

ISDS Reform Conference: Mapping the Way Forward Discussion Paper for the Session on Investment Mediation

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INTRODUCTION

1. Over the past two decades and a half, there has been a tremendous growth in international investment arbitration². While there were only a few dozen investor-State dispute settlement (“ISDS”) cases back in 1992³, the total number of known ISDS arbitration cases as of December 2018 has already reached over 900 according to the figures in the Investment Policy Hub of the United Nations Conference on Trade and Development (“UNCTAD”)⁴.
2. In recent years, ISDS mechanism has attracted much criticism (e.g. inconsistent treaty interpretation by ISDS arbitral tribunals, high cost and duration, perceived bias in arbitrator and etc.) and some have even gone so far to criticize ISDS arbitral tribunals as “secret court” and “kangaroo court”. As observed by Professor Jan Paulsson in his seminal article “*Arbitration without Privity*”, “[a]rbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash.”⁵
3. Amid the backlash against ISDS in which the legitimacy of such dispute resolution mechanism is called into question, the United Nations Commission on International Trade Law (“UNCITRAL”)⁶ and various international organizations have embarked on projects to explore the possible reform of ISDS. Much of the focus of the discussion so far has been on investment arbitration and various systemic ISDS reform proposals such as the establishment of standalone appellate body and multilateral investment court have captured much attention in the debate.
4. While it is indisputable that some forms of reform are required for investment arbitration, one should not lose sight that there also exist other alternative dispute resolution (“ADR”) mechanisms for resolving disputes between host governments and the foreign investors, and a prime example of such ADR mechanisms is investment mediation.

² Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, “*The Backlash against Investment Arbitration – Perception and Reality*”, Kluwer Law International, 2010, see p.xxxvii.

³ A F M Maniruzzaman, “*Investor-State Dispute Settlement by ADR – An Appraisal of the Recent Trends*” (December 2018), Transnational Dispute Management Journal, see p. 1.

⁴ See the website of the Investment Policy Hub of UNCTAD (<https://investmentpolicyhub.unctad.org/ISDS>).

⁵ Jan Paulsson, “*Arbitration Without Privity*”, ICSID Review – Foreign Investment Law Journal, Volume 10, Issue 2, 1 October 1995, pp. 232 – 257, see p.257.

⁶ Please refer to the website of UNCITRAL Working Group III on ISDS Reform (http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

5. This paper seeks to provide information to facilitate the discussion of the panel session on “Investment Mediation”, which will explore topics such as how to incentivize host governments and investors to further utilize investment mediation, the relationship between investment mediation and investment arbitration, and how these two dispute settlement processes can complement each other.

CONCEPTS ON INVESTMENT MEDIATION

6. Mediation is a traditional form of dispute resolution that has a very long history and can be traced back to the earliest history of mankind⁷. Such dispute resolution mechanism has existed as early as around 3,000 BCE, in Egypt, Babel, and Assyria⁸.
7. In China, the mediation system has always been an integral part of the ancient tradition of the Chinese legal culture and can be dated back to early ancient times around 4,000 years ago⁹. The non-adversarial nature of mediation is also in line with all the main schools of thoughts in China, namely, Taoism, Legalism, Confucianism and Mohism¹⁰. Some have even described the practice of mediation as the “Oriental Experience”¹¹.
8. The core idea of mediation involves the use of a third-party neutral to assist the disputing parties in coming to a mutually agreeable solution¹². As for the role of mediators, they do not decide cases for the disputing parties as they are neither judges nor arbitrators¹³. Instead, mediators work with the disputing parties, evaluating, facilitating and moving along the discussion about the matters in dispute and how best to resolve the conflicts¹⁴.
9. There are various styles and forms of mediation. While there have been

⁷ Wang Guiguo and He Xiaoli, “*Mediation and International Investment: A Chinese Perspective*”, *Maine Law Review*, Volume 65, pp. 215 – 236, see p.221.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*, see p.222.

¹¹ Marieke Koekoek, “*Mediation of Investor-State Disputes in China – Mediation as Complementary Method of Dispute Settlement Arbitration*”, September 2012, available at http://www.academia.edu/3574985/Mediation_of_investor-State_disputes_in_China_Mediation_as_complementary_method_of_dispute_settlement_to_arbitration.

¹² Susan D. Franck, “*Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*”, *ICSID Review – Foreign Investment Law Journal*, Volume 29, Issue 1, 1 February 2014, pp. 66 – 89, see p.71.

¹³ *ibid.*

¹⁴ *ibid.*

some discussions as to whether conciliation is a process that is separate and distinct from mediation¹⁵, it appears that in light of the broad concept of “mediation” as described above, it is clear that conciliation would also be conceptually considered as a form of mediation¹⁶.

10. Two common forms of mediation are evaluative mediation and facilitative mediation¹⁷. In evaluative mediation, the mediator operates in an evaluative role, giving his or her opinion as to the relative strengths and weaknesses of the dispute and underlying defences¹⁸. Conciliation under the International Centre for Settlement of Investment Disputes (“ICSID”) is a process that has elements of evaluative mediation¹⁹. Facilitative mediation, on the other hand, is interest-based. The mediator’s role is to assist the parties in discussing their interests, needs and objectives with an eye to understanding where the parties may have shared objectives, interests and needs or otherwise share some common ground²⁰. The mediator does not give an evaluation of the strengths or weaknesses of the parties’ cases or offer her opinion; instead, the mediator focuses on using the process to help the parties’ re-focus their problem solving, and to focus on future gains that parties can control, rather than the formal allocation of blame for conduct in the past that

¹⁵ J.W. Salacuse, “*Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*”, *Journal of Transnational Dispute Management*, Volume 6, Issue 1, March 2009, see p.436.

¹⁶ In fact, 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.”

¹⁷ See Franck (n 12), at p.72.

¹⁸ *ibid.*

¹⁹ In an ICSID conciliation case, *Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1), the late Lord Wilberforce, who was the sole conciliator for the case explained that he “conceive[d] that his task in these proceedings is to examine the contentions raised by the parties, to clarify the issues, and to endeavor to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement”. Afterwards, based on the parties’ memorials, informal oral argument and views submitted in confidence as to what might constitute an acceptable settlement, Lord Wilberforce advanced a proposed settlement for consideration by the disputing parties based on “his estimate of the parties’ chances of success on the issue in dispute”. (Source: Stephen M. Schwebel, “*Is Mediation of Foreign Investment Disputes Plausible?*”, *ICSID Review – Foreign Investment Law Journal*, Volume 22, Issue 2, 1 October 2017, pp. 237 – 241, see pp. 239 – 240.)

²⁰ See Franck (n 12), at p.73.

cannot be altered²¹.

11. That said, evaluative mediation and facilitative mediation are merely tools for mediators to deploy and are by no means the exclusive forms of mediation. If necessary, mediators may even use evaluative mediation and facilitative mediation in combination to assist the disputing parties in reaching settlements.
12. In fact, mediation is commonly found in the dispute resolution mechanisms in a wide variety of areas of international law. For instance, Article 33 of the Charter of the United Nations provides that “[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice” (emphases added). The United Nations Convention on the Law of the Sea and its Annex V also allow the Contracting Parties to resolve their disputes through conciliation²².
13. On international trade and investment front, Article 5 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides for good offices, conciliation and mediation. It has also been 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 city²³. Further, conciliation is also available under the ICSID Convention and there is a set of specific rules for conciliation under the auspices of ICSID²⁴.
14. In a debate session of the Hong Kong Forum – 60th Anniversary of New York Convention co-organized by UNCITRAL, the Department of

²¹ Ibid., see pp.74 – 75.

²² One of the recent examples is the conciliation proceedings between the Democratic Republic of Timor-Leste and the Commonwealth of Australia initiated on 11 April 2016 pursuant to Article 298 and Annex V of the United Nations Convention on the Law of the Sea. Further information is available at <https://pca-cpa.org/en/cases/132/>.

²³ 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. See also Frauke Nitschke, “The ICSID Conciliation Rules in Practice” (to be published in Forthcoming, “Mediation in International Commercial and Investment Dispute”, edited by Catharine Titi and Katia Fach Gómes (Oxford University Press)), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257031#, see p.1.

²⁴ The full text of the ICSID conciliation rules is available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Conciliation-Rules.aspx>.

Justice of the Hong Kong Special Administrative Region and the Asian Academy of International Law on 20 September 2018, it has been said by a speaker that arbitration is “war” while mediation is “peace”. Such view may have been too binary on the relationship between mediation and arbitration. Moreover, in practice, it would appear to be unrealistic and undesirable to advocate for the replacement of investment arbitration by investment mediation²⁵. While investment mediation can function on a stand-alone basis, it is a flexible process in nature and can work with investment arbitration in a complementary manner.

DISCUSSION ON INVESTMENT MEDIATION IN UNCITRAL WORKING GROUP III

15. Investment mediation is within the mandate of the Working Group III of UNCITRAL as its mandate is to consider the possible reform of ISDS, which is not limited to investment arbitration. During the course of the working sessions of UNCITRAL Working Group III, investment mediation has been mentioned by various delegations such as China, the United States and Albania. In Part I of the report of Working Group III on the work of its thirty-fourth session, it was stated that:

“31. ...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...”

...

33. ... States’ experience in domestic court mechanisms and sequencing issues, the relationship between arbitration, alternative dispute resolution mechanisms and court procedures, and State-to-State mechanisms, might inform the Working Group’s considerations of solutions at the third stage of its mandate.”²⁶

16. Moreover, in the round-table session of the first inter-sessional meeting of UNCITRAL Working Group III held on 10 – 11 September 2018, the importance of the use of investment mediation for reaching amicable

²⁵ See Salacuse (n 15), at p. 439, and Jack J. Coe, Jr, “Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch”, Journal of Transnational Dispute Management, Volume 4, Issue 1, February 2007, see p.32.

