



PROCEEDINGS

# ISDS REFORM CONFERENCE 2019

MAPPING THE  
WAY FORWARD

13 FEBRUARY  
Hong Kong SAR, China

**AAIL** ASIAN  
ACADEMY OF  
INTERNATIONAL  
LAW



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# ISDS Reform Conference 2019 — Proceedings —

*Mapping The Way Forward*

ORGANISERS

Asian Academy of International Law

&

Department of Justice

The Government of the Hong Kong Special Administrative Region



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# INTRODUCTION OF ORGANISERS



The Asian Academy of International Law (the Academy) is an independent and registered charitable body set up in Hong Kong to further the studies, research and development of international law in Asia. By providing specialised training to practitioners, judges, government officials and students in various areas of international law, the Academy aims to enhance and reinforce Asia's role and participation in the formulation of international law and international relations. While the Academy focuses on capacity building among Asian countries, it also endeavours to facilitate collaboration among practitioners and academics. In 2018, the Academy has been granted observer status to UNCITRAL Working Group III. For further details about the Academy, please visit [www.aail.org](http://www.aail.org)



Department of Justice  
The Government of the Hong Kong  
Special Administrative Region

The Department of Justice plays a significant role in the legal system of the Hong Kong Special Administrative Region (HK-SAR). The Department gives legal advice to other bureaux and departments of the Government of the HKSAR, represents the Government in legal proceedings, drafts government bills, makes prosecution decisions, and promotes the rule of law. It is an important policy objective of the Department to enhance Hong Kong's status as the deal-making and dispute resolution hub in Asia Pacific and beyond.



**OPENING**

# Welcome Speech

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## **Teresa Cheng GBS SC JP**

**Secretary for Justice**

Hong Kong Special Administrative Region of the People's Republic of China

Ms Teresa Cheng, SC, is the Secretary for Justice of the Hong Kong Special Administrative Region. Prior to her appointment as the Secretary for Justice, Ms Cheng was a Senior Counsel in private practice, a chartered engineer, a chartered arbitrator and an accredited mediator. Apart from being a Past Chairperson of the Hong Kong International Arbitration Centre, Ms Cheng is also a Past President of the Chartered Institute of Arbitrators, Past Vice President of the International Council of Commercial Arbitration and Past Vice President of the ICC International Court of Arbitration. Ms Cheng served as Deputy Judge/Recorder in the High Court of Hong Kong from 2011 to 2017. Besides, Ms Cheng is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators and was a member of the World Bank's Sanctions Board.

Mapping the way forward for the reform of Investor-State Dispute Settlement (ISDS) is something that is very close to everybody's heart, and I would like to look at it at two levels. At the international level, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III is looking at this closely, and ISDS reform is a very important subject in the global community. Today, we have here Ms Caroline Nicholas from UNCITRAL to participate in our conference as well as to take on board the insights that are going to be shared by our distinguished speakers.

At the domestic level, ISDS reform is also very important and relevant to Hong Kong in three aspects. First, Hong Kong is one of the leading global investment hubs. According to the World Investment Report 2018 published by the United Nations Conference on Trade and Development (UNCTAD), Hong Kong ranked world number three for foreign direct investment inflows, and world number five for foreign direct investment outflows in 2017. Moreover, Hong Kong serves as a bridge or a springboard for inbound and outbound investment into and from Mainland China. There are initiatives under the Belt and Road, and next week there is going to be the announcement and the publication of the outline development plan for the Guangdong-Hong Kong-Macao Greater Bay Area, providing great investment opportunities into and from Mainland China via Hong Kong. Against such background, international investment law and dispute settlement become very relevant.

The second reason as to why ISDS reform is also very relevant to Hong Kong is that, some of you may not be aware, a number of very important ISDS cases actually have a very close relationship with Hong Kong. One of the very early ISDS cases, what I would call the Shrimp case, not the *US-Shrimp* case in the World Trade Organization (WTO), but the Sri Lankan shrimp, is actually

initiated by a Hong Kong company, although under the bilateral investment treaty between the United Kingdom and Sri Lanka. The famous case between Philip Morris and Australia on tobacco plain packaging measures, which has not only proceeded to investor-State arbitration, but also to the dispute settlement procedure under the WTO, is also actually a Hong Kong-related matter, as the case was concerned with the Investment Promotion and Protection Agreement between Hong Kong and Australia. Whilst Hong Kong may not be a litigious jurisdiction, it is very relevant to investments and provides a very good platform for investment activities to take place.

The third reason as to why Hong Kong is very relevant to and pays a lot of focus on ISDS reform can be evidenced by the fact that, within the Department of Justice, we have recently set up the Inclusive Dispute Avoidance and Resolution Office. Its Commissioner is Dr James Ding. He is looking after and striving to collaborate in all areas in terms of international law, arbitration and mediation, with a view to meeting the Sustainable Development Goals of the United Nations, Goal 16 (Peace, Justice and Strong Institutions); in particular, providing accessible and inclusive institutions that allow justice to be pursued and rule of law to be promoted.

However, none of these would be possible if we have not been able to bring together some of the greatest speakers from around the world. Some of these speakers I know do not usually accept invitations to speak, and some of them do not wish to participate in the debate, but with the great friendship that they have with Hong Kong, we have been able to persuade all of them to come and participate in this conference.

This conference is going to be very lively. I also have to say that the organisers have done a great job in injecting new ideas into the conference. As you would note, we have a young person from

Hong Kong to prepare a discussion paper for each session. The discussion papers will facilitate the discussions that are going to take place in the conference and, no doubt, also provide you with some thoughts about what are going to be discussed.

We hope very much that this conference will provide a lot of interactions with the audience and a lot of fruitful thoughts for all of you. Apart from the government officials from the Mainland China, I understand that there are government officials from other countries and Consuls who are here in today's conference. We hope that our conference is able to meaningfully contribute to the development of ISDS reform.



