

**UNCITRAL Working Group III on ISDS Reform**

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

**Background Paper for Session 2 – “Multi-tiered Dispute Resolution Process (Mediation Protocol)”**

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## **CONTENTS**

|             |  |           |
|-------------|--|-----------|
| <b>I.</b>   | <b>EXECUTIVE SUMMARY .....</b>   | <b>3</b>  |
| <b>II.</b>  | <b>INTRODUCTION.....</b>   | <b>5</b>  |
| <b>III.</b> | <b>OVERVIEW OF THE MULTI-TIERED DISPUTE<br/>RESOLUTION PROCRRS .....</b>   | <b>5</b>  |
|             | (a) The International Centre for Settlement of Investment<br>Dispute System .....                                    | 5         |
|             | (b) Multi-tiered Dispute Resolution Mechanism in Hong Kong<br>.....  | 9         |
| <b>IV.</b>  | <b>EXISTING PRACTICE REGARDING PROVISIONS ON<br/>MEDIATION IN INTERNATIONAL INVESTMENT<br/>AGREEMENTS .....</b>      | <b>11</b> |
|             | (a) Model Bilateral Investment Agreement.....  | 16        |
|             | (b) Bilateral Investment Agreement .....   | 16        |
|             | (c) Plurilateral Investment Treat .....  | 17        |
|             | (d) Mainland and Hong Kong Closer Economic Partnership<br>Arrangement .....  | 18        |
|             | (e) Comprehensive Economic and Trade Agreement .....   | 20        |
| <b>V.</b>   | <b>BENEFITS OF INCORPORATING A MEDIATION<br/>PROTOCOL IN PROMOTING THE GREATER USE OF<br/>MEDIATION IN ISDS.....</b> | <b>22</b> |
| <b>VI.</b>  | <b>ELEMENTS OF AN EFFECTIVE MEDIATION<br/>PROTOCOL.....</b>  | <b>25</b> |
|             | (a) NUMBER OF MEDIATORS .....  | 25        |
|             | (b) Process Model.....   | 26        |
|             | (c) Management Conference of the Mediation Process .....   | 27        |
|             | (d) Scope of Matters for Mediated Settlement Agreement .....   | 28        |
|             | (e) Voluntariness and Self-determination .....   | 31        |
|             | (f) Confidentiality and Transparency of Mediation in the context<br>of ISDS .....                                    | 32        |
|             | (g) Qualifications and Code of Conduct on Mediators.....   | 34        |
| <b>VII.</b> | <b>CONCLUSION .....</b>  | <b>36</b> |

## **I. EXECUTIVE SUMMARY**

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

The majority of bilateral investment treaties, with the incorporation of a two-tiered dispute settlement clause, used to provide the parties with some forms of alternative dispute resolution before such disputes are to be heard before an arbitral tribunal. The first tier (generally being a period of “cooling-off”) has long been criticised for not being sufficiently conducive to facilitating the disputing parties to go through a collaborative process with a view to finding a resolution to the dispute. Arbitration process, being the second tier of the mechanism, has also aroused increasing concerns from States and international institutions. As such, with the collective efforts of UNCITRAL Working Group III and ICSID, mediation is receiving more attention. Mediation process is more commonly found in the recent treaties signed by States as a form of ISDS mechanism. Furthermore, as an innovative internal arrangement within China, the Mainland China and the Hong Kong Special Administrative Region Investment Agreement enhancing the Closer Economic Partnership Arrangement has incorporated a mediation protocol to provide guidelines on the procedural matters and core values of the mediation process.

The benefits of incorporating a mediation protocol in the investment treaties are manifold. First, it serves as a mediation manual to provide parties with functional suggestions on how mediation can be used to

resolve claims in specific instances. Further, mediation rules offer guidance on the behaviour of mediators and the process through which the mediation is conducted. A mediation protocol also offers practical guidelines to States and investors about what to do and what to expect during the “cooling-off period”.

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

## **II. INTRODUCTION**

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

## **III. OVERVIEW OF THE MULTI-TIERED DISPUTE RESOLUTION PROCRS**

### **(a) The International Centre for Settlement of Investment Dispute System**

2. The multi-tiered dispute resolution mechanism has long been adopted in the context of ISDS. The International Centre for Settlement of Investment Dispute (ICSID) is part of the World Bank Group with the aim to promote international investment by providing confidence in the dispute resolution process.<sup>3</sup> Established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), ICSID provides a multi-tiered dispute resolution system for the resolution of international investment disputes including conciliation and arbitration.<sup>4</sup>

3. The ICSID Convention, which has been ratified by 155 States, provides a procedural framework for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.<sup>5</sup> Where the investment disputes arise between an ICSID Contracting State or its national, and a non-Contracting State or a national of a non-Contracting State, the Additional Facility rules for conciliation or arbitration ("AF Rules") should be adopted. The AF Rules

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<sup>3</sup> See the website of International Centre for Settlement of Investment Dispute <<https://icsid.worldbank.org/>>.

<sup>4</sup> Ibid.

<sup>5</sup> See Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

are in most ways the same as those of the ICSID Convention.<sup>6</sup>

4. ICSID conciliation is a cooperative and non-adversarial dispute resolution process.<sup>7</sup> The goal is to clarify the issues in the dispute,<sup>8</sup> so as to promote amicable and non-imposed settlement between the parties on mutually acceptable terms.<sup>9</sup>

5. To commence an ICSID conciliation proceeding, a written request shall be addressed to the Secretary-General of ICSID.<sup>10</sup> Such written request is treated as a binding consent to ICSID conciliation which cannot be withdrawn by the party unilaterally.<sup>11</sup> Upon receipt of the Request for Conciliation, the Secretary-General will proceed to register the case unless it is “manifestly outside” the jurisdiction of ICSID which extends to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State.<sup>12</sup> Following registration, the conciliation commission shall be constituted as soon as possible and it shall consist of a sole conciliator or any uneven number of conciliators.<sup>13</sup> Should the parties fail to agree on the number of the conciliator to be appointed, the ICSID regime defaults a three-conciliator commission.<sup>14</sup> When three conciliators serve, each disputant selects one conciliator; and the third is designated jointly by the parties.<sup>15</sup>

6. After the constitution of conciliation commission, each party is required to submit a written statement of that party’s position and thereafter the parties shall attend hearings together in private.<sup>16</sup> The commission may

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<sup>6</sup> See ICSID (n3).

<sup>7</sup> See ICSID (n3).

<sup>8</sup> See Article 34(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>9</sup> Jack J. Coe, Jr, “Chapter 4 Settlement of Investor-State Disputes through Mediation-Preliminary Remarks on Processes, Problems, and Prospects” in R. Doak Bishop, “Enforcement of Arbitral Awards Against Sovereigns”, JurisNet LLC, 2009, see p. 73-112.

<sup>10</sup> See Article 28(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>11</sup> See Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>12</sup> See Article 28(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>13</sup> See Article 29 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>14</sup> Ibid.

<sup>15</sup> See Article 29(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>16</sup> See Rule 25 and 27 of the ICSID Convention Conciliation Rules.

at any stages recommend terms of settlement with arguments in support of its recommendations to the parties.<sup>17</sup> Where settlement is reached, the commission is responsible for drawing up a report noting the issues in dispute and recording that the parties have reached an agreement.<sup>18</sup> Where no settlement is reached, the commission shall close the proceedings and draw up a report noting the submission of the dispute and recording the failure of the parties to reach an agreement.<sup>19</sup>

7. The approach to be adopted by a conciliator in dealing with investor-state investment disputes is not clearly prescribed in the ICSID Convention. One prominent conciliation case (*Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1)) has shed light on the role of a conciliator under the ICSID Convention. In that case, the late Lord Wilberforce, who was the sole conciliator for the case explained that he “conceive[d] that his task in these proceedings is to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement”.<sup>20</sup> Afterwards, based on the parties’ memorials, informal oral argument and views submitted in confidence as to what might constitute an acceptable settlement, Lord Wilberforce advanced a proposed settlement for consideration by the disputing parties based on “his estimate of the parties’ chances of success on the issue in dispute”.<sup>21</sup>

8. It is reflected in the nature of the process under the said case that the conciliation under ICSID has elements of evaluative mediation.<sup>22</sup> This is because an ICSID conciliator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do.<sup>23</sup> Like an evaluative mediator, an ICISD

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<sup>17</sup> See Rule 22 of the ICSID Convention Conciliation Rules.