²⁶ UNCITRAL Working Group III Secretariat, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session – Part I” (A/CN.9/930/Rev.1), see paras. 31 – 33.

settlements was highlighted²⁷. During the said round-table session, a number of delegations including China, the United States and the European Union have voiced support to strengthening the use of investment mediation and it has been suggested that further research should be done on two specific issues, namely: (i) the reasons for the under-use of investment mediation; and (ii) how to incentivize the disputing parties of ISDS to utilize investment mediation for dispute resolution.

17. In the annex to Working Paper 149 of UNCITRAL Working Group III for its thirty-sixth session (A/CN.9/WG.III/), investment mediation is listed as a reform option to address the concerns over lengthy and costly ISDS proceedings and to strengthen the existing ISDS mechanism²⁸. During the thirty-sixth session of the Working Group III held in Vienna on 29 October – 2 November 2018, it is note-worthy that the Chinese delegation has made an oral intervention in relation to investment mediation²⁹ and mentioned that it will share further thoughts on investment mediation in the thirty-seventh session of Working Group III to be held in New York on 1 – 5 April 2019.

THE CASE FOR THE GREATER USE OF INVESTMENT MEDIATION

18. As discussed above, investment mediation has the potential to be one of the possible reform options for Working Group III of UNCITRAL. More importantly, the adoption of investment mediation as a reform option for ISDS is fully compatible to the other reform options that are mentioned in the Annex to Working Paper 149 of UNCITRAL Working Group III (A/CN.9/WG.III/), such as the introduction of appellate review mechanism for ISDS or even the establishment of a multilateral investment court.
19. As to be further discussed below, there is a convincing case to advocate for the greater use of investment mediation and the time is ripe to unlock the full potential of investment mediation to strengthen the legitimacy of the ISDS.

²⁷ UNCITRAL Working Group III Secretariat, “*Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea*” (A/CN.9/WG.111/WP.154), see para. 43.

²⁸ UNCITRAL Working Group III Secretariat, “*Note by the Secretariat on the Possible Reform of Investor-State Dispute Settlement*” (A/CN.9/WG.III/WP.149), see pp. 5 – 6 of the Annex.

²⁹ UNCITRAL Working Group III Secretariat, “*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session*” (A/CN.9/964), see para. 118.

(i) *Many Benefits of Investment Mediation*

20. The benefits of investment mediation have been extensively discussed in academic literatures and various studies by international organizations³⁰.
21. Investment mediation, at its core, is a kind of dispute resolution mechanism that emphasizes harmony and achieving win-win situations for the disputing parties. It provides the host States and the foreign investors with a high degree of autonomy, flexibility and consensual resolution options in resolving investment disputes. Apart from allowing the disputing parties to control the mediation process³¹, investment mediation can facilitate the disputing parties to reach 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 mediators³².
22. Generally speaking, the remedies available under investment arbitration are limited to monetary damages (with any applicable interest) and restitution of property³³. However, it has been observed that, for many ISDS cases, an award of money damages or even an injunction is often not the optimal solution. In the words of Professor J. W. Salacuse, whereas an arbitration award is a “*one-dimension solution*” to a problem, a mediated solution to a conflict is often “*multidimensional*”³⁴.
23. The range of remedies that can be included in mediated settlement arrangements is essentially limitless. Such settlement arrangements are not limited to legal remedies that can be awarded by arbitral tribunals but may include non-monetary remedies, such as³⁵: (i) grant or renewal of a license or permit; (ii) provision of a different location or project for the investment as an alternative compensation for the denial of a permit or license to operate a particular investment; (iii) the swapping of deals for other types of investment contracts or obligations; (iv) re-negotiation of the terms of a concession project, (v) re-evaluation of the return of a project and provisions of additional guarantees or sources of revenue; and

³⁰ 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, Volume 11, Issue 1, January 2014.

³¹ Celeste S. Owens, “*Assessing the Current System – Systemic Issues*” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), “*Investor-State Disputes: Prevention and Alternatives to Arbitration IP*” (2010), see p.122.

³² UNCTAD, “*Investor-State Disputes: Prevention and Alternatives to Arbitration*” (2010), see pp. 31 – 33.

³³ See e.g. Article 32 of the Hong Kong – Chile Investment Agreement, Article 34 of US Model Bilateral Investment Treaty (2012) and Article 8.39 of the Investment Chapter of the Canada – EU Comprehensive Economic and Trade Agreement.

³⁴ See Salacuse (n 15), at p. 420.

³⁵ See UNCTAD (n 32), at p. 33.

- (vi) self-assessments and reappraisals by governments of problematic measures they have enacted.
24. More importantly, as compared with investment arbitration, which has been described by some commentators as a “*means to liquidate an economic relationship*”³⁶, investment mediation is beneficial to the preservation of relationship and long-term cooperation between the host States and the foreign investors³⁷.
25. Furthermore, as compared with investment arbitration which places a great focus on international legal rights, investment mediation leaves greater room to take into account non-legal factors, such as actual stakeholder needs, relationships, economic conditions, politics, social values and even socio-cultural history³⁸.
26. According to *the History of the ICSID Convention* published by the ICSID Secretariat, it has been pointed out in a meeting of the executive directors of the World Bank in 1962 that “*conciliation did not in any way infringe or appear to infringe upon a country’s sovereignty*”³⁹. In the same year, it has been pointed out by another executive director of the World Bank that “[c]onciliation enabled a government to save face” and “[s]ometimes a government was convinced of the merits of the foreign investor’s claim, but was politically unable to act upon that conviction. The intervention of a neutral, impartial conciliator, whose opinion was unbiased, was tremendously effective in helping to persuade parliaments that the claim must be settled”⁴⁰. As such, investment mediation may avoid arbitral decisions that the host States may find unacceptable or difficult to comply with, which is a result in line with maintaining the autonomy of the host States.
27. While investment mediation will not be able to directly address the concerns over unjustifiable inconsistencies in the treaty interpretation of investment treaties by arbitral tribunals and the call for *jurisprudence constante* in ISDS, mediation, as compared with arbitration, does not have the risk of creating unsatisfactory precedents⁴¹ in ISDS. Moreover,

³⁶ See Salacuse (n 15), at p.418.

³⁷ See Sussman (n 30), at p.8.

³⁸ See Owens (n 31), at p.122.

³⁹ ICSID Secretariat, “*History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*”, Volume II, Part 1, 1968, see pp. 14 – 15.

⁴⁰ *ibid.*, see p. 68.

⁴¹ While there is no formal doctrine of “*stare decisis*” in ISDS, past ISDS arbitral decisions are often treated as “*de facto*” precedents and cited by arbitral tribunals in adjudicating cases. (Source: Directorate-General for

it has been observed by Professor Jack Coe that the uncertainty of an adjudicated outcome often maintains the parties' interest in engineering with the neutral's assistance, a satisfactory alternative outcome⁴².

28. Potential savings in cost and duration is also a major reason for advocating the greater use of investment mediation⁴³. The high cost and duration of ISDS has been identified by UNCITRAL Working Group III in its thirty-sixth working sessions as concerns which require reform. In respect of investment arbitration, while there is a lack of comprehensive and consolidated information on cost and duration of ISDS, some existing studies such as the study by Jeffery Commission in 2016 ("JC Study 2016")⁴⁴ and the study by Matthew Hodgson in 2017 ("MH Study 2017")⁴⁵ have provided useful insights into the current situation.
29. The MH Study 2017 indicates that the average party costs (based on 177 cases for claimants and 169 cases for respondents) stand at approximately US\$6 million (median US\$3.4 million) for claimants and approximately US\$4.9 million for respondents (median US\$2.8 million)⁴⁶. As for tribunal costs, the MH Study 2017 indicates that the mean ICSID tribunal costs were approximately US\$920,000 (median US\$750,000) and the mean UNCITRAL tribunal costs were approximately US\$1.1 million (median US\$799,000)⁴⁷.
30. The JC Study indicates that the average duration of ICSID arbitration proceedings (based on 231 ICSID awards), from registration to award, was 3.78 years, or 1,381 days (median 1,271 days)⁴⁸. Its review of 60 UNCITRAL proceedings resulting in an award from 1990 to 2015 reveals that the average duration from notice of arbitration to award was 3.96 years, or 1,446 days (median 1,245 days)⁴⁹.

External Policies of the European Parliament, "*Investor-State Dispute Settlement Provisions in the EU's International Investment Agreements*", Volume 1 – Workshop, September 2014, pp. 16 – 17).

⁴² See Coe (n 25), at p.16.

⁴³ 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), see p. 10.

⁴⁴ Jeffery Commission, "*How long is too long to wait for an award*", Global Arbitration Review (18 February 2016).

⁴⁵ Please refer to the website of Allen & Overy (<http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx>) for the MH Study 2017.

⁴⁶ Matthew Hodgson and Alastair Campbell, "Damages and costs in investment treaty arbitration revisited", Global Arbitration Review (14 December 2017).

⁴⁷ *ibid.*

⁴⁸ Jeffery Commission, "*How long is too long to wait for an award*", Global Arbitration Review (18 February 2016).

⁴⁹ *ibid.*

31. As reported by Professor Jack Coe, the former CEO of Metalclad, Mr. Grant Kesler, has expressed his dissatisfaction with the arbitration experience under the famous NAFTA case, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1)⁵⁰. Despite that Metalclad was awarded approximately US\$17 million, Mr. Kesler described the case as a “*hollow victory*” and considered the arbitration process to be slow, disruptive, expensive, unpredictable, and exceedingly contentious⁵¹. The proceedings lasted for approximately five years and the cost for Metalclad was an estimated \$4 million in direct and indirect costs⁵². Mr. Kesler commented that if he had to do it over, he would not pursue arbitration, but would have resorted to the so called “political options” to resolve the dispute⁵³.
32. Investment mediation may avoid complicated procedures involved in investment arbitration, such as witness cross-examinations and document exchanges, thereby reducing costs and duration of the dispute settlement process⁵⁴. As explained by Judge Stephen M. Schwebel, the former President and Judge of the International Court of Justice, since conciliation need not be pleadings-intensive or dependent upon production of full proof, such mechanism can produce results more speedily and less expensively than arbitration⁵⁵.
33. In the past, there have been successful cases in which the potential of investment mediation in saving costs and duration has been achieved. A prime example of such successful cases is the first conciliation case conducted under the auspices of ICSID, *Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1). In that case, Lord Wilberforce has, as a sole conciliator, successfully mediated a dispute involving the distribution of US\$143 million in profits between Tesoro Petroleum Corporation and the State of Trinidad and Tobago in less than two years and at a cost of a mere US\$11,000⁵⁶.
34. As the disputing parties have greater control over the contents of the mediated settlement agreements, it is also more likely for them to

⁵⁰ Jack J. Coe, Jr, “*Should Mediation of Investment Disputes Be Encouraged, and , If So, by Whom and How?*” in Arthur W. Rovine, “*Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)*”, Brill | Nijhoff, 20 May 2010, see p.339 – 340.

