CONCILIATION OF INVESTOR–STATE DISPUTES, ARB-CON-ARB, AND THE SINGAPORE CONVENTION

Conciliation is a dispute settlement mechanism that is particularly suitable for investor–State disputes. It provides flexibility for political sensitivities, relationship preservation, and technical complexity. Most importantly, it offers neutral evaluation of the quantum of compensation. Yet conciliation has played a minimal role in assisting the settlement of investor–State disputes in the last 50 years – why? Two important obstacles to the settlement of investment disputes are the investor's preference for binding results and restrictions on government officials for fear of corruption. This article examines how conciliation and arbitration should be structured to form complementary negotiation windows, examines the prospects of the 2019 Singapore Convention on International Settlement Agreements Resulting from Mediation for conciliation, and recommends that institutions handling investment disputes offer Arb-Con-Arb dispute settlement.

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I. Introduction

A. What is conciliation?

1 Under international law, conciliation is a unique process which shares the characteristics of both arbitration and mediation. States can structure conciliation as an alternative method of dispute resolution or as a preliminary step to arbitration.[1] In the practice of international law, conciliation is sometimes subsumed as a form of mediation.[2] For instance, the Permanent Court of Arbitration's ("PCA's") Optional

1 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 605. See also International Chamber of Commerce Conciliation Rules 1988 (ICC Publication ICC No 447-3); United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Conciliation Rules 1980 (23 July 1980).

2 David J Bederman, *International Law Frameworks* (Foundation Press, 2001) at pp 234–235; John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) at pp 27–31.

Conciliation Rules[3] treats conciliation and mediation interchangeably.[4] At other times, conciliation is practiced in a manner more akin to arbitration – once the parties have consented to conciliation, their consent is irrevocable and the conciliation will proceed.[5] The *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*[6] under the United Nations ("UN") Convention on the Law of the Sea[7] is a form of such "compulsory conciliation".[8]

2 Many definitions of international conciliation have been given over the years, though none have been universally agreed on.[9] Conciliation, like mediation, is a method of dispute settlement that involves a neutral third party, which may be a person, a panel of persons or an institution appointed by the disputing parties. Generally, what distinguishes conciliation from other methods of dispute settlement such as arbitration, fact-finding, inquiry and mediation is that the conciliator will conduct an impartial examination of all aspects of a dispute, and *recommend terms of a settlement to the parties or make other recommendations for settling the dispute*.

3 Unlike an arbitral tribunal's findings, the conciliator's recommendations are non-binding, but are meant to form a basis for further negotiations.[10] The conciliator may also be obliged under some conciliation procedures to issue a written report. This is the case in an International Centre for the Settlement of Investment Disputes

3 Effective 1 July 1996.

4 Permanent Court of Arbitration Optional Conciliation Rules 1996 (effective 1 July 1996) "Introduction" at p 152:

> In modern international practice, the word 'mediation' is sometimes used to designate a process that is very similar to the procedures for 'conciliation' described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words 'conciliation' to 'mediation' and 'conciliator' to 'mediator'.

5 Nassib G Ziadé, "ICSID Conciliation" (1996) 13(2) *News from ICSID* 3 at 4.

6 PCA Case No 2016-10, Decision on Competence (19 September 2016).

7 1833 UNTS 3 (10 December 1982; entry into force 16 November 1994).

8 United Nations Convention on the Law of the Sea (1833 UNTS 3) (10 December 1982; entry into force 16 November 1994) Pt XV and Annex 2; *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* PCA Case No 2016-10, Decision on Competence (19 September 2016): This proceeding involved formal submissions and hearings.

9 Sven Michael George Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (TMC Asser Press, 2008) at p 45.

10 If the parties agree to give a conciliation panel or commission binding powers, this transforms the process from a non-binding to a binding one.

("ICSID") conciliation[11] but not in a PCA optional conciliation.[12] Other rules suitable for international investor–State disputes include the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Commercial Conciliation,[13] the International Chamber of Commerce ("ICC") Mediation Rules[14] and the Stockholm Chamber of Commerce Mediation Rules.[15]

B. Conciliation and mediation defined

4 Conciliation may be distinguished from non-evaluative mediation in terms of their processes. Recommendations for settlement are issued in conciliation, which gives it a "semi-judicial aspect, since the commission of persons empowered has to elucidate the facts, may hear the parties, and must make proposals for a settlement, which is normally non-binding".[16] The mediator "will try to bring the parties together in order that they may *themselves* achieve a compromise solution" [emphasis added].[17] In contrast, a conciliator "will *himself* draw up and propose terms of an agreement designed to represent what is, in his view, a fair compromise of a dispute after having discussed the case with the parties" [emphasis added].[18]

II. Suitability for investor–State disputes

A. Important aspects of investor–State disputes

5 Is conciliation suitable for disputes relating to investments? Alternative dispute resolution ("ADR") has the advantage over formal

11 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) ("ICSID Convention") Art 34(2); ICSID Convention Conciliation Rules 2006 rules 30–32.

12 Permanent Court of Arbitration Optional Conciliation Rules 1996 (effective 1 July 1996).

13 UNCITRAL Model Law on Commercial Conciliation GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002); Eric van Ginkel, "The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal" (2004) 21(1) J Int Arb 1; Pieter Sanders, *The Work of UNCITRAL in Arbitration and Conciliation* (Kluwer, 2004).

14 1 January 2014.

15 Entry into force 1 January 2014.

16 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) at p 719.

17 Alan Redfern & Martin Hunter, *The Law and Practice of International Commercial Arbitration* (Oxford University Press, 2009) at p 46.

18 Alan Redfern & Martin Hunter, *The Law and Practice of International Commercial Arbitration* (Oxford University Press, 2009) at p 46.

litigation of allowing parties to handle conflicts in the manner that is agreed upon by, and thus acceptable to, the parties involved.[19] However, the manner in which ADR practices are instituted may actually make them less effective as inequalities may exist between the disputing parties depending on their capacity to engage in the process and obtain adequate representation.[20] Yet the potential for conciliation to be used to settle disputes is clearly reflected in the reality that 40% of ICSID arbitrations are settled before the final award.[21] In general, out of the 444 concluded investor–State cases to date, approximately 26–28% are settled before an award.[22]

(1) Relationship preservation

6 Arbitration will typically be the last resort where the parties have reached the end of their business relationship.[23] General Counsel of the World Bank Aron Broches observed that:[24]

> 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.

The informal conciliation environment is likely to be warmer than that of the adjudicative forum. The "win-win" character of the conciliatory

19 Matthieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press, 2008) at p 176.

20 Matthieu Deflem, Sociology of Law: Visions of a Scholarly Tradition (Cambridge University Press, 2008) at p 176.

21 International Centre for Settlement of Investment Disputes ("ICSID"), *ICSID Caseload Statistics* (Issue 2019-1, 2019) at p 9; ICSID, "Background Information on the International Centre for Settlement of Investment Disputes (ICSID)" https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf (accessed June 2019); "ICSID Arbitration: How Long Does It Take?" https://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf (accessed June 2019).

22 United Nations Conference on Trade and Development ("UNCTAD"), *Recent Trends in IIAs and ISDS* (IIA Issues Note No 1, February 2015) at p 7 (28%;); UNCTAD, *Investor–State Dispute Settlement: Review of Developments in 2015* (IIA Issues Note No 2, June 2016) (26%); UNCTAD, *Investor–State Dispute Settlement: Review of Developments in 2014* (IIA Issues Note No 2, May 2015) (28%); See also UNCTAD, "Fact Sheet on Investor-State Dispute Settlement Cases in 2018" https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf (accessed June 2019).

23 Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 444; Aron Broches, "Settlement of Disputes Arising Out of Investment in Developing Countries" (1983) 11 Int'l Bus Law 206; Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

24 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

process is a major advantage since it facilitates the maintenance of a harmonious business relationship, whereas the use of an adjudicative form may rupture this connection.[25] Thus, conciliation should be preferred in situations where the parties wish to preserve their extant contractual and commercial ties. For example, conciliation would facilitate the maintenance of a long-term contract or joint venture relationship.

7 Conciliation is appropriate where the parties are prepared to continue their co-operation on the investment.[26] It was noted in 1990, based on the bilateral treaties in force at the time, that:[27]

> Although arbitration is the ultimate resolution method agreed upon in both cases, conciliation is typically found only in the procedure for the settlement of disputes between an investor and the host state. It is likely that conciliation is contemplated in the latter case, since it is a settlement mechanism that can help preserve an amicable relationship between the investor and the host state, thereby facilitating the continuation of the foreign investment.

Conciliation can be particularly effective in cases in which the parties are engaged in an ongoing long-term project, involving significant amounts in sunk costs, where it is necessary to resolve disputes while the project is still continuing. Disputes in oil and gas explication projects, mining and long-term infrastructure projects are well suited.[28] The relationship between the investor and the State in *Hess Equatorial Guinea Inc and Tullow Equatorial Guinea Ltd v Republic of Equatorial Guinea*,[29] which has continued with further investments despite a suspended conciliation process and threat of international dispute settlement proceedings, is a good example of the compatibility of conciliation with preserving long-term investment projects.

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25 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 33.

26 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 29.

27 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 578.

28 Ucheora Onwuamaegbu, 'The Role of ADR in Investor–State Dispute Settlement: The ICSID Experience', (2005) 22(2) *News from ICSID* 12 at 13; Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 176.

29 *Hess Equatorial Guinea, Inc and Tullow Equatorial Guinea Ltd v Republic of Equatorial Guinea* ICSID Case No CONC(AF)/12/1).

(2) Political issues underlying investment disputes

8 International litigation is "but a phase in the unfolding of a political drama".[30] Certain types of disputes are better suited for conciliation;[31] in particular, diplomatic and political disputes are often resolved by mediation and conciliation. As political events often underlie investment disputes, these facts can create obstacles of equal difficulty in the search for a resolution. Where "bringing disputes settlement proceedings against a state is regarded as an 'unfriendly act' that may imply diplomatic costs in inter-state relations", conciliation procedures with their consensual outcomes may be more acceptable as they are a "softer" form of dispute settlement which is "less threatening to the sovereignty of host states".[32]

9 Conciliation has the flexibility to accommodate "diversity in the players and their interests, underlying antagonisms and disrupting developments", as well as the "evolution of political disputes".[33] Its semi-diplomatic nature offers political instead of strictly legal solutions. For example, in *Kardassopoulos and Fuchs v Georgia*,[34] the claimants sought the assistance of Henry Kissinger, the former US Secretary of State, to intervene in their favour with Georgia's President Shevardnadze. This diplomatic intervention of a neutral third party appeared to increase chances for settlement.[35] As conciliation has historical roots in sensitive diplomatic processes,[36] it may be especially useful for politically charged factual backgrounds such as a dispute between a State-owned enterprise as an investor, and another State.