<sup>18</sup> See Article 34(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>19</sup> *Ibid.*

<sup>20</sup> Stephen M. Schwebel, “Is Mediation of Foreign Investment Disputes Plausible?”, *ICSID Review – Foreign Investment Law Journal*, Volume 22, Issue 2, 1 October 2017, pp. 237 – 241, see pp. 239 – 240.

<sup>21</sup> *Ibid.*

<sup>22</sup> David Ng, “Discussion Paper for the Session on Investment Mediation (2019)”, *ISDS Reform Conference: Mapping the Way Forward*, Asian Academy of International Law, see p. 293-294.

<sup>23</sup> Susan D. Franck, “Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide”, *ICSID Review – Foreign Investment Law Journal*, Volume 29, Issue 1, 1

conciliator might make formal or informal recommendations to the parties as to the outcome of the issues.<sup>24</sup>

9. Where the parties are not able to settle their disputes by conciliation, they may initiate an arbitration proceeding at ICSID by filing a Request for Arbitration to the Secretary-General of ICSID,<sup>25</sup> who will proceed to register the case unless it is “manifestly outside” the jurisdiction of ICSID.<sup>26</sup>

10. Under the ICSID Convention, parties have the autonomy to determine the number of arbitrators and appoint any arbitrator as they see fit save and except that there is a prohibition for parties to constitute an even number tribunal.<sup>27</sup> By allowing the parties to pick arbitrator(s), it lends more legitimacy to the proceedings and gives the parties greater buy-in on the process.<sup>28</sup> Once the tribunal is constituted, the first session of the arbitration proceeding must be held within 60 days of its constitution or such other period as the parties may agree.<sup>29</sup> During the proceedings, parties are required to submit written submissions and attend oral hearings to present their cases for the tribunal’s consideration.<sup>30</sup>

11. A final written award shall be drawn up and signed within 120 days by the tribunal after the closure of the proceeding.<sup>31</sup> Such award is binding and the disputing parties must comply with the terms set out in the award except otherwise provided for under the ICSID Convention.<sup>32</sup> Each ICSID Contracting State has an obligation to recognize ICSID awards as binding and enforce the pecuniary obligations of such awards within its territories as if they were final judgments issued by its courts.<sup>33</sup> Unless with the

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February 2014, pp. 66 – 89, see p.71.

<sup>24</sup> Ibid.

<sup>25</sup> See Article 36(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>26</sup> See Article 25 and 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>27</sup> See Article 37(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>28</sup> See Franck (n23), at p.5.

<sup>29</sup> See Rule 13 of ICSID Convention Arbitration Rules.

<sup>30</sup> See Rule 29 of ICSID Convention Arbitration Rules.

<sup>31</sup> See Rule 46 of ICSID Convention Arbitration Rules.

<sup>32</sup> See Article 53 of Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>33</sup> See Article 54 of Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

consent of the parties, the ICSID Secretariat shall not publish the award but is under an obligation to make excerpts of the award public.<sup>34</sup>

12. In addition to the arbitration and conciliation provided by the ICSID Convention and Rules, there are other alternative dispute resolution mechanisms available including but not limited to fact-finding, early evaluation and facilitated negotiation.<sup>35</sup>

13. Since 2016, ICSID has been considering ways to strengthen its multi-tiered dispute resolution mechanism.<sup>36</sup> In particular, ICSID began work on a new set of mediation rules as part of a broader effort to modernise its mechanism in resolving investment disputes in 2018.<sup>37</sup> Since the new set of mediation rules has not been finalised, ICSID may draw inspirations from two multi-tiered dispute resolution mechanisms in Hong Kong.

#### **(b) Multi-tiered Dispute Resolution Mechanism in Hong Kong**

14. In Hong Kong, multi-tiered dispute resolution process has been transplanted to various schemes. One example is Financial Dispute Resolution Scheme (FDRS) of the Financial Dispute Resolution Centre, which was established in August 2017. The FDRS provides an independent channel for financial institutions and their individual customers to resolve monetary disputes primarily by way of "Mediation First, Arbitration Next".<sup>38</sup>

15. Under the FDRS, the mediator shall commence and conduct the mediation as soon as possible but in any event within 21 days of his appointment.<sup>39</sup> The mediator should ensure that the parties sign an agreement to mediate prior to the substantive mediation session.<sup>40</sup> The

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<sup>34</sup> See Article 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

<sup>35</sup> See ICSID (n3).

<sup>36</sup> Ibid.

<sup>37</sup> The full text of the ICSID draft Mediation Rules is available at [https://icsid.worldbank.org/sites/default/files/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf).

<sup>38</sup> See the website of Financial Dispute Resolution Scheme [https://www.fdr.org.hk/en/html/resolvingdisputes/resolvingdisputes\\_fdrs.php](https://www.fdr.org.hk/en/html/resolvingdisputes/resolvingdisputes_fdrs.php).

<sup>39</sup> See Rules 2.3.2 of FDRS Mediation and Arbitration Rules.

<sup>40</sup> See Rules 2.3.1 of FDRS Mediation and Arbitration Rules.

substantive mediation session under FDRS shall not exceed 4 hours.<sup>41</sup> If no settlement is reached during the mediation, an extended mediation session may be arranged.<sup>42</sup> Alternatively, the disputing parties may resort to arbitration for the resolution of the disputes. An arbitral award is to be rendered within 1 month after receipt of the last document by the arbitrator.<sup>43</sup>

16. The latest example is COVID-19 Online Dispute Resolution (ODR) Scheme of eBRAM which aims to provide speedy and cost-effective means to resolve Covid-19 related disputes with the claim amount for each case to be capped at HK\$500,000.<sup>44</sup>

17. Under the eBRAM Rules for the Covid-19 ODR Scheme (eBRAM Rules), parties will attempt to resolve their disputes through a multi-tiered dispute resolution mechanism. The process is in five principal stages: commencement of proceedings;<sup>45</sup> submission of a claim and response (and counterclaim and response (if any));<sup>46</sup> the negotiation stage;<sup>47</sup> the mediation stage;<sup>48</sup> and the arbitration and award stage.<sup>49</sup>

18. Each tier will be conducted within a limited time. For instance, if the parties are not able to settle their dispute by negotiation within three calendar days of the commencement of the negotiation stage, the mediation stage of the proceedings shall commence immediately.<sup>50</sup> This is, however, subject to the parties' agreement to extend the deadline for reaching settlement.<sup>51</sup> The parties may then agree to appoint a neutral person as a mediator to conduct the mediation from a list of five names provided by eBRAM.<sup>52</sup> After the appointment, the mediator shall communicate with the parties through the eBRAM system to reach a settlement agreement.<sup>53</sup>

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<sup>41</sup> See Section A of FDRS Terms of Reference.

<sup>42</sup> Ibid.

<sup>43</sup> See Rules 3.8.8 of FDRS Mediation and Arbitration Rules.

<sup>44</sup> The full text of the eBRAM Rules for the Covid-19 ODR Scheme is available at [https://ebram.org/download/Covid-19%20Rules\\_English.pdf](https://ebram.org/download/Covid-19%20Rules_English.pdf).

<sup>45</sup> See Article 4 of eBRAM Rules.

<sup>46</sup> See Article 5 of eBRAM Rules.

<sup>47</sup> See Article 6 of eBRAM Rules.

<sup>48</sup> See Article 7 of eBRAM Rules.

<sup>49</sup> See Article 8 of eBRAM Rules.

<sup>50</sup> See Article 6.4 and 6.5 of eBRAM Rules.

<sup>51</sup> Ibid.

<sup>52</sup> See Article 7.1 of eBRAM Rules.

<sup>53</sup> See Article 7.2 of eBRAM Rules.

19. Should there be an agreement, the mediated settlement agreement shall be signed and executed electronically by the parties on the eBRAM Platform.<sup>54</sup> If the parties are not able to settle their dispute by mediation within three calendar days of being notified of the appointment of the mediator, the arbitration stage of the proceedings shall commence immediately, subject to the arbitrability of the dispute.<sup>55</sup> Parties may appoint an arbitrator to adjudicate their disputes.<sup>56</sup>

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

#### **IV. EXISTING PRACTICE REGARDING PROVISIONS ON MEDIATION IN INTERNATIONAL INVESTMENT AGREEMENTS**

21. According to Investment Policy Hub’s database of the United Nations Conference on Trade and Development (UNCTAD), there are 3,285 bilateral and multilateral investment treaties,<sup>57</sup> and almost all of them contain some forms of ISDS mechanism.<sup>58</sup> These treaty-based dispute mechanisms can be traced back to a historical concern of private investors when they had to resolve disputes in developing countries’ court systems.<sup>59</sup> The investors worried about the independence of a local court system and that foreigners, whether actual or merely perceived, would be subjected to worse treatment than their respective national counterpart.<sup>60</sup> This set the backdrop for a common mechanism for dispute resolution between host States and foreign investors in order to prevent politicization of conflicts.<sup>61</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> See Article 7.3 of eBRAM Rules.