⁵¹ *ibid.*

⁵² See Coe (n 25), at p.27.

⁵³ See Coe (n 50), at p.339 – 340.

⁵⁴ See UNCTAD (n 32), at p.34.

⁵⁵ See Schwebel (n 19), at p. 240.

⁵⁶ See Salacuse (n 15), at p.436.

voluntarily comply with such agreements⁵⁷. As such, this can potentially save the cost and resources required for handling the post-award procedures such as annulment, setting-aside and enforcement proceedings.

35. In any event, the potential advantage of investment mediation in terms of cost and duration are particularly important for the governments of host States which place great emphasis on the effective use of their resources.

(ii) *Increasing Inclusion of Investment Mediation in the Dispute Settlement Mechanisms Provided under International Investment Treaties*

36. It has often been said that conciliation is the culturally preferred dispute resolution method in Asia⁵⁸. However, from the practice of the investment treaties across the globe, it appears that conciliation finds cultural resonance in jurisdictions of both the Eastern and Western legal traditions⁵⁹.

37. More and more international investment treaties have included express provisions on mediation and some of such provisions are quite detailed. Some recent examples include: the Investment Agreement for the COMESA Investment Area (2007)⁶⁰, the ASEAN Comprehensive Investment Agreement, the model BIT of Thailand (2012)⁶¹, Southern African Development Community Model BIT (2012)⁶², the Revised Unified Agreement for the Investment of Arab Capital in the Arab States (2013)⁶³, the model BIT of India (2016)⁶⁴, the EU – Canada Comprehensive Economic and Trade Agreement (2016)⁶⁵, the draft model BIT of Netherlands (2018)⁶⁶ and the draft text of the Transatlantic

⁵⁷ See Sussman (n 30), at p.8.

⁵⁸ Christine Sims, “*Conciliation of Investor-State Disputes: How Can it be Developed in Asia?*”, 2018 UNCITRAL Emergence Conference – Asian Perspectives on the Future of the Harmonisation and Convergence of Business Laws, 25 July 2018, see p.9.

⁵⁹ *ibid.*

⁶⁰ The text is available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>.

⁶¹ The text is available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3095>.

⁶² The text is available at <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

⁶³ The text is available at <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3087>.

⁶⁴ The text is available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

⁶⁵ The text is available at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

⁶⁶ The draft text is available at https://globalarbitrationreview.com/digital_assets/820bccdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

Trade and Investment Partnership⁶⁷.

38. The investment agreement between Mainland China and the Hong Kong Special Administrative Region (“CEPA Investment Agreement”) under their Closer Economic Partnership Arrangement provides an innovative model. The CEPA Investment Agreement contains provisions that are very similar to those found in international investment treaties, such as fair and equitable treatment, full protection and security and expropriation.
39. However, investment mediation, instead of investment arbitration, is provided for resolving investment disputes between Hong Kong investors and the Central People’s Government as well as those between Mainland investors and the Government of the Hong Kong Special Administrative region.
40. For disputes involving Mainland investors under the CEPA Investment Agreement, Hong Kong International Arbitration Centre – Hong Kong Mediation Council as well as Mainland – Hong Kong Joint Mediation Centre have been designated as the mediation institutions to handle such disputes⁶⁸. Furthermore, a set of modern, high standard, comprehensive yet flexible mediation rules (“CEPA Investment Mediation Rules”) have been devised for such mediation institutions to administer the mediation under the CEPA Investment Agreement⁶⁹. As for disputes involving Hong Kong investors, China Council for the Promotion of International Trade / China Chambers of International Commercial Mediation Centre as well as China International Economic and Trade Arbitration Commission have been designated as the mediation institutions to handle such disputes.
41. Mainland China has also concluded with the Macau Special Administrative Region an arrangement⁷⁰ that is similar to the CPEA Investment Agreement with the Hong Kong Special Administrative Region, and that arrangement also provides for mediation in relation to investment disputes.

⁶⁷ The draft text is available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

⁶⁸ Please refer to the website of the Trade and Industry Department (<https://www.tid.gov.hk/english/cepa/investment/mediation.html>) for the lists of mediation institutions and the lists of mediators.

⁶⁹ Please refer to the website of the Trade and Industry website (<https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>) of the full text of the CEPA Investment Mediation Rules.

⁷⁰ The full text of the CEPA Investment Agreement between Mainland China and Macau is available at https://www.economia.gov.mo/en_US/web/public/pg_cepa_cepa_ai?refresh=true.

(iii) *Greater Recognition of Investment Mediation by International Organizations and Institutions*

42. In recent years, more and more international organizations and institutions recognize the value of mediation as an effective tool for resolving international investment disputes and support the greater use of such dispute resolution mechanism. For example, the United Nations Conference on Trade and Development (“UNCTAD”) has organized a symposium in 2010 in Lexington, Virginia to have in-depth discussion on investment mediation⁷¹. Similarly, under the auspices of the Organization for Economic Co-operation and Development (“OECD”), a series of symposia on investment mediation has taken place⁷².
43. An important development on investment mediation comes with the introduction of the IBA Rules for Investor-State Mediation (2012)⁷³ prepared by the State Mediation Subcommittee of the Mediation Committee of the International Bar Association (with Ms. Anna Joubin-Bret and Mr. Barton Legum as Co-Chairs). It has been reported that the IBA 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)⁷⁴. In another case reported by the *Investment Arbitration Reporter*, the Philippines and a French engineering and consulting services company, Systra SA, have agreed to conduct mediation for a dispute arising under the France-Philippines bilateral investment treaty pursuant to the IBA Rules and under the auspices of the ICC-ADR Centre⁷⁵.
44. Moreover, in the proposal on amendments to the ICSID rules as published in August 2018, apart from making substantial revisions to its conciliation rules to enhance the flexibility⁷⁶, the ICSID Secretariat has proposed the introduction of a new set of additional facility mediation

⁷¹ The Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution (as edited by Susan D. Franck and Anna Joubin-Bret) is available at https://unctad.org/en/Docs/webdiaeia20108_en.pdf.

⁷² See Maniruzzaman (n 3), at p. 3.

⁷³ The full text of the IBA Rules for Investor-State Mediation is available at the website of the International Bar Association (https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx)

⁷⁴ Paul-Jean Le Cannu, “*Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System*”, ICSID Review – Foreign Investment Law Journal, Volume 33, Issue 2, 30 October 2018, pp. 456 – 500, see p. 466 and footnote 78.

⁷⁵ 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).

⁷⁶ ICSID Secretariat, “*Proposals for Amendment of the ICSID Rules – Synopsis*” (2 August 2018), see p. 10.

rules in response to the suggestions of its stakeholders⁷⁷.

45. In 2016, the Energy Charter Conference endorsed the Guide on Investment Mediation to encourage the Contracting Parties to the Energy Charter Treaty to consider the use of mediation on voluntary basis as one of the options at any stage of the dispute to facilitate amicable solution⁷⁸. It is of interest to note that the said Guide on Investment Mediation prepared with the support of a number of international organizations and institutions including UNCITRAL, ICSID, the Permanent Court of Arbitration (“PCA”), International Mediation Institute (“IMI”), the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), and the International Court of Arbitration of the International Chamber of Commerce (“ICC”)⁷⁹.
46. Besides, currently there are the UNCITRAL Conciliation Rules (1980)⁸⁰, the ICC Mediation Rules (2014)⁸¹ and the SCC Mediation Rules (2014)⁸².

POTENTIAL MAJOR OBSTACLES OVER THE GREATER USE OF INVESTMENT MEDIATION

47. Despite the great potential of investment mediation as an effective dispute resolution mechanism for international investment disputes, it has been observed that, as compared with investment arbitration, investment mediation has been relatively under-used⁸³.
48. Although various academic literatures and international conferences have sought to weigh in on the possible reasons for the under-use of investment mediation, empirical researches on that issue have been lacking. Nevertheless, a recent survey report⁸⁴ (“CIL Survey”) prepared

⁷⁷ *ibid.*, see p. 13.

⁷⁸ The full text of the Guide on Investment Mediation is available at <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

⁷⁹ Please refer to <https://energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/>.

⁸⁰ The full text is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html.

⁸¹ The full text is available at <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>.

⁸² The full text is available at https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf.

⁸³ 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).

⁸⁴ The report is available at <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf>. It is noted that the sample size of the CIL Survey is relatively small, which consists of responses from 47 private counsel, institution representatives, and academics who have substantial personal experience in investor-State arbitration. Also, more than half of such participants (64%) had experience advising both investor and State parties.

by Professor Lucy Reed, Mr. J Christopher Thomas QC and Ms. Seraphina Chew on obstacles to settlement of investor-State disputes has provided a good starting point for empirical researches on the issue.

49. Two major possible reasons for the under-use of investment mediation are discussed below, and one would note from the discussion that such obstacles can be overcome with the right methods.