10 An experienced conciliator could diffuse political tensions by issuing recommendations on the terms of settlement in the manner of a

30 Shabtai Rosenne, *The Law and Practice of the International Court* (Dordrecht: Martinus Nijhoff, 2nd Ed, 1985) at p 2.

31 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 176.

32 August Reinisch, "Elements of Conciliation in Dispute Settlement Procedures" in *Conciliation in International Law* (Christian Tomuschat, Riccardo Pisillo Mazzeschi & Daniel Thürer eds) (Brill, 2017) at pp 126 and 128.

33 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at pp 126–127.

34 ICSID Case No ARB/07/15, Award (3 March 2010).

35 *Kardassopoulos and Fuchs v The Republic of Georgia* ICSID Case No ARB/07/15, Award (3 March 2010) at [443]–[448].

36 Giorgio Sacerdoti, "Diplomatic Conciliation of Investment Disputes: The Italian-Swiss Controversy on Secondary Residences in Engadine (1990–1992) and Its Lessons" in *Reflections on the Constitutionalisation of International Economic Law:* Liber Amicorum *for Ernst-Ulrich Petersmann* (Marise Cremona *et al* eds) (Brill, 2013) at pp 415–416.

sagely elder. Where an investment dispute has become politicised due to accusations of corruption, government officials may be unable to obtain approvals for settlement within their domestic political and legal frameworks. Thus, they require the recommendations of a well-respected and neutral third party[37] in order to legitimise any settlement agreements they may enter into on behalf of their states. Without the legitimacy afforded by the recommendations of an independent and experienced conciliator, it could be impossible for government officials to settle a dispute without the threat of negative publicity, criminal and civil prosecution or political retaliation.

(3) Technical complexity

11 Technical complexities arising from an investment dispute such as predicting long-term consequences of a breach is not a hindrance to settlement by conciliation. When designing ICSID conciliation, Broches reported that in the Jamaica cases, where Jamaica unilaterally changed the rate of royalties provided in the agreement, with the effect of changing circumstances on long-term agreements, parties managed to reach a settlement.[38]

12 Conciliation preserves flexibility of practical solutions. Practitioners have given examples of disputes where during the course of an arbitration, the investor offered a non-monetary settlement.[39] In the dispute between Vattenfall and Poland, Thomas Wälde acted as mediator, assisted by a team of experts in electricity regulatory economics, electricity engineering and financial analysis.[40] He produced a long and detailed analysis of the materials evidencing the parties' negotiations and agreements and the evolution of the transaction, and made a proposal for settlement in a manner very much like ICSID

37 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 33.

38 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

39 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 135.

40 Thomas Wälde, "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" (2006) 22(2) Arb Int'l 205.

conciliation.[41] Thereafter, Vattenfall's ICSID arbitration against Germany was settled by negotiations.[42]

13 The focus of investment arbitration is payment of compensation for losses suffered by the foreign investor. This may involve complex determinations on the quantum of damages to be awarded, which small governments may not have the capacity to readily calculate or ascertain. This is where the evaluative aspect of a conciliator's recommendations is superior to the party-driven approach of mediation.

14 The difference between bilateral negotiations and evaluative conciliation is the expertise and trust of a third-party neutral, who would provide a rational view on the merits of the case. This rational view is often much needed in an adversarial situation of escalating tensions. The arbitrators cannot provide this, and the parties cannot glean such information from procedural orders alone. Commonly, the claimant's expert's calculation is several times larger than the respondent's expert's calculation and disputing parties are unable to break the deadlock in negotiations without a third party or third expert. It has been argued that when pure negotiations are not successful, third-party involvement is "inescapable if there is a will to put an end to the dispute".[43]

(4) Optimal economic and political bargain

15 In *Metalclad Corp v United Mexican States*,[44] even though the investor company won a US$17m award, the chief executive officer of the investor surprisingly lamented that "there are no real winners in this case".[45] An arbitral tribunal has to weigh the legal arguments presented by each side in the framework set by international law, treaties, contracts or domestic law, and determine breach, liability and how much

41 Thomas Wälde, "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" (2006) 22(2) Arb Int'l 205 at 205; Stephen Schwebel, "Is Mediation of Foreign Investment Disputes Plausible?" (2007) 22(2) *ICSID Review – Foreign Investment Law Journal* 237 at 238.

42 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* ICSID Case No ARB/09/6.

43 Marcelo Kohen, "Interaction between Diplomatic and Judicial Means at the Initiation of Proceeding" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 18.

44 ICSID Case No ARB(AF)/97/1.

45 *Metalclad Corp v United Mexican States* ICSID Case No ARB(AF)/97/1; "Landmark Victory Awarded to Metalclad in First Ever NAFTA Case" *PRN Newswire* (30 August 1999).

compensation is due. In conciliation, the investor and State will have greater room for implementing creative solutions.[46]

16 Third-party decision-makers in arbitration show that investment disputes can be handled with relative ease, even if the exact accuracy of their decisions on quantum have been criticised. This is where conciliation has a great economic advantage over arbitration, as parties would themselves negotiate further and reach the optimal economic bargain over the sum to be paid for settlement of their dispute.[47] Negotiated outcomes often reflect public policy concerns better.[48] The high rates of settlement in commercial disputes across a variety of industries and geographical areas suggest a similar potential for investor–State disputes.[49]

B. Cultural preferences for conciliation

(1) Cultural preferences vary over time

17 Theories have been posited that the popularity of arbitration "is founded in the Western tradition of conflict determination through binding, adversarial methods".[50] According to this theory, the increasing

46 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 29.

47 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 15.

48 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 39.

49 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 18; Eileen Caroll & Karl Mackie, *International Mediation – The Art of Diplomacy* (Kluwer Law International, 2000) at p 91; Frauke Nitschke, "The IBA's Investor–State Mediation Rules and the ICSID Dispute Settlement Framework" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 112.

50 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 638; Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" (2016) 33(1) J Int Arb 37 at 47; M Scott Donahey, "Seeking Harmony: Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?" (1995) 50(2) Disp Resol J 74 at 77; Julian D M Lew, "Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (ICCA Congress Series No 12) (Kluwer Law International, 2005) at p 425; Ahmad Jefri Rahman, "Developments in Arbitration and Mediation as Alternative Dispute Mechanisms in Brunei Darussalam", paper given at 11th General Assembly of the ASEAN Law Association (15–18 February 2012); Mas Achmad Santosa, "Development of Alternative Dispute Resolution (ADR) in Indonesia", paper given at the

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participation of Eastern states in international economic law should witness a shift towards "consensus-based" dispute settlement procedures such as conciliation over binding arbitration. Asian cultures which are less favourably disposed to adversarial procedures may find conciliation particularly attractive.[51] There is little point in debating in theory whether conciliation can be statistically proven to be the culturally preferred dispute resolution method in Asia.[52] Conciliation provisions are available in domestic dispute resolution forums *throughout* the Eastern *and* Western legal traditions. It finds cultural resonance in various jurisdictions across time. The more important point is to recognise that this theory of Asian preferences for non-adjudicative dispute resolution, if it proves true in the coming years, *could* make conciliation more popular in Asia.

18 Conciliation has been a common form of domestic dispute resolution in the East for centuries.[53] In Singapore, arbitrators can act as mediators.[54] The Hong Kong Law Reform Commission recommended that the Hong Kong Arbitration Ordinance[55] be amended to permit the use of conciliation during the arbitral process, to allow an arbitrator to act as a conciliator.[56] It is applicable to both domestic and international

8th General Assembly of the ASEAN Law Association (1 December 2003); *An Asian Perspective on Mediation* (Joel Lee & Teh Hwee Hwee eds) (Academy Publishing, 2009) at pp 5–6; Patricia-Ann T Prodigalidad, "Building an ASEAN Mediation Model: the Philippine Perspective", paper given at the 11th General Assembly of the ASEAN Law Association (2012); Sundaresh Menon, "Building Sustainable Mediation Programmes: A Singapore Perspective", speech given at the Asia-Pacific International Mediation Summit in New Delhi (14 February 2015).

51 Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) J Int Arb 479; Christopher M Koa, "The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China through the International Centre for Settlement of Investment Disputes" (1991) 24 NYU J Int'l L & Pol 439 at 487; Sally A Harpole, "The Combination of Conciliation with Arbitration in the People's Republic of China" (2007) 24(6) J Int Arb 623; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 445.

52 See, for example, Tatsuya Nakamura & Luke Nottage, "Japan" in *Arbitration in Asia* (Tom Ginsburg & Shahla Ali eds) (Juris, 2013) at pp 223–262.

53 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 611; M L Marasinghe, "The Use of Conciliation for Dispute Settlement: The Sri Lanka Experience" (1980) 29 ICLQ 389 at 393–395.

54 International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 16–17.

55 Cap 609.

56 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 622; Arbitration Ordinance (Cap 609) (Hong Kong) ss 32–33.

arbitrations.[57] The legal system of the People's Republic of China has been described as profoundly influenced by Confucian philosophy, which emphasises hierarchical grouping and the maintenance of social harmony through compromise. China's central and communist political structure has also discouraged an adjudicative legal system and individual rights.[58] Conciliation is practiced through socially based committees, arbitral bodies and the courts. Chinese statutes regulating international business matters suggest that the disputants use conciliation or mediation before resort to adjudicative mechanisms.[59] Conciliation has also been used between the American Arbitration Association, the National Council for US–China Trade, and the China International Economic and Trade Arbitration Commission ("CIETAC").[60] Japan has a statutory optional mechanism for the settlement of civil disputes that can either be initiated by a disputing party prior to litigation, or by the court.[61]

19 In the West, conciliation also has some share of support. Domestic international commercial arbitration laws increasingly include ancillary conciliation provisions as a preliminary or alternative dispute settlement method.[62] Some domestic regimes such as California have legislative provisions for conciliation as an optional, preliminary step before arbitration.[63] The Californian legislation even states that it is the policy of the State of California to encourage parties to an international

57 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 623; Arbitration Ordinance (Cap 609) (Hong Kong) s 2A(2). The Hong Kong Law Reform Commission noted that prior to the introduction of this provision it was regarded as improper for a conciliator to become an arbitrator and an arbitration could be set aside on this basis.