<sup>56</sup> See Article 8.1 of eBRAM Rules.

<sup>57</sup> See the website of Investment Policy Hub < <https://investmentpolicy.unctad.org/>>.

<sup>58</sup> T. Allee and C. Peinhardt, “Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions”, 54 Intl Studies Quarterly 1, March 2010, pp. 1-26.

<sup>59</sup> See Franck (n 23), at p. 70.

<sup>60</sup> Ibid.

<sup>61</sup> Wolf von Kumberg and M.R. Dahlan, “Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation”, Pepperdine Dispute Resolution Law Journal, Volume 18, Issue 3, May 2018.

22. Traditionally, the majority of bilateral investment treaties incorporated a two-tiered dispute settlement clause, providing first for some forms of alternative dispute resolution before submitting the disputes to an arbitral tribunal.<sup>62</sup> The first tier may make reference to a period of “cooling-off”. Some treaties expressly provide that such a “cooling-off period” can be made use of for the parties to attempt mediation or conciliation,<sup>63</sup> while others regard the “cooling-off period” as a mere procedural condition precedent to arbitration.<sup>64</sup> The latter has long been criticised for contradicting the objective of “cooling-off period”, which is to encourage negotiation before parties can initiate formal arbitration procedures.<sup>65</sup>

23. Another problem identified by the UNCTAD is that the “time frame of three to six months usually allocated” for the purpose of “cooling-off period” “is rather short”.<sup>66</sup> States may need a substantial amount of time to discern the source of the breach and responsible institutions among a myriad of government agencies.<sup>67</sup> Therefore, the “cooling-off period” in practice is usually for the preparation of the contemplated arbitration, rather than going through a collaborative process with a view to finding a resolution to the dispute.<sup>68</sup> As a result, the mindset of the parties is to resolve the disputes by way of arbitration rather than genuinely making attempts to resolve their investment dispute through a non-adversarial process.

24. Arbitration is a consensual dispute resolution process, in which a dispute is submitted, by agreement of the parties, to an arbitral tribunal for adjudication. The arbitral award is final and binding. In addition, arbitration is supported by firm treaty network enabling global enforcement of promises to arbitrate and arbitral awards.<sup>69</sup> All these make

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<sup>62</sup> UNCITRAL Working Group III Secretariat, Note by the Secretariat on thirty-ninth session, “Possible reform of investor-State dispute settlement (ISDS): Dispute prevention and mitigation – Means of alternative dispute resolution” (A/CN.9/WG.III/WP.190), see paras 35.

<sup>63</sup> C. Kessedjian, A. van Aaken, R. Lie and L. Mistelis, “Mediation in Future Investor-State Dispute Settlement”, Academic Forum on ISDS Concept Paper 2020/16, March 2020, see p. 11.

<sup>64</sup> Ibid.

<sup>65</sup> The full text of The UNCTAD Paper “Investor-State Disputes: Prevention and Alternatives to Arbitration” is available at <[https://unctad.org/en/docs/diaeia200911\\_en.pdf](https://unctad.org/en/docs/diaeia200911_en.pdf)>.

<sup>66</sup> See UNCTAD (n 64), at p. 10.

<sup>67</sup> Ibid.

<sup>68</sup> Wolf von Kumberg, “The Time For Investor State Mediation has come”, Quraysh IDR Brief, June 2020.

<sup>69</sup> R. D. Bishop, J. Crawford, W.M. Reisman, "Foreign Investment Disputes: Cases, Materials and Commentary", Kluwer Law International, 2014, see p. 1515-1653.

arbitration become a dominant method of ISDS for the past 20 years.<sup>70</sup> Nevertheless, arbitration outcomes remain difficult to predict.<sup>71</sup> The transplantation of the confidential commercial arbitration mechanism into a public law context leads to insufficiency of binding precedents.<sup>72</sup> Although the ICSID Secretariat reserves the right to publish parts of the reasoning when parties to the case do not consent to have the case published in full, there is no official system of precedent in arbitration in the context of ISDS.<sup>73</sup> This may create some perceived unwelcome discrepancies,<sup>74</sup> which “undermine the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged.”<sup>75</sup>

25. In addition, arbitration proceedings in the context of ISDS are often lengthy since they involve complicated facts and novel issues of substance or procedure.<sup>76</sup> On average, it requires 3 years to come up with an award for ICSID arbitrations.<sup>77</sup> Accordingly, substantial costs are incurred in arbitration in the context of ISDS. It is estimated by the Organisation for Economic Co-operation and Development (OECD) that proceedings cost States an average of US\$8 million and can exceed US\$30 million, all of which they have no chance of recovering, whether they win or lose.<sup>78</sup>

26. Moreover, the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea B.V.* (Case C-284/16) found that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia bilateral investment agreement “has an adverse effect on the autonomy of EU

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<sup>70</sup> See Franck (n 23), at p.5.

<sup>71</sup> C.H. Brower II, “Mitsubishi, Investor-State Arbitration, and the Law of State Immunity”, Volume 20, Issue 5, 2005, see p. 911.

<sup>72</sup> Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions”, *Fordham Law Review*, Volume 73, Issue 4, October 2005, p.1511-1625.

<sup>73</sup> D. Gaukrodger and K. Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Paper No. 2012/3, Feb 2013, see p. 102.

<sup>74</sup> Stephan Wilske; Martin Raible; Lars Market, “International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing,” *Contemporary Asia Arbitration Journal* 1, no. 2, November 2008, see p. 213-234.

<sup>75</sup> X. Y. Huang and C. Y. Cheng, “Protection of International Investment - The Study of Establishing Appellate Mechanisms in International Investment Arbitration”, *International Review of Management and Business Research* 3, 2014, see p. 1819.

<sup>76</sup> *Ibid.*

<sup>77</sup> See Coe (n 9), at p.76.

<sup>78</sup> See Gaukrodger (n 72), at p.43.

law”.<sup>79</sup> In particular, the CJEU noted that the arbitral tribunal constituted under the said investment agreement was required to rule on the basis of the law in force of the Contracting State involved in the dispute (Slovak Republic) and other relevant agreements between the parties.<sup>80</sup> As far as CJEU is concerned, requesting the arbitral tribunal to determine disputes of EU law is in violation of Article 344 of Treaty on the Functioning of the European Union (TFEU),<sup>81</sup> which prohibits member States from submitting a dispute concerning the interpretation or application of EU Treaties to any method of settlement other than those provided in the Treaties.

27. Further, the CJEU observed that the arbitral tribunal was not a court or tribunal of a member state of EU law within the meaning of Article 267 TFEU.<sup>82</sup> As such, Article 8 of the said investment treaty is held to be incompatible with certain key principles of EU law.<sup>83</sup> With the effect of the judgment, agreements for terminating intra-EU bilateral investment treaties were signed by numerous EU member States on 5<sup>th</sup> May 2020.<sup>84</sup>

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

29. At the fiftieth session of United Nations Commission on International Trade Law’s meeting in 2017, the UNCITRAL Working Group III (WG) was entrusted to work on the possible reform of the ISDS.<sup>85</sup> In Part 1 of the report of WG on the work of its thirty-fourth session, WG identified mediation as one of the alternative dispute resolution methods that could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration.<sup>86</sup> Later, the significance of the use of mediation in ISDS for reaching amicable

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<sup>79</sup> Slovak Republic v. Achmea B.V. (Case C-284/16), Judgement of 6 March 2018, ECLI:EU:C:2018:158, at para. 59.

<sup>80</sup> See Slovak Republic (n 78), at para 40.

<sup>81</sup> See Slovak Republic (n 78), at para 41.

<sup>82</sup> See Slovak Republic (n 78), at para 48.

<sup>83</sup> Ibid.

<sup>84</sup> See Kumberg (n60), at p.8.