(i) *Institutional and Political Factors*

50. Political factors have been observed as the primary reason for the under-use of investment mediation⁸⁵. Some government officials may have a tendency to avoid taking public responsibility for concluding a settlement with foreign investors and to insist on arbitration so that the blame can be pinned on the arbitral tribunal for making adverse decisions against the governments⁸⁶. As commented by some of the participants of the CIL Survey, government officials might find it “*easier to ‘sell’ to parliament and public opinion the need to comply with a binding award*”, and “*prefer to have an international tribunal tell it to pay*”⁸⁷.
51. The behaviours of government officials described above were said to arise out of fear of allegations of or future prosecution for corruption for the individual official or decision maker who signs off the mediated settlement agreement when the decision to settle and / or the mediated settlement agreement are audited internally and / or brought before an investigator or a court⁸⁸. The CIL Survey suggested that the possibility of “*personal liability*” is a significant institutional disincentive for government officials to recommend settling a dispute⁸⁹.
52. Moreover, as governments value public opinion and support, government officials may be concerned that reaching settlements with foreign investors would be criticized by the public as being “*weak or branded as puppets of foreign interests*”⁹⁰.
53. Technically, all types of international investment disputes can be resolved through investment mediation and the rates of success would vary in light of the actual facts and circumstances of the cases. However, in light of

⁸⁵ See Chew, Reed and Thomas (n 43), at pp. 12 - 15.

⁸⁶ *ibid.*, at pp. 12 - 13.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*, at p. 13.

⁹⁰ *ibid.*

the specific nature of ISDS which generally involve acts of public authorities, disputes involving regulatory measures of general application, or an industry or issue that is highly politicised or sensitive such as public health (e.g. the ISDS case between Philip Morris and Australia on the latter's tobacco plain packaging measures), transboundary resources, extractive industries, or civil aviation would pose greater difficulties to be resolved through investment mediation⁹¹. Furthermore, the aforesaid cases would likely attract significant media and public attention as well as strong opinions from non-governmental organizations, which may make it more difficult for government officials to settle the cases⁹². Disputing parties may also dismiss investment mediation where the relationship between them is so confrontational that there is not even a relationship to be salvaged⁹³ and where the purpose of the disputing parties is to obtain an arbitral precedent to be cited in future ISDS cases.

54. Nevertheless, it has been recently reported that Philip Morris and Ukraine have managed to reach settlement over a potential investment treaty dispute over a US\$23 million tax bill⁹⁴. Such case shows that if the disputing parties have the willingness to resolve their disputes in a non-adversarial manner, the assistance of mediators with the right qualifications and skills still hold the potential to help the parties settle their disputes involving substantial claims.
55. Capacity building and training for government officials are beneficial for enhancing their understanding on the investment mediation process and correcting their misconceptions and misunderstanding over such process, which would encourage the greater use of investment mediation. In this regard, the Department of Justice of the Hong Kong Special Administrative Region has co-organized with ICSID and the Asian Academy of International Law a comprehensive and intensive training on investment mediation for government officials and practitioners in October 2018⁹⁵. Public education is equally important in building up the confidence of the public in the use of investment mediation and this can potentially address the concerns of government officials over public

⁹¹ *ibid.*, see pp. 20 - 21.

⁹² See Salacuse (n 15), at p.409.

⁹³ The former General Counsel of the World Bank, Mr. Aron Broches, observed that “*when you have come to the end of the road in a business relationship, you might as well have a clear decision through arbitration. On the other hand, if the parties hope to continue their partnership, conciliation might be preferable*”. (Source: See Sims (n 58), at p. 4.)

⁹⁴ Tom Jones, “*Philip Morris and Ukraine settle tax dispute*”, Global Arbitration Review, 6 December 2018.

⁹⁵ Please refer to the website of the Asian Academy of International Law (<http://www.aail.org/en/events/details/?id=23>).

criticism on their decisions to mediate and settle with foreign investors.

56. From an institutional standpoint, the fact that ISDS disputes involve a number of government agencies and other public entities⁹⁶ might have hindered the use of investment mediation⁹⁷. In the CIL Survey, it is 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*”⁹⁸. In this regard, internal conflicts within the host government may arise over issues such as who should participate in the mediation, who should take lead in the strategy, and what an acceptable result would be⁹⁹, and there may also be conflicting perspectives and/or priorities among the government agencies¹⁰⁰.
57. Moreover, it has been observed that while statutory authorization generally exists for paying adverse court judgments or arbitral decisions against the State, such authorization may not exist for payments in settlement of investment treaty claims¹⁰¹. The absence of such authorization can also entail that specific authorization from the legislature is required before the proposed settlement can be paid. Such situations may discourage government officials from seriously considering the use of investment mediation. Besides, as more than one government agencies may be involved, there may be friction and lack of accord in practice as to which agency’s budget should pay the settlement amount¹⁰².
58. In the round-table session of the first inter-sessional meeting of UNCITRAL Working Group III held on 10 – 11 September 2018, Ms. Anna Joubin-Bret suggested that governments should establish institutional mechanisms internally for handling and making decisions for investment mediation cases. It appears that there can be a number of

⁹⁶ For example, in the United States, decisions in ISDS disputes are made by an interagency group led by the Office of the Legal Adviser of the Department of State and including representatives of the Office of the United States Trade Representative, the Department of the Treasury, the Department of Commerce, the Department of Justice, the Environmental Protection Agency, the Department of the Interior and the Economics and Business Bureau of the Department of State as well as representatives of the state, local or federal agency or agencies the acts of which are at issue (Source: 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’*”, *Journal of Transnational Dispute Management*, Volume 4, Issue 1, February 2007, see Endnote 2).

⁹⁷ See Chew, Reed and Thomas (n 43), at pp. 14 - 15.

⁹⁸ *ibid.*, see p. 14.

⁹⁹ See Sussman (n 30), at p.11.

¹⁰⁰ See Chew, Reed and Thomas (n 43), at p. 14.

¹⁰¹ See Legum (n 96), at p.2, and Chew, Reed and Thomas (n 43), at pp. 14 – 15.

¹⁰² See Sussman (n 30), at p.11.

variations for such institutional mechanisms. For example, some governments have appointed lead agencies for ISDS disputes and such lead agencies may have an explicit mandate to negotiate a possible settlement with investors¹⁰³. Some governments have formed inter-agency groups for handling ISDS cases, while others have passed legislation that creates a formal institutional framework (including the creation of a legal authority) to prevent and to manage investment disputes¹⁰⁴. In the latter's arrangement, the relevant legislation explicitly empowers government officials to use ADR and such clear legal mandate to seek alternatives to arbitration may encourage government officials to use mediation¹⁰⁵. In this regard, to strengthen the use of investment mediation, international organizations may consider issuing guidelines and sharing best practices to assist governments in thinking how to refine their institutional mechanisms and legal frameworks on investment mediation.

(ii) *Insufficient Understanding and Experience over Investment Mediation*

59. It has been pointed out by a commentator that disputing parties often prefer processes that are familiar and established¹⁰⁶. However, due to the confidential nature of investment mediation in general, it is unclear as to the total number of cases in which the disputing parties have made use of investment mediation to resolve their disputes¹⁰⁷.
60. According to the information collected by Ms. Frauke Nitschke, Team Leader/Legal Counsel of ICSID, there were 10 conciliation cases in total which involved States as respondents, with 8 cases involving state parties from Sub-Saharan Africa, one case involving Trinidad & Tobago and another one involving Albania¹⁰⁸.
61. As observed by Professor J.W. Salacuse, a reason for the under-use of investment mediation is that corporate executives, government officials and lawyers have not been educated about ADR techniques and their

¹⁰³ Silvia Constain, "Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape", ICSID Review – Foreign Investment Law Journal, Volume 29, Issue 1, 1 February 2014, pp. 25 – 40, see p.35.

¹⁰⁴ *ibid.*, see p.36.

¹⁰⁵ *ibid.*

¹⁰⁶ See Owens (n 31), at p.122.

¹⁰⁷ See Schwebel (n 19), at p. 239.

¹⁰⁸ See Nitschke (n 23), at p.7. It is however of interest to note that those conciliation cases involved a variety of industries, with five conciliations in the oil, gas and mining sector, two cases in the textile industry, one case in the forestry sector, one in the construction sector and another one related to electric power and other energy. Further, eight cases involved investors respectively asserting nationalities of the Bahamas, Germany, Greece, the United Kingdom, and the United States.

potential application to investor-State disputes¹⁰⁹. Furthermore, given that investment arbitration is a lucrative legal business, lawyers may be driven by professional disposition or self-interest to advise their client to pursue arbitration instead of mediation¹¹⁰. As observed by a participant of the CIL Survey, counsel may be financially motivated to pursue claims through arbitration regardless of the relative benefits of settlement for the client and some law firms may even see ADR as “*Alarming Drop in Revenue*”¹¹¹.

62. From a statistical standpoint, according to the figures of the Investment Policy Hub of UNCTAD as of December 2018, among 580 known treaty-based investment arbitration cases, 22.9% of such cases were settled¹¹². Besides, 10.9 % of the cases were discontinued¹¹³ and some of them may have been discontinued as a result of the settlements reached between the disputing parties (although not being officially recorded as “*settled*”).
63. Furthermore, according to the statistics of the ICSID Caseload as of June 2018, approximately 36% of the arbitration proceedings under the ICSID Convention and Additional Facility Rules are settled or otherwise discontinued¹¹⁴. While further empirical and statistical research may be conducted to investigate the situation with respect to settlement of ISDS cases, the aforementioned data have at least shown the great potential for the use of investment mediation in resolving ISDS disputes.
64. In fact, Mr. Gabriel Bottini, the former National Director of International Affairs and Disputes of the Treasury-Attorney General’s Office of Argentina, has also commented from his experience that while it is hardly possible to determine how many of the dozens of investment arbitration cases arising from the Argentina’s economic and political crisis could have been resolved through conciliation, the high number of cases that were eventually settled under negotiations between the disputing parties indicated that at least for some of the investors concerned, conciliation could have been a valuable alternative to pursue the resolution of their claims¹¹⁵.

¹⁰⁹ See Salacuse (n 15), at p.443.

¹¹⁰ *ibid.*, see p.441.

¹¹¹ See Chew, Reed and Thomas (n 43), at p. 24.

¹¹² See the website of the Investment Policy Hub of UNCTAD (<https://investmentpolicyhub.unctad.org/ISDS>).