# Opening Remarks

*(An English translation follows the original Chinese transcript)*

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蒋成华

副司长

中国商务部条法司

主要负责外商投资立法、国际投资协定谈判、世贸组织争端解决案件、国际投资争端案件的处理和应对工作。在担任副司长之前，先后在商务部条法司世贸组织法律处和投资法律处工作。

这次研讨会的主题是投资者与东道国争端解决机制（ISDS）改革，这是一个备受各国政府和国际经济法学界高度关注的问题，也是备受广大跨国企业和仲裁实务界高度关注的重要议题。在过去数十年的实践中，ISDS对保护投资者权益、促进跨国投资发挥了重要作用，国际投资法领域的法治化进程也取得了长足进步。但这些实践也暴露出了一系列突出问题，遭到了来自各方的众多批评。

为了应对挑战，联合国国际贸易法委员会（UNCITRAL）第三工作组启动了改革进程，解决投资争端国际中心（ICSID）正在修订投资仲裁规则。这些进程中，部分国家主张作系统性改革，通过拟定多边条约，设立投资法庭和上诉机制；另一部分国家认为应当彻底抛弃ISDS，转而通过国内法院或国家间争端解决机制来解决争议；还有一部分国家认为当前的ISDS机制总体运转良好，只需要在程序性上小修小补，不必进行系统性改革。

这种错综复杂、意见纷呈的局面，一方面，意味着各方对这个重大问题的基本认识还存在较大分歧；另一方面，所谓「危中有机」，也意味着国际投资争端解决机制正面临着多边规则重构的难得历史机遇。前进一步，国际投资领域的多边治理结构和法治化进程会得到完善；后退一步，整个体系可能更加碎片化，跨国投资者将面临更加不确定的法律预期和投资环境。

在这样的背景下，香港特区政府律政司和亚洲国际法律研究院以投资争端解决机制改革为主题，组织了本次研讨会，邀请了很多世界级的著名专家出席并发表真知灼见，这确实是一个意义十分重大的创举；不仅很必要，也很及时，是一次交流思想、碰撞观点的难得机会。

我们认为，ISDS改革涉及复杂的国际公法问题，应该是政府主导的改革进程，但同时也需要保证透明度，听取专家意见，提高公众参与度。只有这样，才能最大可能地寻求共识，才能使改革的设想变为现实。为了完善国际投

资治理体系，我们支持联合国贸法会的ISDS改革，也支持ICSID为完善国际投资仲裁规则所采取的行动和努力。我们支持制定平衡的争端解决规则，一方面，要充分保护投资者权利、降低成本、提高效率；另一方面，要保障东道国政府的合法管理权、防止出现背离缔约意图、不符合公共政策的裁决。在具体需要改革的事项上，有很多重大的问题摆在我们面前，包括仲裁裁决的一致性、纠错机制、仲裁员资格条件和行为守则、第三方资助、仲裁期限和成本，等等。

不论改革涉及多少议题，涉及什么样的议题，各方都需要不忘初心，牢记使命，关键要看是否有利于推进国际投资领域的法治化进程。而判断是否有利于推进国际投资法治，有三个「性」至关重要。一是公正性，要为投资者提供公正的救济，也要确保东道国的正当公共政策目标不会受到伤害；二是独立性，要避免发生利益冲突或事项冲突的现象，从而使国际投资仲裁成为损人利己的工具；三是一致性，要在最大程度上实现仲裁裁决的一致性，给当事方一个稳定的法律预期。只有满足上述要求的改革，才能增强东道国政府和跨国投资者的信心，才能真正使ISDS改革走向成功。

当然，鉴于目前各方存在的重大分歧，要实现这样宏伟的目标，不是一朝一夕的事情，需要国际社会共同做出长期的努力。我们生活的世界充满希望，也充满挑战。我们不能因现实复杂而放弃梦想，不能因理想遥远而放弃追求。中国政府一直坚定奉行多边主义，积极促进「一带一路」国际合作，推动建设开放型世界经济，以共商共建共享为理念，建设相互尊重、公平正义、合作共赢的新型国际关系。中国国家主席习近平早在2013年的二十国集团领导人峰会上就指出：「要探讨完善全球投资规则，引导全球发展资本合理流动」。中国政府将积极参与全球治理体系改革和建设，不断贡献中国智慧和力量。在推进ISDS改革过程中，中国商务部愿意与各方一道相向而行，为推进国际投资法治进程付出我们的努力。

## Jiang Chenghua

### Deputy Director General

Department of Treaty and Law of the Ministry of Commerce,  
People's Republic of China

He is mainly responsible for foreign investment legislation, international investment agreement negotiations, and responding to WTO dispute settlement cases and international investment disputes. Prior to his position as Deputy Director General, he worked in the WTO Legal Division and Investment Law Division of the Department of Treaty and Law of the Ministry of Commerce.

**I**SDS Reform is an issue that has been attached with great importance by all governments and academics. This topic is also highly relevant to multiple cross-border companies and arbitrators. In the past couple of decades, ISDS has played a major role in protecting investor rights and promoting cross-border investment. The rule of law in the field of international investment has made great progress, but these practices have also exposed a series of prominent issues which have drawn great criticisms from all facets of the field.

To tackle the challenges, UNCITRAL Working Group III has commenced the reform process. The International Centre for the Settlement of Investment Disputes (ICSID) has been revising the arbitration rules at the same time. During this process, some countries want to have systematic reforms and establish multilateral treaties, investment courts and an appellate system; some other countries think we should ditch ISDS and resolve disputes through the domestic court or inter-country dispute resolution mechanisms instead; while some other countries think that the current ISDS is functioning well and only needs some small changes instead of systematic reforms.

On the one hand, this is a very disputing issue with dissenting opinions, and there is no consensus. On the other hand, we see opportunities in the crisis, meaning that this is a rare opportunity for us to reconstruct the multilateral rules in the ISDS. Moving forward, there will be improvement of multilateral government structure and the rule of law. Moving backward, it could also be more fragmented, and cross-border investors would be faced with uncertain laws and legal environment.

Against this backdrop, the Department of Justice of the Hong Kong SAR and Asian Academy of International Law have hosted this conference under the theme “Mapping the Way Forward: ISDS Reform Conference”. We have a lot of heavyweights and experts in international law attending the conference to express their insights into this issue. I would say this is an innovative, significant and relevant move. It is timely and necessary, presenting a rare chance for us to have exchanges and discussions.

