

**UNCITRAL Working Group III on ISDS Reform**

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

**Background Paper for Session 4 – “The Way Forward for Mediation  
as a Reform Option for ISDS”**

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## **I. EXECUTIVE SUMMARY**

The purpose of this paper is to provide background information to facilitate the discussion of Session 4 “*The Way Forward for Mediation as a Reform Option for ISDS*” of the virtual pre-intersessional meeting of UNCITRAL Working Group III.

The paper first provides an overview of the discussion of UNCITRAL Working Group III so far on the use of mediation in investor-State dispute settlement (“ISDS”).

The paper then briefly examines the potential of mediation as a voluntary and flexible dispute resolution tool that offers creative and forward-looking settlement arrangements for foreign investors and host jurisdictions. Promoting the greater use of mediation in ISDS disputes is however not without its obstacles, and some structural and policy impediments, particularly for governments, will need to be overcome in the way forward for mediation to function as a viable ISDS reform option.

To unlock the potential of mediation and overcome the obstacles towards its greater use in ISDS, this paper has, with reference to the G20 Guiding Principles for Global Investment Policymaking, identified and discussed, on a non-exhaustive basis, various possible tools on mediation that can be considered for incorporation into the ISDS reform solution to be developed by Working Group III.

These tools can broadly be grouped into three dimensions, namely:

- (i) Establishing facilitative frameworks at treaty-level (e.g. model treaty clauses and investment mediation protocols) and domestic institutional-level to encourage the use of investment mediation;
- (ii) Overcoming the psychological barrier for government officials and investors in using mediation through capacity building and education and promotion initiatives; and
- (iii) Exploring the synergies of mediation with other possible ISDS reform options such as dispute prevention mechanisms and ISDS advisory centre.

In discussing the various possible tools, this paper refers to a number of innovative initiatives adopted by the Hong Kong Special Administrative Region (“Hong Kong SAR”) of the People’s Republic of China in promoting investment mediation. Some examples include the detailed investment mediation rules adopted in the CEPA Investment Agreement

between Mainland China and the Hong Kong SAR, and the investment mediation training jointly offered by the Department of Justice of the Hong Kong SAR and various leading institutions such as ICSID, International Energy Charter and the Asian Academy of International Law.

Furthermore, apart from discussing the substantive tools on mediation, this background paper discusses how Working Group III may consider practically arranging its work so as to deliver results on the mediation-related work within a reasonable period of time. In this regard, the paper mentions the possible use of other constructive, inclusive and transparent working methods such as informal drafting groups and expert groups to facilitate the progress of Working Group III in respect of mediation.

The background paper concludes on a positive and optimistic note. While much work still needs to be done in respect of mediation to further promote its use, mediation certainly has a bright future ahead in the landscape of ISDS reform.

## II. INTRODUCTION

1. The purpose of this paper is to provide background information to facilitate the discussion of Session 4 “*Way Forward for Mediation as a Reform Option for ISDS*” of the virtual pre-intersessional meeting of UNCITRAL Working Group III. This background paper will first recap the discussion of UNCITRAL Working Group III so far on the use of mediation in Investor-State Dispute Settlement (“ISDS”) and examine the potential and obstacles for mediation to serve as a viable ISDS reform option. The article will then identify and discuss, on a non-exhaustive basis, various possible tools on mediation that can be considered for incorporation into the ISDS reform solution to be developed by Working Group III.

## III. BACKGROUND

2. ISDS reform has been a subject of much discussion in the international community in recent years. Ever since UNCITRAL embarked on probably one of its most ambitious projects, through its Working Group III, in 2017, its work on ISDS reform has attracted an unprecedented level of attention from States, investors, relevant international organizations, arbitration and mediation institutions, professional associations, academic and other non-governmental organizations<sup>2</sup>. To contribute to the important work of Working Group III, the Hong Kong Special Administrative Region (“Hong Kong SAR”) of the People’s Republic of China, which is one of the leading global investment hubs, also has its representatives joining in as members of the Chinese delegation, pursuant to the “*one country, two systems*” policy and the Basic Law<sup>3</sup>.

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<sup>2</sup> See the website of Working Group III of UNCITRAL at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>3</sup> Article 152 of the Basic Law provides that “[r]epresentatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name “Hong Kong, China”.”

It is also worth noting that while the Hong Kong SAR is not a sovereign State, within the framework of “*one country, two systems*” and as provided for in the Basic Law, the Central People’s Government has authorized Hong Kong as a special administrative region to enter into 22 investment promotion and protection agreements (“IPPAs”) with foreign economies and all these IPPAs contain the investment arbitration mechanism.

Other than the representatives from the Government of the Hong Kong SAR, the Asian Academy of International Law, an independent and non-profit making body established in the Hong Kong SAR for furthering studies, research and development of international law in Asia, and the Hong Kong

3. ISDS has been a dispute resolution mechanism with a rich history that has replaced the so-called “*gunboat diplomacy*” in resolving international investment disputes. While ISDS is not free from criticisms and there are areas for further refinement, it continues to evolve in order to meet the need for a peaceful, depoliticized and rule-of-law-based dispute resolution mechanism that can have the trust of both host jurisdictions and foreign investors in resolving international investment disputes<sup>4</sup>.

4. According to the latest figures of UNCTAD Investment Policy Hub, as of 31 December 2019, there are already in total 1,023 known treaty-based ISDS cases<sup>5</sup>. Ever since 1987, the number of ISDS cases per year continues to be on a general upward trend and so far 120 countries and the European Union are known to have been respondents to one or more ISDS claims<sup>6</sup>.

5. It has been observed that in recent years, ISDS is facing a backlash and a legitimacy crisis, and most are interested in what the way forward for the ISDS reform is. While investment arbitration is currently the predominant form of ISDS, ISDS is a broad concept that can encompass other forms of dispute resolution methods such as mediation and conciliation.

6. On the way forward, as suggested by Ms. Teresa Cheng, SC, Secretary for Justice of the Hong Kong Special Administrative Region of the People’s Republic of China, in the 45<sup>th</sup> Alexander Lecture of the Chartered Institute of Arbitrators, a “*double-helix*” approach can be explored to decipher the order within the chaos in the evolution of ISDS<sup>7</sup>. The “*double-helix*” approach attempts to address both structural and non-structural reforms and encourages the complementary use of different types of dispute resolution mechanisms to broaden the options of ISDS. In particular, a strand of the “*double-helix*” approach is to promote the greater use of investment mediation so as to give a new look and new life to ISDS.

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International Arbitration Centre have also participated in the work of Working Group III as observer delegations.

<sup>4</sup> See Teresa Cheng, SC, “*The Search for Order within Chaos in the Evolution of ISDS*”, ICSID Review, (2020), at pp. 1 – 19.

<sup>5</sup> See the website of UNCTAD Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>6</sup> UNCTAD, IIA Issues Note – “*Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes and Outcomes in 2019*” (July 2020) (available at <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>).

<sup>7</sup> See Cheng (n 4).

7. As a conceptual matter, while there have been discussion on the possible conceptual differences between “*mediation*” and “*conciliation*”, for the purpose of this paper, the broad concept of “*mediation*” will cover “*conciliation*” and the two terms may be used interchangeably<sup>8</sup>.

#### **IV. STATUS OF THE CURRENT DISCUSSION ON THE USE OF MEDIATION IN ISDS IN WORKING GROUP III**

8. In 2017, UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of ISDS<sup>9</sup>. As made clear at the outset, the Working Group will follow the UNCITRAL process, and when discharging the said mandate, will ensure that “*the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led with high-level input from all Governments, consensus-based and fully transparent*”<sup>10</sup>.

9. Working Group III in essence has adopted a three-step approach to discharge its mandate through: (i) first, identifying and considering concerns regarding ISDS; (ii) second, considering whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, developing any relevant solutions to be recommended to the Commission<sup>11</sup>.

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<sup>8</sup> The same views were held by Working Group II of UNCITRAL. In the report of Working Group II on the work of its sixty-eighth session (A/CN.9/934, para. 16), it is stated that:

“[t]he Working Group took note of, and approved the replacement of the term ‘conciliation’ by ‘mediation’ throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (see A/CN.9/WG.II/WP.205, para. 5), which would be used when revising existing UNCITRAL texts on conciliation.” In paragraph 5 of Working Paper 205 of Working Group, it was explained that “ ‘Mediation’ is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term ‘conciliation’ with the understanding that the terms ‘conciliation’ and ‘mediation’ were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term ‘mediation’ instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications.”

<sup>9</sup> See Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), at paras. 263 and 264.

<sup>10</sup> Note by the UNCITRAL Secretariat, “Possible reform of investor-State dispute settlement” (A/CN.9/WG.III/WP.142), at para. 3.

<sup>11</sup> *Ibid.*



10. It is also notable that a broad discretion has been entrusted to Working Group III in discharging its mandate, and any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)<sup>12</sup>.

11. Much of the discussion in Working Group III are concerned with the reform of investment arbitration. That said, even in the very first formal session of Working Group III back in 2017, interest in the greater use of mediation for resolving ISDS disputes has been expressed in the interventions of the delegations<sup>13</sup>. In particular, part 1 of the report of Working Group III for that session states the following in relation to mediation<sup>14</sup>:

*“31. The Working Group then considered whether work should be limited to arbitration or should include other types of existing ISDS mechanisms. Recalling its earlier discussion, there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration ...*

*32. One view was that such alternative methods were an integral part of ISDS, might be mandatory under some investment treaties, might assist in identifying concerns and possible procedural solutions to concerns about arbitration in ISDS and so should be considered by the Working Group.*

*33. ... it was said that the work should first concentrate on identifying concerns regarding arbitration, and that other types of ISDS mechanisms could subsequently be considered as part of a holistic approach to addressing those concerns. From this perspective, States’ experience in domestic court mechanisms and sequencing issues, the relationship between arbitration, alternative dispute resolution mechanisms and court procedures, and State-to-State mechanisms,*

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<sup>12</sup> *Ibid.*

<sup>13</sup> Among others, in the intervention of the delegation of the United States in the 34<sup>th</sup> session of UNCITRAL Working Group III, support to the greater use of mediation has been made.

<sup>14</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) (A/CN.9/930/Rev.1, paras. 31 – 33 and 60).

*might inform the Working Group’s considerations of solutions at the third stage of its mandate.*

...

*60. The extent to which experience from international commercial arbitral tribunals should guide an analysis of ISDS concerns was discussed...it was said that developments in arbitration practice regarding case management including matters such as time limits, cost ceilings and transparency, as well as encouraging mediation and other alternative dispute resolution mechanisms, could be taken into account by the Working Group at a later stage in its deliberations.”*

12. The topic of mediation has also been mentioned by various delegations from time to time in the formal sessions, inter-sessional meetings and side events of Working Group III. For example, according to the report of Working Group III for its 36<sup>th</sup> session in 2018, the Working Group has discussed a wide range of possible mechanisms to improve the efficiency of ISDS (in terms of duration and cost) that were being introduced by States and institutions, and among such mechanisms, reference has been made to preventive or pre-emptive approaches and use of dispute resolution means other than arbitration such as mediation<sup>15</sup>.

13. The topic of mediation has also attracted much interest in various intersessional regional meetings of Working Group III. For example, according to the report of the first intersessional regional meeting in Korea in 2018, it is observed that:

*“The importance of dispute prevention (including a joint committee of the treaty parties) and other means of dispute resolution (including mediation) to reach an amicable settlement was highlighted. The use of cooling-off periods and mandatory consultations were also mentioned. With respect to mediation, it was noted that the ability for governments to settle might be limited particularly when compensation for damages were involved and the difficulties in coordination among relevant agencies within the government was mentioned. It was added that these tools were currently being under-utilized and efforts should be taken to increase their use, though it was also noted that*

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<sup>15</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 December 2018) (A/CN.9/964, para. 118).

*unsuccessful attempts to settle could lengthen proceedings in some cases.”<sup>16</sup>*

14. With respect to the second intersessional regional meeting of Working Group III in the Dominican Republic in 2019, it was reported that *“regional attempts at creating a framework for mediation and arbitration were presented, including how to design a regional framework in a flexible manner and to tailor dispute resolution mechanisms, so as to accommodate the different views and needs of the participating States”<sup>17</sup>.*

15. During the third intersessional regional meeting of Working Group III in the Republic of Guinea in 2019, mediation was again a key topic of discussion and it was reported that:

*“34. The proposal to reform ISDS through the strengthening of dispute prevention measures such as mediation was mentioned by a large number of States in their written submissions to the Working Group. At present, the majority of international investment agreements already refer to “amicable settlement” or even, in some cases, explicitly to mediation, without specifying the approach that parties should adopt. The discussion focused on the organization within States that the use of mediation might require. For example, State representatives in a proceeding must have the appropriate authority to negotiate and conclude agreements on the State’s behalf and be duly mandated for that purpose, but must not be held liable as a result of the agreement. Lastly, a question was raised regarding whether the public interest and the related principle of transparency should apply in mediation proceedings, since the confidentiality of discussions is a key factor in achieving a successful outcome.”<sup>18</sup>*

16. Having completed the first two steps of its three-step mandate, Working Group III has now reached the third step of its mandate and is considering the various options on ISDS reform to be recommended to the Commission. Participation in Working Group III has been very active, with more than 400 delegates from around 106 States and 66 organizations

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<sup>16</sup> See Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea (A/CN.9/WG.III/WP.154, para. 43).

<sup>17</sup> See Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Dominican Republic (A/CN.9/WG.III/WP.160, para. 11).

<sup>18</sup> See Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Guinea (A/CN.9/WG.III/WP.183, para. 34).

having participated in its 38<sup>th</sup> session in January 2020<sup>19</sup>. Despite the very wide scope of work undertaken by Working Group III on ISDS reform and the complexities of the issues involved, the progress of the Working Group, which has been characterized as a constructive, inclusive and transparent process, so far has been very impressive and it will elaborate and develop multiple potential reform solutions simultaneously<sup>20</sup>.

17. According to the UNCITRAL Secretariat, there is a wide-ranging consensus among States that ISDS reform is needed and numerous reform proposals have been submitted to Working Group III. The UNCITRAL Secretariat sees that the first task is to group the proposals and prepare a coherent roadmap for discussion<sup>21</sup>.

18. It is contemplated that this roadmap has three levels, with the first level looking at alternative dispute resolution (“ADR”)<sup>22</sup>, first instance procedures (e.g. investment arbitration, State-to-State dispute settlement mechanism and domestic courts), and support to parties (e.g. dispute prevention and ISDS advisory centres). At the second level, the roadmap will look at the appellate procedures (e.g. State-to-State appellate mechanism for dispute settlement, the establishment of a standing appellate body or appeal mechanism, and appellate mechanism under the ICSID Convention). At the third level, more wide-ranging issues such as treaty interpretation and control mechanisms by States over such interpretation will be explored. As one can see, mediation, being a form of ADR, is high on the agenda in the roadmap of Working Group III in its consideration of the ISDS reform options.