58 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 630.

59 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 631; Anne Judith Farina, "'Talking Disputes Into Harmony' China Approaches International Commercial Arbitration" (1989) 4 Am U Int'l L Rev 137 at 138–143.

60 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 633.

61 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 628; Hideo Tanaka, "The Role of Law in Japanese Society: Comparisons With the West" (1985) 19 UBC L Rev 375.

62 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 620.

63 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 624; California Civil Procedure Code §§ 1297.11–1297.432.

commercial agreement to resolve their disputes by conciliation.[64] In Australia, an arbitrator may act as a mediator in domestic arbitrations.[65]

20 In fact, between 1923 and 1929, dispute resolution statistics in Europe reflected that conciliation was more popular than arbitration. In May 1929, the International Chamber of Commerce based in Paris recorded that, out of 120 disputes, 80 were concluded by amicable settlement, 21 by conciliation, and only 19 by arbitration.[66] In reality, conciliation is not exclusively "Asian". The German approach to facilitating settlement involves proactive "managerial judging", in which the arbitrator's expression of a preliminary view on the merits of the case and the suggestion of a possible settlement does not constitute bias or pre-judgment.[67] In France, conciliation is expressly mentioned as one of the functions of the judge and arbitrator.[68]

21 In 1961, the executive director representing several Latin American States at the World Bank, Machado, noted that as a cultural matter, "*[c]onciliation enabled a government to save face*" [emphasis added].[69] The conciliation commission's report was considered extremely useful in certain cultures that placed particular emphasis on pride and reputation. Machado illustrated very accurately:[70]

> Sometimes 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.

64 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 625; California Civil Procedure Code § 1297.341.

65 Commercial Arbitration Act 2012 (WA) s 27D.

66 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 614–615; Michel Gaudet, "Overcoming Regional Differences" in *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Pieter Sanders ed) (ICCA Congress Series No 4) (Kluwer Law International, 1989) at pp 302–303.

67 Bernd Ehle, *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do – Recent Developments and Trends* (Bruylant, 2010) at p 82.

68 Bernd Ehle, *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do – Recent Developments and Trends* (Bruylant, 2010) at p 82; French Code of Civil Procedure Arts 1460 and 21.

69 International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* vol II-1 (Washington, DC: ICSID, 1968) at p 68, para 48.

70 International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* vol II-1 (Washington, DC: ICSID, 1968).

(2) Pragmatism in dispute settlement

22 Note Aron Broches' acute observation in 1984 that arbitration was preferred because of "a strong prejudice mostly in business circles against conciliation", but there was "a very strong tendency worldwide toward conciliation".[71] In spite of the growth of international courts and tribunals in the last 50 years, it is unlikely that judicial means will entirely replace diplomatic means of dispute settlement.[72] A review of older-generation investment treaties and policies showed that disputes between two states were generally sent to arbitration only if the disputes could not be settled through diplomatic channels.[73]

23 Resurgence of the "big state"[74] through stronger regulatory systems and government attitudes less indulgent of big businesses could see a revival of conciliation as the preferred method of settlement for investment disputes.[75] Conciliation, which blends a neutral third party's involvement with ultimate state control, has been described as reminiscent of the "old power determined trade diplomacy".[76] The World Trade Organization ("WTO") "member-driven" system is an

71 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54: "UNCITRAL found it useful to have conciliation rules."

72 Lucy Reed, "Observations on the Relationship between Diplomatic and Judicial Means" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at pp 292–296.

73 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 608.

74 Gabrielle Kaufmann-Kohler, "Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales ed) (Brill, 2012) at p 307.

75 Todd L Allee & Paul K Huth, 'The Pursuit of Legal Settlements to Territorial Disputes" (2006) 23(4) *Conflict Management and Peace Science* 285; Holley Hansen, Sara McLaughlin Mitchell & Stephen C Nemeth, "IO Mediation of Interstate Conflicts: Moving Beyond the Global *vs* Regional Dichotomy (2008) 52(2) Journal of Conflict Resolution 295; Sara McLaughlin Mitchell, "A Kantian system? Democracy and Third Party Conflict Resolution"（2002） 46(4) Am J Pol Sci 749; Paul R Hensel, "Contentious Issues and World politics: The Management of Territorial Claims in the Americas 1816–1992" (2001) 45(1) ISQ 81; Paul R Hensel *et al*, "Bones of Contention: Comparing Territorial, Maritime, and River Issues" (2008) 52(1) *Journal of Conflict Resolution* 117; Megan Shannon, "Preventing War and Providing the Peace? International Organizations and the Management of Territorial Disputes" (2009) 26(2) *Conflict Management and Peace Science* 144; Beth Simmons, 'Capacity, Commitment and Compliance: International Law and the Settlement of Territorial Disputes" (2002) 46(6) *Journal of Conflict Resolution* 829 (arbitration is much less likely when there is greater power asymmetry between disputing states).

76 August Reinisch, "Elements of Conciliation in Dispute Settlement Procedures" in *Conciliation in International Law* (Christian Tomuschat, Riccardo Pisillo Mazzeschi & Daniel Thürer eds) (Brill, 2017) at p 119.

example of an international dispute settlement where the states retain more control.[77] Conciliation may become increasingly popular among governments which believe that "a bad agreement is better than a good adjudication".[78]

24 Governments can often be more motivated by political concerns than cost-benefit analysis or commercial efficiency.[79] Growing pragmatism in international relations through the recognition of interdependence between states, and recognising the need for repeated adjusting of long-term contracts to changing circumstances, could also lead to a "more open approach" towards non-binding determinations.[80]

25 States are likely to prefer a resolution where determinations of law and facts are not fixed and final. A confidential one-time settlement will avoid the creation or application of unfavourable precedents that could open the floodgates to claims by other investors.[81] The short history of investor–State arbitration is rife with cases brought in relation to the same series of acts taken by the respondent government, such as the Argentinian pesos crisis in 2001[82] and the Spanish government's regulation of the energy sector in 2012.[83] Where the determinations of

77 Joseph H Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", Harvard Jean Monnet Working Paper No 9/00 (2000) at p 4 <http://jeanmonnetprogram.org/archive/papers/00/000901.html> (accessed June 2019); Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 95.

78 Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 99.

79 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 184.

80 Aron Broches, "Settlement of Disputes Arising out of Investment in Developing Countries" (1983) 11 Int'l Bus Law 206 at 210.

81 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 22.

82 *Sempra Energy International v The Argentine Republic* ICSID Case No ARB/02/16, Award (28 September 2007); *Enron Corp v The Argentine Republic* ICSID Case No ARB/01/3, Award (22 May 2007); *LG&E Energy Corp et al v The Argentine Republic* ICSID Case No ARB/02/1, Award (25 July 2007).

83 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 22; Luke Eric Peterson, "Foreign Investment Arbitral Claims Continue to Pile Up on Spain, As Government Turns Screws on Energy Sector" *Investment Arbitration Reporter* (5 December 2013); *Watkins Holdings S.à r.l. v Kingdom of Spain* ICSID Case No ARB/15/44; *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain* ICSID Case No ARB/14/11.

fact in an ICSID arbitration are public and binding, a government may have no choice but to litigate and expend costs on each and every case, for fear of losing one case which then influences all related cases. Conciliation may provide a confidential and without prejudice – but nevertheless evaluative – function to resolve such investment disputes that arise from the same facts and legal issues but spawn multiple claims.

III. Why has investor–State conciliation been used so little?

26 Today, the ICSID is the main forum for resolution of investment disputes. Prior to 1965, it was predicted by the drafters that when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[84] ("ICSID Convention") came into operation, conciliation activities would prove "more important than arbitral proceedings".[85] Despite the suitability of conciliation for investment disputes, the opposite has proven true 50 years later. ICSID conciliation is now the "disfavoured dispute resolution mechanism".[86] As of 2016, there have been only ten cases of ICSID conciliation, representing only 1.8% of all registered ICSID cases.[87] Although the confidential nature of conciliation could mean that there are other unreported cases, conciliation remains a significantly underused dispute settlement mechanism for investment disputes.

27 Why has conciliation been used so little in investment disputes? Some have argued that in Asia, there are very few claims against Asian states, and most Asian states have prevailed in investment arbitrations, accounting for the limited use of conciliation.[88] However, investment disputes in Asia are set to increase in the coming years alongside Asia's growing demand for energy and infrastructure development, and most

84 575 UNTS 159 (18 March 1965; entry into force 14 October 1966).

85 International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* vol II-1 (Washington, DC: ICSID, 1968) at p 242.

86 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 177; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) at p 432: "Despite its equivalent treatment under the Convention, ICSID conciliation has been used sparingly. It shares this fate with other forms of conciliation"; Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 587–588.

87 International Centre for Settlement of Investment Disputes, *ICSID Caseload – Statistics* (Issue 2016-2, 2016) at p 8.

88 Luke Nottage & Romesh Weeramantry, "Investment Arbitration in Asia: Five Perspectives on Law and Practice" (2012) 28 Arb Int'l 19; Luke Nottage & Sakda Thanitcul, "Special Issue: International Investment Arbitration in Southeast Asia – An Introduction" (2017) 18(5–6) *Journal of World Investment and Trade* 767.

significantly through China's "One Belt One Road" construction and investment projects.

(1) Investor's preference for binding decisions

28 When conciliation is not the mandatory method for the settlement of disputes but merely an optional alternative, investors naturally prefer the adjudicative mechanism of arbitration.[89] Most importantly, conciliation is non-binding and unenforceable, whereas arbitration is binding, automatically recognised and enforceable.[90] Furthermore, the claimant always has the *choice* of which proceedings it prefers when commencing a claim under an investment treaty or contract.

29 The "ready availability of arbitration" and parties' preference for binding adjudication is the reason that conciliation has been left as a dusty alternative dispute settlement method.[91] As Broches explained, in the ICSID context, "a major reason for the low number of cases is the preventive effect of arbitration clause".[92] Investors may have already engaged in negotiations, protracted correspondence and administrative battles with the State.[93] Weary investors are thus unlikely to opt for further non-binding dispute settlement methods by the time the dispute has crystallised.

30 Broches noted in 1982 that "[t]here is still a strong prejudice mostly in business circles against conciliation, and yet a very strong tendency worldwide toward conciliation".[94] In 2002, the Chairman of the International Chamber of Commerce Court of Arbitration opined that "[m]ediation, conciliation, mini-trial, *etc*. can play an important role, but they are rarely suited to the great majority of international

89 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 607.