ISDS reform involves complex questions of public international law. It should be a government-led process, but at the same time we need to ensure transparency, listen to experts, and increase participation of the public. Only by so doing can we get the maximum consensus among different players and turn our thoughts into reality. To improve the international investment governance system, we support the ISDS reforms of UNCITRAL, and we also support the effort of ICSID in improving international investment arbitration rules. We want a balanced dispute resolution mechanism. On the one hand, it must protect the rights of investors, reduce costs and improve efficiency. On the other hand, we need to protect legitimate jurisdiction and rights of the State. We need to make sure that all arbitration awards are in line with the original intentions of our treaties and public interest. We are currently facing a lot of issues regarding the consistency and coherence of arbitration awards, the quality of arbitrators, and

third party funding, etc.

Even though there are many issues to be addressed, we need to hold on to our initial thought and mission, i.e. facilitating the promotion of the rule of law in the field of international investment. We must base our judgements on three aspects. First, justice; we need to provide access to justice and remedies to investors, but we also need to make sure that the legitimate and public interest of the State is not harmed. Second, independence; avoid conflict of interest or issues, so that the ISDS is not used as a tool to harm. Third, consistency; we need to make sure that the award of arbitration is consistent and provide a stable expectation for the parties involved. With all these reforms, can we be sure that the confidence of States and investors are enhanced, and ISDS reforms will be successful? Of course, we acknowledge the great discrepancies among the ideas and attitudes; it is not something that we can do in a day or two. It requires our long-term effort.

The world we live in is full of hope and challenges. We cannot give up our dreams and missions because of the complexity and the distance towards our goal. Chinese government has been upholding multilateralism. We promote the Belt and Road Initiative to build an open world economy, basing on the concept of cooperation and sharing to build a new international relationship of mutual respect, fairness, justice, and win-win cooperation. President Xi Jinping pointed out at the G20 Leaders' Summit in 2013 that, we need to improve international investment rules and regulations, and guide global development capital with a rational flow. Chinese government will continue to participate in the reform discussions and constructions, as we want to contribute our minds and thoughts. The Ministry of Commerce would like to work with all of you and make our due efforts.

# Opening Remarks

*(An English translation follows the original Chinese transcript)*

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孙劲

参赞

中国外交部条约法律司

武汉大学国际私法博士、墨尔本大学国际法和比较法硕士、武汉大学国际法学士、硕士。历任中国外交部条约法律司处长、中国驻美使馆参赞/法律顾问、中国最高人民法院国际合作局副局长。孙博士是多项国际私法公约、国际刑事司法公约、人权文书、国家豁免公约、双边司法协助条约、中美/中加/中日韩投资保护协定等谈判的中国代表团首席谈判代表和主要成员；著有国际法专著和多篇中英文论文。

本世纪以来随着全球化和国际贸易的发展，ISDS机制处理的案件数量大幅增加，近三年已达到每年40至50起，但与此同时，国际社会对ISDS机制质疑的声音也在增加，甚至有国家开始排除ISDS机制的适用。为此，一些国家提出改革方案，联合国国际贸易法委员会（UNCITRAL）也正就此议题展开深入的讨论，香港特别行政区政府律政司和亚洲国际法律研究院举办本次研讨会可谓恰逢其时。

ISDS机制自创立以来已成为解决投资者与东道国投资争端的有效手段，在吸引外国投资和保护投资者利益、促进全球经济一体化方面发挥了重要作用，这一点得到很多国家的认可。但不容回避的是，经历了半个世纪发展的ISDS机制也积累了不少仍需解决的问题，例如仲裁不一致、仲裁程序烦琐冗长和仲裁费高昂等，这些短板在一定程度上影响ISDS机制的发展，因此有必要对ISDS机制进行适当的改革，我们注意到有国家希望系统改革、有国家希望部分改良，相关的讨论正在进行中。总体看来，各方差异还是比较大，改革还没有非常确定的方向和路径，对于下一步的改革进程我们认为应该注意以下三个方面：

第一，应加强不同讨论平台的协调配合，当前包括联合国国际贸易法委员会等国际机构和区域性组织都在进行ISDS改革问题的讨论，相关的讨论平台侧重点虽然有所不同，但可能也会存在一些重复研究的问题，为形成合力、加强协调，各讨论平台应加强信息共享、相互借鉴，共同推进改革的进程。

第二，应该平衡保护投资者与东道国的利益，有观点认为，现有的ISDS机制侧重保护投资者的利益，影响了东道国的管治权及其公共利益，对通过ISDS机制解决投资争端抱有戒心。这也是一些国家不希望再使用ISDS机制的重要原因，但在全球经济一体化的背景下，ISDS改革方案应更多体现发达国家与发展中国家诉求的平衡，妥善处理投资者保护与东道国国内管治权之间的关系。一个更具包容性的ISDS机制才能赢得更多国家的支持，提高其利用率和美誉度。



第三，应该注重不同纠纷解决方式的兼容互补，ISDS机制包括磋商、调解，诉诸东道主法院和国际仲裁等救济途径，但实践中诉诸仲裁的案件占比远超过其他的争端解决方式，这也是近年来仲裁案件井喷式增长的重要原因。事实上，不同的争端解决方式各具特色，我们经常讲「百花齐放，百家争鸣」，只有激发其他纠纷解决方式的活力才能更好地为全球经济的发展保驾护航。

今天研讨会的第一个议题是投资调解，调解是一种古老的争端解决方式。仲裁等方式出现之前，调解曾经是主要的争端解决方式，在ISDS改革的相关讨论中，调解是一种可选择的替代性争端解决机制。去年北京召开的「一带一路」法治合作国际论坛上，有中国学者提出建立国际调解院等设想，希望通过设立一个专司调解的组织，充分发挥古老争端解决方式的现代魅力。在做好争端预防的同时，以快捷高效的方式解决争端。

今天，借此机会我希望听取各位对于替代性争端解决方式，特别是调解的看法和意见。随着共建「一带一路」的深入发展，中国对外投资规模进一步扩大，多元化的争端解决方式助力「一带一路」建设及国家间的双边合作。本次研讨会选取各方重点关注的话题，邀请了很多重量级的嘉宾，这是香港特区积极发挥自身特点和作用，参与ISDS改革讨论的一次非常有意义的尝试。今天的讨论非常有价值，相信大家会碰撞出思想的火花。