<sup>85</sup> United Nations, Official Records of Seventy-second Session of General Assembly (Report of the United Nations Commission on International Trade Law) (A/72/17), see paras. 227.

<sup>86</sup> UNCITRAL Working Group III Secretariat, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session – Part I” (A/CN.9/930/Rev.1), see paras. 31 – 33.

settlements was singled out during the round-table session of the first inter-session meeting of the WG in September 2018.<sup>87</sup> The idea of enhancing the use of mediation in the context of ISDS received great support from a number of delegations, with China and the European Union to be included.<sup>88</sup>

30. In the report of WG on the work of its thirty-sixth session, WG agreed that there were sufficient concerns with ISDS system to warrant reform,<sup>89</sup> and recognised mediation as a reform option to address the concerns in the annex to Working Paper 149 of UNCITRAL Working Group III for its thirty-sixth session (A/CN.9/WG.III/).<sup>90</sup> In view of the underutilisation of the alternative dispute resolution in the context of ISDS, the WG, in the thirty-ninth session of its meeting which was held in October 2020, requested the UNCITRAL Secretariat (Secretariat) to develop model clauses to be used in investment treaties indicating procedural steps the disputing parties could usefully take and guiding parties on how to conduct a mediation in the context of ISDS.<sup>91</sup> The WG stressed the significance in reflecting the best practices on the “cooling-off period”, including an adequate length of time and clear rules on how such period could be complied with.<sup>92</sup> This is to avoid unnecessary delays and costs and ensure that mediation would be used in a meaningful manner.<sup>93</sup> Furthermore, the Secretariat is tasked to develop more specific guidelines for effective use of ADR and rules for mediation in the ISDS context.<sup>94</sup>

31. In the context of ICSID, the Secretariat proposed to its 151 Member States the Rules of Mediation Proceedings (ICSID Mediation Rules) and the Additional Facility Rules of Procedure for Mediation Proceedings, which are specifically designed for investor-State disputes, in 2018.<sup>95</sup> Since then, the ICSID Secretariat has engaged in stakeholder consultations

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<sup>87</sup> UNCITRAL Working Group III Secretariat, “Summary of the intersessional regional meeting on Investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea” (A/CN.9/WG.111/WP.154), see para. 43.

<sup>88</sup> *Ibid.*

<sup>89</sup> UNCITRAL Working Group III Secretariat, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session” (A/CN.9/964), see paras. 54 -90.

<sup>90</sup> UNCITRAL Working Group III Secretariat, “Note by the Secretariat on the Possible Reform of Investor-State Dispute Settlement” (A/CN.9/WG.III/WP.149), see pp. 5 – 6 of the Annex.

<sup>91</sup> Revised draft report of the 39<sup>th</sup> session of Working Group III.

<sup>92</sup> See UNICITRAL (n91).

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> ICSID Secretariat, “Proposals for Amendment of the ICSID Rules – Synopsis” (2 August 2018), see p. 13.

with States and the general public.

32. Under the proposed institutional mediation rules of ICSID, parties who have or have not agreed in writing to mediate could file a request to the secretary-general of ICSID to institute a mediation.<sup>96</sup> The mediation is required to be conducted by either one or two mediator(s), which shall be mutually appointed by the parties.<sup>97</sup> Some core values of mediation, such as confidentiality and without prejudice are included in the mediation rules.<sup>98</sup> It appears that facilitative model of mediation is preferred under the ICSID Mediation Rules as the mediators do not have the authority to impose resolution of the dispute on the parties.<sup>99</sup>

33. In addition to WG's exploration of the use of ISDS mediation, mediation is also getting attention in the recent treaties signed by States. A new generation of treaties refers specifically to mediation or recourse to third-party neutrals as available to the parties to reach an amicable settlement before going to international arbitration.<sup>100</sup>

#### **(a) Model Bilateral Investment Agreement**

34. For instance, the Netherlands Model Bilateral Investment Agreement 2019 provides that “any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation.”<sup>101</sup> A similar provision can be found in the Model Text for the Indian Bilateral Investment Treaty 2015 that parties should settle the disputes through consultation or negotiation or the use of non-binding third-party mediation before pursuing arbitration.<sup>102</sup>

#### **(b) Bilateral Investment Agreement**

35. A few States included mediation in the continuum of options available in their bilateral investment agreements. Article 16(3) of the Japan-

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<sup>96</sup> See Rule 5 and 6 of ICSID Mediation Rules.

<sup>97</sup> See Rule 13 of ICSID Mediation Rules.

<sup>98</sup> See Rule 10 and 11 of ICSID Mediation Rules.

<sup>99</sup> See Rule 17 of ICSID Mediation Rules.

<sup>100</sup> A. J. Bret and B. Legum, “A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules, ICSID Review, Vo. 29, No.1, March 2014, see p. 17-24.

<sup>101</sup> See Article 17(1) of Netherlands Model Bilateral Investment Agreement 2019.

<sup>102</sup> See Article 31.1 of Model Text for the Indian Bilateral Investment Treaty 2015.

Morocco bilateral investment agreement, which is signed in January 2020, provides that:

Any investment dispute shall, as far as possible, be settled amicably through, consultations and negotiations conducted in good faith between the disputing investor and the disputing Party (hereinafter referred to in this Article as "the disputing parties"). To this end, the disputing investor shall deliver to the disputing Party a written request for consultations setting out a brief description of facts regarding the measure or measures at issue. The consultation shall be commenced no later than thirty days after the date of its receipt by the disputing Party. Nothing in this paragraph precludes the use of non-binding, third party procedures, such as good offices, conciliation or mediation.<sup>103</sup>

36. Similarly, article 12(1) of the Switzerland-Egypt bilateral investment agreement states that:

Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as "investment dispute") shall, without prejudice to Article 13 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation or mediation (hereinafter referred to "procedure of amicable settlement").<sup>104</sup>

37. The Egypt-Mauritius bilateral investment agreement adopts a similar first-tiered dispute settlement clause with the Switzerland-Egypt bilateral investment agreement but includes "conciliation" as one of the means to settle the disputes.<sup>105</sup>

### **(c) Plurilateral Investment Treat**

38. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement between Canada and ten

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<sup>103</sup> See Article 16(3) of Japan-Morocco Bilateral Investment Agreement 2020.

<sup>104</sup> See Article 12(1) of Switzerland-Egypt Bilateral Investment Agreement 2010.

<sup>105</sup> See Article 10(1) of Egypt-Mauritius Bilateral Investment Agreement 2014.

other countries in the Asia-Pacific region, entering into force on 30 December 2018.<sup>106</sup> It sets out a two-tiered dispute settlement mechanism and foresees good offices, conciliation, and mediation under Article 9.18.<sup>107</sup> No further guidance concerning mediation is provided under CPTPP.

39. The Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area (COMESA) was signed on 23<sup>rd</sup> May 2007.<sup>108</sup> It is a multilateral investment agreement with the goal to promote and protect cross border investments within 20 African states.<sup>109</sup> COMESA provides for the use of informal settlement methods in the first place, and then goes on to mediation should no alternative means of dispute settlement is agreed upon by the parties.<sup>110</sup> If amicable negotiation or mediation fails, parties may resort to arbitration.<sup>111</sup>

40. The above model investment agreements, bilateral investment agreements and plurilateral treaties name mediation as one of the options to amicably settle the investment disputes between the investors and States. The inclusion of mediation in a system of ISDS as an alternative dispute resolution process provides for the right balance of flexibility, efficiency, confidentiality and consensus that is needed to reach settlements.<sup>112</sup> Some signatories of the recent treaties go even further in encouraging mediation as an alternative to solve investment disputes by incorporating a comprehensive protocol with detailed procedural rules.

#### **(d) Mainland and Hong Kong Closer Economic Partnership Arrangement**

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<sup>106</sup> See the website of Comprehensive and Progressive Agreement for Trans-Pacific Partnership <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/index.aspx?lang=eng>>.

<sup>107</sup> See Article 9.18 of Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

<sup>108</sup> See the website of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>>.

<sup>109</sup> Peter Muchlinski, "The COMESA Common Investment Area: Substantive Standards and Problems in Dispute Settlement", Soas Law Working Papers, No.11, 2010, see p. 2.

<sup>110</sup> See Article 26(3) and (4) of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area.

<sup>111</sup> Article 28 of Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area.

<sup>112</sup> Klaus Peter Berger, "Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators", *Arbitration International*, Volume 19, Issue 3, September 2003, see p. 387–403.