90 Gabriel Bottini & Veronica Lavista, "Conciliation and BITs" in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Arthur Rovine ed) (Brill, 2010) at pp 359–360.

91 Ucheora Onwuamaegbu, 'The Role of ADR in Investor–State Dispute Settlement: The ICSID Experience', (2005) 22(2) *News from ICSID* 12 at 13.

92 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

93 Noah Rubins, "Comments to Jack C Coe Jr's Article on Conciliation" (2006) 21(4) *Mealey's International Arbitration Report* 63 at 64; Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 178.

94 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

commercial disputes".[95] Today, the pro-arbitration attitudes of businesses might have shifted. Investors with experience in multi-jurisdiction enforcement efforts which last for years, and facing costly battles against sovereign immunity laws,[96] perceive arbitration as far slower to deliver resolutions than years ago.

31 In 1972, to avoid conciliation being a waste of proceedings, Broches had suggested that "[t]he parties may agree in advance to accept a recommendation of conciliators as binding".[97] However, an agreement to accept the recommendations of a conciliation commission as binding would not give the recommendation the binding force or enforceability that an arbitral award enjoys due to the wide international scope of the ICSID Convention[98] and Convention on the Recognition and Enforcement of Foreign Arbitral Awards[99] ("New York Convention"). There remains little incentive for a claimant to commence conciliation instead of arbitration.

32 To address the non-binding nature of ICSID conciliation, some commentators have also recommended that "it may be wise to include an arbitration clause into an agreement reached under Art 34(2)".[100] However, such a process potentially duplicates the conciliation proceeding with a second dispute over the settlement agreement's terms, and only extends the time and costs required to finally achieve a binding award.[101]

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95 Robert Briner (Chairman, International Court of Arbitration of the International Chamber of Commerce), "The Changing Landscape of International Commercial Arbitration" (2002) 19(2) *News from ICSID* 14.

96 "Argentina Announces Another Settlement of Unpaid BIT Awards, Once Again at a Discount" *Investment Arbitration Reporter* (15 May 2016); Joel Dahlquist & Luke Eric Peterson, "Analysis: As Venezuela's ICSID Debts Hits $4.6 Billion (before Interest), Two *Ad Hoc* Committees Offer Differing Approaches to Requests that Stays of Enforcement Be Lifted" *Investment Arbitration Reporter* (21 April 2016); *Sedelmayer v Russian Federation* Decision of the Supreme Court of Sweden (1 July 2011); *Sedelmayer v Russian Federation* Decision of the Supreme Court of Germany (4 October 2005).

97 Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 *Recueil des cours* 331 at 337, cited in Nassib G Ziadé, "ICSID Conciliation" (1996) 13(2) *News from ICSID* 3 at 7; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 452.

98 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Art 54; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 450.

99 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

100 Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 451.

101 Lester Nurick & Stephen J Schnably, "The First ICSID Conciliation: *Tesoro Petroleum Corp v Trinidad and Tobago*" (1986) 1 *ICSID Review – Foreign*

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33 In addition, the increasingly common presence of substantive time bars in investment treaties limiting the investor's right to commence arbitration proceedings for disputes arising within a short time frame is fundamentally incompatible with a serious attempt at conciliation. For example, the Dominican Republic–Central America–United States Free Trade Agreement[102] and China–Korea bilateral investment treaty ("BIT")[103] limit investors' rights to bring claims arising from disputes occurring within three years of the investor's knowledge or implied knowledge of their claim. If faced with a substantive time bar, it would be no wonder that investors prefer arbitration. Even if such treaties were to provide for conciliation as part of negotiations before the commencement of arbitration, the pressure of a time bar would discourage serious efforts being undertaken for a proper conciliation.

34 On top of the pressure of such time bars, a commitment to conciliation under some sets of conciliation rules could create a fork in the road or prohibit recourse to arbitration. Article 16 of the PCA Optional Conciliation Rules states:[104]

> The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

35 It remains unclear whether Art 26 of the ICSID Convention should be interpreted as applying to ICSID conciliation. Article 26 states that consent to arbitrate is "to the exclusion of any other remedy".[105] In *Amco v Indonesia*,[106] the tribunal suggested that "remedy" in Art 26

Investment Law Journal 340 at 343; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 454; Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 32–33.

102 Dominican Republic–Central America–United States Free Trade Agreement 2004 Art 10.18.1; *Corona Materials LLC v Dominican Republic* ICSID Case No ARB(AF)/14/3, Award (31 March 2016).

103 Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments 2007 Art 9.7; *Ansung Housing Co, Ltd v People's Republic of China* ICSID Case No ARB/14/25, Award (9 March 2017).

104 Permanent Court of Arbitration Optional Conciliation Rules (effective 1 July 1996) Art 16.

105 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Art 26 states: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."

106 Decision on Provisional Measures (9 December 1983) at para 3.

meant only judicial remedies. On the other hand, Schreuer *et al* have expressed the view that the exclusion of any other remedy should "go beyond judicial proceedings".[107]

(2) Restrictions on government officials

36 Often, the agency defending an investment treaty claim, for example, the Attorney-General's Chambers, Ministry of Justice or Prime Minister's office, is not the agency directly involved in the dispute. That agency might be another ministry, or a combination of ministries such as the ministry for environment, ministry of finance, and ministry of transport.[108] This leads to problems with collecting information, evidence and obtaining instructions. There could be a fundamental problem of availability of funds,[109] as the budget for paying an investment treaty claim is unlikely to have been projected in any particular government ministry or parliamentary-approved forecast.[110]

37 Government officials also face limitations on authority to settle and risks of personal liability.[111] One of the key reasons that states are unable to enter into settlement agreements is the fear that the decisions of the officials in charge will be questioned by political opponents and the public. Engaging in mediation can be particularly difficult for government officials.[112] An unfavourable result can be blamed on the

107 Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 387: "the second sentence of Art. 26 specifically refers to 'administrative or judicial remedies' in the context of exhaustion of local remedies … the better view appears to be that the exclusion of any other remedy would go beyond judicial proceedings."

108 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'" (2006) 21 *Mealey's International Arbitration Report* 1.

109 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 185.

110 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'" (2006) 21 *Mealey's International Arbitration Report* 1 at 3.

111 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 185; 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'" (2006) 21 *Mealey's International Arbitration Report* 1 at 2.

112 Rüdiger Wolfrum, "Conciliation under the UN Convention on the Law of the Sea" in *Conciliation in International Law* (Christian Tomuschat, Riccardo Pisillo Mazzeschi & Daniel Thürer eds) (Brill, 2017) at p 189.

arbitrator or judge, while the government official himself will have to take responsibility for any concessions included in a settlement agreement. International arbitration or adjudication provides democratic leaders with useful means to settle a dispute when domestic political opposition is likely to block a negotiated solution.[113] Particularly where public opinion has turned against the foreign investor, a settlement can be viewed as a betrayal of national interests.[114] In addition, many states have openness and transparency policies which run counter to the secrecy of conciliation.[115]

38 Government officials often have their hands tied with regard to negotiating settlements with foreign investors.[116] Uncertainty over whether domestic laws authorise settlement payments for investment treaty claims can seriously discourage government officials.[117] Even when internal laws permit direct negotiations as an option, public servants may be personally, legally and financially liable for agreements reached with investors. Investigations and accusations of misuse of public funds on these agreements may arise years later. Under many domestic regimes, taking responsibility for settlement agreements is too risky, and government officials prefer to allow a third party to decide.[118]

39 This is where the written recommendations of a respected conciliator could be very helpful to assist government officials in justifying their recommendations to settle. Non-evaluative mediations do not offer this evaluative feature – including a neutral quantification of damages – that may be extremely helpful in investment disputes. A conciliator's recommendations, if issued in a written report, also has the ability to withstand changes in government administrations. The Argentinian government's recent decisions to negotiate payments of long-outstanding arbitral awards reflect the potential for disputes to

113 Beth Simmons, "Capacity, Commitment and Compliance: International Law and the Settlement of Territorial Disputes" (2002) 46(6) *Journal of Conflict Resolution* 829.

114 Noah Rubins, "Comments to Jack C Coe Jr's Article on Conciliation" (2006) 21(4) *Mealey's International Arbitration Report* 63 at 64.

115 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 179.

116 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 36.

117 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'" (2006) 21 *Mealey's International Arbitration Report* 1 at 2.

118 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 33.

be settled after changes in administration.[119] Therefore, even if a dispute cannot be immediately settled based on the conciliator's recommendations, in several years, they might be reviewed more favourably by a new administration through the lens of different political sensitivities and policies.

IV. Structural improvements to conciliation and arbitration

40 How should conciliation be structured to help resolve investment disputes in a cost-efficient and timely way? In 1982, the General Counsel of the World Bank drafting the ICSID Convention, Aron Broches, noted that:[120]

> … there is a growing wish to explore the possibilities of conciliation, possibly in an attempt to combine the advantages of both procedures. The idea of a convention to recognize and enforce agreements arrived at after conciliation has been suggested by Dr. Otto-arndt Glossuer, the well-known German arbitration expert, but I think that is too tricky an enterprise. I think we have other more pressing worries.

Thus, attempts to put both conciliation and arbitration to good use were momentarily shelved.

41 In 2017, serious headway was made by UNCITRAL Working Group II on the enforcement of settlement agreements reached by conciliation.[121] In parallel, UNCITRAL Working Group III is actively attempting to reform investor–State arbitration, through structural changes to the dispute settlement mechanisms currently used, in particular, proposing to install a permanent standing court for investment disputes. In this light, perhaps the time has come to harness

119 "Argentina Announces Another Settlement of Unpaid BIT Awards, Once Again at a Discount" *Investment Arbitration Reporter* (15 May 2016); Joel Dahlquist & Luke Eric Peterson, "Analysis: As Venezuela's ICSID Debts Hits $4.6 Billion (before Interest), Two *Ad Hoc* Committees Offer Differing Approaches to Requests that Says of Enforcement Be Lifted" *Investment Arbitration Reporter* (21 April 2016); *Sedelmayer v Russian Federation* Decision of the Supreme Court of Sweden (1 July 2011); *Sedelmayer v Russian Federation* Decision of the Supreme Court of Germany (4 October 2005).

120 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

121 UNCITRAL, Working Group II (Arbitration and Conciliation), *Settlement of Commercial Disputes – International Commercial Conciliation: Enforceability of Settlement Agreements* (1–5 February 2016) (A/CN.9/WG.II/WP.195) (2 December 2015); UNCITRAL, Working Group II (Dispute Settlement), *Settlement of Commercial Disputes International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation* (12–23 September 2016) (A/CN.9/WG.II/WP.198) (30 June 2016).

conciliation as a dispute settlement mechanism for investment disputes of the 21st century.