## Sun Jin

### Counselor

Department of Treaty and Law of the Ministry of Foreign Affairs,  
People's Republic of China

Dr Sun obtained his PhD degree in Private International Law from Wuhan University, China and master's degree in International Law and Comparative Law from the University of Melbourne, Australia. He was the chief negotiator and the major member of Chinese Delegation in the negotiations of many international conventions and legal instruments on private international law, international criminal justice, human rights and state immunity as well as bilateral treaties on judicial assistance and the promotion and protection of investments such as China-US, China-Canada and China-Japan-Korea. He has published books on international law and academic papers in both Chinese and English. Before taking up the current role, he was Deputy Director General of Foreign Affairs Bureau of Supreme People's Court, China, Counselor & Legal Adviser of Chinese Embassy in the United States, as well as Director of Department of Treaty and Law of the Ministry of Foreign Affairs, PRC.

With the development of globalisation and international trade, the number of cases handled by the ISDS mechanism has increased significantly, reaching 40 - 50 per year in the past three years. At the same time, the international society has been raising their doubts about the ISDS system. Many countries have even begun opting out of ISDS. Therefore, some countries have raised their concerns over reforms and UNCITRAL has also conducted in-depth discussion on this issue. So, I believe this conference organised by the Department of Justice of the Hong Kong SAR and Asian Academy of International Law comes just at the right time.

The ISDS mechanism has been an effective means of resolving investor-State disputes since its inception. It has played an important role in attracting foreign investment, protecting the interests of

investors and promoting global economic integration. However, it is unavoidable that after half a century of development, the ISDS system has accumulated many problems that need to be resolved; for example, the inconsistencies in arbitration awards, cumbersome and long arbitration procedures, and high arbitration fees. All these shortcomings have affected the development of ISDS, resulting in necessary reform of the system. We have taken notice that some countries are hoping for a systematic reform, and other countries are hoping for a partial improvement. By and large, there is significant difference in opinions with no general consensus. For the next step to go, we believe that we need to pay attention to the following three aspects.

First, we need to strengthen cooperation and coordination across different platforms. Currently international institutions such as UNCITRAL and regional organisations are all conducting discussions on ISDS reform. Although those platforms are focusing on different aspects, there is overlapping of topics. I believe it is crucial for us to share information and learn from each other in order to propel the reform process.

Second, we should try to balance the interest of investors and host countries. Many people believe the ISDS mechanism tilts towards investors' interest and affects host country's regulatory right and public interest, and thus causing scepticism towards the ISDS. This is an important reason why some countries are opting out of ISDS. However, in the context of globalisation, ISDS reform should balance the demands between developed and developing countries, and properly handle the protection of investors and the regulatory right of the host countries. A more inclusive and comprehensive ISDS mechanism can win the support of more countries, improving their utilisation and reputation.

Third, we should also focus on the compatibility of different dispute resolution mechanisms. The ISDS system includes

consultation, mediation, arbitration and other remedies. In practice, however, arbitration has been utilised far more often than other methods of dispute resolution, resulting in the rise of arbitration cases in recent years. As a matter of fact, different dispute resolution mechanisms have their own characteristics. We always say, “Let different flowers blossom in its own ways and different schools advocate its own thoughts”. Only by stimulating the vitality of other dispute resolution methods can we provide greater support for the integration of global economic development.

The first topic of today’s agenda is mediation, which is an ancient dispute resolution method. Before the emergence of arbitration, mediation was the most common method of dispute resolution. In the discussion of ISDS reform, I believe mediation is a possible alternative to other existing dispute resolution mechanisms. At the Forum on the Belt and Road Legal Cooperation held in Beijing in 2018, a Chinese scholar proposed the establishment of an international mediation organisation to promote using this ancient method to solve our modern issues in an efficient manner.

I want to take this opportunity to listen to your views, especially on alternative dispute resolution mechanisms. With the development of the Belt and Road Initiative, Chinese foreign investments are on the rise, and diversified dispute resolution mechanisms will surely contribute to Belt and Road cooperation. This conference is a useful attempt by the Hong Kong SAR to actively play its own role in the discussion of ISDS reform, with topical issues presented by an array of experts. I believe today’s discussion will be of great value and I look forward to the spark of thoughts.

# Opening Remarks

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**Anthony Neoh QC SC JP**

Chairman

Asian Academy of International Law

Anthony is a senior member of the Hong Kong Bar specialising in international litigation, arbitration and financial regulatory matters. In 1979, he commenced practice at the Hong Kong Bar after serving for 13 years in the Hong Kong Civil Service. From 1991 to 1994, he was a member of the Hong Kong Stock Exchange Council and its Listing Committee, and chaired its Disciplinary Committee and Debt Securities Group, and was Co-Chairman of the Legal Committee of the Hong Kong and China Listing Working Group. He was the chief architect of the legal structure for the listing of Chinese enterprises in Hong Kong. He is former Chairman of the Hong Kong Securities and Futures Commission from 1995 to 1998; during this time, he was the first Asian to be elected Chairman of the Technical Committee of the International Organization of Securities Commissions. From 1999 to 2004, he was Chief Advisor of the China Securities Regulatory Commission, at the personal invitation of former Premier Zhu Rongji. On 1 June 2018, Dr Neoh was appointed as Chairman of the Hong Kong Independent Police Complaints Council to serve a term of two years. He was the Convenor of the HKMA Expert Group on the Finance Academy and now serves as Member of the HKMA Preparatory Committee for the Finance Academy. He is also the Co-Chairman of 2018 B20 Financing Growth and Infrastructure Task Force, and Co-Chairman of The China Securitization Forum.

It occurs to me that you may find it useful to have an analogy beyond our present field to assist our deliberations today. There are of course no perfect analogies, but sometimes, the trials and triumphs in one field may help to inspire those embarked on a difficult journey in another. So here is a story, which I hope you will find useful. If not, then, please pardon me for being self-indulgent.