19. Moreover, it is of note that mediation has been expressly listed in the table of ISDS reform options in Working Paper 166 of the UNCITRAL Secretariat<sup>23</sup>. For example, the Secretariat observes that mediation can facilitate the promotion of early settlement of disputes, particularly during the cooling-off period, and as a reform option, can be implemented as a stand-alone reform or in conjunction with other reform options<sup>24</sup>. In the

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<sup>19</sup> See UNCITRAL Secretariat, “*UNCITRAL Working Group on investor–State dispute settlement (ISDS) continues work on reforms*” (24 January 2020) at [https://unis.unvienna.org/unis/en/press\\_releases.html](https://unis.unvienna.org/unis/en/press_releases.html).

<sup>20</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (A/CN.9/1004/Add.1, para. 4).

<sup>21</sup> See “*An update on UNCITRAL’s work on expedited rules and ISDS reform*”, Global Arbitration Review (11 September 2020).

<sup>22</sup> *Ibid.*

<sup>23</sup> See Note by the UNCITRAL Secretariat, “*Possible reform of investor-State dispute settlement*” (Addendum) – tabular presentation of reform options (A/CN.9/WG.III/WP.166/Add.1).

<sup>24</sup> *Ibid.*, at pp. 7 – 8.

said table of ISDS reform options, mediation is seen as being able to address the concerns over the cost and duration of ISDS proceedings and preservation of long-term relations<sup>25</sup>. In this regard, the Secretariat notes the possibilities of development of relevant standard clauses on mediation for investment treaties, promotion of existing mediation rules for ISDS and establishment of relevant facilities if necessary<sup>26</sup>.

20. In respect of the views of State delegations of Working Group III, it is worth noting that support on the greater use of mediation in resolving ISDS disputes has been observed in various written submissions of Working Group III's delegations<sup>27</sup>.

21. In this regard, apart from making the suggestion of studying the important topic of establishing an appellate mechanism to ensure the correctness and predictability of ISDS awards, China's written submission has referred to the various merits of mediation in the context of ISDS and made the suggestion of actively exploring the effective use of mediation as Working Group III is considering the ISDS reform options<sup>28</sup>.

22. A common theme of the written submissions which are supportive to the greater use of mediation in ISDS is that mediation is not meant to replace the use of investment arbitration, and rather, mediation is a process that can work hand-in-hand with arbitration in a complementary manner. Among others, the written submission of Thailand has highlighted the importance for there to be mediation rules specific to international investment agreements and ISDS, which serve as a procedural framework to guide the disputing parties through the mediation process as well as for hybrid processes of mediation and arbitration<sup>29</sup>.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> See Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, para. 19); Submission from the European Union and its member States (A/CN.9/WG.III/WP.159/Add.1, para. 12); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 14); Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 24); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, page 7, annex I); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41); Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5); Submission from the Government of Mali (A/CN.9/WG.III/WP.181, section F); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, p. 6); and Submission from the Government of Turkey (A/CN.9/WG.III/WP.197, p.2).

<sup>28</sup> See Submission from the Government of China (A/CN.9/WG.III/WP.177, p.5).

<sup>29</sup> See Submission from the Government of Thailand (A/CN.9/WG.III/WP.162).

23. When it comes to the process design for mediation in resolving ISDS disputes, it is understandable for there to be differences in views and approaches. For example, the written submission of Indonesia has raised the suggestion of introducing mandatory mediation as a requirement before resorting to investment arbitration in international investment agreements in order to prevent an investment dispute from escalating into costly and relationship-damaging legal actions<sup>30</sup>. The subject of mandatory mediation in ISDS has been discussed in the academic community for quite some time, with some considering it to be a necessary step to get disputing parties give a chance to try resolving disputes through mediation, while others considering that mandatory mediation may result in delays and costs in resolving disputes<sup>31</sup>.

24. Apart from making suggestions on the process design of mediation, some written submissions have touched upon the idea for mediation to be offered in an institutional setting. For example, the written submission of South Africa has highlighted that arbitration institutions have a role to play in promoting the greater use of mediation in the context of ISDS disputes through providing and administering simple and flexible rules for ADR (including mediation), developing capacity, encouraging the inclusion of ADR experts in their lists and providing logistical and secretarial support to parties agreeing to engage in mediation<sup>32</sup>.

25. Furthermore, in the Scoping Study conducted by the Columbia Center on Sustainable Investment on “*Securing Adequate Legal Defense in Proceedings under International Investment Agreements*”, the question of whether ADR services (including mediation) should be offered by an Advisory Centre or other similar aid institutions for ISDS has been raised<sup>33</sup>. The written submission from Turkey is also supportive to the idea for an Advisory Centre for ISDS to offer mediation services for investors and States to resolve their international investment disputes<sup>34</sup>.

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<sup>30</sup> See Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, paras. 19 – 20).

<sup>31</sup> See 2020 QMUL-CCIAG Survey: *Investors’ Perceptions of ISDS* (May 2020) (available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>), at pp. 24 – 25.

<sup>32</sup> See Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 49).

<sup>33</sup> See Submission from the Governments of The Netherlands, Peru and Thailand (A/CN.9/WG.III/WP.196).

<sup>34</sup> See Submission from the Government of Turkey (A/CN.9/WG.III/WP.197, p. 2).

26. Interests in the greater use of mediation in the context of ISDS are not limited to State delegations in Working Group III. Various observer delegations of Working Group III have also expressed support to mediation.

27. For example, the written submission of the Corporate Counsel International Arbitration Group, which represents investors' interest, supports the greater use of mediation and conciliation in solving ISDS dispute, and it refers to the experience of many investors who have successfully used mediation and conciliation to resolve difficulty commercial disputes to illustrate the point that there is no reason why similar results could not be achieved in investment disputes<sup>35</sup>. Moreover, the United States Council for International Business, another observer delegation which represents investors' interest, have expressed inclination towards prevention and ADR mechanisms in resolving ISDS disputes with States<sup>36</sup>.

28. Professional organizations such as the International Bar Association have also made various useful suggestions on promoting the greater use of mediation in ISDS<sup>37</sup>. Various members of the Academic Forum on ISDS has published a concept paper to discuss the use of mediation in future ISDS disputes<sup>38</sup>.

29. NGOs such as the Columbia Center on Sustainable Investment have also observed that many States and other stakeholders are increasingly focusing on alternatives to investment arbitration, and mediation may provide a useful tool in advancing the long-term objectives of States, investors, and other stakeholders as well as achieving sustainable outcome<sup>39</sup>.

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<sup>35</sup> See Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (18 December 2019).

<sup>36</sup> See Catherine Kessedjian, Anne van Aaken, Runar Lie and Loukas Mistelis, "*Mediation in Future Investor-State Dispute Settlement*" (Academic Forum on ISDS Concept Paper 2020/16) (5 March 2020) (available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>), at p. 2. In the verbal intervention of United States Council for International Business for the 39<sup>th</sup> Session of Working Group III, support is expressed by the delegation towards the use of mediation in resolving ISDS disputes.

<sup>37</sup> See IBA Arbitration Subcommittee on Investment Treaty Arbitration, "*Consistency, Efficiency and Transparency in Investment Treaty Arbitration*" (November 2018), at pp. 43 – 49.

<sup>38</sup> See Kessedjian and others (n 36).

<sup>39</sup> See Brooke Skartvedt Güven, "*Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes*" (3 January, 2020), available at <http://ccsi.columbia.edu/2020/01/03/investor-state-mediation-an-opportunity-to-advance-sustainable-outcomes/>.

30. In light of the global COVID-19 pandemic, the 39<sup>th</sup> session of Working Group III in New York was postponed. Despite this, there is still much momentum in the discussion on the use of mediation in ISDS. In this regard, a webinar has been co-organized by the UNCITRAL Secretariat and the ISDS Academic Forum on the role of mediation in ISDS and various experts and practitioners have shared their views on the existing legal framework and practice of mediation as well as its role in the future of ISDS<sup>40</sup>.

31. To facilitate the discussion on the reform option of mediation, the Secretariat has also prepared a dedicated working paper, entitled “*Dispute prevention and mitigation – Means of alternative dispute resolution*”, which, among others, provides an overview on the use of mediation in ISDS and various related proposals in the written submissions of the State delegations<sup>41</sup>.

32. During the 39<sup>th</sup> session of Working Group III in early October 2020, the Working Group for the first time has a dedicated section of the meetings allocated to the preliminary discussion on mediation. From the various interventions by the delegations of Working Group III, much optimism has been expressed on the greater use of mediation in ISDS disputes, in complementary to the use of investment arbitration<sup>42</sup>. The Working Group has noted the general support and interests among the delegations for the UNCITRAL Secretariat to pursue further work on mediation, with a view to ensure its effective use<sup>43</sup>. While noting the various benefits of mediation as a dispute resolution tool for ISDS, the Work Group also identified various structural, legislative and policy impediments, particularly for governments, to the greater use of mediation in ISDS and considered the way forward for mediation<sup>44</sup>.

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<sup>40</sup> See the website of the webinar (18 June 2020) at <https://uncitral.un.org/en/mediationwebinar>.

<sup>41</sup> See Note by the UNCITRAL Secretariat, “*Possible reform of investor-State dispute settlement – Dispute prevention and mitigation – Means of alternative dispute resolution*” (A/CN.9/WG.III/WP.190) (15 January 2020).

<sup>42</sup> During the 39<sup>th</sup> session of Working Group III, many States delegations, including China, the United States, the European Union, India, Thailand, Indonesia, Korea, Israel, Mexico, Cameroon, Iran, Switzerland, Chile, Bahrain, Colombia, Singapore and Honduras, and other observer delegations such as the Asian Academic of International Law, the International Law Association, and the Center for International Investment and Commercial Arbitration, have expressed positive views over the use of mediation in ISDS.

<sup>43</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>44</sup> *Ibid.*



## V. POTENTIAL OF MEDIATION AS A VIABLE ISDS REFORM OPTION

33. Mediation is a form of dispute resolution that has a very long history, which can be traced back to the earliest history of mankind, and has always been an integral part of Chinese legal culture<sup>45</sup>. The early history of modern use of mediation and conciliation can be traced to their use in inter-State dispute settlement such as the Hague Convention on the Pacific Settlement of Disputes of 1899 and 1907, mixed claims commissions established under the Jay Treaty of 1794, Article 33 of the Charter of the United Nations, and the United Nations Convention on the Law of the Sea<sup>46</sup>.

34. In the context of ISDS, the use of mediation and conciliation is a relatively recent phenomenon, with it being first conceptualized into the ICSID Convention Conciliation Rules back in 1967<sup>47</sup>. In modern times, rising interest in the use of mediation for ISDS is observed, with more and more international investment agreements including express provisions on mediation<sup>48</sup>.

35. The benefits of utilizing mediation in resolving ISDS disputes have been extensively discussed in numerous academic literatures and studies

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<sup>45</sup> See Wang Guiguo and He Xiaoli, “*Mediation and International Investment: A Chinese Perspective*”, *Maine Law Review*, Vol.65, pp.215-236.

<sup>46</sup> See David Ng, “*Investment Mediation*”, in the Proceedings for the ISDS Reform Conference 2019 – Mapping the Way Forward organised by the Department of Justice of the Hong Kong Special Administrative Region of the People’s Republic of China and Asian Academy of International Law (13 February 2019), see pp. 292 – 295. See also Romesh Weeramantry and Brian Chang, “*Bibliography on Investor-State Conciliation and Mediation*” (September 2020), Project on Investor-State Conciliation (Working Paper 20/01) (available at <https://cil.nus.edu.sg/publication/bibliography-on-investor-state-conciliation-and-mediation/>).

<sup>47</sup> See <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>. It has also been previously reported that even before the creation of ICSID, investors and governments have requested the World Bank or its then President Eugene R. Black to perform conciliation and mediation functions, and one example is the 1958 dispute between Tokyo and French nationals who held bonds issued by the city (See Gabriel Bottini and Veronica Lavista, “*Conciliation and BITS*”, in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2009), Brill | Nijhoff, 20 May 2010, see p.358, and Frauke Nitschke, “*The ICSID Conciliation Rules in Practice*”, in Catharine Titi and Katia Fach Gómez “*Mediation in International Commercial and Investment Dispute*”, edited by (Oxford University Press)), at p.122.

<sup>48</sup> See e.g. the Investment Agreement for the COMESA Investment Area (2007), the ASEAN Comprehensive Investment Agreement, the model BIT of Thailand (2012), Southern African Development Community Model BIT (2012), the Revised Unified Agreement for the Investment of Arab Capital in the Arab States (2013), the model BIT of India (2016), the EU-Canada Comprehensive Economic and Trade Agreement (2016), the Hong Kong – Chile Investment Agreement (2016), the Model BIT of Netherlands (2018), Hong Kong – Australia Investment Agreement (2019) and Hong Kong – United Arab Emirates Investment Promotion and Protection Agreement (2019).

for a long period of time<sup>49</sup>. In essence, mediation emphasises harmony and achieving win-win situations for the disputing parties. As compared with other dispute resolution methods such as investment arbitration, investment mediation offers various unique benefits, such as providing host States and foreign investors with a high degree of autonomy, flexibility and consensual resolution options in resolving international investment disputes<sup>50</sup>. Mediation can also facilitate the disputing parties in reaching creative and forward-looking settlement arrangements that are based on the common interests and needs of the parties in dispute, with the assistance of professional mediators<sup>51</sup>.

36. The following extract from the Final Award of *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, also testifies to the potential of mediation in ISDS:

*“[T]he Tribunal remarked that it had a sense ‘that a settlement in this case would be a good thing, in that the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case.’ The Tribunal emphasised that it was not its role to “get involved in this in any way at all” but suggested that should the Parties desire to seek out somebody who might act as a mediator or reconciliatory... The Tribunal noted that any such steps would be taken in parallel with the continuation of the case.”*<sup>52</sup>

37. In terms of statistics, the data at UNCTAD Investment Policy Hub shows that, as of 31 December 2019, among the total number of 1023 known treaty-based ISDS cases, 20.6% of the cases were settled and 11.4% were discontinued<sup>53</sup>. In respect of the statistics of ICSID, as of June 2020, for arbitration proceedings under the ICSID Convention and Additional Facility Rules, 35% of the dispute were settled or otherwise discontinued<sup>54</sup>. While there are no further breakdown of the aforesaid figures in terms of

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<sup>49</sup> See e.g. E. Sussman, “*The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*”, *Journal of Transnational Dispute Management*, Vol.11, No.1, January 2014, and Ng (n 46), at pp. 290 – 338.