41. The Mainland China and the Hong Kong Special Administrative Region Investment Agreement (CEPA Investment Agreement) under the CEPA is an unique example that contains a well-established mediation mechanism and a detailed CEPA Investment Mediation Rules (CEPA Mediation Rules).<sup>113</sup> The purpose of signing the CEPA Investment Agreement is to deepen economic and technical collaboration between Mainland China and Hong Kong, and to provide for promotion and protection of increasing investments between the two jurisdictions within one country.<sup>114</sup>

42. Article 19 and Article 20 of CPEA Investment Agreement stipulate the dispute resolution mechanism between the disputing parties, including consultation and mediation. Unlike most of the investment treaties, arbitration is not available as a mean of alternative dispute resolution settlement.<sup>115</sup> In most of the bilateral investment treaties, the ISDS mechanisms usually envision a series of steps from negotiation to arbitration, where mediation is often considered as “gap filler”.<sup>116</sup> It is innovative to have a stand-alone mediation mechanism as a form of dispute settlement process under the CEPA Investment Agreement. While one may initially be puzzled by the absence of arbitration under the CEPA Investment Agreement, one will appreciate that the use of mediation to resolve disputes between investors of one jurisdiction and the government of another jurisdiction within the same country has the benefit of maintaining the harmony of the people of the two jurisdictions within one country.

43. Pursuant to Article 19 of CPEA Investment Agreement, Hong Kong investors are eligible to apply for mediation to China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Centre; or China International Economic and Trade Arbitration Commission to deal with the investment disputes arising

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<sup>113</sup> Please refer to the website of the Trade and Industry website of the full text of the CEPA Investment Mediation Rules <<https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>>.

<sup>114</sup> See the website of the Trade and Industry Department <<https://www.tid.gov.hk/english/cepa/investment/mediation.html>>.

<sup>115</sup> See Article 19 of CEPA Investment Agreement.

<sup>116</sup> Shu Shang, "Responding to the ISDS Legitimacy Crisis by Way of Mediation: Implications from CEPA's Dispute Resolution Mechanism," *Journal of International Business and Law* 18, no. 2 (Spring 2019), see p. 217-236.

between the Mainland authorities or institutions of the obligations.<sup>117</sup> Likewise, Mainland investors may apply to Hong Kong International Arbitration Centre - Hong Kong Mediation Council; or Mainland - Hong Kong Joint Mediation Centre for mediation.<sup>118</sup>

44. The CEPA Mediation Rules specify the condition for the disputing parties to submit the dispute to mediation, in particular the mediation should only be handled by the designated institution mentioned above.<sup>119</sup> In addition, the CEPA Mediation Rules set out certain core principles that mediators are required to observe throughout the mediation.<sup>120</sup> Comprehensive guidelines with regard to the appointment of mediators;<sup>121</sup> the replacement and resignation of Mediator;<sup>122</sup> role of the mediation commission;<sup>123</sup> the commencement and the conduct of mediation;<sup>124</sup> and the termination of the mediation are clearly provided under the CEPA Mediation Rules.<sup>125</sup>

#### **(e) Comprehensive Economic and Trade Agreement**

45. The Comprehensive Economic and Trade Agreement (CETA) was signed on 30 October 2016 and has been provisionally applied since 21 September 2017. It is a multilateral investment treaty signed between Canada, of the one part, and the European Union and its Member States, of the other part, with the intention to liberalise and facilitate trade and investment, and to promote a closer economic relationship between the European Union and Canada.<sup>126</sup> The treaty provides for a three-tiered dispute resolution process in ISDS, which includes consultation, mediation and arbitration in the ISDS matrix.<sup>127</sup> Article 8.20 of CETA is the

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<sup>117</sup> Please refer to the website of the Trade and Industry Department (<https://www.tid.gov.hk/english/cepa/investment/mediation.html>) for the lists of mediation institutions and the lists of mediators.

<sup>118</sup> Ibid.

<sup>119</sup> See Article 2.3 of CEPA Mediation Rules.

<sup>120</sup> See Article 3 and 7 of CEPA Mediation Rules.

<sup>121</sup> See Article 5 of CEPA Mediation Rules.

<sup>122</sup> See Article 6 of CEPA Mediation Rules.

<sup>123</sup> See Article 7 of CEPA Mediation Rules.

<sup>124</sup> See Article 10 of CEPA Mediation Rules.

<sup>125</sup> See Article 12 of CEPA Mediation Rules.

<sup>126</sup> European Commission, "Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of rules for mediation for use by disputing parties in investment disputes", COM/2019/460 final.

<sup>127</sup> See Articles 7 and 8 of Comprehensive Economic and Trade Agreement.

mediation clause, supplemented by the Procedure Rules and Code of Conduct of Mediators (Code) in Annex 29 to CETA.

46. Core values of mediation such as impartiality of the mediator are laid down in the Code.<sup>128</sup> The treaty provides that the mediator in the context of ISDS must not be a citizen of either party unless otherwise agreed.<sup>129</sup> This is to avoid state officials acting as mediators to be perceived as biased.<sup>130</sup> Additionally, the mediators should avoid direct and indirect conflicts of interests, and must disclose such conflict if it is likely to affect their impartiality.<sup>131</sup>

47. Since June 2018, the European Commission has been working with the Member States in the Trade Policy Committee on Services and Investment of the Council and with Canada on refining the rules for mediation for use by disputing parties.<sup>132</sup> A decision concerning the said rules (the envisaged act) was adopted by the Committee on Services and Investment in late 2019.<sup>133</sup> The purpose of the envisaged act is to implement the CETA by establishing a mediation mechanism to facilitate the finding of a mutually agreed solution between the disputing parties in an investment dispute through a comprehensive and expeditious procedure with the assistance of a mediator.<sup>134</sup>

48. The envisaged act serves as a procedural rule and includes detailed guidance on the initiation of the mediation procedure;<sup>135</sup> the appointment of the mediator;<sup>136</sup> the mediation procedure;<sup>137</sup> the implementation of a mutually agreed solution;<sup>138</sup> relationship to dispute settlement;<sup>139</sup> time limits and costs of the mediation procedure.<sup>140</sup>

49. It is worth noting that one of the disputing parties may request for a

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<sup>128</sup> See Rules 2 and 11 of Code of Conduct for Arbitrators and Mediators of CETA.

<sup>129</sup> Nancy A. Welsh and Andrea K. Schneider, "Becoming Investor-State Mediation", *Penn State Journal of Law & International Affairs*, Volume 1, Issue 1, April 2012, see p. 86-95.

<sup>130</sup> *Ibid.*

<sup>131</sup> See Rules 3 and 4 of Code of Conduct for Arbitrators and Mediators of CETA.

<sup>132</sup> See European Commission (n122), at para. 3.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> See Article 3 of the Envisaged Act.

<sup>136</sup> See Article 4 of the Envisaged Act.

<sup>137</sup> See Article 5 of the Envisaged Act.

<sup>138</sup> See Article 6 of the Envisaged Act.

<sup>139</sup> See Article 7 of the Envisaged Act.

<sup>140</sup> See Article 8 and 9 of the Envisaged Act.

mediation at any time under the envisaged act.<sup>141</sup> Under the envisaged act, the mediators may offer advice and propose solutions for the consideration of the disputing parties and that demonstrates evaluative mediation is not excluded in the process.<sup>142</sup>

50. Other renowned treaties that provide mediation protocol are the draft text of the Transatlantic Trade and Investment Partnership and IBA Rules for Investor-State Mediation (IBA Rules) adopted by the IBA Council. It is foreseeable that there will be an upward trend for exhaustive mediation protocol to be incorporated in different investment agreements.

## **V. BENEFITS OF INCORPORATING A MEDIATION PROTOCOL IN PROMOTING THE GREATER USE OF MEDIATION IN ISDS**

51. The ISDS Mediation Working Group, which was established after the 2019 ISDS Mediation Colloquium at Harvard University, has identified two major obstacles to the more effective implementation of mediation in the context of ISDS. Firstly, there is a lack of awareness of mediation as an alternative to arbitration by States and investors<sup>143</sup>. Secondly, there is an insufficient formal, legal framework to support mediation and mediated settlements.<sup>144</sup> Therefore, the Working Group recommended that clear rules surrounding mediation in ISDS with frameworks should be developed.<sup>145</sup>

52. In international commercial mediation, the objective of a mediation protocol is to promote and encourage the negotiated settlement, and early and cost-effective resolution of disputes by mediation.<sup>146</sup> The mediation rules serve to provide a guide to the rights and responsibility of all participants in the mediation.<sup>147</sup> This is conducive to empowering the disputing parties to negotiate and resolve the dispute promptly and confidentially.<sup>148</sup>

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<sup>141</sup> See Article 3.1 of the Envisaged Act.

