTA 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 ...*”²⁴³

(5) Guidance and structural reform to ease the 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 in settling a case. Where necessary, structural (including legal) reform can be implemented to give comfort to the government officials in charge, who consider that the dispute should be settled on certain terms. Also, external expert or legal advice can be sought in confidence before the final decision to settle is made.

²⁴³ EU-Vietnam FTA, Chapter 15, Clause 15.4 referring to Annex 15-C (Mediation Mechanism), art.5(3)

(6) 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 seen in commercial dispute context, 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 Coe has proposed an innovative idea, which he termed as “Concurrent Med-Arb”. 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 to the said model is to have two mediators, with each disputant party appointing one.

(7) Mandatory mediation?

132. Despite general welcoming and encouraging remarks by almost all stakeholders to embrace mediation (or similar processes) to resolve investor-State disputes, it is not difficult to detect from the academia as well as the States some reservations on the use of mediation as a *mandatory* process, which is said to be at odds with the “voluntary nature” of the mediation process, and may be futile or even detrimental in some situations.²⁴⁴

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: the rules of mediation should provide for “easy opt-outs” after a period of compulsory participation.²⁴⁵
- (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

²⁴⁴ (Revised) Draft Summary, *Possible reform of investor-State Dispute Settlement (Addendum)* (A/CN.9/WG.III/XXXIX/CRP.1/Add.1) para 18. See also Above n 63, paras 85-88 explaining the possible use of mandatory mediation during the “cooling off” period.

²⁴⁵ *Id.*

wishes to reach out to the other party to attempt mediation.²⁴⁶ Especially in the context of ISDS, this presumptive use of mediation precisely “chip[s] away at” the “reluctance” on the part of host State’s officials to attempt mediation or accede to any settlement, in that (as noted above) such moves which may later be viewed as a source of liability, legal or political.²⁴⁷

- (c) The “timing for a paradigm shift is opportune”, and a proposal of compulsory mediation is rightly made at this point given that mediation has gained “currency” in ISDS in recent times (as noted above).²⁴⁸

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 party autonomy and may, inadvertently or otherwise, add an element of “coercing settlement” into the process.²⁴⁹ A scheme that requires the parties to participate in “the entire mediation process” is clearly at *the extreme end* of the scale; while a less intrusive approach (such as requiring an acceptable period of mandatory participation) may be able to dispel these concerns and, in fact, appear more sensible.²⁵⁰
- (b) It is incorrect to assume that every dispute that is liable to be arbitrated is “automatically qualified to mediate”.²⁵¹ 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, more suitable options, such as “expert evaluation or adjudication”, to be used, or simply, the disputing parties are “amenable” to other options but not mediation.²⁵²
- (c) Mediation remains an “‘investment’ in time and money with uncertain results”.²⁵³ As such, the question of “mediate or not to mediate” is best left for the parties to decide. Any successful experiences with compulsory mediation in “domestic legal systems” must be approached with caution, and cannot be a “perfect analog”; as such, it may be

²⁴⁶ Lisa Blomgren Bingham, “Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels”, in above n 88, UNCTAD, p 36.

²⁴⁷ Above n 96252, James M. Claxton, p 99.

²⁴⁸ *Id.*, p 100.

²⁴⁹ Above n 230, Nancy Welsh, Andrea Schneider, p 128.

²⁵⁰ Above n 230, Nancy Welsh, Andrea Schneider, p 129.

²⁵¹ Wolf von Kumberg, “Making Mediation Mainstream: An Application for Investment Treaty Disputes”, in above n 88, UNCTAD, p 74.

²⁵² Above n 96252, James M. Claxton, p 96.

²⁵³ *Id.*

impossible to translate such experiences into a workable practice in ISDS context.²⁵⁴

- (d) Even if minimum 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.²⁵⁵
- (e) Information obtained as a result of the mediation process can subsequently be used not as *evidence* directly (which is, in any event, 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 better strategy in the ensuing arbitral proceedings.²⁵⁶

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 international legal framework level, States under the coordination of UNCITRAL should strive to develop model treaty mediation clauses and investment mediation protocols in ISDS context. A recognized 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 appreciating their legal duties in participating in the mediation process. On this, the mediation clause and mediation rules under the Mainland-HKSAR CEPA IA, amongst others, provide a valuable reference models.

137. In addition, guidance should be provided, both at international and domestic levels, to government officials addressing their concerns in 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 ISDS

²⁵⁴ *Id.*, p 98.

²⁵⁵ *Id.*, p 96.

²⁵⁶ *Id.*

context. In fact, it is of paramount importance particularly when investment mediation is still at the “infancy” stage. Training can take in various forms such as seminars, workshops, international conferences and/or structured training.²⁵⁷ Such effort would greatly assist all stakeholders (government officials, investors and legal practitioners) in familiarizing themselves with the mediation process, which in turn will assist them in developing (or improving) the 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 fortifies the stakeholders’ confidence in mediation, and in a long run maintains 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.²⁵⁸ 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 the challenges and find its appropriate place in ISDS context.

²⁵⁷ The Department of Justice of the Government of 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.

²⁵⁸ C Brown, P Winch, “*The Confidentiality and Transparency Debate in Commercial and Investment Mediation*” in Titi/Fach Gómez, above n 52, p 329.