<sup>50</sup> See Ng (n 46), at pp. 298 – 303.

<sup>51</sup> *Ibid.*, at pp. 298 – 299.

<sup>52</sup> See Final Award for *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (7 December 2012), at para. 60.

<sup>53</sup> See <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>54</sup> See ICSID, “*The ICSID Caseload – Statistics (Issue 2020-2)*” (available at <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>), at pp. 13 – 14.

the percentages of cases that are settled or discontinued as a result of mediation having been deployed to resolve the ISDS disputes, such statistics indicate that there is much room for the greater use of mediation to facilitate the amicable settlement of ISDS cases.

38. More importantly, as discussed above, the ISDS reform option of mediation has enjoyed much support from a wide range of stakeholders (including States, investors, academics as well as NGOs) in UNCITRAL Working Group III and is an important subject that will be further explored by the Working Group. Moreover, according to the 2020 QMUL-CCIAG Survey: *Investors' Perceptions of ISDS*, 55% of the survey participants expressed positive views towards mediation, and 73% were positive towards treaty-based ISDS arbitration<sup>55</sup>.

39. At the international level, the United Nations Convention on International Settlement Agreements Resulting from Mediation (“UN Mediation Convention”)<sup>56</sup> is also a new development that may provide some impetus for the further development of mediation as a dispute resolution mechanism for international disputes<sup>57</sup>.

40. The UN Mediation Convention may apply to mediated settlement agreements resulting from international investment disputes to the extent of the reservations made by the relevant Contracting States<sup>58</sup>. Some may argue that enforcement of international mediated settlement agreements should in practice rarely be necessary as parties who voluntarily settle their disputes would most likely comply with their settlement agreements<sup>59</sup>. In

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<sup>55</sup> See QMUL-CCIAG (n 31), at p. 7.

<sup>56</sup> The UN Mediation Convention was open for signature on 7 August 2019 and has so far been ratified by six States.

<sup>57</sup> See the speech of Ms. Teresa Cheng, SC for 2019 Colloquium on International Law “*Synergy and Security: The Keys to Sustainable Global Investment*” – Session II: Dispute Resolution – The Global Dimension (15 August 2019).

<sup>58</sup> Article 8(1) (Reservations) of the UN Mediation Convention provides that “[a] Party to the Convention may declare that: (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention”.

<sup>59</sup> As observed by Ms. Lucy Reed, under the UN Mediation Convention, a mediated international settlement agreements will be enforceable in domestic courts of Contracting States not as a contract, which is generally the existing position in various jurisdictions, but as a new international mediated settlement category, and one can think about the UN Mediation Convention as one half of the New York Convention because the Convention only goes to the enforcement of mediated settlement agreements but not the enforcement of agreement to mediate. (See Lucy Reed, “*To Explore How to Incentivise Host Governments and Investors to Utilise Investor-State Mediation*”, in the Proceedings for the ISDS Reform Conference 2019 – Mapping the Way Forward organised by the Department of Justice of the Hong Kong

response to such views, as observed by Ms. Teresa Cheng, SC, the key is that the UN Mediation Convention will enhance the legitimacy of international mediation and encourage mediation to be more widely adopted by parties around the world<sup>60</sup>. That said, so far only a few States have ratified the UN Mediation Convention, and it will certainly take some time before we know how much impact the Convention will actually have on mediated settlement and enforcement of mediated settlement agreements in the context of ISDS<sup>61</sup>.

41. In considering the reform of ISDS, it is also important to take into account the implications of COVID-19 over the performance of the international investment agreements and the aftermath of this global crisis. In face of this unprecedented pandemic, which is the worst global crisis since World War II, States need to put into place various public health emergency measures including compulsory quarantine measures and social distancing measures to prevent and suppress the outbreak. Some of those measures, such as city lockdowns, suspension of operations of various business establishments, and international travel restrictions, will no doubt have a serious impact on businesses and investments. In light of the severe economic and financial impact brought about by the COVID-19 pandemic, governments also have no choice but to take various economic measures to address budget deficit and support industries.

42. As observed by UNCTAD, some of the policy responses taken by governments to address the COVID-19 pandemic and its economic fallout could create “*friction*” with the existing obligations under international investment agreements<sup>62</sup>. While the more recent international investment agreements usually contain an exception for measures necessary for

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Special Administrative Region of the People’s Republic of China and Asian Academy of International Law (13 February 2019), see pp. 33 – 35).

<sup>60</sup> Under Article I(3) of the New York Convention, it is provided that “[w]hen signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State”. Interestingly, unlike the New York Convention, the UN Mediation Convention does not provide for such specified reservations relating to the reciprocity of enforcement and recognition of mediated settlement agreements. Contracting States to the UN Mediation Convention are thus not permitted to make any reciprocity reservation. This may have implications that mediated settlement agreements made in a non-Contracting State to Convention may still be enforced in a Contracting State of the Convention. (See the speech of Ms. Teresa Cheng, SC for 2019 Colloquium on International Law “*Synergy and Security: The Keys to Sustainable Global Investment*” – Session II: Dispute Resolution – The Global Dimension (15 August 2019)).

<sup>61</sup> See Reed (n 59), at p.35.

<sup>62</sup> See UNCTAD, “*IIA Issues Note – The Changing IIA Landscape: New Treaties and Recent Policy Developments*” (July 2020) (available at <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf>). See also UNCTAD, “*World Investment Report 2020 – International Production Beyond the Pandemic*”, at pp. 87 – 96.

protection of public health, older generation agreements very often contain no such exception.

43. In light of the COVID-19 pandemic, the Columbia Center on Sustainable Investment and its partner organizations went so far as to call for an immediate moratorium on all arbitration claims by private corporations against governments using international investment agreements, and a permanent restriction on all arbitration claims related to government measures targeting health, economic, and social dimensions of the COVID-19 pandemic and its effect<sup>63</sup>.

44. While it is not the purpose of this paper to discuss the merits and rationality of the said proposed moratorium, one can foresee that investment arbitration cases against COVID-19 related measures, especially those that eventually result in adverse arbitral decisions against States, will cause political controversies and further exacerbate the legitimacy crisis of ISDS. Such controversies have been witnessed before in various ISDS cases such as the series of investment arbitration cases related to the financial crisis of Argentina in 2001 – 2002<sup>64</sup>, the challenges by Philip Morris against the plain packaging measures adopted by Australia and Uruguay<sup>65</sup>, and the case filed by Vattenfall against Germany regarding the phasing out of nuclear power plants<sup>66</sup>. Against such background, mediation, with its various benefits as a non-adversarial dispute resolution tool, may prove to be very useful in the amicable settlement of ISDS disputes amid the COVID-19 crisis.

45. As the saying goes, when there is a crisis, there lies an opportunity. As insightfully observed by Mr. Wolf von Kumberg in his concept paper entitled “*The Time for Investor State Mediation has Come*”<sup>67</sup>, the COVID-

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<sup>63</sup> See Columbia Center on Sustainable Investment, “*Call for ISDS Moratorium During COVID-19 Crisis and Response*” (May, 2020) (available at <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>).

<sup>64</sup> See e.g. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) and *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16).

<sup>65</sup> See *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) and *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12).

<sup>66</sup> See *Vattenfall AB and others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12).

<sup>67</sup> See Wolf von Kumberg, “*The Time for Investor State Mediation Has Come*” (16 June 2020) (available at <https://quraysh.com/wp-content/uploads/2020/06/The-Time-for-Investor-State-Mediation-Has-Come-1.pdf>).

19 pandemic has created a situation in which “mediation can play a vital role in helping both investors and States to restructure their legal commitments and, in many cases, to maintain the investment in a different form or conclude it on agreed terms”. Mr. von Kumberg further observes that arbitration has its limitations when it comes to the range of remedies that it can offer, and in any event, enforcing an arbitral award against a State the cannot pay, or seeks to avoid payment amid the pandemic, hardly makes good business sense.

## **VI. OBSTACLES THAT NEEDS TO BE OVERCOME FOR MEDIATION TO BE VIABLE ISDS REFORM OPTION**

46. Although the benefits of using mediation to resolve ISDS disputes have been widely recognized in various studies and academic writings, the number of the reported use of mediation in ISDS disputes is significantly lower than that of the reported cases of treaty-based investment arbitration cases. While there are in total 1,023 known treaty-based ISDS cases as of 31 December 2019<sup>68</sup>, an empirical study by the Academic Forum on ISDS has identified 12 cases that have been reported under the ICSID conciliation rules<sup>69</sup> and 10 other cases where mediation / conciliation has been attempted<sup>70</sup>.

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<sup>68</sup> See the website of UNCTAD Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>69</sup> These 12 cases are *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar* (CONC/82/1), *Tesoro Petroleum Corporation v. Trinidad and Tobago* (CONC/83/1), *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar* (CONC/94/1), *TG World Petroleum Limited v. Republic of Niger* (CONC/03/1), *Togo Electricité v. Republic of Togo* (CONC/05/1), *Shareholders of SESAM v. Central African Republic* (CONC/07/1), *RSM Production Corporation v. Republic of Cameroon* (CONC/11/1), *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea* (CONC(AF)/12/1), *Republic of Equatorial Guinea v. CMS Energy Corporation and others* (CONC(AF)/12/2), *Xenofon Karagiannis v Republic of Albania* (CONC/16/1), *Société d’Energie et d’Eau du Gabon v. Gabonese Republic, and La Camerounaise des Eaux (CDE) v. Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)* (CONC/19/1). The information on these 10 ICSID conciliation cases is available at <https://icsid.worldbank.org/cases/case-database>.

<sup>70</sup> See Kessedjian and others (n 36), at pp. 9 – 10. These 10 cases are *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), *Balkan Energy (Ghana) Limited v. Republic of Ghana* (PCA Case No. 2010-7), *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), *Italba Corporation v. Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9), *KBR, Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1), *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), *Methanex Corporation v. United States of America, Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), *Olyana Holdings v. Rwanda, Pan African Burkina v. Burkina Faso, and Systra SA v. Philippines*.

47. As observed in Working Paper 190 of the UNCITRAL Secretariat for Working Group III, alternative dispute resolution methods such as mediation are usually confidential and it is difficult to collect accurate data on their use<sup>71</sup>. The lack of empirical data in this regard has caused difficulties to the promotion on the greater use of mediation because government officials are generally conservative in nature and may feel uncertain and uncomfortable with trying mediation when the extent of its usage by users of ISDS is not clear.

48. In the current system of ISDS, arbitration is the default mode of dispute resolution for ISDS. In a recent survey of corporate executives, in-house counsel and lawyers on their experience with ISDS, 82% and 52% of the survey participants have respectively used institutional arbitration and ad arbitration in ISDS, whereas only 14% and 7% of the survey participants have respectively used *ad hoc* mediation and institutional mediation<sup>72</sup>. Critics and skeptics also often point to the relatively smaller number of known cases of successful investment mediation as compared with the number of cases of investment arbitration, and the apparent reluctance of government officials in engaging in mediation to settle ISDS disputes in making their points that mediation does not work.

49. Some early works in academic literatures has examined the possible obstacles to the use of mediation in ISDS disputes. For example, as identified by Ms Edna Sussman, various obstacles may generally include: (i) concern over infringement on sovereignty; (ii) unpredictability in the result in investment arbitration; (iii) the involvement of multiple government agencies; (iv) practical difficulties identifying all of the necessary participants in mediation; (v) budgetary constraints; (vi) need for legislative measures to resolve the disputes; (vii) government officials' preference for shifting the responsibility to an arbitral tribunal; (viii) concerns over time and expenses required for mediation; (ix) failure in the previous direct negotiations between the host jurisdiction and the investor; (x) difficulties in balancing demands for transparency with the need for confidentiality; (xi) concerns over enforcement difficulties; (xii) concerns of government officials over giving rise to bad publicity and bad precedent;

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<sup>71</sup> See Note by the UNCITRAL Secretariat, "*Possible reform of investor-State dispute settlement – Dispute prevention and mitigation – Means of alternative dispute resolution*" (A/CN.9/WG.III/WP.190, para. 43) (15 January 2020).

<sup>72</sup> See SIDRA International Dispute Resolution Survey: 2020 Final Report (available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/6/index.html>), at pp. 16 – 19.

and (xiii) the lack of personal stakes and incentives for government officials to engage in mediation<sup>73</sup>.

50. A commentary by Mr. Barton Legum has also highlighted that the involvement of multiple agencies in an ISDS dispute and the absence of or uncertainty over budgetary and legislative authorisation to settle a dispute through mediation is possibly a major obstacle to the greater use of mediation in ISDS<sup>74</sup>.

51. In recent years, more and more empirical studies have been conducted to precisely identify the obstacles to the use of mediation and figure out how to encourage users of ISDS to attempt mediation. One of the very useful study in the regard is the survey report prepared by Ms. Lucy Reed, Mr. J Christopher Thomas QC and Ms. Seraphina Chew<sup>75</sup>. This empirical study is based on the responses from private counsel, institution representatives and academics with substantial personal experience in investment arbitration, with more than half of them having experience advising both investors and States. According to the said survey, at least from a perception standpoint, the majority (70%) of the survey participants considers that, as compared to the investor, the State is the party that is more reluctant to settle ISDS disputes<sup>76</sup>. Although whether this is in fact true may require further research, the survey has concluded that States do encounter unique considerations when it comes to settlement of ISDS disputes<sup>77</sup>.

52. In a way, the aforesaid observation is further supported in the empirical findings of the 2020 QMUL-CCIAG Survey: *Investors' Perceptions of ISDS*, which shows that while investors generally feel positive about investment arbitration, arbitration is rarely a preferred course of action for their organizations because in practice they prefer amicable solutions that can preserve their relationships with States and the

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<sup>73</sup> See e.g. Sussman, Edna. "Investor State Dispute Mediation: The Benefits and Obstacles, Contemporary Issues in International Arbitration and Mediation" In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Leiden: Martinus Nijhoff Publishers, 2010), edited by Arthur W. Rovine, at pp. 323–38.

<sup>74</sup> See 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'", *Transnational Dispute Management Journal*, Vol. 4 Issue 1 (February 2007).

<sup>75</sup> See Seraphina Chew, Lucy Reed and J Christopher Thomas QC, "Report: Survey on Obstacles to Settlement of Investor-State Disputes" (NUS - Centre for International Law Working Paper 18/01) (September 2018), available at <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-state-disputes/>.