<sup>142</sup> See Article 5.3 of the Envisaged Act.

<sup>143</sup> ISDS Mediation Working Group, “Unlocking Value Through Stakeholder Engagement: New Forms to Resolve Investor- State Disputes (2020)”, June 2020, see p. 10.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> See Rule 1.5 of New Zealand International Arbitration Centre Mediation Protocol.

<sup>147</sup> See Rule 1.6 of New Zealand International Arbitration Centre Mediation Protocol.

<sup>148</sup> See Rule 1.4 of New Zealand International Arbitration Centre Mediation Protocol.

53. In the context of ISDS, mediation protocol serves as a mediation manual to provide parties with functional suggestions on how mediation can be used to resolve claims in specific instances.<sup>149</sup> The parties will know the precise framework well in advance of any actual disputes, which enhances the transparency of mediation in the context of ISDS. The transparent procedures laid down in the mediation rules may well encourage State officials or senior executives to engage in mediation.<sup>150</sup> Without a set of clear mediation rules, the disputing parties may need to negotiate the rules and formats of the mediation at a time when the parties are holding strong views against each other as a result of the different perceptions on how the dispute has arisen. This may prevent the mediation to commence in a timely manner and thus more unnecessary costs will be incurred.

54. The Investor-State Mediation Committee of the International Bar Association has also identified the insufficient knowledge of the potential usefulness of mediation and the role of mediator in the process as one of the major obstacles to the use of ISDS mediation.<sup>151</sup> Mediation rules, such as CEPA Mediation Rules and IBA Rules, offer guidance on the behaviour of mediators and the way to conduct the mediation. This helps the parties understand how the role of mediators distinct from conciliators and arbitrators.<sup>152</sup> In fact, mediation rules serve to educate the parties as to what mediation is and how it might be used to resolve their dispute.<sup>153</sup> Mediation protocol also sets out rights and obligations of mediation participants and outside parties.<sup>154</sup> The core values and code of conduct specified in the protocol preserve certainty on the performance and integrity of the mediators.

55. As observed above, investment treaties usually provide for a “cooling-off period”. There are no guidelines or international norms suggesting how

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<sup>149</sup> Wolf von Kumberg, Jeremy Lack, Michael Leathes, “Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come”, *ICSID Review - Foreign Investment Law Journal*, Volume 29, Issue 1, February 2014, see p. 137.

<sup>150</sup> *Ibid.*

<sup>151</sup> See Bret (n96), at p. 24.

<sup>152</sup> See Kumberg (n 145), at p. 139.

<sup>153</sup> See Bret (n96), at p. 20.

<sup>154</sup> Nadja Alexander, “Mediation and the Art of Regulation”, *Queensland University of Technology Law and Justice Journal* 8(1), June 2008, see p. 15.

parties can use this period productively.<sup>155</sup> As discussed by the panelists of a SIDRA Webinar on Investor-State Mediation held on 12<sup>th</sup> September 2020, a mediation protocol offers practical guidelines to States and investors about what to do and what to expect during the “cooling-off period”.<sup>156</sup>

56. Furthermore, the incorporation of a mediation protocol encourages mediation to be used systematically during the “cooling-off period” to focus the parties on the procedural issues.<sup>157</sup> This facilitates the parties to make use of the period to consider ways of enabling faster and less costly outcomes, and allowing interests and other constraints to be taken into consideration at an early stage.<sup>158</sup>

57. It is obvious that the mediation protocol is generated after substantial amount of discussion by the committees and gathering of public views. For instance, the State Mediation Subcommittee (Subcommittee) of International Bar Association launched the rule-drafting of IBA Rules in early 2011.<sup>159</sup> The Subcommittee established a working group with several drafting committees, each devoted to preparing between two and four articles on specified topics.<sup>160</sup> The drafting committees were broadly representative, including representatives from potential end-users (States and investors), arbitration and mediation practitioners, institutions supporting arbitration and mediation, and other stakeholders.<sup>161</sup> The IBA Rules were launched in 2012 with the collective efforts. Similarly, the initial draft of the ICSID Mediation Rules was unveiled in ICSID’s first working paper on the rule amendment in August 2018.<sup>162</sup> Since then, ICSID has invited inputs from States and arbitration and mediation practitioners. Incorporating the reliable mediation protocol into the investment agreements enhances the public confidence in the process. It

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<sup>155</sup> See Kumberg (n 145), at p. 135.

<sup>156</sup> See the website of SIDRA Webinar

<[https://mediacast.smu.edu.sg/media/SIDRA+Webinar+on+Investor-State+Mediation+and+the+Singapore+Convention+on+Mediation+%2812+September+2020%29/1\\_7fyrrf4](https://mediacast.smu.edu.sg/media/SIDRA+Webinar+on+Investor-State+Mediation+and+the+Singapore+Convention+on+Mediation+%2812+September+2020%29/1_7fyrrf4)>.

<sup>157</sup> See Kumberg (n 145), at p. 138.

<sup>158</sup> Ibid.

<sup>159</sup> See Bret (n96), at p. 20.

<sup>160</sup> Ibid.

<sup>161</sup> See Bret (n96), at p. 21.

<sup>162</sup> The full text of the ICSID’s first working paper is available at

<[https://icsid.worldbank.org/sites/default/files/publications/WP1\\_Amendments\\_Vol\\_3\\_WP-updated-9.17.18.pdf](https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf)>.

also makes mediation become more predictable despite its voluntary character.<sup>163</sup>

## **VI. ELEMENTS OF AN EFFECTIVE MEDIATION PROTOCOL**

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

### **(a) Number of Mediators**

59. There are no consistent requirements on the number of mediators in different investment agreements.

60. Under the IBA Rules, the default rule is that a sole mediator should be appointed unless the parties agree otherwise.<sup>164</sup> Parties may opt for a co-mediation in accordance with Article 6, which is one of the main features of the IBA Rules.<sup>165</sup>

61. The CEPA Mediation Rules adopt a different approach. Similar to the ICSID Conciliation Rules, the default position under the CEPA Mediation Rules is to constitute a mediation commission with three mediators.<sup>166</sup> Under such mechanism, each party selects one mediator to the mediation commission and jointly propose a mediator to be the president of the commission.<sup>167</sup> The role of the mediation commission is to clarify the issues in dispute between the parties; facilitate the communication and explore the interest of the parties; and endeavour to bring about the mediated settlement agreement based on terms acceptable to both parties.<sup>168</sup> One of the key features of the CEPA Mediation Rules is the

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<sup>163</sup> See Coe (n 9), at p.76.

<sup>164</sup> See Article 4 of IBA Investor-State Mediation Rules.

<sup>165</sup> Article 6 of IBA Investor-State Mediation Rules.

<sup>166</sup> Article 5 of CEPA Mediation Rules.

<sup>167</sup> Ibid.

<sup>168</sup> Article 8(1) of CEPA Mediation Rules.

formation of a three-mediator commission which means mediators of different backgrounds and expertise (including but not limited to investor-state arbitration experiences) could be included in a mediation commission so that the mediation commission would be better equipped to assist the parties to resolve their disputes which usually involve emotional, procedural and substantive dimensions. Besides, should the mediation commission be requested to make non-binding recommendations to the parties with a view to resolving the disputes, a three-mediator commission would mean a small possibility of having a deadlock of opinions among the members of the mediation commission.

62. As observed by Professor Jack Coe, parties should have the autonomy to elect the neutrals to conduct the neutral-aided collaborative procedures.<sup>169</sup> The CEPA mediation mechanism allows the party to exercise control over proceedings through mediation, and this would enhance the attractiveness of ISDS mechanism for governments and investors alike.<sup>170</sup> Furthermore, the CEPA mediation model offers a greater diversity of linguistic, cultural and technical abilities to the mediation commission in handling complicated investment disputes.<sup>171</sup> It is, therefore, conducive to addressing the needs of the parties from two jurisdictions.