A. The 2019 Singapore Mediation Convention

42 On 20 December 2018, the UN General Assembly passed a resolution to adopt the UN Convention on International Settlement Agreements Resulting from Mediation[122] ("Singapore Mediation Convention"), which will be open for signature and ratification by states starting 7 August 2019.

43 Apart from the diplomatic value of the 2019 Singapore Mediation Convention for Singapore as a nation, the Mediation Convention could provide a significant breakthrough in conciliation of investor–State disputes. This Convention was conceived as the "1958 New York Convention" for mediation. It basically provides that states undertake to enforce settlement agreements resulting from mediations. The Mediation Convention requires member states to enforce settlement agreements in a similar manner as arbitration awards are treated under the New York Convention – recognition and enforcement, subject only to specific limited conditions.[123]

44 The New York Convention allowed international arbitration to rise as a reliable method of dispute resolution for international businesses, by providing a wide network of jurisdictions for the enforcement of awards, and thereby laid the foundation for investor–State arbitrations. The Mediation Convention hopes to provide a reliable method of dispute resolution for international business. Similarly, although initially driven as a mechanism for international businesses,[124] the Mediation Convention should be adopted in the resolution of investor–State disputes. The ICSID, currently the institution with the world's largest caseload in administering investor–State arbitration, has already referred to the possibility of using the Singapore Mediation Convention in its 2018 reform of the ICSID Conciliation Rules. The

122 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

123 United Nations Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "Singapore Convention on Mediation") Art 3(1): "Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention."

124 UNCITRAL Working Group II (Dispute Settlement), *Settlement of Commercial Disputes International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation* (5–9 February 2018) (A/CN.9/WG.II/WP.205) (23 November 2017).

ICSID amendments to the ICSID Conciliation Rules have been drafted in a manner to allow such an agreement to fall within the purview of the proposed Singapore Mediation Convention on enforcement of mediated settlements.[125]

45 The definition of "mediation" under the Convention is:[126]

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

The definition of "mediation" in the Singapore Mediation Convention includes conciliation. During the UNCITRAL Working Group meetings, the word "conciliation" was replaced with "mediation" as a wider term that better reflects contemporary usage. Similar to the New York Convention, the scope of application of the intended international instrument would apply to all "commercial" settlement agreements, including investment disputes.[127] Such definition encompasses investor–State conciliation.

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125 International Centre for Settlement of Investment Disputes Secretariat, *Proposals for Amendment of the ICSID Rules – Synopsis* (2 August 2018).

126 UNCITRAL, *Settlement of Commercial Disputes – International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation* (25 June–13 July 2018) (A/CN.9/942) (2 March 2018) Art 2(3) (Definitions):

> 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

127 UNCITRAL, Working Group II (Dispute Settlement), *Settlement of Commercial Disputes – International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation* (12–23 September 2016) (A/CN.9/WG.II/WP.198) (30 June 2016) at p 3, para 6; UNCITRAL, Working Group II (Arbitration and Conciliation), *Settlement of Commercial Disputes – International Commercial Conciliation: Enforceability of Settlement Agreements* (1–5 February 2016) (A/CN.9/WG.II/WP.195) (2 December 2015) at p 6, paras 13–21 and fn 8:

> [T]he Working Group may wish to note that footnote 1 of article 1 of the Model Law contains an illustrative list of commercial transaction, which provides that: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of

(*cont'd on the next page*)

46 Although the Mediation Convention appears to apply to all commercial mediations including investor–State conciliations, the draft Convention's Art 8 allows member states to make reservations excluding settlement agreements with the State's government or government agencies.[128] This reservation may in reality be used very little given that honourable states' governments would be more likely than commercial parties to enforce a settlement they had entered into willingly with a foreign investor. Envisioning the greater participation of international organisations such as the European Union ("EU") and ASEAN in international economic law and investment disputes, the draft Singapore Mediation Convention is also open to signature by "regional economic integration organizations" that are "constituted by sovereign States".[129]

47 However, several concerns with using mediation for the settlement of investor–State disputes remain. As described above, the possibility of abuse by investors and corrupt state regimes is chief of these concerns, followed by the possibility that states will use mediation as a delay tactic. While the Mediation Convention promises expeditious enforcement of settlement agreements, the issue remains in sanctity of the process prior to the settlement agreement.

48 If the Singapore Mediation Convention is rapidly ratified worldwide by a swathe of States as large as the New York Convention, it could obviate one of the key downsides of conciliation – enforceability. However, without clear authority to terminate a conciliation that has no reasonable prospect of settlement, and without the threat of an arbitrator with the power to decide on the investor's claims with binding force, the risk of states protracting conciliation as a delay tactic remains. How should investor–State conciliation be structured to benefit from the expediency of the Singapore Mediation Convention?

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industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.'

128 Article 8(1) of the Singapore Convention on Mediation states:

> 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.

129 Article 12(1) of the Singapore Convention on Mediation states:

> A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention.

B. The value of conciliation prior to arbitration

49 In theory, conciliation can fulfil a valuable role in transnational economic dispute settlement as an early, informal process that, if successful, obviates the need to resort to adjudicative mechanisms. It offers an objective third party to resolve a dispute while maintaining flexibility of procedure and the ultimate freedom of the disputants to choose whether or not to accept the conciliator's recommendations.[130]

50 The recommendations of a well-respected neutral person may bring some sense of reality into the discussion between the parties.[131] For government officials facing internal restrictions in particular, the legitimacy of a conciliator's recommendations can alleviate personal responsibility. Thus, the recommendations of a conciliator may be described in this manner: the threat of a punch that will not hit anyone can still make a country flinch.[132]

51 An example of a "stacked" dispute resolution clause is the Asian-African Legal Consultation Committee 1988 Model Agreements. Pursuant to Art 10 of each model agreement, three stages of dispute settlement are created: negotiations, conciliation and arbitration. Consent of the parties to conciliation or arbitration in accordance with the BIT is given in Art 10(i). If negotiations break down, Art 10(ii) states that either party can initiate conciliation or arbitration proceedings if the local remedies requirements have been satisfied. If conciliation proceedings are implemented, unless the parties have agreed to use the ICSID Convention facilities, it is specified that conciliation shall take place under the UNCITRAL Conciliation Rules. *If conciliation fails*, Arts 10(iv) and 10(v) require that the dispute be referred to arbitration at the behest of either party.[133]

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130 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 637; Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press, 2014) at p 142: "The law's shadow is stronger when a third party intervenes in the negotiation and reminds the parties of their rights and obligations under that law."

131 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 123; Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 38; Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 183.

132 Marc L Busch & Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24(1) Fordham Int'l LJ 158 at 165.

133 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 609.

52 Several states involved in the negotiation of BITs anticipated that maintenance of a long-term relationship between the host state and the investor requires a layered dispute resolution structure including non-binding mechanisms such as conciliation.[134] There is no doubt conciliation can be a great complement to ICSID arbitration especially in clarifying and narrowing issues. The result should be higher-quality submissions, and a more streamlined arbitration. [135]

C. The problem with conciliation used as a step before arbitration

53 It has been most commonly suggested that the rational way of including both conciliation and arbitration in a consent agreement would be to provide for conciliation, if unsuccessful, to be followed by arbitration.[136] It has been argued that the best role for conciliation is as an optional, initial step. If conflict occurs, the parties can decide at that future point whether conciliation would be a viable mechanism. If it is successful and a settlement agreement is reached, the substantial costs of adjudication are avoided. If conciliation fails, the disputants can proceed to other agreed modes of settlement and can benefit to a certain degree from aspects of the conciliatory exercise.[137] A survey in 2016 showed that the most common practice in commercial disputes is still combining non-binding dispute settlement with binding arbitration sequentially, using a "stacked" dispute resolution clause.[138]

54 Using conciliation as a step to arbitration is, however, not the most efficient way to use conciliation in encouraging settlement of investment disputes. In practice, practitioners and government officials facing claims from foreign investors will know that structuring an unsuccessful conciliation or mediation as a preliminary step to arbitration lends itself to being used as a significant delay tactic.[139] The

134 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 611.

135 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 19.

136 Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 444.

137 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 636.

138 Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" (2016) 33(1) J Int Arb 37 at 49.

139 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 31: "There may be reasons, especially for a respondent sovereign, to welcome delay. For a state facing multiple claims, delay may be a method of managing its resources. It may also be, however, a tool for effecting more Machiavellian strategies"; Molly M Melin, "Escalation in International Conflict Management:

(*cont'd on the next page*)

challenge is "providing an international mechanism that encourages conciliation at a stage before the international arbitration mechanism is engaged".[140] Coe has accurately identified the problem – the chief weakness of the conventional two-step model of Med-Arb is that arbitration makes no progress during the conciliation process.[141]

55 In addition, some conciliation procedures could be exploited in a manner that delays the next step of arbitration. Although access to interim measures from the arbitral tribunal is not available,[142] in ICSID conciliation, the commission has unusually specific powers to enjoin parties from acting in a manner that could jeopardise settlement.[143] An ICSID conciliation can only be terminated when the commission renders its conciliation report. Therefore, a party could be enjoined from taking any further step towards an arbitration, in reality creating hindrances to the commencement of an arbitration.

56 There is simply little urgency to reach a settlement during pure conciliation. In investor–State arbitration, it is much easier to participate in conciliation proceedings indefinitely, than to seek a payout from government coffers, which often involves significant bureaucratic hurdles. In addition, there are certainly disincentives in many states for officials to enter into secret settlement agreements to pay large sums of money to foreign businesses. Government officials face risks of criminal and civil prosecution. For example, when the Bolivian minister agreed to convert an investment dispute under ICSID arbitration to UNCITRAL arbitration, she was removed and subjected to criminal investigations.[144]

A Foreign Policy Perspective" (2015) 32(1) *Conflict Management and Peace Science* 28 at 35–36: "verbal efforts and strategic inaction are essentially costless and entail little or no commitment".

140 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'" (2006) 21 *Mealey's International Arbitration Report* 1 at 3.

141 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 32.

142 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 32.

143 An International Centre for Settlement of Investment Disputes ("ICSID") commission has the express power to recommend that parties "refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute": ICSID Convention Conciliation Rules 2006 rule 22(2); Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 448.