<sup>76</sup> *Ibid.*, at p.11.

<sup>77</sup> *Ibid.*, at pp.5 – 6.



prospect of a mutually acceptable solution or settlement, better aligned with the investor's own business objectives, is seen as more appealing than going to a lengthy arbitration<sup>78</sup>. Investors are generally more receptive to the use of mediation in resolving ISDS disputes, and the commencement of arbitral proceedings is often used merely as leverage to start or progress a negotiation or a settlement or a measure of last resort<sup>79</sup>.

53. In terms of the unique hurdles faced by States over the use of mediation in ISDS, the survey report prepared by Ms. Lucy Reed, Mr. J Christopher Thomas QC and Ms. Seraphina Chew has confirmed some of the observations in the academic literatures. In particular, according to the survey report, the three most significant obstacles to settlement of ISDS disputes are: (i) the desire of government officials to defer or avoid taking responsibility for concluding settlement agreements with investors; (ii) the ISDS disputes becomes a political concern / issue because of media (international and/or domestic) coverage, pressuring the State to take a firmer stance; and (iii) fear of public or political criticism (which is also related to the fear of allegations of or future prosecution for corruption)<sup>80</sup>.

54. Apart from these three political factors, the issue of government structure (i.e. the involvement of multiple ministries and agencies with potentially competing perspective and priorities and the difficulty in obtaining budgetary approval for settlement) has again been identified as an obstacle in the survey<sup>81</sup>.

55. Nevertheless, these obstacles are not insurmountable and the questions that Working Group III should focus on is how to overcome such hurdles. The relatively smaller number of cases of mediation in ISDS, as compared with investment arbitration, should probably be seen as disputing parties lacking familiarity with the mediation process, rather than the parties' perception of success rates of mediation proceedings or the effectiveness of mediation as a dispute resolution tool<sup>82</sup>. If one looks at the

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<sup>78</sup> See QMUL-CCIAG (n 31), at p. 8.

<sup>79</sup> *Ibid.* In the 39<sup>th</sup> Session of Working Group III, it was mentioned that, statistically, in 7 out of 10 times after the investment arbitration, the foreign investors concerned chose to cease investing in the host jurisdictions.

<sup>80</sup> See Reed and others (n 75).

<sup>81</sup> *Ibid.*, at p.2. In the survey, it is also stated that “*the unity of the State is a fiction in international law, for what is treated as a single entity is in reality a complex organisation comprising ministries, administrative and other agencies, legislatures, subnational authorities*” (see p.14).

<sup>82</sup> See Shu Shang, “*Implementing Investor-State Mediation in China's Next Generation Investment Treaties*”, in Julien Chaisse (ed), “*China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*” (Oxford University Press) (2019), at pp. 504 – 517.

trajectory of the history of treaty-based ISDS, the option of investment arbitration between foreign investors and host jurisdictions first appeared in the Italy – Chad BIT in 1969, but it was not until the famous *AAPL v Sri Lanka* case in 1987 that a Hong Kong-incorporated company invoked for the very first time investment arbitration under the UK – Sri Lanka BIT<sup>83</sup>. The use mediation in ISDS disputes is a relatively new development, a certain degree of patience is therefore necessary for mediation to prove its value as a useful dispute resolution tool in ISDS disputes and for its use to be further promoted internationally.

56. As already discussed above and evidenced in the discussion on the subject in Working Group III, the potential and value that mediation can add to the practice of ISDS are well-recognized by States, investors, practitioners, academics as well as other stakeholders of ISDS. Various international organizations such as UNCITRAL, ICSID, UNCTAD and the International Energy Charter have put in much efforts and resources in promoting and facilitating the use of mediation in resolving ISDS disputes.

57. On the side of practitioners, as observed in the 2020 Harvard Investor-State Mediation Report, while the conventional wisdom is that law firms are opposed to mediation, some international firm have managed to develop profitable models from mediated settlements and therefore practitioners may not be the obstacle they were once perceived to be<sup>84</sup>.

58. Overall speaking, there is a future for mediation, and mediation has a promising prospect as an ISDS reform option, provided that the right strategies and approaches are deployed to effectively address the obstacles.

59. On how to overcome the obstacles, as observed by leading experts such as Professor Jack Coe Jr., one important question is how to make mediation become more routine and predictable despite its voluntary character, and the initial hurdle of convening the disputing parties and launching the mediation cannot be underestimated<sup>85</sup>. In the context of commercial mediation, as observed, the data supports the expectation that

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<sup>83</sup> See Cheng (n 4), pp. 3 – 4.

<sup>84</sup> See ISDS Mediation Working Group, *Unlocking Values Through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes* (June 2020) (available at <https://quraysh.com/wp-content/uploads/2020/06/2020-ISDS-Mediation-Working-Group-Report-200616.pdf>), at p. 8.

<sup>85</sup> See Jack J. Coe Jr., “*To Explore the Relationship between Investor-State Mediation and Investor-State Arbitration and How the Two Processes Can Complement with Each Other*”, in the Proceedings for the ISDS Reform Conference 2019 – Mapping the Way Forward organised by the Department of Justice of the Hong Kong Special Administrative Region of the People’s Republic of China and Asian Academy of International Law (13 February 2019), see pp. 26 – 28.

mediation has worked exceedingly well, sometimes achieving miraculous results, and the same can be applied to ISDS disputes<sup>86</sup>.

60. In order to overcome the obstacles to the greater use of mediation in ISDS, as insightfully observed by Professor Coe, it boils down to convincing government officials and investors to give mediation a chance, which would entail “*a change of habits, a change of standard operating procedures, a change of expectations and, to some extent, how we define best practices in approaching [ISDS] disputes*”<sup>87</sup>. This brings us to the very important question that this paper seeks to discuss, that is the way forward.

## **VII. THE WAY FORWARD – POSSIBLE COMPONENTS OF THE ISDS REFORM ON MEDIATION**

61. On the way forward, restoring and enhancing the legitimacy (both actual and perceived) of ISDS is a key consideration and this applies to mediation as a reform option. In this regard, the G20 Guiding Principles for Global Investment Policymaking, agreed at the G20 Ministerial Meeting in 2016, are particularly instructive on what the essential elements of “legitimacy” are<sup>88</sup>, and the relevant guiding principles are extracted as follows:

*“III. Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.*

*IV. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law.”*

62. With reference to the abovementioned G20 Guiding Principles, this paper observes that the possible components that can be considered for

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<sup>86</sup> *Ibid.*, see p. 26.

<sup>87</sup> *Ibid.*, see p. 27.

<sup>88</sup> The text is available at <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.

incorporation into the ISDS reform on mediation, can broadly be grouped into three dimensions, namely:

- (i) Establishing facilitative frameworks at treaty-level and domestic institutional-level to encourage the use of investment mediation;
- (ii) Overcoming the psychological barrier for government officials and investors in using mediation through capacity building and education and promotion initiatives; and
- (iii) Exploring the synergies of mediation with other possible ISDS reform options such as dispute prevention mechanisms and ISDS advisory centre.

63. The various tools discussed below are, by no means, exhaustive, and stakeholders of ISDS are most welcome to explore other creative and feasible tools to encourage the use of mediation in resolving ISDS disputes.

**(1) Facilitative Frameworks on Investment Mediation at the Treaty-level and Domestic Institutional-level**

64. The lack of formal legal frameworks to support mediation and mediated settlement has been a major obstacle to the more effective implementation of mediation in ISDS<sup>89</sup>. As to be further elaborated below, development of facilitative frameworks on investment mediation is necessary at both the treaty level and domestic institutional level.

**(a) The Use of Informal Drafting Groups to Develop the Work on Mediation for Consideration by Working Group III**

65. Before discussing the details and designs of the aforesaid facilitative frameworks on investment mediation, it is necessary for Working Group III to consider how the preparatory work can be conducted effectively and efficiently in practice. This is especially when Working Group III has a rather wide range of ISDS topics to tackle and it is estimated by the UNCITRAL Secretariat that a period of 10 years beginning 2021 will be

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<sup>89</sup> See ISDS Mediation Working Group (n 84), at p. 8.

required for Working Group III to complete its work on the basis of two formal one-week sessions per year<sup>90</sup>.

66. In order to deliver results within a reasonable period, in addition to formal sessions, Working Group III may have to resort to other constructive, inclusive and transparent working methods, such as intersessional meetings, conferences and seminars, expert groups and drafting groups, to further its work on the use of mediation in ISDS.

67. Under the UNCITRAL process, in developing texts, drafting group meetings are often held in conjunction with working group sessions as a facilitative tool<sup>91</sup>. As stated in Working Paper 158 of the UNCITRAL Secretariat on the options for implementing a work plan for Working Group III, greater use of informal consultations and drafting groups in the margins of Commission and working group sessions might enhance the use of meeting time for both the Commission and working groups<sup>92</sup>. In this regard, it is further observed the use of drafting groups have been productive in the development of UNCITRAL texts such as the Model Law on Public Procurement and the UN Mediation Convention<sup>93</sup>.

68. More importantly, the use of drafting groups will be in line with the practice of Working Group III, which is that no decisions of the Working Group will be made outside the formal sessions and the draft texts and other outcomes developed by the drafting groups will be submitted to the Working Group for consideration and discussion.

69. Furthermore, the COVID-19 pandemic has already caused delays in the work of Working Group III and it will take some time before physical formal sessions can be resumed. To adjust to this “*new normal*”, while the use of online tools has, with reference to the experience of the 39<sup>th</sup> Session of Working Group III, proved to be viable, the use of drafting groups for developing mediation as an option for ISDS reform is also a valuable tool that is worth being considered by the Working Group.

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<sup>90</sup> Note by the UNCITRAL Secretariat, “*Resources to implement work programme with respect to investor-State dispute settlement (ISDS) reform*” (A/CN.9/1011, para. 24) (6 May 2020).

<sup>91</sup> See UNCITRAL Secretariat, “*A Guide to UNCITRAL – Basic facts about the United Nations Commission on International Trade Law*” (available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf>), at p.9.

<sup>92</sup> Note by the UNCITRAL Secretariat, “*Possible reform of investor-State dispute settlement (ISDS) – Information on options for implementing a workplan*” (A/CN.9/WG.III/WP.158, para. 11) (25 January 2019).

<sup>93</sup> *Ibid.* See also Note by the UNCITRAL Secretariat, “*Resources to implement the work programme with respect to investor-State dispute settlement (ISDS) reform*” (A/CN.9/1011, para. 31) (6 May 2020).

**(b) Development of model treaty clauses and ISDS-specific mediation protocols for incorporation into international investment agreements**

70. The incorporation of mediation-related model treaty clauses and mediation protocol (i.e. mediation rules) into international investment agreements or similar arrangements is a more recent phenomenon.

71. According to the empirical study of the Academic Forum on ISDS, among the sample of 2577 international investment agreements, approximately 627 (around 24%) of such agreements contain voluntary conciliation and/or mediation in their provisions on cooling-off period<sup>94</sup>. From a purely legal standpoint, it is generally recognized that a lack of express reference of mediation in international investment agreements does not actually prevent the disputing parties of ISDS from agreeing to resort to mediation to resolve their disputes. However, at a stage when government officials, investors and other stakeholders have not yet become familiar with and used to resolving ISDS disputes through mediation, the lack of express treaty provisions and mediation protocols in international investment agreements is an issue that needs to be looked into.

72. As observed by Ms Anna Joubin-Bret in her article “*InvestorState Mediation (ISM): A Comparison of Recent Treaties and Rules*”, many existing international investment treaties provide for a “cooling-off” period, during which the disputing parties are invited to find an amicable settlement to their disputes<sup>95</sup>. However, treaty practice varies as to the options that are available to the parties for settlement of disputes during the cooling-off period and some treaties are silent about the methods and processes available to the parties<sup>96</sup>.

73. It has been further pointed out by Ms Joubin-Bret that even for certain treaties that expressly provide for mediation, the rules are not sufficiently precise and are not clear on how mediation can take place and

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<sup>94</sup> See Kessedjian and others (n 36).

<sup>95</sup> Anna Joubin-Bret, “*Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules*” in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Brill | Nijhoff, 14 October 2015, see p.154. According to the statistics of the Academic Forum on ISDS, among 3,127 known international investment agreements, around 2,183 clause have been identified as “cooling-off clauses”.

<sup>96</sup> *Ibid.*, see p.154.

the sequence between mediation and arbitration, thus not being conducive to the use of investment mediation<sup>97</sup>.

74. The idea with respect to the development of model treaty clauses and investment mediation protocols was also discussed in the 39<sup>th</sup> session of Working Group III and the importance of guidance in the effective use of mediation during the cooling-off period for early resolution of ISDS disputes is also highlighted<sup>98</sup>. In this regard, the UNCITRAL Secretariat has been requested by the Working Group to work with interested delegations and organizations, to develop or adapt rules for mediation in the ISDS context as well as model clauses for incorporation into international investment agreements (including model clauses for promoting effective use of mediation during the cooling-off period)<sup>99</sup>.

75. In designing the model treaty clauses and mediation protocols, the overriding key principles are that such provisions should enshrine the values of the rule of law (including fairness, impartiality and due process), have a strong emphasis on cost effectiveness and efficiency, and ensure the preservation of voluntariness and high degree of flexibility<sup>100</sup>. While it is observed that treaty provisions on investment arbitration have a trend of becoming more detailed and sophisticated in recent years, it is important to bear in mind that the function of a mediation protocol is to provide a framework for disputing parties and serve as a guide or roadmap through the mediation process. As such, it would be undesirable for the mediation protocols to be overly detailed or complex.

76. One of the possible reference models of an ISDS-specific mediation protocol can be found in the investment mediation rules (“CEPA Investment Mediation Rules”) <sup>101</sup> for resolving investment disputes between the Government of the Hong Kong SAR and investors from Mainland China under the Investment Agreement of the Closer Economic Partnership Arrangement (“CEPA Investment Agreement”)<sup>102</sup>. While the

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<sup>97</sup> *Ibid.*, see p.155.

<sup>98</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>99</sup> *Ibid.*

<sup>100</sup> See Ng (n 46), at pp. 317 – 319.

<sup>101</sup> The text of the CEPA Investment Mediation Rules can be found in <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>.

<sup>102</sup> The text of the CEPA Investment Agreement can be found in <https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>. In terms of structure, there is a separate document to the CEPA Investment Agreement, entitled “*Mediation Mechanism for Investment Disputes*”, which sets out, among others, the mediation principles, conditions for submission of dispute to mediation, the provisions on the use of information and confidentiality and mediation settlement agreements. Such Mediation Mechanism is applicable to the disputes between Mainland

nature of the CEPA Investment Agreement is an arrangement within one country, it contains provisions, such as fair and equitable treatment, full protection and security, and prohibition against performance requirements and illegal expropriation, which are commonly found in modern international investment agreements.