### **(b) Process Model**

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

64. For instance, CEPA Mediation Rules allow the mediation commission to have joint sessions and private meetings with the parties and their representatives.<sup>172</sup> The rule, however, does not specify a precise model as to when the joint session and caucus should begin or come to an end. Moreover, the mediation commission should take into account of the

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<sup>169</sup> Jack J. Coe, Jr, "Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch", *Journal of Transnational Dispute Management*, Volume 4, Issue 1, February 2007, see p.32.

<sup>170</sup> See Kumberg (n60), see p. 470.

<sup>171</sup> See Coe (n165), at p. 38.

<sup>172</sup> See Article 8.3 of CEPA Mediation Rules.

intention of the parties in the way of conducting the mediation.<sup>173</sup> This is to preserve flexibility of the mediation proceedings and cater different needs of disputing parties in different cases.

65. Throughout the mediation process, the commission should adopt a facilitative approach to encourage direct communication between the parties and to explore their common interests.<sup>174</sup> Although the mediation commission may make any recommendations to the disputing parties, such recommendation is not binding on the parties.<sup>175</sup> The advantage of this model is to generate momentum for the parties to focus on future value in light of the parties' constraints and needs,<sup>176</sup> and therefore forms a wholly new relationship between the disputing parties.<sup>177</sup>

66. Some mediation protocol may include parties' obligations in the mediation. According to the International Chamber of Commerce Mediation Rules (ICC Rules), the parties' agreement to participate in the mediation proceedings pursuant to the ICC Mediation Rules implies that they are at least committed until an initial meeting or a discussion with the mediator has taken place.<sup>178</sup> In contrast, the ICSID Conciliation Rules instruct the conciliators to close the proceedings if a party fails to participate.<sup>179</sup>

67. A similar mechanism is provided in CEPA Mediation Rules where the mediation commission shall declare the mediation terminated if a party fails to appear or participate in the mediation.<sup>180</sup> This is in line with the principles of self-determination and voluntariness of the parties, which are the core values of facilitative mediation approach.

### **(c) Management Conference of the Mediation Process**

68. Currently, only CEPA Mediation Rules and IBA Rules provide for a mediation management conference in the process. According to the CEPA

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<sup>173</sup> See Article 8.8 of CEPA Mediation Rules.

<sup>174</sup> See Article 8.1 of CEPA Mediation Rules.

<sup>175</sup> See Article 8.4 of CEPA Mediation Rules.

<sup>176</sup> See Franck (n23), at p.10.

<sup>177</sup> See Coe (n165), at p. 24.

<sup>178</sup> See the website of International Chamber of Commerce <<https://iccwbo.org/dispute-resolution-services/mediation/procedure/>>.

<sup>179</sup> See Article 2(3) of the ICSID Conciliation Rules.

<sup>180</sup> See Article 12 (5) of CEPA Mediation Rules.

Mediation Rules, a mediation management conference should be held as soon as practicable after the constitution of the mediation commission, allowing for the organisation of the process.<sup>181</sup> The conference can be done in person or by any means of communication.<sup>182</sup>

69. The mediation management conference goes further than a mere procedural meeting as it paves the way to the mediated settlement agreement by clarifying the important issues such as the conduct of the mediation,<sup>183</sup> a provisional timetable for the mediation process,<sup>184</sup> the confidentiality and privacy arrangements throughout the mediation.<sup>185</sup>

70. The mediation management conference allows the parties and the mediator to go through a checklist of issues that will facilitate the process.<sup>186</sup> As such, it gives the mediation a chance to proceed and provides a platform for the parties to communicate and establish a dialogue.<sup>187</sup>

#### **(d) Scope of Matters for Mediated Settlement Agreement**

71. One major obstacle of promoting the use of ISDS mediation is that there are no mechanisms to transform the mediated agreement into an enforceable award in a cross-border context.<sup>188</sup> With the coming into force of the United Nations Convention on International Settlement Agreements Resulting from Mediation (UN Mediation Convention) in September 2020, there is a mechanism for signatory states of the UN Mediation Convention to enforce mediated settlement agreements, so long as the requirements of the convention are met.<sup>189</sup> This is similar to the recognition and enforcement of arbitral awards pursuant to the “New York Convention 1958”.<sup>190</sup>

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<sup>181</sup> See Article 9(1) of CEPA Mediation Rules.

<sup>182</sup> Ibid.

<sup>183</sup> See Article 9(1)(a) of CEPA Mediation Rules.

<sup>184</sup> See Article 9(1)(b) of CEPA Mediation Rules.

<sup>185</sup> See Article 9(1)(c) of CEPA Mediation Rules.

<sup>186</sup> See Bret (n96), at p.22.

<sup>187</sup> Ibid.

<sup>188</sup> See Coke (n165), at p. 18.

<sup>189</sup> See Article 3 of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

<sup>190</sup> See Article III of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

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

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

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

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

73. Furthermore, the UN Mediation Convention applies to an agreement of commercial dispute resulting from mediation which, at the time of its conclusion, is international.<sup>191</sup> There are, however, no definitions of “commercial dispute” available in the text.

74. According to 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UNCITRAL Model Law), which was developed simultaneously along with the UN Mediation Convention, the term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.<sup>192</sup> The footnote 1 of the UNCITRAL Model Law provides some

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<sup>191</sup> See Article 1 of the United Nations Convention on International Settlement Agreements Resulting from Mediation.

<sup>192</sup> See footnote 1 of UNCITRAL Model Law on International Commercial Mediation and

examples that fall within the definition of commercial transaction, namely investment transaction; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.<sup>193</sup>

75. That said, when it comes to the enforcement, one cannot be very sure as to how the court of a signatory state of UN Mediation Convention would interpret the definition of commercial transaction and whether the court would give any reference to the examples of a footnote of UNCITRAL Model Law for the purpose of determining the inclusion or exclusion of investor-state investment disputes under the scope of commercial transaction.

76. It appears Annex E of the ICSID (Additional Facility) Mediation Rules confirms that the UN Mediation Convention will apply to settlements reached in the context of investment disputes.<sup>194</sup> As such, mediated settlement agreements in the context of ISDS can be enforced and invoked internationally, so long as the requirements of the UN Mediation Convention are met.

77. However, those familiar with investor-state investment disputes are aware that enforcement of a settlement agreement may be more arduous when the agreement contains non-monetary undertakings.<sup>195</sup> CEPA Mediation Rules specify that the solutions under the mediated settlement agreement shall be confined to monetary compensation; restitution of property and/or other legitimate means of compensation agreed by the disputing parties.<sup>196</sup> Under such rules, parties can anticipate the mediation outcome. This enhances the predictability of the mediation in the context of ISDS.

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

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International Settlement Agreements Resulting from Mediation.

<sup>193</sup> Ibid.

<sup>194</sup> ICSID Secretariat, "Proposals for Amendment of the ICSID Rules — Working Paper", Volume 3, August 2018, at p.748

<sup>195</sup> Christoph H. Schreuer, "The ICSID Convention: A Commentary", 2nd edition, Cambridge University Press, September 2010, see p. 1143.

<sup>196</sup> See Article 2.3 (i) of CEPA Mediation Rules.

**(e) Voluntariness and Self-determination**

79. Party's self-determination and voluntariness are the key principles of mediation, which differentiate mediation from other forms of alternative dispute resolution. Adjudicative dispute settlement methods such as arbitration usually remove all the decision-making power from the parties and place it in the hands of professional adjudicators. In contrast, mediation at its core rests on the premise that people have the capacity to make their own decisions about the issues that confront them.<sup>197</sup> Parties are empowered to determine how the mediation will be conducted and the outcome of the mediation.

80. The voluntary nature of mediation begins with the necessity of consent to participate in the mediation process. This is the rationale of requiring the party who initiates the mediation to submit a request for mediation;<sup>198</sup> and the other party to submit a written consent for a mediation under the CEPA Mediation Rules.<sup>199</sup>

81. Although facilitative mediators are often regarded as process managers, they have to consult the parties as to the way to conduct the process in the mediation management conference.<sup>200</sup> The intention of the parties must be priorly taken into account by the mediation commission,<sup>201</sup> such that the process belongs to the parties and they have the control over the mediation process.

82. The voluntary nature of mediation also sheds light on the fact that all parties may choose whether to participate in or to withdraw from mediation.<sup>202</sup> Under Article 12 of CEPA Mediation Rules, the mediation can be terminated if one of the parties withdraws from the proceeding.<sup>203</sup>

83. Although most of the mediation practitioners are familiar with the core

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<sup>197</sup> Robert A. Baruch Bush and J. P. Folger, "Mediation and Social Justice: Risks and Opportunities", *Ohio State Journal on Dispute Resolution* 27, no. 1, 2012, see p. 48.