¹¹³ *ibid.*

¹¹⁴ ICSID Secretariat, “*The ICSID Caseload – Statistics (Issue 2018 – 2)*” (available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf)), see p.13.

¹¹⁵ See Bottini and Lavista (n 23), at p.365.

65. Professor Lucy Reed has suggested back in 2010 that international organizations such as UNCTAD, ICSID and other institutions should create a space to publicize and reward success by governments in settlements of international investment disputes without disclosing confidential information¹¹⁶. Successful investment mediation cases probably have the “*snowball effect*” of encouraging the greater use of such mechanism in practice. Furthermore, sharing of information on successful investment mediation cases would be useful in promoting mediation as an attractive dispute resolution mechanism for ISDS disputes and enhance the confidence of the disputing parties as well as their legal advisors in relying on such mechanism to resolve disputes.

POSSIBLE APPROACHES FOR PROMOTING THE GREATER USE OF INVESTMENT MEDIATION

66. Seminars, international conferences and capacity building are useful means to promoting the use of investment mediation. Various experts have also shared their thoughts on the future direction for the research on the subject. For example, Professor J.W. Salacuse considered that a better understanding of the anatomy of ISDS disputes is needed and researches may be conducted on questions such as how ISDS disputes arise and evolve, what actions tend to exacerbate the conflicts, at what point third party neutrals are best suited to intervene, and what kind of experience, skills and resources are best suited to help resolve particular types of ISDS disputes¹¹⁷. Professor Lucy Reed has also recommended that further studies should be conducted to analyze cases that do not result in a final arbitration award on the merits and those awards that memorialize settlement agreements in order to explore the specific patterns that foster settlement and lead to successful non-adjudicative outcomes¹¹⁸.
67. As discussed above, the issuance of guidelines and sharing of best practices on investment mediation by international organizations would be useful as well.
68. Nevertheless, an even more extensive solution would involve the creation of a set of model investment mediation rules that may be utilized on a standalone basis or incorporated into international investment treaties.

¹¹⁶ Lucy Reed, “*Synopsis of Closing Remarks*” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), “*Investor-State Disputes: Prevention and Alternatives to Arbitration II*” (2010), see p.31.

¹¹⁷ See Salacuse (n 15), at p.443.

¹¹⁸ See Reed (n 116), at p.31.

69. As observed by Ms. Anna Joubin-Bret in her article “*Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules*”, many existing international investment treaties provide for a “cooling-off” period, during which the disputing parties are invited to find an amicable settlement to their disputes¹¹⁹. 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 parties¹²⁰.
70. 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 the sequence between mediation and arbitration, thus not being conducive to the use of investment mediation¹²¹.
71. In light of the aforesaid, the creation of a set of model rules on an effective investment mediation mechanism is an option that is worth being further explored in order to fully harness the potential of investment mediation.

KEY PRINCIPLES OF AN EFFECTIVE INVESTMENT MEDIATION MECHANISM

72. The following paragraphs attempt to set out the key principles for guiding the design of an effective investment mediation mechanism.
- (i) *Enshrine the Values of the Rule of Law (including Fairness, Impartiality and Due Process)*
73. Rule of law (including fairness and impartiality) is an essential ingredient for the legitimacy and credibility of a successful investment mediation mechanism.
74. According to Professor Nancy A Welsh, there is a wealth of research and theory affirming the importance of providing mediation processes that can offer the disputing parties with “*an experience of justice*”¹²². To

¹¹⁹ 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.

¹²⁰ *ibid.*

¹²¹ *ibid.*, at p.155.

¹²² 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 IP*” (2010), see p.109.

achieve such an experience of justice, it was said the disputing parties need the opportunity to be fully heard, to know that what they have said has been considered by both the mediator(s) and the other party to the dispute, and to feel treated in an even-handed and respectful manner by both the mediator(s) and the other party to the dispute¹²³.

(ii) *Strong Emphasis on Cost Effectiveness and Efficiency*

75. To incentivize the disputing parties to utilize investment mediation to resolve their international investment disputes, the investment mediation mechanism should be designed in a way that is sensitive to cost¹²⁴ and duration and encourages the parties to have early settlement of disputes.
76. For investors, they have an incentive to conserve scarce resources as they are responsible to their shareholders and should use their internal resources for developing commercial innovations instead of expending time and resources in dispute resolution¹²⁵. Similarly, governments have an incentive to conserve taxpayer dollars as they are ultimately responsible to their citizens and are obliged to ensure that public resources are used properly to develop social welfare and promote investment¹²⁶. Early settlement of dispute is thus in line with the mutual interests of host governments and investors.

(iii) *Voluntariness and High Degree of Flexibility*

77. Voluntariness and flexibility are the cornerstones for investment mediation. Voluntariness comes in two senses. Firstly, there should be voluntariness in the mediation process itself¹²⁷. For example, the CEPA Investment Mediation Rules provides that all parties may, in accordance with the principle of voluntary participation, choose whether to withdraw from mediation¹²⁸. Secondly, the disputing parties should be entitled to disregard suggested terms of settlement, even if such terms are well-constructed and fair¹²⁹. Under the IBA Rules for Investment Mediation (2012), it is made explicit that the mediator shall not have the authority to impose on the parties any partial or complete settlement of the

¹²³ *ibid.*

¹²⁴ See Coe (n 25), at p.37.

¹²⁵ Susan Franck and Jason Ratigan, “*The Way Forward*” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), “*Investor-State Disputes: Prevention and Alternatives to Arbitration IP*” (2010), see p.126.

¹²⁶ *ibid.*

¹²⁷ See Coe (n 25), at pp.34 – 35.

¹²⁸ See Article 3(1) of the CEPA Investment Mediation Rules.

¹²⁹ See Coe (n 25), at p.35.

differences or disputes¹³⁰.

78. It has also been suggested that the investment mediation mechanism should provide for flexible standards for process design, language issues and representations of the disputing parties¹³¹. An effective investment mediation mechanism should set out a clear basic framework to guide the disputing parties on the process and should provide sufficient room for modifications and customization of the mediation rules to fit with the circumstances of the individual cases and the preference of the parties.

KEY ISSUES IN THE DESIGN OF THE MODEL RULES FOR AN EFFECTIVE INVESTMENT MEDIATION MECHANISM

79. The insightful paper by Professor Jack Coe, “*Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*” has provided a much-needed analysis on the considerations involved in the design of investment mediation mechanism. The following paragraphs seek to provide an overview of the key issues involved in the design of the model rules for an effective investment mediation mechanism.
80. Given the complexities of the issues involved, the present paper does not seek to provide the ultimate answers to all such issues and it is hoped that the questions raised below can be addressed in future researches on the topic. Nevertheless, as a preliminary observation, the CEPA Investment Mediation Rules does provide a suitable reference model for the design of an effective investment mediation mechanism that is in line with the key principles discussed above.
- (i) *Scope of Matters for Mediation*
81. Given the highly flexible nature of investment mediation, the scope of matters that can be subject to mediation may include the whole dispute, certain causes of actions and discrete issues of a dispute¹³².

(ii) *Timing of Mediation*

¹³⁰ See Article 7(2) of the IBA Rules for Investment Mediation (2012).

¹³¹ Wolf von Kumberg, Jeremy Lack and Michael Leathes, “*Enabling Early Settlement in Investor-State Arbitration – The Time to Introduce Mediation Has Come*”, ICSID Review – Foreign Investment Law Journal, Volume 29, Issue 1, 1 February 2014, pp. 133 – 141, see p.138.

¹³² See Franck (n 12), at p.74.

82. Depending on the choice of the disputing parties, investment mediation should be available at any stage of the disputes.
83. 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. 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 issued¹³³. This example illustrates that parties' view may change in light of the exchange of written pleadings, oral submissions during the hearings, orders made by the arbitral tribunals as the case progresses. As such, it is important for investment mediation to be available at any stage of disputes so that the parties may utilize it when appropriate.
84. It is also of interest to note that there may also be opportunities to foster settlements through mediation even during the post-award phase. Observers have noted that this may involve the creative exploration of whether there are still opportunities to generate value amongst investors and States that foster mutual interests in light of how international law rights have been adjudicated¹³⁴.

(iii) *Mandatory Mediation*

85. A consideration in the design of investment mediation mechanism is whether there should be mandatory mediation. Professor Lucy Reed has expressed a degree of skepticism about the value of mandatory ADR for international investment disputes, and indicated that the experience of national court system in mandatory ADR (including court-ordered mediation) may not readily translate to resolution of disputes between governments and foreign investors¹³⁵. Professor Jack Coe has also commented that “*the system ought to be particularly on guard against adding elements of coercion unsupported by data or an articulated policy basis*”¹³⁶.
86. That said, mandatory mediation comes in many forms¹³⁷. In the context

¹³³ See Schwebel (n 19), at pp. 237 – 238.

¹³⁴ See Franck and Ratigan (n 125), at p.131.

¹³⁵ See Reed (n 116), at p.30.

¹³⁶ See Coe (n 25), at p.36.

¹³⁷ 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. (Source: Nancy A. Welsh and

of ISDS disputes, a form of mandatory mediation that may be worth considering is to mandate the parties to attempt to resolve their dispute through mediation during the “cooling off period” before resorting to arbitration. In light of the current insufficient understanding and experience over investment mediation, the aforesaid form of mandatory mediation may be useful in encouraging the wider use of such mechanism¹³⁸. Such mandatory mediation is also compatible with the principle of voluntariness as the disputing parties are free to withdraw from the mediation process.

87. Moreover, it has been observed that it is generally easier to effect a negotiated settlement of a dispute if a mediator intervenes earlier rather than later in the conflict because following the submission of the dispute to international arbitration, the difficulties of its settlement may increase due to the hardening of the disputant’s positions¹³⁹, further deterioration of the relationship between the parties and the increased attention of the media, political parties, non-governmental organizations and the public on the dispute¹⁴⁰. As a result, the aforesaid form of mandatory settlement may increase the chance of successful settlement in the early stage of the dispute. Furthermore, such mandatory mediation would, to some extent, render the initiation of the mediation mechanism automatic, which addresses the concern over the perception that the making of an invitation to mediation by a disputing party may be interpreted as a sign of weakness¹⁴¹.
88. 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 dispute, narrowing the issues, and assisting the parties in gaining a better understanding of the case¹⁴².