77. Investment mediation is the only available detailed mechanism for resolving investment disputes under the CEPA Investment Agreement<sup>103</sup>. Should mediation fail to resolve the dispute, the disputing parties may resort to litigation in courts. The CEPA Investment Mediation Rules are administered by designated mediation institutions in the Hong Kong SAR<sup>104</sup> and such designated institutions respectively maintain a list of mediators.

78. The CEPA Investment Mediation Rules set out a basic framework for the disputing parties to work on and leave ample room for them to customize the mediation process in light of their preferences and the nature of the dispute<sup>105</sup>. Under those Rules, the disputing parties may, in accordance with the principle of voluntary participation, choose whether to participate in or to withdraw from mediation, and the disputing parties are required to cooperate with the mediators and each other in good faith and to participate in the mediation actively so as to advance the mediation expeditiously and efficiently<sup>106</sup>.

79. A distinguishing feature of the CEPA Investment Mediation Rules is that the default position is for a mediation commission consisting of three mediators<sup>107</sup>, which is similar to the party appointment mechanism in investment arbitration. With their three-member mediation commission

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investors and the Hong Kong SAR and those between Hong Kong investors and the Mainland. The CEPA Investment Mediation Rules are applicable to the relevant disputes between Mainland investors and the Hong Kong SAR, while a different set of mediation rules are applicable to the relevant disputes between Hong Kong investors and the Mainland.

<sup>103</sup> See Articles 19 and 20 of the CEPA Investment Agreement.

<sup>104</sup> As of October 2020, Hong Kong International Arbitration Center – Hong Kong Mediation Council and the Mainland – Hong Kong Joint Mediation Center have been designated for administering the CEPA Investment Mediation Rules (See <https://www.tid.gov.hk/english/cepa/investment/mediation.html>). The lists of mediators are available at [https://www.tid.gov.hk/english/cepa/investment/files/mediators\\_hkiac.pdf](https://www.tid.gov.hk/english/cepa/investment/files/mediators_hkiac.pdf) and [https://www.tid.gov.hk/english/cepa/investment/files/mediators\\_mhjmc.pdf](https://www.tid.gov.hk/english/cepa/investment/files/mediators_mhjmc.pdf).

<sup>105</sup> Under Article 1(2) of the CEPA Investment Mediation Rules, it is provided that, save for certain fundamental provisions, the disputing parties may agree to exclude or vary any of the rules.

<sup>106</sup> See Article 3 of the CEPA Investment Mediation Rules.

<sup>107</sup> See Article 5(1) of the CEPA Investment Mediation Rules. As for the role of the mediation commission, it is set out under Article 8 of the CEPA Investment Mediation Rules.



model<sup>108</sup> and robust qualification requirements on mediators<sup>109</sup>, the CEPA Investment Mediation Rules allow a greater diversity of mediators in terms of linguistics, cultural and technical backgrounds to collaborate in the process<sup>110</sup>, potentially creating a greater balance in the team and facilitating the “*brainstorming*” of creative settlement arrangements. Those may include, but are not limited to, the grant or renewal of a license and the swapping of deals for other types of investment contracts or obligations<sup>111</sup>.

80. In the context of international investment agreements, it is observed that various recent international investment agreements concluded by the EU such as the EU – Canada Comprehensive Economic and Trade Agreement (“CETA”) have also included a detailed annex on the procedural rules of mediation<sup>112</sup>.

81. Moreover, various institutions have developed mediation or conciliation rules, some are general and some are specific to ISDS. One notable example is the ICSID Conciliation Rules (1967)<sup>113</sup> provided for in the ICSID Convention and in the Additional Facility (Conciliation) Rules. In this connection, a new set of mediation rules is also current being developed by ICSID in the amendment exercise of its Rules and Regulations<sup>114</sup>. The new mediation rules will complement ICSID’s

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<sup>108</sup> See Article 5 of the CEPA Investment Mediation Rules.

<sup>109</sup> The qualification requirements of mediators are set out in para. 1.6 of the CPEA Mediation Mechanism, which states that “[t]he mediators shall have attained the relevant qualification in mediation, and shall have professional knowledge and experience in the fields of cross-border or international trade and investment and law, and shall remain impartial in resolving the investment disputes”.

<sup>110</sup> In terms of the mediation process, the CEPA Investment Mediation Rules seek to ensure efficiency by introducing the mechanism of mediation management conference (see Article 9).

<sup>111</sup> According to Article 12(2) of the CEPA Investment Mediation Rules, the solutions under the mediated settlement agreement shall be confined to the following: (i) monetary compensation and any applicable interest; (ii) restitution of property or monetary compensation and any applicable interest in lieu of restitution of property; and (iii) other legitimate means of compensation agreed upon by the disputing parties. Such legitimate means of compensation may include a wide variety of non-monetary remedies, such as: (i) provision of a different location or project for the investment as an alternative compensation for the denial of a permit or license to operate a particular investment; (ii) re-negotiation of the terms of a concession project; (iii) re-evaluation of the return of a project and provisions of additional guarantees or sources of revenue; and (iv) self-assessments and reappraisals by governments of problematic measures they have enacted. (See UNCTAD, “*Investor-State Disputes: Prevention and Alternatives to Arbitration*” (2010)). See also para. 4 of the CEPA Mediation Mechanism.

<sup>112</sup> The text of CETA is available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)).

<sup>113</sup> The text of the latest version of the ICSID Conciliation Rules is available at <https://icsid.worldbank.org/resources/rules-and-regulations/convention/conciliation-rules>.

<sup>114</sup> See <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>.

existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings<sup>115</sup>. UNCITRAL is also in the process of updating its Conciliation Rules (1980) as part of a newly developed framework on international mediation and such updated Rules (and reportedly to be renamed as Mediation Rules) will be available for use in ISDS disputes<sup>116</sup>. The Permanent Court of Arbitration also has its Optional Conciliation Rules, which have been in effect for some time<sup>117</sup>.

82. In recent years, we also see the development of ISDS-specific mediation protocols such as the *ad hoc* Rules for Investor-State Mediation of the International Bar Association (“IBA Mediation Rules”) in 2012. It has been reported that the IBA Mediation Rules were applied for the first time in an ICSID conciliation case, *Republic of Equatorial Guinea v CMS Energy Corporation and others* (ICSID Case No. CONC(AF)/12/2)<sup>118</sup>, and has also been utilized in the ISDS dispute of *Systra SA v. Philippines* under the France – Philippines BIT in 2016, with the leading arbitrator, Mr. J Christopher Thomas, reportedly chosen by the disputing parties as the mediator and the mediation administered by the ICC – ADR Centre<sup>119</sup>.

83. Besides, there are also currently the ICC Mediation Rules (2014)<sup>120</sup> and the SCC Mediation Rules (2014)<sup>121</sup>, which may be utilized for resolving ISDS disputes.

84. Following the 39<sup>th</sup> session of Working Group III, the UNCITRAL Secretariat has been tasked with preparing model clauses reflecting best practices on the amicable settlement or cooling-off period, including an adequate length of time and clear rules on how such period could be

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<sup>115</sup> See <https://icsid.worldbank.org/services-arbitration-investor-state-mediation>.

<sup>116</sup> See Note by the UNCITRAL Secretariat, “Possible reform of investor-State dispute settlement – Dispute prevention and mitigation – Means of alternative dispute resolution” (A/CN.9/WG.III/WP.190) (15 January 2020).

<sup>117</sup> See Catherine Titi, “Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism” in Catherine Titi and Katia Fach Gómez (eds), “Mediation in International Commercial and Investment Disputes” (Oxford University Press) (2019), at pp. 32 – 33.

<sup>118</sup> See Paul-Jean Le Cannu, “Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System” ICSID Review, Vol.33, No.2, 30 October 2018, pp.456-500, at p.466 and footnote 78.

<sup>119</sup> See Investment Arbitration Reporter, “In an Apparent First, Investor and Host-State Agree to Try Mediation under IBA Rules to Resolve an Investment Treaty Dispute” (14 April, 2016).

<sup>120</sup> See <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>.

<sup>121</sup> See [https://sccinstitute.com/media/40123/mediationrules\\_eng\\_webbversion.pdf](https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf).

compiled with<sup>122</sup>. It is clear that promoting the effective use of mediation during the cooling-off period is important, but the potential of mediation at other stages of the disputes should also be considered. While early settlement of disputes is optimal in terms of saving in costs and duration, some disputes may only be able to be resolved at the later stage<sup>123</sup>. Disputing parties' view may change in light of the exchange of written pleadings, oral submissions during the hearings, and orders made by the arbitral tribunals as the case progresses. It is also of interest to note that there may also be opportunities to foster settlements through mediation even during the post-award phase.

85. Given the differences in preferences and views on the process design of mediation, optional provisions may be included in the model treaty clauses and the ISDS-specific mediation protocol to cater for features such as mandatory mediation prior to arbitration, disclosure requirement for third party funding and transparency requirement.

#### Mandatory mediation

86. During the 39<sup>th</sup> session of Working Group III, the desirability of mandatory mediation has been discussed. Some delegations have expressed reservation over mandatory mediation out of concerns that not all ISDS disputes are suitable to be resolved through mediation and mandatory mediation may not sit well with the principle of voluntariness<sup>124</sup>. As a matter of treaty practice, only a few known international investment agreements have express provisions on mandatory mediation. For example, in Hong Kong – United Arab Emirates IPPA (2019), there is an express provision allowing the host Contracting Party to request for mandatory conciliation before the investor can submit a dispute to arbitration<sup>125</sup>.

87. That said, mandatory mediation is not completely without its merits. According to the 2020 QMUL-CCIAG Survey: *Investors' Perceptions of ISDS*, it is found that the respondents of the empirical study would

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<sup>122</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>123</sup> For example, in a case involving an African State and a major foreign investor of that State, while Judge Stephen M. Schwebel was not able to successfully mediate the dispute before the parties pursued arbitration, the dispute was settled by the parties at an advanced stage of the arbitral proceedings but before an award was issued. (See Stephen M. Schwebel, "Is Mediation of Foreign Investment Disputes Plausible?", ICSID Review, Vol.22, No.2, 1 October, pp.237-241, at pp.237-238.

<sup>124</sup> [Revised draft report for the 39<sup>th</sup> session of Working Group III]

<sup>125</sup> Article 8(3) of the Hong Kong – United Arab Emirates provides that "[w]hen required by the Contracting Party, if the dispute cannot be settled amicably within six months from the date of receipt of the written notice, it shall be submitted to the competent authorities of that Contracting Party or arbitration centres thereof, for conciliation".

welcome a mandatory requirement to go through mediation before arbitration proceedings can be commenced<sup>126</sup>.

88. To have an informed consideration on the matter, it is necessary to recognize that mandatory mediation comes in many forms<sup>127</sup>. Mandatory mediation does not necessarily mean that the disputing parties are forced to go through the whole mediation process from start to finish.

89. In the discussion papers entitled “*Efficiency, Decisions, and Decision Makers*” prepared by the Chartered Institute of Arbitrators (“CIArb”) for Working Group III, it is also observed that “[t]he movement to encourage the use of other alternative dispute resolution procedures prior to the initiation of ISDS arbitration claims may be more promising than expedited procedures in applicable rules sets”<sup>128</sup>. In this regard, the CIArb has made a useful suggestion that a possible option is to require disputing parties to attempt mediation before filing a claim in ISDS, and such requirements to mediate prior to filing a claim in ISDS can be incorporated into the provisions of international investment agreements.

90. In light of the current insufficient understanding and experience over investment mediation, the form of mandatory mediation as suggested in CIArb’s paper may be useful in encouraging the wider use of such mechanism<sup>129</sup>. This is also compatible with the principle of voluntariness as the disputing parties are free to withdraw from the mediation process. Besides, even if the mediation at the stage of the cooling-off period is unsuccessful, it may still have the benefits of eliminating areas of the

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<sup>126</sup> See QMUL-CCIAG (n 31).

<sup>127</sup> As pointed out by Professor Nancy A. Welsh, the most intrusive form of mandatory mediation is one which requires participation of the disputing parties in the entire mediation process. (See Nancy A. Welsh and Andrea Kupfer Schneider, “*The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*”, Harvard Negotiation Law Review, Vol.18, 2013, at p.129). However, there can be other forms of mandatory mediation, such as: only requiring the disputing parties to consider the use of mediation, requiring the disputing parties to attend a case conference at which mediation will be discussed, requiring the disputing parties to first attend an initial orientation or mediation session and allowing such parties to determine afterwards as to whether they wish to continue the process. (See Nancy A. Welsh, “*Mandatory Mediation and Its Variations*” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2010), at pp.110-111.)

<sup>128</sup> See Discussion Papers – CIArb at UNCITRAL Working Group III on ISDS Reform: *Efficiency, Decisions, and Decision Makers* (February, 2019) (available at <https://www.ciarb.org/media/3480/ciarb-uncitral-discussion-papers.pdf>), at pp. 8 – 9.

<sup>129</sup> See Melissa Hanks, “*Perspectives on Mandatory Mediation*”, University of New South Wales Law Journal, Vol.35, No.3, 2012, see p.951. See also Welsh and Schneider (n 137), at p.132.

dispute, narrowing the issues, and assisting the parties in gaining a better understanding of the case<sup>130</sup>.

91. Furthermore, an alternative to mandatory mediation clause is the so-called “*convening clause*”, which provides for an independent third person to convene a meeting between the disputing parties to assist them in evaluating and choosing an appropriate dispute resolution process<sup>131</sup>.

### *The use of third party funding in mediation*

92. The practice of third party funding in ISDS has been a contentious issue. In the context of investment mediation, it has been reported by mediators that they have already seen third party funders such as Harbour Litigation Funding at the mediation table<sup>132</sup>. The implications of the use of third party funding was first discussed in the presentation of Ms. Teresa Cheng, SC during the intersessional meeting of Working Group III in Korea. In designing the investment mediation protocol, it is necessary to take into account the potential implications associated with the use of third party funding in mediation (e.g. conflict of interests between the mediators and the third party funders concerned)<sup>133</sup>. In the context of investment arbitration, one approach that is under consideration in the ICSID rule amendments exercise is to impose disclosure requirement on the use of third party funding<sup>134</sup>. This may also be an option for regulating the use of third party funding in mediation for ISDS disputes.