You have probably come across *Swan Lake*, which is accompanied by the immortal music of Tchaikovsky. The story of *Swan Lake* is a simple one, but if you like classical music, the music is unforgettable in its beauty, not only as heard but particularly when it is played with the dance in a full production. That, of course, is the magic of ballet music. The music does not just stand on its own, but together with the choreography, the dancing and the sets, blossoming into an artistic creation which far exceeds the sum of its parts.

*Swan Lake*, however, did not receive the acclaim that it has today when it was first performed. First performed in 1877 in Bolshoi Theatre, with Stepan Ryabov as conductor, Julius Reisinger as choreographer and Karl Valts as set designer, the ballet received a lukewarm reception. For the next 18 years, it languished in limbo, with a total of only 41 performances.

It was then revived in 1895 and performed in Saint Petersburg, with a revised score by Riccardo Drigo, new choreography by Marius Petipa and sets by Andreev, Bocharov, and Levogt. Drigo tightened the score by taking off more than 1,600 bars and made the sequencing of the story easier to follow while retaining the essence of Tchaikovsky's music. In particular, Drigo kept the music in the two *pas de deux*, one with the White Swan and the other with the Black Swan, which, together with Tchaikovsky's leitmotif, constituted the essence of *Swan Lake*. After its debut in London in 1911, with the legendary Nijinsky in the role of the Prince, *Swan*

Lake joined the universal pantheon of the most beloved ballet music of the 20<sup>th</sup> century. Propelling the ballet into the 21<sup>st</sup> century was the 1960s duo of Margot Fonteyn (who was then in her 40's, already universally acclaimed and contemplating retirement) and Rudolf Nureyev (in his early 30's, at the beginning of what turned out to be a brilliant career), with their legendary interpretation of Swan Lake. It is said that the duo achieved the pinnacle of joint artistic creation, as yet unequalled to this day.

This story brings us to our task today. A ballet succeeds because of the productive interplay of music, choreography, sets, and dancers, each contributing to the whole with the whole becoming more than the sum of its parts. Today, the many international investment agreements signed since the 1960s collectively demand the attention of many parties involved: States, investors, related UN specialised agencies, dispute resolution bodies, legal and other professionals, to make them work effectively. This task is in many ways no different to the process of artistic creation in a ballet, with each participant joining in to create a whole which is more than the sum of its parts. I hope you will bear this in mind in your deliberations today.

Finally, you will not be surprised to hear that over the Lunar New Year holidays, I spent some time dusting off the covers of my Swan Lake LPs, cleaning the records and adjusting my turntable, and was rewarded by a full one and half hours of glorious music. I hope you will enjoy today's Proceedings as much as I have enjoyed listening to Tchaikovsky's music.

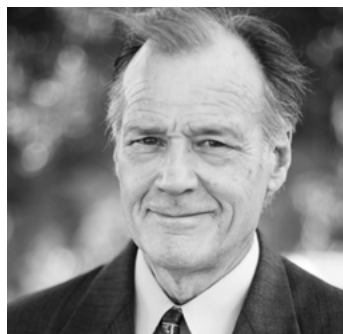
# **SESSION I**

Investment Mediation



# Speaker

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**Jack J. Coe Jr.**

Professor of Law

Pepperdine Law School

Jack J. Coe Jr. is Professor of Law at Pepperdine Law School where he teaches for the Straus Institute for Dispute Resolution. He is an Associate Reporter for the Restatement on the U.S. Law of International Commercial Arbitration and has authored numerous books and articles on arbitration, private international law, and related topics. Coe has held leadership posts in several professional societies, including the IBA, the ABA, and the ITA and has worked at the Iran-U.S. Claims Tribunal. His ongoing expert and arbitral appointments have involved a variety of international transactions and direct investment disputes. He has degrees from UCLA, Loyola (LA), Exeter, and the London School of Economics and Political Science. He also holds the Diploma of the Hague Academy.

## To Explore the Relationship Between Investor-State Mediation and Investor-State Arbitration and How the Two Processes Can Complement with Each Other

This panel raises interesting questions of what I call process design. Given that we have been asked to talk in particular about mediation of investor-State disputes and to do so in a concise way, let me get right to it. I believe there is a significant role to be played by mediation in investor-State disputes, without it becoming a replacement for arbitration. Specifically, mediation should supplement the existing arbitration model, indeed, on a routine basis. But the design part of the process design exercise I am attempting involves many potential architectural variations and many subsidiary questions. My plan is to prefigure what Lucy will explore next by introducing a number of these questions, and in turn offering my tentative (and possibly flawed) answers to some of them.

I start by asking, what is mediation? My definition is that, mediation is a process by which a neutral third party assists the disputing parties to negotiate a settlement, using various techniques deployed first to understand the dispute and second to promote an agreed resolution of it. That third-party assistance is intended to improve the chances of ending the dispute compared to what simple bilateral negotiations between respective counsel might achieve. (I use mediation and reconciliation interchangeably – I suppose not everybody does).

My second question takes account of the specialised nature of investment disputes. The question is, “who should be the mediators?” I could say Lucy and leave it at that, but, on the off chance that her calendar may be full. Let me suggest that investor-State mediators should be persons who understand well investment

disputes, investment arbitration and the now-quite-rich jurisprudence the tribunals consult in deciding claims, and persons who are also skilful in the techniques of mediation. The subsidiary point is that, although some say that one needs only to know the basic techniques of mediation and be equipped merely to understand the legal issues in broad outline, the mediator who knows the field will be better able to educate the parties concerning the risks each faces and, if appropriate, to offer various forms of merits evaluation. Such mediators will naturally communicate better with the parties and be more persuasive. Imagine for example the prospective mediator who ask for an interpreter when being told, “Welcome to our dispute; it involves a fork-in-the-road clause which may have been rendered irrelevant by an MFN clause; there is also an umbrella clause in play and we suspect to debate in due recourse the modern day relevance of *Neer* and *Chorzow Factory*.” Put it in another way, investment disputes have their own language.

The related but separate requirement that the mediator should be skilful in mediation process I hope is not laughably obvious. But just to underscore the point, not all arbitrators and experts on investment law would make good mediators. Arbitration and mediation require different skill sets. Finally, on the question of who the mediators should be, note that no version of what I propose involves an arbitrator also acting as mediator or vice versa. Again, I understand that is not the rule everywhere but that is the premise that I adopt.