144 "Bolivia Asks US Court to Block Telecoms Claim" *Global Arbitration Review* (12 October 2010); Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence

(*cont'd on the next page*)

57 It is also extremely difficult for the other disputing party or the commission to conclude that there is no prospect of settlement when the other party continuously expresses itself as willing to negotiate, and acts in a conciliatory manner. For example, in *Kardassopoulos and Fuchs v Georgia*, the tribunal observed that:[145]

> … the spirit of settlement appears to have diminished over time as lengthy delays, refusals by various government officials to address the matter, and internal disputes over who carried responsibility for the matter combined to result in an overall obfuscation of the compensation process and disregard for the duty to provide compensation.

At what point can the parties conclude there is no prospect for settlement?

D. Reconstructing conciliation into the arbitration proceeding

58 Conciliation should not be promoted merely as an alternative to arbitration. The purpose and most effective use of ADR is often "building in *complementary* resolution methods, not usurping current adjudicatory procedure" [emphasis added].[146] One proposal for reforming conciliation as a popular and effective tool for resolving investment disputes is to structure conciliation as a mechanism to be used *during* the arbitration.[147] This creates optimal "intertwining between negotiation and third-party dispute settlement",[148] and "mixing those characteristics".[149] Such an intertwining Arb-Med-Arb approach has seen great success in domestic legal systems such as Germany, Singapore, Switzerland and China where the same or different judges

Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 135.

145 *Kardassopoulos and Fuchs v The Republic of Georgia* ICSID Case No ARB/07/15, Award (3 March 2010) at [443]–[448].

146 Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1994–1995) 10 Ohio St J on Disp Resol 211 at 253.

147 Klaus Peter Berger, "Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19(3) Arb Int'l 387 at 396; James T Peter, "Med-Arb in International Arbitration" (1997) 8(1) Am Rev Int'l Arb 83 at 84–85 and 101–103; Christian Buhring-Uhle, "Designing Procedures for Effective Conflict Management" in *Arbitration and Mediation in International Business* (Kluwer Law International, 1996) at pp 370–381.

148 Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 94.

149 Paul de Waart, "ICSID and Other Forms of Arbitration" *Foreign Investment in the Present and a New International Economic Order* (Fribourg University Press, 1987) at p 117.

regularly interact with the parties in the course of proceedings to attempt to settle the case.[150]

59 For example, s 30(1) of the British Columbia International Commercial Arbitration Act[151] states that:[152]

> … [i]t is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time *during* the arbitral proceedings to encourage settlement.

60 Tribunals have been instrumental in the settlement of many ICSID arbitration cases.[153] In 1982, Broches reported that out of ten ICSID arbitration cases concluded, six were discontinued after settlement. He remarked that "*even in those instances where the disputants went beyond the edge of the water, they got out again and settled the case*" [emphasis in original].[154] On hindsight, it is precisely because these parties had gone "beyond the edge" by instituting binding proceedings that they were able to reach a settlement.

61 Disputing parties are reluctant to use conciliation, but their willingness to settle is triggered once arbitration has commenced. This could explain why 40% of ICSID arbitrations are settled only *after* commencement of the arbitration.[155] This concurs with the settlement rate of disputes referred to mediation after commencement of the suit in

150 German Code of Civil Procedure (ZPO) Art 278 (1); Swiss Federal Code of Civil Procedure (CC 272) Art 124(3), cited in Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 123.

151 RSBC 1996, c 233.

152 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 621.

153 Nassib G Ziadé, "ICSID Conciliation" (1996) 13(2) *News from ICSID* 3 at 7; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 449.

154 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 54.

155 International Centre for Settlement of Investment Disputes ("ICSID"), *ICSID Caseload – Statistics* (Issue 2012-1, 2012) at p 13; ICSID, "Background Information on the International Centre for Settlement of Investment Disputes (ICSID)" https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf (accessed June 2019); Anthony Sinclair, Louise Fisher & Sarah Macrory, "ICSID Arbitration: How Long Does It Take?" https://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf (accessed June 2019).

some domestic courts[156] and the approximately 47% settlement rate in ICC international arbitration,[157] suggesting the potential that roughly 40% of ICSID disputes could be settled by conciliation once the wheels of arbitration begin to turn. There would be room for a neutral to anticipate or complement the activities of the tribunal by clarifying misconceptions or misplaced assumptions early in the process.[158]

E. Effect of intertwining arbitration and conciliation

62 Intertwining arbitration and conciliation could be particularly effective for investment disputes. Some governments asserting strong positions of sovereignty may require "blood to be spilt" before they can justify compromise.[159] Getting approval for a settlement requires parties to change the positions that they defended previously. Government officials and company representatives alike must present explanations to justify the change.[160]

63 The commencement of arbitration proceedings by the investor may serve as a new event that can justify the government administration's reconsideration of its position.[161] Subsequent procedural or partial decisions, presentation of arguments or production of evidence can also trigger parties to undertake a reassessment of their position.[162] Often, a claim is settled after a successful cross-examination of a witness.

156 Tetsuya Obuchi, "Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-court Compromise" (1987) 20 *Law in Japan* 74 at 74, fn 1.

157 Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*" (ICC Publication 729, 2012) at p 323.

158 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 18.

159 Arif Ali & Baiju Vasani, "Ten Golden Rules for US Investors to Follow in Dispute Resolution Negotiations with a Foreign State or State Entity" in American Arbitration Association, *Handbook on International Arbitration and ADR* (Juris, 2nd Ed, 2010) at p 352.

160 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 136.

161 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at pp 135–136.

162 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 136.

64 A definitive legal opinion from the institution may empower groups within the defendant state who oppose the disputed measure.[163] These events are useful in triggering or strengthening the parties' willingness to settle – or at least re-evaluate their position – by making the risks of binding proceedings more apparent.[164] Most importantly, conciliation offers the evaluative function that mediation does not always provide. Mediators are also far more likely to provide informal recommendations orally, if at all, than in a formal written form. In investor–State disputes, obtaining an early evaluation of the State's liability and compensation likely to be awarded – in the form of written recommendations or reports – could provide government officials with the justification necessary for settlement.

65 Currently, the most common mode for enforcement of rules of private international law exemplifies a "transnational shadow of the law".[165] Coupled with "loop back" mechanisms or negotiation windows, Arb-Con-Arb could be the most effective form of "bargaining in the shadow of the law".[166]

66 The threat of a binding and enforceable award is the most effective method of engendering the willingness to reach a

163 Marc L Busch & Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24(1) Fordham Int'l LJ 158 at 165–166.

164 Michael E Schneider, "Investment Disputes – Moving Beyond Arbitration" in Diplomatic and Judicial Means of Dispute Settlement (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at p 140.

165 Robert Wai, "Enforcement in the Shadows of Transnational Economic Law" in *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hans W Miklitz & Andrea Wechsler eds) (Hart Publishing, 2016) at pp 38–42; Christopher A Whytock, "Enforcement of Foreign Judgments: Governance, Rights and the Market for Dispute Resolution Services" in *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hans W Miklitz & Andrea Wechsler eds) (Hart Publishing, 2016) at pp 63–64.

166 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 185; Robert Cooter, Stephen Marks & Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour" (1982) 11 J Legal Stud 225; Christian Buhring-Uhle, "Designing Procedures for Effective Conflict Management" in *Arbitration and Mediation in International Business* (Kluwer Law International, 1996) at p 266: "a structure that permits the participants of a rights-based adjudication procedure to revert to interest-based negotiation"; Lucy Greenwood, "A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in order for Parties to Explore Settlement" (2011) 27(2) Arb Int'l 199 at 199–200; Stuart Birks, "Why the Shadow of the Law Is Important for Economists" (2012) 46(1) *New Zealand Economic Papers* 79.

compromise.[167] In a system in which a parallel arbitration is moving forward apace, either side can cut short its efforts in response to truculent behaviour.[168] There have been many examples of the effectiveness of combined binding and non-binding procedures. Steven Schwebel J has reported his experience as a mediator which quickly failed because both parties maintained inflexible demands; however, when the dispute moved on to arbitration, the proceedings had advanced and *when an award was imminent*, the parties settled. Schwebel J had no information why the sensible solution had not been reached earlier, but he offered a possible explanation that "the exchange of written pleadings was salutary in demonstrating to the parties that the position of each side had their infirmities".[169] In another ICSID arbitration, at first the non-binding dispute settlement attempt failed, but as the arbitration proceeded, the parties managed to reach agreement on some issues and left the others to be decided by the tribunal.[170]

67 In *Goetz v Burundi*,[171] the tribunal rendered a partial award which left the respondent state with the option of revoking its offending act or paying compensation. The case was then settled.[172] Before the Eritrea–Ethiopia Claims Commission, the prospect of third-party adjudication apparently prompted the parties voluntarily to alter their behaviour. Ethiopia had interned approximately 2,600 Eritrean prisoners of war ("POWs") during the conflict. Eritrea filed its claims on 12 December 2001 for loss, damage and injury suffered as a result of Ethiopia's alleged unlawful treatment of its POWs, seeking immediate release of all of the remaining POWs. On 29 November 2002, just a few

167 Lauren B Edelman & Robin Stryker, "A Sociological Approach to Law and the Economy" in *The Handbook of Economic Sociology* (Neil J Smelser & Richard Swedberg eds) (Russell Sage, 2005) at pp 539–543:

> While court adjudication is a realm for overt resource mobilization, as is the contestation and negotiation between regulatory agencies and regulated parties, taken-for-granted assumptions shape how these conflicts are framed and may limit the impact of regulation. More generally, research suggests that the constitutive legal environment plays a critical role in shaping facilitative and regulatory legal environments.

168 Jack C Coe Jr, "Toward a Complementary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch" (2005) 12 UC Davis J Int'l L & Pol'y 7 at 31–32.

169 Stephen Schwebel, "Is Mediation of Foreign Investment Disputes Plausible?" (2007) 22(2) *ICSID Review – Foreign Investment Law Journal* 237 at 238.

170 Eloise Obadia, "How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID Perspective" (1999) 16(2) *News from ICSID* 8.