### *Striking a balance between transparency and confidentiality in mediation*

93. Transparency remains to be a thorny issue for ISDS. In recent years, there has been an appreciable increase in process transparency and public scrutiny on investment arbitration<sup>135</sup>. Confidentiality is considered to be an essential element in mediation in that it encourages parties to speak freely

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<sup>130</sup> See E. Sussman, “*The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*”, *Journal of Transnational Dispute Management*, Vol.11, No.1, January 2014, at p.8.

<sup>131</sup> See IBA (n 37), at p.48.

<sup>132</sup> See Geoff Sharp (Brick Court Chambers/Clifton Chambers), “*A New Seat at the Mediation Table? The Impact of Third Party Funding on the Mediation Process (Part 2)*”, *Kluwer Mediation Blog*, 1 April 2017.

<sup>133</sup> See Ng (n 46), at p. 335. See also Kessedjian and others (n 36), at p. 14.

<sup>134</sup> See ICSID, “*Proposals for Amendment of the ICSID Rules – Working Paper 4*” (February 2020) (available at [https://icsid.worldbank.org/sites/default/files/amendments/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf)).

<sup>135</sup> See Jack J. Coe, Jr, “*Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*”, *Journal of Transnational Dispute Management*, Vol.4, No.1, February 2007, at p.27.

and openly in the mediation while ensuring the integrity of the process<sup>136</sup>. The element of confidentiality can come into tension with the call for greater transparency in ISDS<sup>137</sup>.

94. As observed in the 2020 Harvard Investor-State Mediation Report, transparency as an objective in ISDS would create problems such as hindering efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that can lead to posturing and unproductive dialogue<sup>138</sup>. It is also noteworthy that Professor Jack Coe considers it important to explore how the policies supporting transparency can be addressed with respect to mediation, while acknowledging that investment mediation and investment arbitration are fundamentally different so as to avoid rigid insistence that the two dispute settlement mechanisms should function with equivalent levels of transparency<sup>139</sup>.

95. The CEPA Investment Agreement also provides flexibility in the confidentiality obligation<sup>140</sup> to accommodate the needs and policies of host governments on transparency in ISDS and public disclosure for individual cases<sup>141</sup>. For example, the CEPA Investment Mediation Rules provides that unless otherwise agreed by the disputing parties in writing, the confidentiality obligation shall not extend to the fact that the disputing parties have agreed to mediate or a settlement has been reached from the mediation<sup>142</sup>.

### Hybrid use of mediation and arbitration

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<sup>136</sup> Shahla F. Ali & Odysseas G. Repousis, “*Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?*”, Denver Journal of International Law and Policy, Vol.45, No. 2, at p.246.

<sup>137</sup> See Jack J. Coe, Jr., “*Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*”, Kansas Law Review, Vol. 54, 2006, at p.1382.

<sup>138</sup> See ISDS Mediation Working Group (n 84), at p. 7.

<sup>139</sup> See Coe (n 135), at p.27.

<sup>140</sup> See Article 11 of the CEPA Investment Mediation Rules. See also para. 3 of the CEPA Mediation Mechanism.

<sup>141</sup> For example, in the standard contract of the Government of the Hong Kong Special Administrative Region, it is provided that the Government may disclose the outline of any terms of settlement for which a settlement agreement has been reached with the contractor or the outcome of the arbitration or any other means of resolution of dispute to the Public Accounts Committee of the Legislative Council upon its request.

<sup>142</sup> See Article 11(4)(a) of the CEPA Investment Mediation Rules. Article 11(4)(b)(i) of the CEPA Investment Mediation Rules further provides that the confidentiality obligation does not apply where the disclosure of mediation communication is agreed by the disputing parties and the mediation commission, and for such purposes as approved by them.

96. Given that mediation is a flexible mechanism that can be combined with the use of arbitration (whether as a multi-tiered dispute resolution procedure such as “*mediate first, arbitration next*” or as parallel processes) in resolving ISDS disputes, the design of the ISDS-specific mediation protocol will need to take in account the possible use of such hybrid models. In this regard, Professor Jack Coe has suggested the possibility for States to include optional or elective Med-Arb protocols in international investment agreements, which set forth detailed hybrid processes designed to harness and coordinate flexibly the combined strengths of arbitration and mediation<sup>143</sup>.

### **(c) Guidelines and Manual on the Use of Mediation in ISDS**

97. While having well-designed model treaty clauses and mediation protocol on papers is an important step for promoting the greater use of mediation in ISDS, users, mediators and practitioners of investment mediation need to know, especially in the initial stage, how to utilize the aforesaid mediation-related instruments to resolve ISDS disputes in practices. In this regard, guidelines and manual on the use of mediation in ISDS will be highly beneficial, especially for users of ISDS, in raising awareness and enhancing familiarity with investment mediation as well as guiding them through the mediation process.

98. In the context of ISDS, there have been some previous examples of guidelines and manuals at the international level that are useful for users of ISDS (especially government officials), such as APEC / UNCTAD Modules - International Investment Agreements Negotiators Handbook (2012)<sup>144</sup> and the APEC Handbook on Obligations in International Investment Treaties<sup>145</sup>.

99. With reference to the aforesaid initiatives, Working Group III may wish to consider the publication of guidelines and manuals to accompany the development of facilitative frameworks on investment mediation as a tool for the promotion of greater use of mediation.

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<sup>143</sup> See Coe (n 85), at p. 27.

<sup>144</sup> The Handbook is available at <https://www.apec.org/Publications/2013/05/International-Investment-Agreements-Negotiators-Handbook-APECUNCTAD-MODULES>.

<sup>145</sup> The Handbook is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/apec\\_handbook\\_on\\_obligations\\_in\\_iit.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/apec_handbook_on_obligations_in_iit.pdf).

100. One interesting example for reference is the Guide on Investment Mediation adopted by the Energy Charter Conference (“ECC”) on 19 July 2016<sup>146</sup>. The Guide is a shining example of combined efforts at the global level to promote the use of mediation, as the Guide was prepared with support of the support of the International Mediation Institute (“IMI”), ICSID, SCC, ICC, UNCITRAL and PCA<sup>147</sup>.

101. The Guide has been endorsed by the ECC as a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes, and the ECC has also encouraged its Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat<sup>148</sup>. The ECC further “*welcomed the willingness of the Contracting Parties to facilitate effective enforcement in their Area of settlement agreements with foreign investors in accordance with the applicable law and the relevant domestic procedures.*”

102. Unlike the ICSID Convention, the Energy Charter Treaty (“ECT”) does not have its own sets of conciliation and mediation rules. Its Guide on Investment Mediation nevertheless still provides a useful explanatory document that could be voluntarily used by governments and companies to take the decision on whether to engage in mediation and how to prepare for such procedure. In terms of contents, the Guide has a comprehensive coverage, ranging from:

- (i) Explaining the mediation process in general (e.g. the nature of mediation, basic principles and rules of the mediation proceedings, the major steps of mediation, and barriers to settlement);
- (ii) Providing facilitative tips (e.g. how to prepare for each steps of mediation, the factors that should be considered in assessing the usefulness of mediation for a particular dispute, how mediation can function as part of the ECT dispute resolution mechanisms (including during the three-month cooling-off period under Art. 26.1 of the ECT and after the three-month cooling-off period

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<sup>146</sup> The Guide on Investment Mediation is available at <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>. See also M. Appel and J.M. Tirado, “*Investor-State Mediation – New Tools for Policy Makers*”, Transnational Dispute Management, Vol. 17, Issue 2, February 2020.

<sup>147</sup> See <https://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/>.

<sup>148</sup> See the preamble of the Guide on Investment Mediation.



under Arts. 26.3 and 26.4 of the ECT), selection of mediators and seats of mediation, and how to handle the confidentiality of mediation); and

- (iii) Elaborating on the role of the Energy Charter Secretariat and other institutions in respect of the mediation process (e.g. helping to secure the agreement of disputing parties to participate in the mediation process, facilitating information on costs, assisting with the selection of qualified mediators, and administration of the proceedings).

#### **(d) Code of Conduct on ISDS mediators**

103. In the context of Working Group III, the UNCITRAL and ICSID Secretariats have jointly developed a draft Code of Conduct for Adjudicators for ISDS for consideration by the Working Group<sup>149</sup>. The draft Code of Conduct provides applicable principles and detailed provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency and civility.

104. In respect of mediation in ISDS, apart from the issue of qualification of mediators, a code of conduct on mediators is also essential for ensuring the legitimacy and credibility of investment mediation. After all, government officials, investors and other stakeholders of ISDS can only place their trust and confidence in a dispute resolution method that is aligned with the principles of rule of law<sup>150</sup>. In this regard, while there are some existing general codes of conduct and guidelines, such as the JAMS Mediators Ethical Guidelines and the IMI Code of Professional Conduct, the Working Group III may wish to consider the development of a code of conduct specifically for mediators of ISDS disputes.

105. Some recent international investment agreement have sought to address the issue by providing that the code of conduct on arbitration applies, *mutatis mutandis*, to mediators<sup>151</sup>. Nevertheless, due to the

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<sup>149</sup> The draft Code of Conduct for Adjudicator in Investor-State Dispute Settlement is available at <https://uncitral.un.org/en/codeofconduct>.

<sup>150</sup> See Ng (n 46), at p. 325.

<sup>151</sup> See e.g. para. 21 of Annex 29-B (Code of Conduct for Arbitrators and Mediators) of the EU-Canada Comprehensive Economic and Trade Agreement and para. 20 of Annex 11 (Code of Conduct for Arbitrators and Mediators) of EU – Singapore Investment Protection Agreement.

differences in the respective roles between arbitrators and mediators, the considerations over the design of the code of conduct on mediators should presumably be different from those for the code of conduct on arbitrators.

106. In this regard, the CEPA Investment Mediation Rules have set out very comprehensive code of conduct of mediators<sup>152</sup>. In particular, it is provided that each mediator shall be independent and impartial and shall mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable<sup>153</sup>.

107. Code of conduct for mediators however cannot be without “teeth”. One thorny issue is concerned with how to enforce and ensure compliance with the code of conduct, and what consequences will be faced by mediators if they are found to be in breach of the code of conduct. If the disputing parties notice that the mediator concerned is in violation of the code of conduct during the mediation process, it is clear that they can dismiss such mediator due to the inherent nature of mediation as a voluntary process. If however, the breach of code of conduct is only discovered after the mediation proceedings, the disputing parties may be left without any redress or remedies. In such scenario, not only that the time and resources of the disputing parties are wasted, but also that the mediated settlement agreements reached may be tainted by the violations of code of conduct and cannot be enforced<sup>154</sup>.

108. While mediators can generally be expected to perform their roles in accordance with the applicable code of conduct, incidents of violations of code of conduct (especially when there are no consequences or disciplinary actions attached to such violations) will have implications beyond the

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<sup>152</sup> See Article 7 of the CEPA Investment Mediation Rules. For example, Article 7.3 of the CPEA Investment Mediation Rules reads that “[t]he mediator shall ensure that he has the capacity to conduct the mediation and avoid his performance (whether in the preparation or in the course of mediation) from being affected by his own financial, business, professional, family or social relationships or responsibilities”. See also para. 1.6 of the CEPA Mediation Mechanism.

<sup>153</sup> See Article 7.1 of the CEPA Investment Mediation Rules.

<sup>154</sup> For example, under Article 5(1)(e) and (f) the UN Mediation Convention, two relevant grounds of refusal of granting relief for enforcement of international mediated settlement agreements are:

“(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or  
(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.”

Depending on the circumstances, the ground of refusal under Article 5(2)(a) of the UN Mediation Convention, which provides that “[g]ranted relief would be contrary to the public policy of [the Party to the Convention where relief is sought]”, may also be relevant.

interests of the disputing parties. It is inevitable that such incidents will seriously undermine the trust and confidence in the use of mediation in ISDS, and hence its legitimacy.

109. The enforcement and the monitoring of mediators' compliance of code of conduct is a matter that can be more effectively dealt with under an institutional setting or where there are independent and professional accreditation bodies for ISDS mediators.

110. Under an institutional setting, the relevant body would generally maintain a roster of qualified mediators, and in the scenario that there is a violation of the applicable code of conduct by a mediator, the relevant institution can impose disciplinary actions against the mediator concerned (including the possibility of striking out the mediator from the roster for the most serious breaches of the code of conduct).

111. So far, there is not a specific accreditation scheme for ISDS mediators. If one is to be established, the relevant accreditation body can similarly enforce the code of conduct by way of disciplinary action (including the removal of the accreditation of the mediator concerned)<sup>155</sup>.

**(e) Development of guides on establishing and refining domestic institutional framework to facilitate the use of investment mediation by government officials**

112. The existence of facilitative framework at the treaty level by itself is not sufficient to address the situation of the under-utilization of mediation in ISDS because a domestic institutional framework is essential to empower, incentivise, regulate and facilitate the use of mediation by government officials in resolving ISDS disputes. As discussed above and observed in Working Group III, the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal uncertainty required for officials to be involved in such settlement and how to ensure that the necessary approval process was set up (including the necessary authority for the negotiators to agree to a settlement), have all resulted in impediments to the greater use of mediation in ISDS<sup>156</sup>.

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<sup>155</sup> A similar mechanism is the Professional Conduct Assessment Process on IMI Certified Mediators (see <https://imimmediation.org/practitioners/professional-conduct-assessment-process/>).

<sup>156</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

113. The aforesaid observations echo the findings in the survey conducted the Energy Charter Secretariat among members and observers to the International Energy Charter, it is observed that government representatives are concerned with an absence of clear domestic legal frameworks for addressing ISDS disputes<sup>157</sup>. Such absence created ambiguity regarding authority to even engage in negotiation or mediation and additional fears surrounding the potential abuse of power, possible allegations of corruption and the absence of funding.

114. During the roundtable session of the first intersessional meeting of Working Group III in Korea in 2019, Ms Anna Joubin-Bret raised the idea that governments should consider establishing institutional mechanisms internally for handling and making decisions for investment mediation cases. As a step further, Working Group III has in its 39<sup>th</sup> session requested the UNCITRAL Secretariat to prepare guidelines and best practices covering the organizational aspects that States might need to consider at the national level to minimize structural or policy impediments to the use of mediation, and the representation of public interest in mediation<sup>158</sup>.

115. In respect of developing guides on establishing and refining domestic institutional framework to facilitate the use of investment mediation by government officials, the Model Instrument on Management of Investment Disputes adopted by the ECC in 2018 provides a useful reference model<sup>159</sup>. The Model Instrument is the result of consultations with government officials and international organisations involved in investment disputes<sup>160</sup>, and is an instrument developed by the Energy Charter Secretariat to be one that could be voluntarily utilised by States, either by way of implementing a domestic ISDS dispute resolution framework or serving as guidance concerning the practical and legal issues that should be considered in implementing a comprehensive conflict management plan for investment disputes<sup>161</sup>.