The third question relates to timing: when in the process should mediation be attempted? After the claim is notified but before the claim is filed? Perhaps after the arbitration been underway for a while, or after a pivotal arbitral hearing perhaps (such as on jurisdiction or the merits)? Perhaps after the award is rendered? Most of you will recognise this is a trick question, if I answer yes to all of the above, I could look for additional

opportunities to introduce mediation as a collateral process during the dispute. Again, I do not propose to replace arbitration; rather, I see mediation as a companion, shadow, process running concurrently with the arbitration. The arbitration moves forward apace ever closer to a result that the parties cannot really control, while recurrent episodes of mediation offer parties a way to take back control of the outcome – a way for both sides to end the dispute, to declare victory and move on with their other business. That other business may or may not involve the counterparty in some kind of continuing relationship.

The fourth question: how many total neutrals – arbitrators and mediators combined – should be involved? My sense after all these years is that, the disputants have a very deep attachment to the three-arbitrator model, in which each party picks one arbitrator and are jointly involved (directly or indirectly) in designating the presiding arbitrator. Taking that three-arbitrator premise will give us four neutrals: three arbitrators and one shadow mediator, but I cannot help but wonder about other possibilities that might promote an even more collaborative centre of gravity. Specifically, I would love to see what would happen if the arbitration centre piece of my model consisted in a sole arbitrator who would then be shadowed by a team of two mediators. That is, the two sides, or perhaps an institution, would jointly appoint a sole arbitrator and each party would also appoint a mediator resulting in a concurrent mediation involving two mediators who would as a team parallel the sole arbitrator. The sole arbitrator would arbitrate the case in the usual way, although accommodating in various ways the parallel mediation.

At its best, co-mediation will allow for complimentary mediator skill sets and domains of expertise to operate. The single arbitrator tribunal would presumably lead to faster proceedings in many cases than under the three-arbitrator model. And, if the

mediation results in settlement during the arbitration, the arbitrator can (just as with the three-arbitrator tribunal) render an award on agreed terms. That agreed award theoretically should enjoy enforceability as any other award would.

You will appreciate that there are other possibilities, such as having team mediation shadow three arbitrators, a five-neutral approach that might make sense in a very complicated case.

The fifth question I ask is related to who the mediators should be and how many should be used. It is the question of how they should be appointed. I will not belabour this except to say that although there is no doubt a role for institutions to play, I tend to favour an approach that grants party autonomy in the first instance. There are of course pros and cons that we can discuss during Q&A: For instance, if the parties each select a mediator, the system by giving them this element of control might promote confidence in the process. On the other hand, since those appointments will not necessarily be coordinated, there is less of a chance that the mediators will fully complement each other and in fact their respective styles may actually clash. Institutions – if making the appointments – could, by contrast, strive for complementarity.

The final question I ask – and I am only going to touch on this enough to introduce Lucy's very important study – is how do we make mediation become more routine and predictable despite its voluntary character? When the parties give mediation a chance to operate, the data involving commercial disputes support the expectation that mediation will work exceedingly well, indeed, sometimes achieving miraculous results. Still, that initial hurdle of convening the parties and launching the mediation cannot be underestimated; it is significant.

What we are really talking about among other things is a change of habits, a change of standard operating procedures, a

change of expectations and, to some extent, how we define best practices in approaching these disputes. It is after all mediation, and we cannot be too coercive so as to lose mediations' voluntary essence. Yet, there ought to be room for what I call 'Dutch uncle' prompting. I am informed by Google – having heard that expression my whole life – that a Dutch uncle is someone who gives firm but benevolent advice. I am thinking of cues and promptings in the texts that the disputants come into contact regularly in the process. Triggers that raise the issue and give the parties permission to talk about it without either side feeling they are signalling weakness, which fear is one of the obstacles to mediation often identified. As an incremental approach I would suggest small changes in the language of BITs, arbitration rules, arbitration ethics texts, draft agendas for organisational meetings, and indeed in 'procedural order number one' – an important benchmark that regulates the parties' expectations.

Of course, I am just naming some of the places in which we might attempt to induce a mediation habit. A more elaborate approach would be for States to include optional or elective med-arb protocols in their BITs; these might, for example, set forth detailed hybrid processes designed to harness and coordinate flexibly the combined strengths of arbitration and mediation.

There are other influences that will bear on efforts to make mediation more routine, especially as relates to disputant attitudes. On the private side, greater use of mediation will likely to some extent be client-driven just as it has been in United States domestic ADR scene. On the State side, ongoing efforts to build relevant governmental capacities by UNCTAD, UNCITRAL and others should of course continue. Relatedly, governments ought to more fully embrace principles of resource management and prudent stewardship in considering how in a given case mediation might bring an end to a risk-laden dispute, allowing the government

officials legitimately to declare victory, and then return to the State's other business. Additionally, we need to study domestic corruption laws and other municipal disincentives to government settlements with foreign investors. State officials ought to be free to end disputes without fear of corruption charges later being brought against them, in turn putting the settlement itself at risk.

Finally, before we hear from Lucy, let me suggest that, the use of mediation is just one of many process adjustments that might be made. Consider that the best time to settle the dispute might be before it actually arises. In particular, I am attracted to the idea of host States using some sort of monitoring system, such as by instituting an ombudsman or similar regime. We are talking about some sort of early warning system for detecting and collaboratively neutralising inchoate disputes. More could be said, but I will stop here.

# Speaker

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## Lucy Reed

### Director

Centre for International Law, Faculty of Law,  
National University of Singapore

Professor Reed, who joined the NUS Law Faculty and Centre for International Law in 2016, teaches investor-State arbitration and mediation/conciliation, and regularly serves as arbitrator. As a partner in the international firm Freshfields, she led the global arbitration group and represented private and public clients in investment treaty and complex commercial arbitrations. She is a Vice President of the Singapore International Arbitration Centre and the International Council for Commercial Arbitration. While with the US State Department, Professor Reed was the US Agent to the Iran-US Claims Tribunal and a lead adviser on international investment disputes. As general counsel of the international organisation KEDO, she led negotiations with North Korea. A former President of the American Society of International Law, she received her JD from the University of Chicago and is a New York-qualified lawyer.