(iv) *Number of Mediators*

89. Investment mediation can be conducted by a single mediator, co-

Andrea Kupfer Schneider, “*The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*”, Harvard Negotiation Law Review, Volume 18, 2013, see 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. (Source: See Welsh (n 122), at p.110 – 111.)

¹³⁸ Melissa Hanks, “*Perspectives on Mandatory Mediation*”, University of New South Wales Law Journal, Volume 35, Issue 3, 2012, see p.951. See also Welsh and Schneider (n 137), at p.132.

¹³⁹ See Salacuse (n 15), at p.444.

¹⁴⁰ See Constain (n 103), at p.35.

¹⁴¹ See Coe (n 25), at footnote 129.

¹⁴² See Sussman (n 30), at p.8.

mediators or a mediation commission consisting of multiple mediators.

90. As observed by Professor Jack Coe, parties should be entitled to select their own conciliator or conciliators, subject to the usual default to an appointing authority upon expiry of a designed period of time because such feature would allow the parties to have greater trust in the process¹⁴³.
91. In the CEPA Investment Mediation Rules, unless otherwise agreed by the parties, the default position is a mediation commission consisting three mediators (with each parties appointing one and the chairperson to be appointed jointly by the parties)¹⁴⁴. The advantage of such arrangement is that the parties can have a say in appointing its own mediator, which give them a greater sense of control over the process. While such mediation commission model may add complexity to the mediation process management and entail coordination among mediators, such model, with mediators of the right caliber appointed, has the benefit of allowing a greater diversity of mediators in terms of linguistics, cultural and technical backgrounds, and this can potentially create a greater balance in the team and facilitate the “brain-storming” of creative settlement arrangements.

(v) *Qualifications and Code of Conduct on Mediators*

92. To ensure the credibility and effectiveness of the dispute settlement mechanism, it is clear that both mediators and arbitrators have to be knowledgeable about public international law and international investment law.
93. However, as compared with arbitrators whose role is to adjudicate the cases in accordance with the relevant investment treaties, the applicable laws and the facts of the cases, mediators need to possess some different skills such as the ability to understand and deal with a wide variety of emotional, psychological, organizational, political, and process issues that obstruct understanding between the parties¹⁴⁵. In this regard, Professor J. W. Salacuse has commented that “*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*

¹⁴³ See Coe (n 25), at p.38.

¹⁴⁴ See Article 5(1) of the CEPA Investment Mediation Rules.

¹⁴⁵ See Salacuse (n 15), at p.441.

of a litigator”¹⁴⁶.

94. The differences in the role of mediator and that of arbitrator are best illustrated by the successful mediation by Professor Thomas Wälde in the energy dispute between the Swedish, State-owned company Vattenfall and the Polish State integrated energy company PSE. In that case, instead of simply hearing the legal arguments made by each side, Professor Wälde, who was assisted by experts in electricity regulatory economics, electricity engineering and financial analysis, actively worked to identify and eliminate the various barriers that had obstructed negotiations¹⁴⁷. To achieve this, Professor Wälde shuttled between Stockholm and Warsaw, interviewed key players in depth, held extended formal and informal bilateral consultations, and spent some 40 to 50 days at the “*intelligence gathering*” exercise¹⁴⁸. Professor Wälde produced a long and detailed analysis of the materials evidencing the parties negotiations and agreements and the evolution of the transaction¹⁴⁹, and came back to the disputing parties with a proposal and succeeded in persuading the senior executives of both parties that this proposal was rooted in their ideas¹⁵⁰. The aforesaid tasks that have been undertaken by Professor Wälde in the case are quite different from that of an arbitrator.
95. Under the CEPA Investment Mediation Rules, it is provided that the mediators shall have attained the relevant qualifications 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 disputes¹⁵¹.
96. Apart from the issue of qualification of mediators, the code of conduct on mediators is essential for ensuring the legitimacy and credibility of the investment mediation mechanism. Nevertheless, due to the differences in the respective roles between arbitrators and mediators, the considerations over the design of the code of conduct on mediators should presumably be different from those for the code of conduct on arbitrators. In this regard, the CEPA Investment Mediation Rules have set out very comprehensive code of conduct of mediators. 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

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*, at p.438.

¹⁴⁸ See Schwebel (n 19), at p. 238.

¹⁴⁹ See Sims (n 58), at pp. 6 – 7.

¹⁵⁰ See Schwebel (n 19), at p. 239.

¹⁵¹ See paragraph 1.6 of the Annex to the CEPA Investment Mediation Rules.

reasonable¹⁵².

97. Under the CEPA Investment Mediation Rules, mediators are required to avoid their performance from being affected by their own financial, business, professional, family or social relationships or responsibilities¹⁵³. Moreover, unless otherwise agreed by the disputing parties, by accepting an appointment as mediator of a dispute under the CEPA Investment Agreement, the mediator is deemed to agree not to act in any other role (including but not limited to counsel, arbitrator, expert or witness) in respect of: (i) any differences or disputes which are the subject of the mediation; or (ii) any other differences or disputes in which a party is involved as a disputant pending the resolution of the dispute in mediation¹⁵⁴.
98. Moreover, if, during the course of the mediation, a mediator becomes aware of any facts or circumstances that may call into question the mediator's independence or impartiality in the eyes of the parties, the mediator is required under the CEPA Investment Mediation Rules to disclose those facts or circumstances to the parties in writing without delay¹⁵⁵.
99. On the issue of mediators for investment mediation, it is also of interest to note that Professor J. W. Salacuse has suggested the creation of an international investment mediation service by international institutions and other respected organizations. In the view of Professor Salacuse, such service would consist of a corp of experienced international mediators who could be called upon to offer their assistance in cases of disputes between investors and the host governments¹⁵⁶.

(vi) *Management of the Mediation Process*

100. Both the CEPA Investment Mediation Rules¹⁵⁷ and the IBA Rules for Investor-State Mediation (2012)¹⁵⁸ have included the mechanism of

¹⁵² See Article 7(1) of the CEPA Investment Mediation Rules.

¹⁵³ See Article 7(3) of the CEPA Investment Mediation Rules.

¹⁵⁴ See Article 7(4) of the CEPA Investment Mediation Rules. Article 7(6) of the CEPA Investment Mediation Rules further provides that “[i]f the Parties are unable to resolve a Dispute through mediation, the mediators who were appointed to conduct the mediation shall not be appointed as judge, arbitrator, agent or legal adviser of any Party to the Dispute in any subsequent proceedings (including litigation and arbitration proceedings) of the same or related dispute, unless the Parties otherwise agree”.

¹⁵⁵ See Article 7(5) of the CEPA Investment Mediation Rules.

¹⁵⁶ See Salacuse (n 15), at p.445.

¹⁵⁷ See Article 9 of the CEPA Investment Mediation Rules.

¹⁵⁸ See Article 9 of the IBA Rules for Investor-State Mediation (2012).

mediation management conference to ensure that the mediation process is well-organized and efficient.

(vii) *Hybrid Models of Arbitration and Mediation*

101. Arbitration and mediation are two dispute settlement mechanisms that can function in a complementary manner with each other. There are a wide variety of hybrid models of arbitration and mediation, and some examples are set out as follows¹⁵⁹:

Med-Arb: a process in which mediation is first attempted before arbitration is commenced. If no settlement agreement is reached, the appointed arbitrator will proceed to hear the case.

Arb-Med: a process in which the disputing parties first commence arbitration and have the substantive arbitration hearings before mediation is attempted. A common form of Arb-Med would involve an arbitrator preparing an award under seal before taking up the role of mediator, and if the mediation does not result in settlement, the earlier drafted award under seal will be issued.

Arb-Med-Arb: a process where disputing parties commence arbitration, and mediation is attempted before the substantive arbitration hearing. In the scenario that the disputing parties come to settlement after mediation, they can return to the arbitral tribunal to record a consent arbitral award. If however no settlement is reached through mediation, the disputing parties will proceed with arbitration.

102. There are also two models called Med-in-Arb¹⁶⁰ and Arb-in-Med¹⁶¹. However, strictly speaking, unlike Med-Arb, Arb-Med and Arb-Med-Arb, the two aforesaid models are not actually hybrid processes because

¹⁵⁹ E.Chua, “A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure”, *Journal of Transnational Dispute Management*, August 2018, see pp. 3 – 6.

¹⁶⁰ Med-in-Arb is an arbitration process where the arbitrator uses facilitative techniques to encourage settlement without switching out of the arbitrator role. Such techniques may include arbitrators facilitating discussions and possible agreements on scheduling, discovery and other procedural matters, “setting the stage” for settlement through management of the pre-hearing process, making decisions on information exchange, issuing partial awards on key issues susceptible to early disposition, and the like, promoting use of mediation, offering preliminary views on a case or presenting proposals for settlement, and rendering a decision based on a settlement agreement. (Source: See Chua (n 159), at p.5.)

¹⁶¹ Arb-in-Med is a mediation process where a mediator uses evaluative techniques without switching out of the mediator role. Such techniques may include mediators using non-binding evaluation or mediator proposals as a means of encouraging settlement and mediators “setting the stage” for adjudication and other dispute resolution options by helping parties to design a dispute resolution process. (Source: See Chua (n 159), at p.6.)

the nature of the processes involved remains essentially the same throughout the dispute resolution procedure (i.e. for Med-in-Arb, an arbitration process and, for Arb-in-Med, a mediation process), and there are no formal switching “hats” by the neutrals involved¹⁶².