171 ICSID Case No ARB/95/3, Award (10 February 1999).

172 See also *Texaco Overseas Petroleum Co and Calasiatic v Libya* (1978) 17 ILM 1.

days before the hearing was scheduled to take place at the Peace Palace in The Hague, Ethiopia released the remaining POWs.[173]

F. Conflict risks in Arb-Con-Arb

68 It is not ideal that arbitrators act as conciliators in politically sensitive investment disputes.[174] As an illustration, in the case between Egypt and Israel with regard to the dispute concerning the establishment of boundary markers in the Taba area, an arbitral tribunal of five members was constituted. According to Art IX of the *compromis*, after the filing of the counter-memorials, a three-member chamber, comprising the two national arbitrators, would have the possibility to make a unanimous recommendation to the parties. The conciliation failed and the arbitration was subsequently criticised as "not all members of the tribunal were put in an equal position, with some of them knowing the alternatives of conciliation and others not".[175]

69 It is vital to ensure the legitimacy of any conciliation process, that the neutral is both perceived as independent and impartial. Arbitrators descending into the fray as mediators is a practice only culturally accepted in a handful of jurisdictions.[176] Thus, a 2009 commission studying the low rate of settlement in international arbitrations encouraged arbitrators to facilitate settlements, but concluded with a slew of warnings. Some notable warnings were that "[a]rbitrators should not meet with the Parties separately"; they should

173 Lucy Reed, "Observations on the Relationship between Diplomatic and Judicial Means" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge Viñuales eds) (Brill, 2012) at pp 296–297.

174 Eloise Obadia, "How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID Perspective" (1999) 16(2) *News from ICSID* 8; Bernd Ehle, *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do – Recent Developments and Trends*' (Bruylant, 2010) at p 94; Christian Buhring-Uhle, "Designing Procedures for Effective Conflict Management" in *Arbitration and Mediation in International Business* (Kluwer Law International, 1996) at p 262; Philip Naughton, "The Role of Arbitrators and Arbitration Institutions in the Use of Alternatives for the Settlement of Disputes" (2007) 73(1) *Arbitration* 31 at 37; Lucy Greenwood, "A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement" (2011) 27(2) Arb Int'l 199 at 204–206; Gu Weixia, "The Delicate Art of Med-Arb and its Future Institutionalisation in China" (2014) 31(2) UCLA Pac Basin LJ 97 at 101–111 and 118–120.

175 Marcelo Kohen, "Interaction between Diplomatic and Judicial Means at the Initiation of Proceeding" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 18.

176 Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, *Draft Paper for Consultation* (2009) (chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) at p 1, para 1.3.

not "obtain any information from one Party which is not shared with the other Parties"; "arbitrators must also avoid putting pressure on the parties to settle"; and, most fatally:[177]

> … [i]f, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign.

70 Further, the commission drafted a set of rules to assist arbitrators in their facilitation of settlements. However, the majority of these rules are practically impossible to ensure, for example, that the "Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications", and:[178]

> … the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions.

71 The Achilles' heel of the Med-Arb process has been described as such: "If the parties know that the mediator is to become the adjudicator if the case does not settle, this may well inhibit effective negotiation and must change the whole dynamic of the mediation."[179] Even in jurisdictions with established practices of Med-Arb like China, the practice of private caucusing is regarded as a "delicate art" that raises serious due process concerns.[180] Considering the fundamental incompatibility of the role of an arbitrator as a decision-maker with the role of a conciliator, ICSID Arbitration Rule 1(4)'s prescription that conciliators may not act as arbitrators[181] should be diligently preserved.

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177 Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, *Draft Paper for Consultation* (2009) (chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) Recommendations 4.2.6, 4.2.7 and 4.3.

178 Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, *Draft Paper for Consultation* (2009) (chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) Appendix 1; CEDR Rules for the Facilitation of Settlement in International Arbitration (November 2009) Art 3.5.

179 Klaus Peter Berger, "Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19(3) Arb Int'l 387 at 394.

180 Gu Weixia, "The Delicate Art of Med-Arb" (2014) 31 UCLA Pac Basin LJ 97 at 117.

181 ICSID Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) rule 1(4).

G. Models for combining conciliation with arbitration

72 There are numerous possibilities for combining conciliation with arbitration, including serial procedures, parallel or simultaneous procedures.[182] Parallel track conciliation was recommended by the Commission on Settlement in International Arbitration. Specifically, this was "so that work on settlement can be undertaken without delaying the arbitration".[183]

73 The parallel negotiations and third-party dispute settlement procedures in the Dispute Settlement Understanding ("DSU") of the WTO serve as a model example. Compulsory negotiations built into the DSU correspond to certain steps in the third-party dispute settlement process. No party has the power to block the third-party compulsory procedure once a claim has been commenced.[184] Approximately 60% of WTO disputes are settled before submission to a WTO panel.[185]

74 The WTO DSU system intertwines third-party-assisted dispute settlement with both informal and formal negotiation opportunities.[186] When parties are not able to reach an agreement, the respondent does not have the power to block the progress of the binding dispute settlement system.[187] Its key strength is that windows for negotiations correspond to procedural steps in the binding dispute settlement process.

75 Thus, the 13-year *Bananas* disputes between the EU, US and several Latin American countries were finally resolved by resorting to

182 Klaus Peter Berger, "Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19(3) Arb Int'l 387 at 393–396.

183 Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, *Draft Paper for Consultation* (2009) (chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) Recommendation 4.9.2.

184 Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 95.

185 Marc L Busch & Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24(1) Fordham Int'l LJ 158 at 162.

186 Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 94.

187 Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 95.

WTO procedures for "good offices, conciliation or mediation".[188] Good offices opened the door to the continuation of the negotiations that led to the conclusion of two agreements on 15 December 2009 containing mutually agreed solutions.[189]

76 Some other examples of combined dispute resolution procedures consisting of a series of procedures between the parties include "Dispute Review Boards" in international construction projects, and the "pre-arbitral review process" agreed in the Channel Tunnel contract between France and England and in the construction contract for the Hong Kong airport.[190] In the Boston Central Artery/Tunnel Project, the parties used a four-stage process: (a) partnering; (b) presentation of the dispute before an authorised representative; (c) dispute review board; and (d) mediation or other ADR process.[191]

77 Neutral evaluation mandated by domestic court systems have seen settlement rates of around 80%[192] and could serve as a viable model for management of the ICSID's caseload. In the Singapore State Courts, the settlement rate of court-diverted mediation is 89%–92%.[193]

188 Understanding on Rules and Procedures Governing the Settlement of Disputes Arts 5 and 3.12; Decision of 5 April 1966 on Procedures under Article XXIII, Accelerated Procedure at the Request of a Developing Country Member (BISD 14S/18).

189 *EC – Regime for the Importation of Bananas* (DS361) (initiated by Colombia); *EC – Regime for the Importation of Bananas* (DS364) (initiated by Panama); *Report by the Director-General on the Use of His Good Offices in the Above-mentioned Disputes (pursuant to Article 3.12 of the DSU)* (WT/DS361/2 and WT/DS364/2) (22 December 2009); Geneva Agreement on Trade in Bananas (WT/L/784); Helene Ruiz Fabri, "The Relationship between Negotiations and Third-party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute" in *Diplomatic and Judicial Means of Dispute Settlement* (Laurence Boisson de Chazournes, Marcelo Kohen & Jorge E Viñuales eds) (Brill, 2012) at p 94.

190 Klaus Peter Berger, "Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19 Arb Int'l 387 at 395:

191 Klaus Peter Berger, "Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19 Arb Int'l 387 at 395.

192 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at pp 183–184.

193 The Honourable the Chief Justice Sundaresh Menon, "Building Sustainable Mediation Programmes: A Singapore Perspective", speech at the Asia-Pacific International Mediation Summit (14 February 2015) at p 6; Dorcas Quek & Seah Chi-Ling, "Finding the Appropriate Mode of Dispute Resolution: Introducing Neutral Evaluation in the Subordinate Courts" *Singapore Law Gazette* (November 2011).

According to CIETAC statistics, 20% to 30% of the caseload of CIETAC is resolved by Med-Arb.[194]

78 The system provided under the SIAC-SIMC Arb-Med-Arb Protocol of the Singapore International Mediation Centre ("the Protocol") started in November 2014 may be considered as a model. The Protocol provides that after receipt of the notice of arbitration and response, the case will be referred to mediation. To prevent delay of the arbitration, the mediation is limited to eight weeks. If settlement attempts fail, parties will revert to arbitration.[195] The looming threat of the strict timeline of an arbitration can be a significant motivation for negotiating settlements. Out of 15 cases submitted to SIAC-SIMC's new Arb-Med-Arb regime, approximately half were settled.[196] In fact, under the 1984 ICSID Arbitration Rules, it was envisioned that the pre-hearing conference between the arbitral tribunal and the parties would be used to facilitate an early amicable settlement.[197]

79 A limited timeframe for conciliation is worth considering. The conciliation procedures in Annex V of the UN Convention on the Law of the Sea were designed with a one-year termination date.[198] Setting an "expiry date" for the conciliation ensures that parties cannot use conciliation to delay compulsory dispute settlement procedures. It also prevents dilatory tactics. When there is no expiry date for a voluntary process, there may be indefinite requests for stays of the arbitration, and

194 Alison Ross, "An Interview with Yu Jianlong" *Global Arbitration Review* (5 September 2011).

195 Singapore International Mediation Centre, "SIAC-SIMC Arb-Med-Arb Protocol" http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf; Gerald Aksen, "Comments on Enforceability of Awards on the Role of Arbitrators As Settlement Facilitators" in *New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (ICCA Congress Series No 12) (Kluwer Law International, 2005) at p 566.

196 Statistics discussed on an informal basis: Eunice Chua, "Arbitration As a Default Dispute Resolution Mechanism for Cross-border Deals and Transactions" ALB Asia Pacific Arbitration Conference 2016 (15 November 2016).

197 Nassib G Ziadé, "ICSID Conciliation" (1996) 13(2) *News from ICSID* 3 at 7.

198 See, for example, Annex V, Art 7 of the United Nations Convention on the Law of the Sea (1833 UNTS 3) (10 December 1982; entry into force 16 November 1994):

> 1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.
>
> 2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.

the conciliation could take significantly longer, such as three years in *Republic of Equatorial Guinea v CMS Energy Corp*.[199]

80 A prominent counsel at ICSID, Ziadé, opined that such pre-hearing conferences between the parties to arbitration proceedings led to early settlements.[200] Using the first procedural conference call of an arbitration to examine whether conciliation could resolve the dispute could reduce costs. The first procedural conference also intervenes at an early enough stage, when both parties to the dispute are likely to be more flexible in their ability to act, and their relationship may still stand on positive ground.[201] Non-monetary or policy-based alternatives, such as offers of future concessions or modified implementation of regulatory measures, are more readily available and acceptable at this stage.[202]

81 The neutral conciliator's recommendations could break through deadlocks in negotiations, providing a more expeditious and harmonious solution of the investment dispute. Using the arbitrators themselves to ascertain if the parties would consider conciliation could help to overcome parties' concerns about showing weakness if they propose negotiations.[203] A rule similar to Art 20(1) of the ICSID Conciliation Rules requiring conciliators to "ascertain" the views of parties on conciliation would not fall foul of arbitrator's independence and impartiality. Such a rule could be easily drafted into arbitration rules of institutions such as the Stockholm Chamber of Commerce and ICSID which have conciliation rules, harnessing the symbiotic relationship between the dispute settlement procedures.