## To Explore How to Incentivise Host Governments and Investors to Utilise Investor-State Mediation

Today I want to briefly describe the results of the survey that we, Centre for International Law, did on the obstacles to settlement by mediation (or otherwise) of investor-State disputes and then focus on the harder topic of how to improve settlement numbers. I have three overarching points for you.

First, States do face special obstacles to settlement in ISDS with or without the help of mediators. Some obstacles cannot be overcome, and some disputes cannot be settled. I tell my students in my course on mediation and conciliation of State level disputes in Singapore that, if they say that all disputes can be settled, they will fail. But, second, based on my decades in international arbitration at the State level, I do believe and I do observe that many more disputes could and should be settled. And third, in my view, coercion and sanctions will not get us there. The challenge is to find incentives, and that is why I call my talk today ‘Carrots and Carrots’ rather than ‘Carrots and Sticks’.

The Centre of International Law that I run conducted a survey in 2016, in which we wanted to test the validity of the perceived obstacles to settlement in ISDS. We had about 50 active participants who were a mix of top practitioners, arbitrators, and institutional representatives. And they had not only to do the easy task of ranking factors but also to answer open-ended questions with prose. So, it took some work. The first question was: Is it the investor or the State who is more reluctant to settle? 70 percent not surprisingly said that it is the State, and that is why we focus on the State. Question two was harder: What are the top obstacles to settlement? The results in the slide showed that the top obstacle to

settlement in ISDS, by far, is the State's desire to avoid responsibility for a settlement and to defer decision making to third-party arbitrators.

The second greatest obstacle is the political risk involved. The third one is the difficulty of getting budget approval when there is a voluntary settlement instead of an arbitral award. Fourth is, as Jack Coe mentioned, a fear of public criticism, media criticism, and even allegations of corruption in taking a bribe in order to settle a case with a potentially hated investor. Fifth was the fear of setting a precedent, meaning opening the floodgates to being sued again and again because you make a settlement. Then there are structural inefficiencies; because there are so many agencies involved, it is just hard to get approval.

I want to share with you some specific comments from our respondents, because they informed the incentives discussion. For observations on avoiding responsibility, some said it is often easier to sell to government and to the public the need to comply with an award instead of a settlement. In terms of fear of criticism, some of our respondents said that government officials fear being criticised as weak for being willing to go to mediation, and they may lose face. In terms of allegations of corruption, which I have experienced in some of my own mediations as counsel, what we heard are concerns about personal liability and the 'money agencies' – the budget agencies – are suspicious about paying settlements as compared to paying awards from arbitral tribunals, because, again, there are concerns about potential bribery. And there are always questions of "well, it might look good for the current government to settle, but what about when the next government officials look back and think that public funds have been wasted." In terms of structural inefficiencies, what we heard is that, the sheer number of different officials in departments who need to consider and approve a settlement can be a barrier – this may be a challenge to

Dr James Ding in his new role in Hong Kong.

Let us flip our perspective and look at what we asked respondents about what might help them to settle in appropriate cases – again, not the impossible cases. Several factors might lead them to invite a mediator in. By far the most important factor was the desire to save time and money, so, please remember this one. Second, obviously, is when the case is known to be weak and might be lost. Third is appreciating the certainty of a settlement, over which they have some control, as compared to the uncertainty of an arbitration decision, which you might win but you also might lose and lose big. And the fourth factor actually was the desire to preserve a long-term relationship, if the relations are not already fractured as they often are in big investments.

So, the challenge is how to incentivise a mediated settlement by somehow balancing the obstacles with the factors that will help settlements. How can you tackle this? I will refer you to David Ng's excellent paper for a good collection of suggestions. I want to highlight four today.

The first suggestion goes to education and training. Remember I said that in the survey the biggest worry was State accountability, but the biggest carrot, if you will, was to save time and money. So, the obvious path is to show State officials how mediation can be win-win with creative forward-looking solutions that might save some costs. In arbitration you are going to win money at the most or have to pay money at the worst, but in mediation you have almost limitless options. You can get a new project, new terms, or new deal swaps, etc. And I would ask, why official would not want to bear the responsibility of successfully settling a dispute at a good cost? And maybe we should be asking more why there should not be State accountability for not trying to settle appropriate cases? One warning I want to flag – if the State of the investor does too much to help the mediation, there is a risk of that being seen as

espousal, which might bar the investor from going forward with an arbitration case if necessary.

The second suggestion really goes to mediation and arbitration institutions, which have a very important role to play. In my view, there are a lot of good rules on paper. We have the 2012 International Bar Association (IBA) Rules on Investor-State Mediation; ICSID has draft rules from last year; and we have in Singapore the Arb-Med-Arb rules. But what about more action? There can be compulsion, as I say, with sanctions or financial penalties for not settling, but I do not think they help when we have government officials who are concerned about personal liability for settling. I think it is better to look for a carrot. One suggestion is for institutions to publish examples of success stories, sanitised probably, to show what kind of disputes there were and what kind of settlements were achieved. That would help State officials see that they are not pioneers at risk.

The third suggestion is what Jack has just talked about, namely for institutions, and for arbitral tribunals in particular to make it easy for mediation to be attempted in many ways at many times during dispute resolution. Jack is a pioneer in this area, and I do recommend his articles which are cited in David Ng's paper.

The fourth suggestion is the new-new thing, focusing on the Singapore Convention. The overall suggestion is for States to take advantage of their treaty-making role, because, by the way, it was the States that created all those bilateral investment treaties and the perceived problems in the first place; so, States bear responsibility if they want to help fix the problem.

One thing that can be done of course is for States to consider adding provisions in new treaties or renegotiating treaties in order to build in mandatory mediation or encourage mediation with more teeth than a cooling off period. As I think Jack referenced,

if the treaty requires mediation to be attempted, then in a specific dispute a State will not look weak in proposing mediation or considering protections for State officials who participate in settlement. There are also some proposals for a Mauritius Convention-like umbrella multilateral convention on mediation with retroactive effect. I am not very optimistic about that.