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<sup>157</sup> See Appel and Tirado (n 146), at p.2.

<sup>158</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>159</sup> The Model Instrument on Management of Investment Disputes is available in several languages at <https://www.energychartertreaty.org/model-instrument/>. A comment on the Model Instrument is available at Carballo Leyda, A. (2019) “*Model Instrument for Management of Investment Disputes*”, in Chaisse J., Choukroune L., Jusoh S. (eds) *Handbook of International Investment Law and Policy*, Springer, Singapore ([https://link.springer.com/referenceworkentry/10.1007%2F978-981-13-5744-2\\_19-1](https://link.springer.com/referenceworkentry/10.1007%2F978-981-13-5744-2_19-1)).

<sup>160</sup> See <https://www.energychartertreaty.org/model-instrument/>.

<sup>161</sup> See Appel and Tirado (n 146), at p.2.

116. The Model Instrument is comprehensive in its scope, covering not only treaty-based ISDS, but also contract-based ISDS<sup>162</sup>. It seeks to address a wide range of practical issues, including tasks, powers, decision making, information sharing, financial considerations, coordination among government agencies, relevant organisations and individuals and representation of the government in the resolution of international investment disputes<sup>163</sup>. It is of interest to note that the Model Instrument has put forward the concept of “*Responsible Body*” (which can adopt a single Ministry model or an inter-institutional commission model). Such “*Responsible Body*” will be the central focal point for ISDS disputes and be entrusted with sufficient competence to conduct the dispute settlement process from the very beginning (amicable settlement) until the very end (enforcement), as well as being given the exclusive authority as the sole legitimate representative in relation to the investor and the arbitral tribunal<sup>164</sup>.

117. The Model Instrument has a specific part on the use of mediation (see Arts. 22 – 24)<sup>165</sup>. Among others, it emphasises the importance of

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<sup>162</sup> *Ibid.*, at p.3.

<sup>163</sup> See Article 2 of the Model Instrument.

<sup>164</sup> See Article 10 of the Model Instrument and its explanatory note at p.23.

<sup>165</sup> The relevant provisions of the Model Instrument read as follows:

**“Article 22**

***Alternative Dispute Resolution Methods***

1. *The importance is hereby recognised of Alternative Dispute Resolution (ADR) methods such as negotiation, conciliation and mediation, which allow a more agile, efficient, and effective resolution of disputes. [x] shall prioritise the use of ADR methods.*

2. *[x] shall make all reasonable efforts to provide for the use of conciliation, mediation and other ADR methods in its International Investment Agreements and Investment Contracts, as an additional mechanism to be used prior to, during or after the submission of disputes to international arbitration.*

3. *Any consultations, negotiation, conciliation, mediation, good offices and other ADR methods that may be used to resolve disputes arising in relation to International Investment Agreements shall be managed by the Responsible Body, including matters relating to contracting of legal counsel, experts and external advisers in accordance with the regulations in force governing public procurement, among others. The corresponding expenses shall be met in accordance with the terms of Article 19 of this Instrument.*

4. *The Responsible Body shall have settlement authority for the purposes of the negotiation and conclusion of settlement agreements with foreign investors on behalf of [x] and foreign investors shall be entitled to rely on the Responsible Body having that authority on behalf of [x].*

**Article 23**

***Assessing the Use of Amicable Dispute Settlement Mechanisms***

*In order to assess the usefulness of amicable dispute settlement mechanisms with foreign investors for a particular dispute, the Responsible Body may consider, among other issues, whether:*

*(a) the monetary costs of pursuing international litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;*

ADRs and encourage the use of mediation by the governments in resolving ISDS disputes and provides guidance on assessing the usefulness of ADRs in a particular disputes. The Model Instrument also seeks to address the domestic institutional issue by providing that the Responsible Body will be entrusted with managing the use of mediation in resolving the ISDS disputes and possess sufficient authority in reaching settlement with investors<sup>166</sup>. Furthermore, the Model Instrument requires an early and independent assessment of the dispute to ascertain the most effective course of action, including mediation. It also provides policy options on how to balance the transparency-confidentiality requirements.

118. Additionally, the ECT's Guide has also touched upon the issue of domestic institutional framework, in particular on government officials' concerns over allegation of corruption in reaching settlement with investors. The Guide states that:

*“[H]eighted expectations of confidentiality in mediation limit the ability of states to disclose and explain mediated settlements publicly. The state party may therefore wish to define an internal monitoring mechanism that requires the state’s representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposal that may have been made by the mediator. Such documentation strengthens the legitimacy of the settlement in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness*

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- (b) the effect of an international decision against [x] becoming public;
  - (c) a fast resolution is of the utmost importance;
  - (d) maintaining a relationship is more important than the formal outcome, as well as the likelihood of continuing such relationship in case of settlement;
  - (e) matters of fundamental principle are at stake;
  - (f) both parties can involve their respective decision-making authorities;
  - (g) a foreign investor would seek some non-monetary relief;
  - (h) neither side is certain that it will prevail in litigation or arbitration;
  - (i) the dispute can have an impact on the reputation of the State; and
  - (j) the investment has an important impact on the economy or security of [x].

#### **Article 24**

##### ***Dispute Resolution Clauses Included in International Investment Agreements and Contracts***

*All reasonable efforts shall be made to ensure that every dispute resolution clause includes, as a minimum, a period for consultation, negotiation, mediation or any other amicable dispute settlement mechanism between the parties before the dispute may be submitted to international arbitration or a competent international tribunal.”*

<sup>166</sup> See explanatory note of the Model Instrument at pp. 29 – 30.

*of concessions or payments to the other party. This also facilitates to rebuttal potential allegations of corruption over the settlement agreement.”*<sup>167</sup>

119. With respect to the development of domestic facilitative framework on the use of mediation in resolving ISDS disputes, it is necessary to take into account the circumstances of each jurisdictions such as the political and government structures as well as the administrative policy, practices and cultures. In this regard, the ECT Model Instrument is also sensitive to this dimension. According to the explanatory note to the Model Instrument, a State should take into account its specific administrative needs and particularities in implementing the Model Instrument<sup>168</sup>. Furthermore, the explanatory note makes it clear that the State may need to modify or leave out some of the provisions of the Model Instrument, and consider whether complementary amendments to other domestic laws or regulations to ensure coherence in the legal framework<sup>169</sup>.

120. Other than establishing domestic institutional frameworks such as the approach advocated in the Model Instrument, some jurisdiction has used pledges to advocate for the greater use of mediation. For example, in the United Kingdom, the Lord Chancellor’s March 2001 Pledge committed government departments and agencies that ADR will be considered and used in all suitable cases where the other party accepts it<sup>170</sup>. In the Hong Kong SAR, the Government is committed to promoting the development of mediation locally, regionally and internationally through the “*Mediate First*” Pledge, which was launched in 2009. The “*Mediate First*” Pledge is a statement of policy aimed at encouraging greater use of mediation as a flexible, creative and constructive approach in resolving disputes. Companies and trade organisations are encouraged to sign the Pledge to signify their willingness to first explore the use of mediation in the course of their operation before resorting to other means of dispute resolution such as litigation.

## **(2) Overcoming the psychological barrier in the use of mediation**

121. While having facilitative frameworks on papers regarding the use of mediation for resolving ISDS disputes is useful, it ultimately falls on

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<sup>167</sup> See ECT Guide on Investment Mediation, at Part 10.C.

<sup>168</sup> See the explanatory note to the ECT Model Instrument, at pp. 17 – 18.

<sup>169</sup> *Ibid.*

<sup>170</sup> See Appel and Tirado (n 146), at p.3.

government officials and investors to decide whether to engage in mediation. However, as observed by the International Bar Association in its report, “*Consistency, Efficiency and Transparency in Investment Treaty Arbitration*” (2018), the existing situation remains to be that government officials, corporate executives tend to lack knowledge and experience with respect to mediation in ISDS<sup>171</sup>.

122. In order to make mediation a successful and effective ISDS reform option, it is therefore essential and of paramount importance for the users of ISDS to overcome the psychological barrier in the use of mediation, and the initiatives to be discussed in the following will have a pivotal role to play in this regard.

### **(a) Training and capacity building**

123. Education is a fundamental part in the promotion of the greater use of mediation in ISDS. This is also recognized by Working Group III which considers that capacity building and training is a key aspect in raising awareness on mediation among stakeholders and incentivising both investors and government officials in actively engage in mediation<sup>172</sup>. There are two aspects here, namely training and capacity building for mediators and those for users of ISDS (including e.g. government officials, investors and practitioners).

124. With respect to users of ISDS, as discussed above, a lack of familiarity with mediation among users of ISDS has created a psychological barriers to the use of such dispute resolution method. Worse, some may not even aware of the existence of mediation as an alternative to investment arbitration. Users of ISDS may also have some misunderstandings over mediation. For example, some government officials and investors may consider that making the request for initiating mediation will be perceived as a sign of weakness, and the use of mediation will only prolong the dispute resolution process and waste resources. Some legal practitioners may even see ADR as “*Alarming Drop in Revenue*”<sup>173</sup>. These highlight the need for strengthening education of the users of ISDS, which is the first dimension of capacity building and training.

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<sup>171</sup> See IBA (n 37), at pp. 43 – 44.

<sup>172</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>173</sup> See Reed and others (n 75), at p.24.



125. For the second dimension, mediator is certainly a crucial component in the mediation process and its professional assistance to the disputing parties is what distinguishes mediation from direct negotiation and settlement between the disputing parties. It is natural that users of ISDS will only put their faith into mediation if such process is conducted by professional mediators with the necessary qualifications, experience and skills.

126. At the basic level, same as arbitrators, mediators of ISDS disputes have to be knowledgeable about public international law and international investment law<sup>174</sup>. That said, mediators need to be able to command unique skill sets that are different from those of arbitrator, whose role is to adjudicate the cases in accordance with the relevant international investment agreements (including the applicable laws) and the facts of the cases<sup>175</sup>. In particular, it is important for mediators to possess skills such as the ability to understand and deal with a wide variety of emotional, psychological, organisational, political, and process issues that obstruct understanding between the disputing parties<sup>176</sup>. In the insightful words of Professor J. W. Salacuse, “*the resources and experience of a deal-making investment banker are probably much more germane to the mediation of an investor-State dispute than are the talents of a litigator*”<sup>177</sup>.

127. Moreover, as observed by ICSID, while currently there are some experts specialized in investment mediation, there are much larger pool of professional mediators who have not applied their skills to international investment disputes yet, and experts of investment arbitration who may be less familiar with the specific techniques and approaches of a successful mediation<sup>178</sup>. This illustrates that much work needs to be done in terms of capacity building and training to bridge the aforesaid knowledge gaps in order to further unlock the potential of mediation in ISDS<sup>179</sup>.

128. In terms of training and capacity building on the use of mediation of ISDS, the Department of Justice of the Hong Kong SAR has been a pioneer in Asian in partnering up with leading institutions such as ICSID, International Energy Charter, the Centre for Effective Dispute Resolution

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<sup>174</sup> See Ng (n 46), at p. 325.

<sup>175</sup> *Ibid.*

<sup>176</sup> See J. W. Salacuse, “*Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*”, *Journal of Transnational Dispute Management*, Vol. 6(1), March 2009, at p.441.

<sup>177</sup> *Ibid.*

<sup>178</sup> See “*ICSID’s Role in Advancing Investor-State Mediation*”, *Global Arbitration Review* (24 July 2019).

<sup>179</sup> *Ibid.*

and the Asian Academy of International Law to offer its flagship Investment Law and Investor-State Mediator Training Courses. Since 2018, two round of Courses have been held, with a view to building up a pool of investment mediators specialised in handling international investment disputes and promoting the use of investment mediation among government officials and practitioners.

129. The Courses have a comprehensive coverage of topics in that it covers not only substantive knowledge of international investment law, but also various topical issues on investment mediation ranging from the conceptual framework, specific process consideration and design options, co-mediation, intercultural competency, stakeholder analysis and mapping, conduct of mediation to ethics of mediators. To ensure that the participants are well-equipped in utilizing and conducting mediation in practice as they complete the Courses, an approach of “*Learn, Train and Practice*” has been adopted. In this regard, coaching days have been conducted by a line-up of experienced practitioners and academics in the field during the Courses to engage participants through role-play in an investment mediation setting and let them have a first-hand experience in the process.

130. The two rounds of Courses were very well-received, with a total over 90 participants from over 26 countries around the world, including government officials as well as legal and mediation practitioners from Mainland China, member States from the Association of Southeast Asian Nations, the Middle East, Africa and Europe. The Department of Justice of the Hong Kong SAR will continue to partner up with leading international and regional institutions in offering the Investment Law and Investor-State Mediator Training Courses in the near future to contribute to the momentum in the greater use of mediation in ISDS.

**(b) Establishing an online information portal to share experience and best practices on mediation in ISDS**

131. Given that the work on investment mediation has been undertaken by various institutions and individual jurisdictions simultaneously, it is currently a time-consuming exercise for government officials, investors and practitioners to keep track of the development of mediation and the latest best practices on mediation. As discussed above, academics have also expressed difficulties in finding empirical data on the use of mediation in ISDS cases.

132. According to the UNCITRAL Secretariat, it is considered that further discussion and consultation is required in order to identify what is missing from the current system in respect of mediation and what any future reforms should focus on<sup>180</sup>. During the 39<sup>th</sup> session of UNCITRAL Working Group III, the importance of having a systematic and organized way in sharing experience and information on mediation has been highlighted. In this regard, an online information portal may be a useful tool that is worth consideration by Working Group III<sup>181</sup>.

133. A user-friendly online information portal can provide a “*one-stop shop*” that consolidates the latest development, news and information as well as other resources such as know-how, guidelines, best practices, model treaty clauses, investment mediation model protocols and other facilitative instrument on the use of mediation in ISDS. Such online information portal can facilitate the identification of “*gaps*” in the existing work on the promotion and practice of mediation for ISDS disputes. In respect of online information portal in the context of ISDS, the UNCTAD Investment Policy Hub is a prime example<sup>182</sup> and to some extent, the website of Working Group III serves a similar function<sup>183</sup>. As such, one may either expand upon the existing platforms or establish a specialized one to perform the function an online “*all-in-one*” information portal on the use of mediation in ISDS.

134. One important feature of the online information portal is to provide a database on mediation cases in ISDS. Ms. Anna Joubin-Bret has previously suggested that administration of mediation proceedings is essential to build trust in mediation in ISDS and it is useful to disseminate success cases<sup>184</sup>. A similar suggestion was also made by Ms. Lucy Reed. In Ms. Reed’s view, the publication of examples of investor-state mediations with sensitive and confidential information redacted allows the users of ISDS to see what kind of disputes were able to be settled via

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<sup>180</sup> See GAR (n 21).