82 As an ancillary issue, Art 26 of the ICSID Convention should not be interpreted as applying to ICSID conciliation.[204] Article 26 of the

199 *Republic of Equatorial Guinea v CMS Energy Corp* ICSID Case No CONC(AF)/12/2.

200 Nassib G Ziadé, "ICSID Conciliation" (1996) 13(2) *News from ICSID* 3 at 8.

201 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 34.

202 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 34.

203 Wolf von Kumberg, Jeremy Lack & Michael Leathes, "Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 133 at 136.

204 Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) states: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy"; Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed,

(*cont'd on the next page*)

Convention is concerned mainly with ensuring that parties who have consented to ICSID as their choice of forum for dispute settlement do not frustrate the process by resorting to parallel judicial forums or administrative authorities.[205] In any event, if conciliation is built *into the arbitration process itself*, conciliation is part of the arbitration, and there is no conflict. ICSID still remains the exclusive dispute settlement forum for that dispute.

83 There is also unlikely to be any conflict in the case where the investment treaty refers to mediation or conciliation in general terms. For example, the 2009 ASEAN–Australia–New Zealand Agreement provides the state parties' consent to conciliation "or" arbitration.[206] In this case, the better interpretation is that conciliation does not preclude arbitration, although submission to different forms of arbitration, court proceedings or other *binding* dispute settlement is precluded. Therefore, conciliation "may continue while the matter is being examined by an arbitral tribunal established or re-convened under" the dispute settlement provisions.[207]

2009) at p 387: "[T]he better view appears to be that the exclusion of any other remedy would go beyond judicial proceedings."

205 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) at para 32:

> Arbitration as Exclusive Remedy: It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.

See also Christoph H Schreuer *et al*, "Conciliation" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 402; International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* vol II-2 (Washington, DC: ICSID, 1968) at p 794; *Amco v Indonesia*, Decision on Provisional Measures (9 December 1983) at [3].

206 2009 Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area Chapter 17, Art 20: "If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations, the disputing investor may, subject to this Article, submit to conciliation or arbitration a claim …"

207 2009 Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area Chapter 17, Art 7:

> 1. The Parties to the dispute may at any time agree to good offices, conciliation or mediation. Procedures for good offices, conciliation or mediation may begin at any time and may be terminated at any time. 2. If the Parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the matter is being examined by an arbitral tribunal established or re-convened under this Chapter. 3. Proceedings involving good offices, conciliation and mediation and positions taken by the Parties to the dispute during these proceedings shall be confidential and without prejudice to the rights of any Parties to the dispute in any further or other proceedings.

H. Enforceability of settlements produced by conciliation

84 Perhaps the greatest disincentive in conciliation was that an agreement reached in the course of conciliation did not enjoy the status of an award. A breach of a settlement agreement is merely a breach of contract. However, a breach of contract is usually the cause of the dispute in the first place.[208] Under most conciliation rules used for investor–State disputes, there is no possibility to incorporate such an agreement into an award such as that available under rule 43(2) of the ICSID Arbitration Rules. For example, enforcement of a settlement reached in the course of an ICSID conciliation does not enjoy the weight of automatic recognition offered to arbitration awards under Art 54 of the ICSID Convention.

85 Although the drafters of the 1985 UNCITRAL Model Law on International Commercial Arbitration[209] had discussed the inclusion of references to conciliation as another mechanism for settling disputes, the final draft of the Model Law did not contain any provisions on conciliation.[210] Some jurisdictions such as Canadian provinces and territories thus unilaterally inserted references to conciliation and mediation in their legislation on Model Law.[211]

86 The 2017 Singapore Mediation Act[212] could ameliorate this situation if conciliating parties agree to use Singapore as the "seat" of their conciliation. The Singapore Mediation Act provides a legislative framework for parties who have reached a settlement agreement through mediation to record their settlement agreement in a court order. Effectively, this converts the disputing parties' settlement agreement into a Singapore court order, enforceable internationally as a judgment under the legislative frameworks of other states. In particular,

208 Edna Sussman, "Combinations and Permutations of Arbitration and Mediation: Issues and Solutions" in *ADR in Business: Practice and Issues across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Kluwer Law International 2011) at pp 381–382.

209 A/40/17, Annex I (21 June 1985).

210 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 620.

211 Linda C Reif, "Conciliation As a Mechanism for the Resolution of International Economic and Business Disputes" (1990–1991) 14 Fordham Int'l LJ 578 at 620, citing s 5 of the International Commercial Arbitration Act of Alberta (RSA 2000, c I-5); s 30(1) of the International Commercial Arbitration Act of British Columbia (RSBC 1996, c 223); s 5 of the International Commercial Arbitration Act of Manitoba (CCSM, c C151); s 5 of the International Commercial Arbitration Act of New Brunswick (SNB 1986, c I-12.2); s 6 of the International Commercial Arbitration Act of Newfoundland (RSNL 1990, c I-15); s 6 of the International Commercial Arbitration Act of Nova Scotia (RSNS 1989, c 234); and s 3 of the International Commercial Arbitration Act of Ontario (SO 2017, c 2).

212 Act 1 of 2017.

Singapore court judgments are widely recognised and enforceable under the 2005 Hague Convention on Choice of Court Agreements,[213] the system of Reciprocal Enforcement of Commonwealth Judgments[214] and the system of Reciprocal Enforcement of Foreign Judgments.[215]

87 The Singapore Mediation Act defines "mediation" as:[216]

> … a process comprising one or more sessions in which one or more mediators assist the parties to the dispute to do all or any of the following with a view to facilitating the resolution of the whole or part of the dispute:
>
> (*a*) identify the issues in dispute;
>
> (*b*) explore and generate options;
>
> (*c*) communicate with one another;
>
> (*d*) voluntarily reach an agreement.

The mediation agreement would have to provide that the Mediation Act is to apply to the mediation.[217] Article 12(1) of the Mediation Act provides that:

> Where a mediated settlement agreement has been reached at a mediation in relation to a dispute for which no proceedings have been commenced in a court, any party to the agreement may, with the consent of all the other parties to that agreement, *apply to a court to record the agreement as an order of court*. [emphasis added]

88 Critics of the unenforceability of conciliation settlement agreements, however, may be over-stating the issue. Given the voluntary participation and self-determined terms of settlement in conciliation, the solutions are durable and stronger agreements – in any event, in

213 30 June 2005; entry into force 1 October 2015. Austria, Belgium, Bulgaria, Croatia Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK, Mexico, US and Ukraine.

214 See, for example, Singapore Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed); England and Wales Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13). This includes Australia, New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea and India.

215 Includes Hong Kong.

216 Mediation Act 2017 (Act 1 of 2017) s 3(1).

217 Mediation Act 2017 (Act 1 of 2017) s 6(1).

most instances, conciliated settlement agreements would be naturally self-executing.[218]

89 In 1965, during the elaboration of ICSID, the products of neither conciliation nor arbitration were widely enforceable. In contrast to the widely enforceable arbitral awards today, in 1982, it was noted that the ICSID Convention had 85 signatories – more than the New York Convention.[219] The expansion of the New York Convention network in the last 58 years has added to the attractiveness of arbitration for the resolution of investment disputes. Parties can use "consent awards" to record settlement terms under rule 43 of the ICSID Arbitration Rules or rule 36.1 of the UNCITRAL Arbitration Rules, giving them full force and effect under the New York Convention or the ICSID Convention.[220]

90 Finally, some of the attendees at the February 2015 UNCITRAL Working Group II session had put forward the view that mediated/conciliated settlement agreements could be reduced to "consent awards," thereby reducing the settlement to an arbitral award, which would be enforceable under the New York Convention. The obvious downside of that approach is the cost and the delay – parties would have to commence an arbitration, appoint an arbitrator and have that arbitrator sign off on the settlement agreement as a consent award; not to mention that arbitrators may not want to be viewed as a "rubber stamp" for an agreement the parties entered into without the assistance of the arbitrator.[221]

91 A combined method of conciliation anchored by arbitration offers the benefit of efficient international enforceability.[222] In order to circumvent the problem of unenforceable conciliated settlement agreements, an amendment of arbitration rules, to structure in a window for conciliation, would make conciliation part of the arbitration process itself. If a settlement is reached, the result would be a *consent*

218 Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 25 at 33 and 37.

219 Aron Broches, "Avoidance and Settlement of International Investment Disputes" (1984) 78 Am Soc'y Int'l L Proc 38 at 53.

220 Wolf von Kumberg, Jeremy Lack & Michael Leathes, "Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come" (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 133 at 140.

221 Lorraine Brennan, "Do We Need a New York Convention for Mediation/ Conciliation?" *Mediate.com* (February 2015).

222 Susan Franck, "Reconsidering Dispute Resolution in International Investment Agreements" in *Appeals Mechanism in International Investment Disputes* (Karl P Sauvant ed) (Oxford University Press, 2008) at p 185.

award,[223] enforceable under either the ICSID Convention or the New York Convention, or recognised as an arbitral award under domestic laws. In 2013, 40 out of 471 ICC arbitration awards were consent awards.[224]

V. Conclusion

92 Non-binding international dispute settlement depends on the commitment of the parties concerned to apply all the phases of the agreed procedures whenever a dispute arises.[225] This is more important in conciliation than in arbitration. While the hope is that mutually agreed settlement agreements would be voluntarily executed, or the Singapore Mediation Convention on enforcement of settlement agreements will be widely ratified, the New York Convention took several decades to achieve widespread ratification. The safeguard of having a consent award through an Arb-Con-Arb process could assist dramatically in settlement of investment disputes by conciliation.

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223 Yaraslau Kryvoi & Dmitry Davydenko, "Consent Awards in International Law" (2015) 40(3) Brook J Int'l L 828.

224 International Court of Arbitration, "2013 Statistical Report" (2014) 25 ICC Int'l Arb Bull 1 at 14.

225 Paul de Waart, "ICSID and other forms of Arbitration" in *Foreign Investment in the Present and a New International Economic Order* (Fribourg University Press, 1987) at pp 120–121.