103. In respect of Med-Arb, Arb-Med and Arb-Med-Arb, a consideration in the process design is whether the mediation and arbitration will be conducted by the same or different neutrals. An advantage of hybrid models with the same neutrals is the potential savings in cost and duration because where the mediator and arbitrator is the same person, there is familiarity with the dispute, thus avoiding the need for any duplication of work, additional expense or delay when switching from one process to another¹⁶³.
104. It has been suggested that legal culture may influence the parties’ use of same neutral hybrid procedure¹⁶⁴. For example, it was said that China’s long-standing emphasis on the stability and harmony of the society and on deference to authority have underpinned the practice of mediation by arbitrators or judges, and Germany also has a long tradition of adjudicators engaging in settlement-oriented activities¹⁶⁵. That said, it has also been observed that there are same neutral hybrid practice in the United States¹⁶⁶.
105. However, the same-neutral hybrid procedures do come with their own challenges. A particularly challenging issue is whether the same-neutral’s impartiality will be affected by such hybrid procedures. For example, there may be concerns that in the event that the mediation procedure fails and the arbitration continues, the neutral, as an arbitrator, may lose his or her objectivity on account of the information he or she became privy to during the mediation procedure¹⁶⁷. The neutral may also gain access to information and documents which are confidential and privileged during

¹⁶² See Chua (n 159), at p.6. Klaus Peter Berger, “*The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute Offering Preliminary Views, Discussion Settlement Options, Suggesting Solutions, Caucusing*”, *Journal of International Arbitration*, Volume 35, Issue 5, 2018, pp. 501 – 516, see pp. 513 – 514.

¹⁶³ See Chua (n 159), at p.8.

¹⁶⁴ Dilyara Nigmatullina, “*The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study*”, *Journal of International Arbitration*, Volume 33, Issue 1, 2016, pp.37 – 82, see pp.62 – 63.

¹⁶⁵ Thomas J. Stipanowich and Véronique Fraser, “*The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases*”, Pepperdine University Legal Studies Research Paper No. 2017/4 (available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920785), see p.13.

¹⁶⁶ *ibid.*, see pp. 13 -14.

¹⁶⁷ Gabrielle Kaufmann-Kohler, “*When Arbitrators Facilitate Settlement: Towards a Transnational Standard – Clayton Utz / University of Sydney International Arbitration Lecture*”, *Arbitration International*, Volume 25, No.2, 2009, pp. 187 – 205, see pp. 197 – 198.

the mediation process, but such documents and information may not be admissible in the arbitral proceedings. While there may be rules to prevent the admission of information or documents obtained during mediation, it would, in practice, be very difficult for the neutral to block out or erase information obtained during mediation when determining an award as an arbitrator¹⁶⁸. Such risk is more evident in the scenario of Med-Arb. As for Arb-Med, because the disputing parties will most likely have already disclosed information that would materially affect the result of arbitration during the hearings, the aforesaid risk of the hybrid procedure will presumably be less.

106. Another inter-related risk is the expression of provisional view by the neutral at the early stage of the hybrid process when the disputing parties have not yet had a sufficient opportunity to express their views and, in the scenario that the parties fail to settle, the arbitral award resulted from such process may be at risk of being challenged on the ground of arbitrator's bias¹⁶⁹. A possible solution for addressing this risk is to first obtain an express waiver from the disputing parties of any possible challenge against the tribunal or the award resulting from the receipt of information by the tribunal during the mediation process and the views on it that the tribunal will have expressed¹⁷⁰.
107. Moreover, private caucus between the mediator and one of the disputing parties is a common tool deployed in mediation process to allow a disputing party to discuss its concerns and interests candidly with the mediator. Apart from subjective opinions and personal comments, private caucuses may also involve the divulging of confidential information¹⁷¹. This gives rise to concerns that the information obtained through private caucuses, may lead the mediator consciously forming an opinion that affects the subsequent arbitration¹⁷² and there is also a due process concern as the disputing party cannot rebut the comments made by the other disputing party made in the private caucuses¹⁷³. Three possible

¹⁶⁸ Alexis Mourre, "The Proper Use of Med-Arb in the Resolution of International Disputes", Asian Dispute Review, Volume 18, Issue 2, 2016, pp. 94 – 99, see p.98. Tai Heng Cheng and Anthony Kohtio, "Some Limits to Apply Chinese Med-Arb Internationally", New York Law School Legal Studies, Research Paper Series 09/10 # 33, see p.95.

¹⁶⁹ See Mourre (n 168), at pp.96 – 97. For a case concerned with the challenge of an arbitral award on the ground of arbitrator's bias allegedly resulted from hybrid arbitration and mediation process, please refer to *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157 and *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

¹⁷⁰ *ibid.*, at p.97.

¹⁷¹ Srikant Deekshitha and Arka Saha, "Amalgamating the Conciliatory and the Adjudicative: Hybrid Processes and Asian Arbitral Institutions", Indian Journal of Arbitration Law, Volume III, Issue 1, 2014, pp. 76 – 100, see p.90.

¹⁷² *ibid.*

¹⁷³ See Kaufmann-Kohler (n 167), at p. 198.

solutions have been suggested to address this concern, namely¹⁷⁴: (i) prohibiting the information obtained through private caucuses from being used by the arbitrator if the arbitration continues; (ii) mandatory disclosure by the arbitrator of the information obtained through private caucuses to the other disputing party if arbitration proceeds; and (iii) do not engage in private caucuses at all.

108. For Med-Arb and Arb-Med, there may also be concerns of coercion exerted by the neutrals on the parties into settlement¹⁷⁵ because the fact that the mediation is conducted by the neutrals who will adjudicate or issue the award on the dispute in the event of failure of mediation may put pressure on the parties¹⁷⁶. That said, whether the aforesaid risks would materialize in practice depends very much of the skills and styles of the neutrals concerned.
109. The aforesaid concerns may nevertheless be addressed by having different neutrals as the mediator and the arbitrator for the hybrid procedures, but a downside that needs to be taken into account by the disputing parties would be the increase in cost.
110. On the design of hybrid models, Professor Jack Coe has proposed an innovative idea, which he termed as “*Concurrent Med-Arb*” (“CMA”). The CMA model involves one or more mediators “*shadowing*” the concurrent arbitral process and applying mediation techniques at various junctures of the process with a view to assisting the parties in reaching a settlement that might then be embodied in a consent arbitral award¹⁷⁷. As pointed out by Professor Coe himself, the challenge in crafting the architecture of CMA is to “*promote unencumbered exploitation of the strengths of [arbitration and mediation] while also containing costs and preventing one process from disrupting or subjugating the other*”¹⁷⁸.
111. The CMA model envisions a default composition of one arbitrator and one mediator, with each of them to be jointly appointed by the parties subject to the use of institutional appointments in case of deadlock¹⁷⁹. A variation to the aforesaid model is to have two mediators instead one,

¹⁷⁴ *ibid.*, see pp. 198 – 199.

¹⁷⁵ See Deekshitha and Saha (n 171), at pp. 92 – 93.

¹⁷⁶ See Kaufmann-Kohler (n 167), at p. 200.

¹⁷⁷ Jack J. Coe, Jr, “*Concurrent Med-Arb (CMA) – Some Further Reflections on a Work in Progress*” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), “*Investor-State Disputes: Prevention and Alternatives to Arbitration II*” (2010), see p.43.

¹⁷⁸ See Coe (n 25), at p.33.

¹⁷⁹ See Coe (n 177), at p.45.

with each disputing party appointing one¹⁸⁰. Such model would require frequent but efficient communications and cooperation between the arbitrators and mediators¹⁸¹. For example, the mediators are to be given copies of the principal arbitral submissions¹⁸² and can be present at arbitral hearings, site inspections, and the like¹⁸³.

112. It remains to be seen as how the innovative CMA model as advocated by Professor Jack Coe will function in practice. As observed by Professor Coe, the replacement of the prevailing three-arbitrator model by a single arbitrator may generate a counter-trend¹⁸⁴. Furthermore, if the disputing parties insist on adopting the three-arbitrator model, the additional mediators for shadowing the arbitration process would render the CMA model “*fee-heavy*”¹⁸⁵.

(viii) *Transparency of Investment Mediation*

113. Transparency is a thorny issue in the context of ISDS. It has been observed that in recent years, there has been the appreciable increase in process transparency and public scrutiny on investment arbitration¹⁸⁶ and one notable development is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration¹⁸⁷.
114. Confidentiality is considered to be an essential element in mediation in that it encourages parties to speak freely and openly in the mediation while ensuring the integrity of the process¹⁸⁸. However, ISDS disputes are different from purely private commercial disputes and confidentiality of mediation may come into tension with the trend towards greater

¹⁸⁰ *ibid.*

¹⁸¹ See Coe (n 25), at p.33. While there should be cooperation between the arbitrators and mediators under the CMA model, it has been pointed out by Professor Jack Coe that, unless the parties agree otherwise, the arbitrator should not be exposed to the *ex parte* views of the mediators regarding the merits and, in principle, the *ex parte* interaction between the arbitrator and the mediator should be confined to discussing scheduling and clerical matters required to mesh the two parallel processes. Furthermore, Professor Coe took the view that no arbitrator should attend a mediation session under the CMA model, prior to the finalization of a settlement agreement but may meet with the parties in the presence of the mediators to craft an award on agreed terms. (Source: See Coe (n 177), at pp. 46 – 47)

¹⁸² See Coe (n 177), at p.47.

¹⁸³ See Coe (n 25), at p.33.

¹⁸⁴ See Coe (n 177), at p.44.

¹⁸⁵ *ibid.*, see p.43.

¹⁸⁶ See Coe (n 25), at p.27.

¹⁸⁷ The full text of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration is available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

¹⁸⁸ 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, Volume 45, No. 2, see p.246.

transparency in ISDS¹⁸⁹.

115. As insightfully observed by Professor Jack Coe, it is 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 transparency¹⁹⁰.
116. Due to the specific nature of ISDS disputes, while the investment mediation mechanism should be kept private and confidential¹⁹¹, it needs to provide for flexibility on the confidentiality obligation to accommodate the needs and policies of host governments on transparency and public disclosure for individual cases¹⁹².
117. The CEPA Investment Mediation Rules provides that the mediation proceedings shall not be disclosed and shall remain confidential, save as otherwise agreed by the disputing parties and the mediation commission¹⁹³. Furthermore, the disputing parties, the designated mediation institutions, each member of the mediation commission and the persons who participate in the mediation shall not disclose any mediation communication to any other person¹⁹⁴.
118. Nevertheless, 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 mediation¹⁹⁵. Moreover, 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

¹⁸⁹ Jack J. Coe, Jr., “*Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*”, *Kansas Law Review*, Vol. 54, 2006, see p.1382.