<sup>181</sup> In fact, it is also noted that Working Paper 190 of the UNCITRAL Secretariat briefly mentions the idea of developing a comprehensive database on dispute prevention and mitigation. (See Note by the UNCITRAL Secretariat, “*Possible reform of investor-State dispute settlement – Dispute prevention and mitigation – Means of alternative dispute resolution*” (A/CN.9/WG.III/WP.190, para. 26) (15 January 2020)

<sup>182</sup> The Investment Policy Hub of UNCTAD can be accessed at <https://investmentpolicy.unctad.org/>.

<sup>183</sup> The website of UNCITRAL Working Group III can be accessed at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>184</sup> See Anna Joubin-Bret, “*Recent Trends in Investor-State Disputes: An Update on Mediation and Conciliation*”, Presentation Slides for Energy Charter Treaty Conference (21 November 2014).

mediation and what kind of settlements were achieved<sup>185</sup>. This, in particular, can help alleviate government officials' concerns and anxiety over the use of mediation as they can see that they are not pioneers at risk and the range of remedies that can be obtained through mediation (as compared with the “win-lose” or even “lose-lose” situation that may result in the context of investment arbitration). In this regard, it is clear that successful investment mediation cases will likely have a “snowball effect” of encouraging and incentivising its greater use in practice<sup>186</sup>.

135. Other contents in the online information portal may include a bibliography on literature on the use of conciliation and mediation in ISDS disputes<sup>187</sup> as well as list of events related to the use of mediation in ISDS.

### **(c) Colloquium, Conference, Seminars, ISDS Mediation Competition and Publications**

136. It has generally been observed that investor-State conciliation and mediation are less frequently the subject of considered examination than investor-State arbitration, with fewer books, monographs and edited volumes dedicated to the topic<sup>188</sup>. This shows the need to explore other avenues and channels to disseminate information on the use of mediation in ISDS and encourage discussion and research on the subject.

137. Working Paper 190 of the UNCITRAL Secretariat has also raised the question of how mediation, conciliation and other forms of ADRs could be promoted and more widely used. In this regard, one useful way to address this is to organize conference, seminars, expert groups and other promotion activities such ISDS mediation competition for university students. These activities can raise awareness among stakeholders on the use of mediation in resolving ISDS disputes, facilitate the exchange of knowledge, information and practices with respect to mediation and provide a forum to explore cutting-edge issues on investment mediation.

138. Moreover, the findings and ideas discussed in these activities can be compiled into publications to further the dissemination of information and

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<sup>185</sup> See Reed (n 59), at pp. 32 – 35.

<sup>186</sup> See Ng (n 46), see p. 315.

<sup>187</sup> One example is the *Bibliography on Investor-State Conciliation and Mediation* (September 2020) compiled by Romesh Weeramantry and Brian Chang (available at <https://cil.nus.edu.sg/publication/bibliography-on-investor-state-conciliation-and-mediation/>).

<sup>188</sup> See Weeramantry and Chang (n 46), at p.7.

knowledge on the use of investment mediation globally in future and enhance the continuity in mediation-related promotion work.

139. Back in 2010, UNCTAD organized a Joint Symposium on International Investment and Alternative Dispute Resolution in Lexington, Virginia in which more than 30 leading scholars and practitioners explored various topical issues investor-State conciliation and mediation as well as the interplay with dispute prevention policies. The contributions were subsequently edited and compiled by Ms. Susan D. Franck and Ms. Anna Joubin-Bret into a conference proceedings, which contains much valuable knowledge and insights on the subject<sup>189</sup>. Similarly, under the auspices of the Organization for Economic Co-operation and Development (OECD), a series of symposia on investment mediation has taken place<sup>190</sup>.

140. Another interesting example is the 2019 ISDS Reform Conference, “*Mapping the Way Forward*”, which contains a dedicated session on the use of mediation in ISDS, co-organized by the Department of Justice of the Hong Kong SAR and the Asian Academy of International Law. The speakers’ presentations and background papers prepared by ISDS practitioners in Hong Kong have subsequently been compiled into a conference proceedings<sup>191</sup> and distributed by the Asian Academy of International Law to the delegations during the 38<sup>th</sup> session of UNCITRAL Working Group III to facilitate knowledge and experience sharing. In Hong Kong, there is also the annual Mediation Lecture in the Legal Week each year, and leading experts such as Professor Jack J. Coe Jr. and Mr. Mark Appel have been invited to deliver the Mediation Lectures, which also touched upon the topics on the use of mediation in ISDS.

141. The types of initiatives discussed above not only provide a forum outside the formal meetings of the Working Group for exchange of ideas and proposals among the stakeholders of ISDS reform, but also enhance the understanding and acceptance of the public over the use of mediation by government officials to reach a settlement with foreign investors, which is important for ensuring the perceived legitimacy of mediation as ISDS dispute resolution tool. It is also expected that these initiatives can inspire further researches into various innovative topics on the use of mediation in ISDS, such as studying what best practices and approaches in international

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<sup>189</sup> The conference proceedings is available at [https://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](https://unctad.org/en/Docs/webdiaeia20108_en.pdf).

<sup>190</sup> See A. F. M. Maniruzzaman, “*Investor-State Dispute Settlement by ADR – An Appraisal of the Recent Trends*”, *Transnational Dispute Management Journal*, December 2018, at p.1.

<sup>191</sup> The conference proceedings of the ISDS Reform Conference 2019 is available at <https://www.aail.org/wp-content/uploads/2020/07/2019-ISDS-Conference-Proceedings-eBOOK.pdf>.

commercial mediation can be adapted to international investment mediation, the lessons for international investment mediation from the successful use of mediation in resolving public and contractual disputes between host governments and foreign investors<sup>192</sup>, and the role of LawTech in facilitating the use of mediation.

142. Besides, to promote the wide use of mediation in ISDS, apart from capacity building and training, other initiatives for grooming future talents in the field are also an important aspect. Currently, there is the annual ICC International Commercial Mediation Competition. A similar global mediation competition can be organized for ISDS to generate interests among university students on investment mediation, facilitate intellectual exchanges among practitioners, academics and participating students as well as illustrating how investment mediation can be conducted in a simulated setting.

**(3) Explore the synergies of mediation with other possible ISDS reform options**

143. Mediation should not be a subject that is considered in isolation of other reform options. In fact, in light of the inherent nature of mediation as a flexible, highly customizable and consensual form of dispute resolution method, it can function effectively in combination with other possible ISDS reform options. For example, mediation can be an option that the disputing parties can choose to make use of in the context of an ISDS appellate mechanism. The synergy and interface of mediation with other possible ISDS reform options is a subject that Working Group III may wish to explore and capitalize on.

144. As noted in Working Paper 190 of the UNCITRAL Secretariat, the question strengthening ADR mechanisms is closely connected to the reform option of establishment of the proposed Advisory Centre on International Investment Law<sup>193</sup>. Furthermore, mediation, if effectively used, can avoid the escalation of international investment disputes to investment arbitration or litigation, and can therefore have the potential of being seamlessly incorporated into dispute prevention mechanism.

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<sup>192</sup> One example is the successful mediation by Professor Thomas Wälde in the energy dispute between the Swedish, Stateowned company Vattenfall and the Polish State integrated energy company PSE.

<sup>193</sup> See Note by the UNCITRAL Secretariat, “*Possible reform of investor-State dispute settlement – Dispute prevention and mitigation – Means of alternative dispute resolution*” (A/CN.9/WG.III/WP.190, para. 47) (15 January 2020).

**(a) Provision of mediation services by the proposed Advisory Centre on International Investment Law**

145. The establishment of an assistance mechanism known as the Advisory Centre on International Investment Law is an ISDS reform that has received general support in Working Group III<sup>194</sup>. The exact design of the Advisory Centre is still under consideration by the Working Group, and one of the reference models is the Advisory Centre on WTO Law.

146. Relevant to this paper is the question on the possible role that such Advisory Centre can play in respect of mediation. During the 39<sup>th</sup> Session of Working Group III, it was suggested that the Advisory Centre, if established, could play a role in compiling and sharing information on best practices with respect to mediation<sup>195</sup>.

147. Apart from the aforesaid, as mentioned in Working Paper 168 of the UNCITRAL Secretariat, one question that the Working Group may also wish to consider is whether the proposed Advisory Centre will offer mediation-related services<sup>196</sup>. In this regard, as discussed by Mr. Charlie Garnjana-Goonchorn from the Thailand delegation in his presentation for the UNCIRAL Working Group III webinar<sup>197</sup>, the Advisory Centre on International Investment Law can take up various roles in promoting and facilitating the use of mediation in ISDS, including explaining to the disputing parties how mediation works, conducting unbiased assessment on or evaluating the feasibility of mediation, curating a list / roster of mediators, administering mediation (including drafting settlement agreements) and providing a platform to exchange best practices.

148. At the same time, Mr. Charlie Garnjana-Goonchorn has insightfully pointed out a number of practical questions that needs to addressed if the

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<sup>194</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019) (A/CN.9/1004, para. 28) (23 October 2019). See also Karl P. Sauvart, “An Advisory Centre on International Investment Law” (Academic Forum on ISDS Concept Paper 2019/14) (10 September 2019) (available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>).

<sup>195</sup> [Revised draft report of the 39<sup>th</sup> session of Working Group III]

<sup>196</sup> See Note by the UNCITRAL Secretariat, “Possible reform of investor-State dispute settlement (ISDS) Advisory Centre” (A/CN.9/WG.III/WP.168, paras. 21 - 22) (25 July 2019).

<sup>197</sup> See presentation slides of Charlie Garnjana-Goonchorn (Department of Treaties and Legal Affairs, MFA Thailand) (21 April 2020), available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ac\\_webinar\\_thailand\\_en.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ac_webinar_thailand_en.pdf).

Advisory Centre is to offer mediation services. Given that the scope of services to be offered by the Advisory Centre will have implications in terms of workload and budget, there will be the questions of whether mediation services should be offered right at the start of the establishment of the Advisory Centre or should be included later as an expansion of capacity and how such services are to be funded<sup>198</sup>.

149. Furthermore, as discussed in Working Paper 168, it is also necessary to consider how the Advisory Centre would handle potential conflicts of interest that might arise where it would be involved in both ADR and defence services<sup>199</sup>.

**(b) Synergy between investment mediation and dispute prevention mechanism**

150. Dispute prevention mechanism is a tool closely related to the use of mediation, if one takes a holistic view on the process of ISDS. The Working Group III recognizes that there is a conceptual distinction between the two, with dispute prevention mechanism being in the pre-dispute phase and mediation being in the post-dispute but possibly pre-arbitration phase. Nevertheless, dispute prevention mechanism and mediation can sometimes work in combination with each other in a complementary manner. In this regard, the potential synergy between investment mediation and dispute prevention mechanism is something that may be worth being explored by Working Group III.

151. As discussed in literatures over the years, various dispute prevention policies model have been identified<sup>200</sup>. Some examples include Peru's Special Commission established under its State System of Coordination and Defense in International Investment Disputes, which serves as a designated State agency in handling ISDS disputes; the Colombia model with a high-level inter-ministerial body established to develop and coordinate measures to prevent and manage investment disputes (which include deciding whether to resort to mediation and adopt a mediated settlement agreement); and Korea's Office of Foreign Investment Ombudsman ("OIO"), which hears and attempts to resolve investors' grievances.

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<sup>198</sup> *Ibid.*

<sup>199</sup> See Note by the UNCITRAL Secretariat, "*Possible reform of investor-State dispute settlement (ISDS) Advisory Centre*" (A/CN.9/WG.III/WP.168, para. 22) (25 July 2019).

<sup>200</sup> See Weeramantry and Chang (n 46), at pp. 22 – 24.



152. Of interest to this paper is how such dispute prevention policy models can synergize with mediation. One clear example would be for an ombudsman to also deploy mediation to facilitate the amicable resolution of ISDS disputes. As suggested by Professor Hi-Taek Shin, the OIO may function as one agreeable avenue for both the government officials and the foreign investors to explore an ADR while avoiding the bitter legal battle that would ensue if investment arbitration were used<sup>201</sup>.

153. The practice of the International Finance Corporation's Compliance Advisory Ombudsman, which is the independent accountability mechanism for IFC and MIGA has also provided some reference value on how to combine the use of dispute prevention and mediation. It has been reported that the said international organization has already made use of mediation to resolve investment-related disputes related to IFC / MIGA projects between investors and local communities<sup>202</sup>.

154. In fact, the Model Instrument developed by the Energy Charter Treaty has also taken a holistic approach with respect to dispute prevention and mitigation<sup>203</sup>. Apart from the provisions on mediation discussed above, the Model Instrument recognizes the importance in "*preventing and managing foreign investment disputes before formal dispute resolution becomes necessary, by facilitating efficient and coordinated inter-institutional actions; and to effectively and efficiently resolving such disputes*"<sup>204</sup>. The Model Instrument also contains a specific article on early alert mechanism to facilitate the exchange of information within the government, e.g. via an online preventive platform, on the relevant international agreements with dispute resolution provisions and notifications to the Responsible Body on the potential investment disputes with foreign investors<sup>205</sup>.

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<sup>201</sup> See Hi-Taek Shin, "An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution" in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2010), at pp. 97 – 101.

<sup>202</sup> See Güven (n 39).

<sup>203</sup> See the Statement of the Energy Charter Secretariat on "*Investment Mediation and Dispute Prevention*" made at the October meeting of UNCITRAL WGIII [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ecs\\_statement\\_-\\_en.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ecs_statement_-_en.pdf).

<sup>204</sup> See the Preamble to the Model Instrument.

<sup>205</sup> See Article 8 of the Model Instrument and the explanatory notes at p. 22.

## VIII. CONCLUSION

155. As recognized by Working Group III, mediation is not a “*panacea*” that address all the concerns of ISDS. It is inevitable that even with the best mediators in the world, some disputes cannot be amicably resolved through mediation (particularly, when disputing parties have inflexible demands and are uncooperative with mediators, or the relationship between the disputing parties is beyond repair)<sup>206</sup>.

156. Nevertheless, as discussed above, it appears evident that the time is ripe for promoting the greater use of mediation in resolving ISDS disputes. One is also optimistic that the work on mediation will be further developed in the future formal sessions of UNCITRAL Working Group III and the intersessional meeting on the subject in the Hong Kong SAR, PRC in 2021.

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<sup>206</sup> See Ng (n 46), at p. 338.