<sup>198</sup> See Article 4(1) of CPEA Mediation Rules.

<sup>199</sup> See Article 4(5) of CPEA Mediation Rules.

<sup>200</sup> See Article 9(1)(a) of CPEA Mediation Rules.

<sup>201</sup> See Article 8(8) of CPEA Mediation Rules.

<sup>202</sup> See Article 3 of CPEA Mediation Rules.

<sup>203</sup> See Article 12 of CPEA Mediation Rules.

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

**(f) Confidentiality and Transparency of Mediation in the context of ISDS**

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

85. Law on mediation of different states and institutions may have different features. Confidentiality, however, remains the key element of the relevant law. For example, mediation communication, which does not include a mediated settlement agreement, should be kept confidential under section 8 of the Hong Kong Mediation Ordinance, subject to certain exception.<sup>204</sup> The UN Model Law also has provisions to protect confidentiality in mediation proceedings. Article 10 requires all information relating to the mediation proceedings to be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.<sup>205</sup>

86. When it comes to mediation in the context of ISDS, the confidential nature of the process would bring suspicion as any government of a state needs to maintain accountability.<sup>206</sup>

87. That said, confidentiality remains the cornerstone of mediation in the context of mediation. A state, for example, may be concerned about the revelation of secrets bearing on national security, or the negative publicity

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<sup>204</sup> See section 8 of the Mediation Ordinance.

<sup>205</sup> See Article 10 of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

<sup>206</sup> See Coe (n165), p. 27.

generated by the investor's allegations.<sup>207</sup> The investor may fear disclosure of trade secrets, or to litigation-prone shareholders.<sup>208</sup> Therefore, the inclusion of confidentiality would help the parties especially those who are from the jurisdictions without the benefit of mediation legislation covering confidentiality to understand the necessity of the confidential nature of mediation.

88. In accordance with Article 11 of CEPA Mediation Rules, the mediation proceedings shall not be disclosed and remain confidential, save as otherwise agreed by the parties and the mediation commission.<sup>209</sup> Moreover, the participants of the mediation proceedings are not allowed to disclose any mediation communication to any other person.<sup>210</sup> In particular, the appointed mediators are required to sign declarations to undertake not to disclose any information arising out of or in connection with the mediation of the dispute.<sup>211</sup> It should be noted that the definition of mediation communication under Article 1 of CEPA Mediation Rules does not cover an agreement to mediate or a mediated settlement Agreement. This echoes Professor Jack Coe's proposal to publicise the terms of settlement so as to achieve greater predictability and transparency of the mediation in the context of ISDS.<sup>212</sup>

89. Furthermore, disclosure of mediation communication cannot be done unless there is an agreement not only among the parties but also the mediation commission and they have to agree upon on the purposes of the disclosure of such communication.<sup>213</sup> Such requirements under the CPEA Mediation Rules are to make a balance between retaining privacy and achieving transparency in mediation in the context of ISDS.

90. More importantly, the confidentiality obligation does not extend to the fact that the parties have agreed to mediate or a settlement has been reached from the mediation, unless otherwise agreed by the parties in writing.<sup>214</sup> This allows the designated institution to have a system of statistics and

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<sup>207</sup> Ibid.

<sup>208</sup> See Coe (n165), at p. 23.

<sup>209</sup> See Article 11 of CPEA Mediation Rules.

<sup>210</sup> See Article 11(3) of CPEA Mediation Rules.

<sup>211</sup> See Article 7 of CPEA Mediation Rules.

<sup>212</sup> See Coe (n165), at p. 40.

<sup>213</sup> See Article 11(4) of CPEA Mediation Rules.

<sup>214</sup> See Article 11(5) of CPEA Mediation Rules.

generate data for academic and research purposes, which aids to promote the use of ISDS mediation.

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

### **(g) Qualifications and Code of Conduct on Mediators**

92. According to Professor Jack Coe, the quality of the third-party neutrals is the most critical element affecting the success of a neutral-aided collective mechanism.<sup>215</sup> This is not difficult to understand. The quality of the persons enlisted to serve as neutrals directly influences the credibility and effectiveness of the ISDS mechanism.

93. An extensive mediation protocol should include provisions on the qualification of mediators so as to ensure that the mediators are fit for handling the investment disputes. A mediator in the context of ISDS should possess the skills to understand the legal issues, and deal with emotional and psychological dimension of the parties.<sup>216</sup> In addition, it is important for the mediators to have a broad cultural understanding of the parties that are involved in order to help them to reach a mutually acceptable agreement.<sup>217</sup>

94. A set of eligibility criteria for designation as mediator is developed under the CEPA mediation mechanism. The mediators are required to have attained relevant qualifications in mediation, and acquire professional knowledge and experience in the fields of cross-border or international trade and investment and law.<sup>218</sup>

95. Requirements of impartiality and independence of the mediators are of paramount importance in a well-drafted mediation protocol. Neutrality enables both the mediation process and the mediator to operate

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<sup>215</sup> See Coe (n165), at p. 38.

<sup>216</sup> J.W. Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution", *Journal of Transnational Dispute Management*, Volume 6, Issue 1, March 2009, see p.441.

<sup>217</sup> See Kumberg (n60), at p. 492.

<sup>218</sup> See paragraph 1.6 of the CEPA Mediation Mechanism.

effectively,<sup>219</sup> and provides legitimacy to the mediator and the process.<sup>220</sup> A facilitator mediator may not be able to build up rapport and trust with the parties if he or she has a vested interest in the outcome or is perceived to be biased.

96. ICC Rules require the mediator to be guided by the principles of fairness and impartiality.<sup>221</sup> Before appointment, a prospective mediator shall sign a statement of acceptance, availability, impartiality and independence.<sup>222</sup> Similar requirements are set out in the IBA Rules which provides that appointed mediators shall be impartial and independent.<sup>223</sup> The mediators shall disclose any facts or circumstances that might call into question the mediator's independence or impartiality in the eyes of the parties.<sup>224</sup>

97. The requirement of neutrality is detailed in Article 7 of CEPA Mediation Rules.<sup>225</sup> Mediators shall mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.<sup>226</sup> Similar to ICC Rules, the mediator has to sign a declaration to undertake not to be adversely affect his ability to mediate the dispute prior to the appointment.<sup>227</sup>

98. Throughout the mediation, mediators are required to avoid their performance from being affected by their own financial, business, professional, family or social relationships or responsibilities.<sup>228</sup> If, during the course of the mediation, a mediator becomes aware of any facts or circumstances that may call into question the mediator's independence or impartiality in the eyes of the parties, the mediator shall forthwith disclose those facts or circumstances to the parties in writing without delay.<sup>229</sup>

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<sup>219</sup> Joseph P. Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind", Vermont Law Review 6, no. 1 (Spring 1981), see p. 85-118.

<sup>220</sup> Hilary Astor, "Mediator Neutrality: Making Sense of Theory and Practice", 16 Social and Legal Studies, June 2007, see p. 225.

<sup>221</sup> See Article 7 of ICC Mediation Rules.

<sup>222</sup> See Article 5(1) of ICC Mediation Rules.

<sup>223</sup> See Article 3(1) of IBA Mediation Rules.

<sup>224</sup> See Article 3(3) of IBA Mediation Rules.

<sup>225</sup> See Article 7(1) of CPEA Mediation Rules.

<sup>226</sup> Ibid.

<sup>227</sup> See Article 7(2) of CPEA Mediation Rules.

<sup>228</sup> See Article 7(3) of CPEA Mediation Rules.

<sup>229</sup> See Article 7(5) of CPEA Mediation Rules.

99. In the context of ISDS mechanisms, one should not rely on the integrity and self-claimed qualifications of the mediators. The mediation protocol which prescribes detailed qualifications of a qualified mediator and the code of practice that mediators have to comply with will enable the users to have confidence in mediation and at the same time, provide a guideline for uniform practice.

## **VII. CONCLUSION**

100. As mentioned before, this paper intends to provide background information on the use of ISDS mediation and the related issues. The four main parts of this paper discussed above are only some of the issues for the consideration of those who are promoting mediation as an alternative and appropriate process for the resolution of investor-state investment disputes. With the experts from different jurisdictions putting their heads together, mediation in the context of ISDS will surely gather more momentum in its development and eventually may become the preferred process as adopted in the CEPA arrangement.