¹⁹⁰ See Coe (n 25), at p.27.

¹⁹¹ *ibid.*, p.40.

¹⁹² For example, in the standard contract of the Government of the Hong Kong Special Administrative Region, it is provided that 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.

¹⁹³ See Article 11(1) of the CEPA Investment Mediation Rules.

¹⁹⁴ See Article 11(3) of the CEPA Investment Mediation Rules. Article 11(3) of the CEPA Investment Agreement further provides that “[w]ithout prejudice to the foregoing, none of the Parties shall, in any subsequent administrative review (if applicable), arbitration, judicial or any other proceedings, adduce as evidence, or invoke or rely on, any views expressed, statements, admissions or concessions made by the other Party, the Commission or individual member of the Commission; or any report or recommendations made by the Commission or individual member of the Commission”.

¹⁹⁵ See Article 11(4)(a) of the CEPA Investment Mediation Rules.

them¹⁹⁶.

119. Similarly, in the IBA Rules for Investor-State Mediation (2012), the confidentiality obligation does not extend to (i) the fact that the disputing parties have agreed to mediate or a settlement resulted from the mediation, unless they otherwise agree in writing and (ii) the terms of a settlement or partial settlement, unless and to extent that the disputing parties otherwise agree in writing¹⁹⁷. It is also provided that disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible¹⁹⁸.

(ix) *Investment Mediation and Third Party Funding*

120. The practice of third party funding in ISDS has been a contentious issue and may be identified as a concern that needs to be addressed in the Working Group III of UNCITRAL.
121. It has been observed that the rise of third party funding in litigation and arbitration will likely be accompanied by the increase in the use of funding in mediation because much mediation happens alongside the two aforesaid dispute resolution mechanisms¹⁹⁹. In fact, it has been reported by mediators that they have seen third party funders such as Harbour Litigation Funding at the mediation table²⁰⁰.
122. In Hong Kong, law reform with respect to third party funding has been undertaken and it has been clarified that third party funding of arbitration, mediation and related proceedings is permitted under Hong Kong law by amending the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620)²⁰¹. Given that the practice of third party funding may also give rise to concerns such as conflict of interests in the context of investment mediation (e.g. conflict of interests between the mediators and the third party funders concerned), considerations need to be given on the approach for regulation of the practice of third party funding in investment mediation.

¹⁹⁶ See Article 11(4)(b)(i) of the CEPA Investment Mediation Rules.

¹⁹⁷ See Article 10(3)(a) and (b) of the IBA Rules for Investor-State Mediation (2012).

¹⁹⁸ See Article 10(3) of the IBA Rules for Investor-State Mediation (2012).

¹⁹⁹ 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 1)*”, Kluwer Mediation Blog, 5 December 2016.

²⁰⁰ 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.

²⁰¹ Legislative Council Brief, “*Commencement of Section 3 of Arbitration and Mediation Legislation (Third Party Funding)*” (LP 19/00/16C), December 2018, see pp.1 -2.

(x) *Enforcement of Mediated Settlement Agreements*

123. Enforceability of mediated settlement agreements is a key element for the credibility of investment mediation as an effective dispute resolution tool²⁰². At the end of the day, it is an enforceable mediated settlement agreement that can give a sense of closure to the disputing parties.
124. Generally speaking, a mediated settlement agreement may be enforced in the domestic courts as a contract in the event of a breach. However, enforcement under contract has been commented as a “*circuitous, slow, complicated and expensive process, leaving the aggrieved party effectively back to square one*”²⁰³.
125. Some efforts have been made to strengthen the enforcement of mediated settlement agreements in some domestic jurisdictions²⁰⁴, including (i) allowing direct enforcement of a mediated settlement agreement in court²⁰⁵; (ii) allowing a mediated settlement agreement to be transposed into a notarial deed for enforcement²⁰⁶; (iii) allowing a mediated settlement agreement to be enforced as a consent arbitral award²⁰⁷.
126. In light of the international nature of ISDS disputes, the international enforceability of settlement agreements reached through investment mediation becomes even more crucial. The many variations in the approaches of domestic jurisdictions with respect to the enforcement of mediated settlement agreement may deter foreign investors from utilizing investment mediation and it has also been observed cross-border enforcement of mediated settlement agreement can be difficult²⁰⁸. Such concerns on the international enforceability of mediated settlement agreements can, to a certain extent, be addressed by the new United Nations Convention on International Settlement Agreements Resulting from Mediation (“UN Mediation Convention”) prepared by the Working Group II of UNCITRAL²⁰⁹, which has been commented as the equivalent

²⁰² See Joubin-Bret (n 119), at pp.163 – 165.

²⁰³ See Chua (n 159), at p.6.

²⁰⁴ *ibid.*, see pp.6 – 7.

²⁰⁵ See e.g. the Commercial Mediation Act 2010 of Ontario, Canada, the Philippines Alternative Dispute Resolution Act and the Singapore Mediation Act 2017.

²⁰⁶ See e.g. Spain’s Act No.5/2012 of 6 July 2012 on mediation in civil and commercial matters and Act No. 1/2000 of 7 January 2000 on civil procedure.

²⁰⁷ See e.g. India’s Arbitration and Conciliation Act 1996 and the Arbitration Law of China.

²⁰⁸ See Joubin-Bret (n 119), at p. 165.

²⁰⁹ The text of the draft UN Mediation Convention is available at <https://undocs.org/en/A/CN.9/942> and such text is to be read together with Part III (Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation) of the report of the fifty-first session (25 June – 13 July 2018) of UNCITRAL (available at <https://undocs.org/en/A/73/17%20>). Apart from the draft UN Mediation

of “*New York Convention*” for mediation²¹⁰.

127. As explained by Ms. Anna Joubin-Bret in her presentation during Hong Kong Forum – 60th Anniversary of New York Convention on 20 September 2018, mediated settlement agreements resulting from international investment disputes are within the scope of application of the UN Mediation Convention to the extent of the reservations made by the States²¹¹.
128. Hybrid models such as Arb-Med and Arb-Med-Arb provide an effective alternative mechanism for international enforcement. If the disputing parties successfully resolve their disputes in mediation, they can go back to the arbitral tribunal to record their settlement agreement in the form of a consent arbitral award²¹². Such procedure is available under Rule 43 of the ICSID arbitration rules²¹³ and Rule 36(1) of the UNCITRAL arbitration rules (2013)²¹⁴. A distinctive advantage of procedure is that the

Convention, Working Group II has prepared a draft model law on international commercial mediation and international settlement agreements resulting from mediation and the draft text of such model law is available at <https://undocs.org/en/A/CN.9/943>.

²¹⁰ Nadja Alexander, “A *Convention on the Enforcement of International Mediation Settlement Agreements and a New Model Law*”, Kluwer Mediation Blog (16 March 2018).

²¹¹ On the reservations that may be made by the States under the UN Mediation Convention, Article 8 of the draft text provides that:

“Article 8. Reservations

1. 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.”

²¹² See Chua (n 159), at p.4.

²¹³ Rule 43 of the ICSID arbitration rules provides that:

“Rule 43 Settlement and Discontinuance

(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.”

²¹⁴ Rule 36(1) of the UNCITRAL arbitration rules (2013) provides that:

Settlement or other grounds for termination

Article 36

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.”

In the UNCITRAL model law on international commercial arbitration (2006), it is provided that:

“Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state

consent arbitral awards can be enforceable under the New York Convention. This is particularly effective in ensuring the international enforceability of mediated settlement agreements in light of the large number of Contracting States to the New York Convention (in total, 159 at present²¹⁵), whereas it would take some time before the UN Mediation Convention is widely ratified and implemented by States²¹⁶.

129. However, it should be pointed out that the mechanism for enforcement of mediated settlement agreements as consent arbitral awards is not available for Med-Arb because where an arbitrator is appointed after the dispute has been resolved in mediation, there is not a dispute existing between the parties to provide a basis for arbitration at the time of commencement of the arbitration²¹⁷. With respect to Arb-Med and Arb-Med-Arb, there is no such problem as the arbitration has commenced before the mediation starts²¹⁸.

CONCLUSION

130. Investment mediation has the potential to be an effective dispute resolution mechanism for ISDS disputes and the greater use of such mechanism should be encouraged. Apart from being able to function on its own, investment mediation can be creatively combined with investment arbitration to strengthen the legitimacy and effectiveness of the system of ISDS.
131. Nevertheless, investment mediation is not a “*panacea*” to all the problems of ISDS²¹⁹, and it has its limitations. For example, when the disputing parties have inflexible demands, the mediators have not been provided with adequate information or sufficient expert support teams, or the relationship between the disputing parties is beyond repair, even top legal minds such as Judge Stephen M. Schwebel may not be able to successfully mediate the disputes²²⁰. However, this should not deter the efforts to promote the greater use of investment mediation for ISDS.
132. Investment mediation is currently under-used and much work needs to be

that it is an award. Such an award has the same status and effect as any other award on the merits of the case.”

²¹⁵ The list of Contracting States to the New York Convention is available at <http://www.newyorkconvention.org/list+of+contracting+states>.

²¹⁶ See Chua (n 159), at p.7.

²¹⁷ *ibid.*, see pp.7 – 8.

²¹⁸ *ibid.*, see p.8.

²¹⁹ See Chew, Reed and Thomas (n 43), at p. 27.

²²⁰ See Schwebel (n 19), at pp. 237 – 238.

done to increase its use. As international organizations such as UNCITRAL are discussing the issue of ISDS reform amid the current backlash against the ISDS system, perhaps the timing is right to advocate for the incorporation of investment mediation in the reform options that may come out from such discussions. In this regard, the development of a set of high standard investment mediation model rules would be an option that should be further studied.