Another idea is to take advantage of the new Singapore Convention, about which I am optimistic. The real name of the Singapore Convention is the “UN Convention on Enforcement of Mediated Settlement Agreements”. It was approved by the UN General Assembly in December 2018. It is up for signature in Singapore in August 2019; and it will go into effect six months after only three States sign on to it. What is it and what is it not? There are some confusion, so I will say this sentence slowly about what it is. When the Singapore Convention is in effect, courts and State parties must enforce written settlement agreements resulting from mediation (proven mediation) in disputes that are commercial and international, subject to protections very similar to the protections in Article V of the New York Convention. So, under the Singapore Convention, a mediated international settlement agreement will be enforceable in domestic courts of signatory States not as a contract, which is what we have now, but as a new animal, a new international mediated settlement category. One can think about the Singapore Convention as one half of the New York Convention, because the Convention only goes to the enforcement of mediated settlement agreements and does nothing for enforcing agreements to mediate. And that is because, the UNCITRAL Working Group recognises, at least so far, that one cannot compel a good faith negotiation of a dispute.

The question for today is whether the Singapore Convention would apply to ISDS? On the one hand, foreign investment is

international; it is commercial, and the parties can settle by mediation. But on the other hand, there is a reservation. One of the two reservations in the Convention is that a State can opt out and say it will not apply to a mediated settlement agreement to which the State is a party.

Now my last comment on the Singapore Convention in my talk today is this: one can argue that we do not need the Singapore Convention because parties who voluntarily settle their disputes tend to comply with their settlement agreements and most courts enforce settlement agreements. So, why do we need it? The driving argument here is that, the Convention will give legitimacy to international mediation – a patina – like we enjoy with the New York Convention for international arbitration. This should promote the use of mediation in ISDS and other international disputes, including by States, unless the States use the reservation I just mentioned. Only time will tell how much impact the Convention will have on mediated settlement and enforcement of mediated settlement agreements in investor-State disputes.

## Slide 1



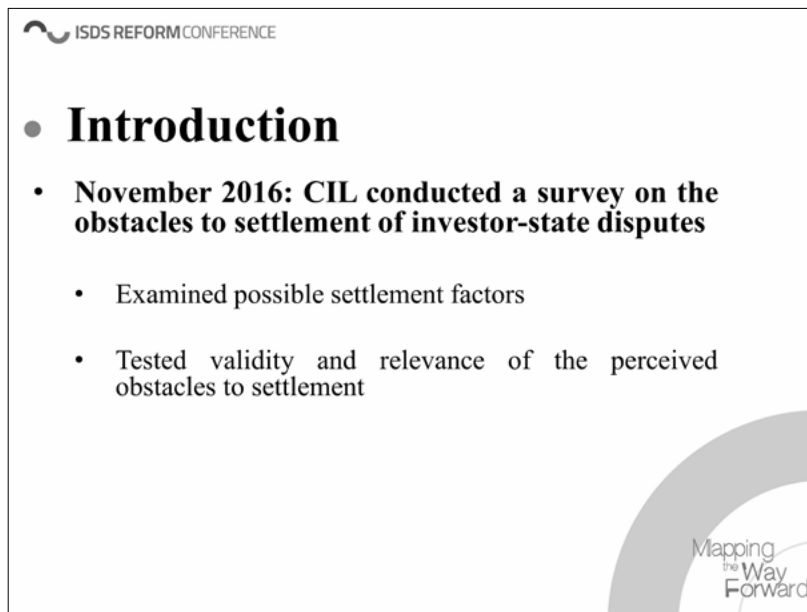
ISDS REFORM CONFERENCE

Mapping the Way Forward

# Carrots and Carrots: Incentivising Investor-State Mediation

**Prof Lucy Reed**  
**Director**  
**NUS Centre for International Law (CIL)**

## Slide 2




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## ● Introduction

- **November 2016: CIL conducted a survey on the obstacles to settlement of investor-state disputes**
  - Examined possible settlement factors
  - Tested validity and relevance of the perceived obstacles to settlement


Mapping the Way Forward

## Slide 3




**• Survey Methodology**

- 47 out of 97 participants responded
- Respondents were a mix of:
  - Private practitioners
  - Arbitrators
  - Representatives from institutions
  - Academics
- More than 50% reported experience advising both investors and states




## Slide 4




**• Survey Structure and Key Questions**

- Respondents were asked to rank settlement factors and answer open-ended questions
- Key Questions:
  - 1) Is investor or state more reluctant to settle?
  - 2) What are the top obstacles to settlement?






## Slide 5




• **Summary of Findings**

**Question 1: Is investor or state more reluctant to settle?**

State – 70% of respondents




## Slide 6



• **Summary of Findings**

**Question 2: What are the top obstacles to settlement?**

- 1) \*State desire to avoid responsibility and defer decision-making to third party
- 2) Political risk
- 3) Difficulty of getting budget approval to pay a settlement
- 4) Fear of public criticism and allegations of corruption
- 5) Fear of setting a precedent
- 6) Structural inefficiencies



## Slide 7

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## ● Observations from Respondents – On Avoiding Responsibility

“Cases take so long it could easily ultimately be someone else’s problem”

“it is often easier to “sell” to parliament and public opinion the need to comply with a binding award”

“kicking the problem down the road”

“unwillingness to take public responsibility for doing a deal”

Mapping the Way Forward

## Slide 8

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## ● Observations from Respondents – On Fear of Criticism

“concerns about face”

“government officials ... will often fear being criticized as weak or branded as puppets of foreign interests”

“fear of losing face”

“don’t want to appear weak”

Mapping the Way Forward

## Slide 9

ISDS REFORM CONFERENCE

## Observations from Respondents – On

- Fear of Allegations of Corruption

“fear of the officials concerned of being accused of corruption”

“concerns about personal liability if financial resources need to be allocated”

“Comptroller agencies tend to look with suspicious eyes at settlements given corruption concerns”

“especially in developing states, no-one wants to accept responsibility for paying voluntarily a settlement amount for fear of it being questioned in the future when government changes”

Mapping the Way Forward

## Slide 10

ISDS REFORM CONFERENCE

## Observations from Respondents – On

- Structural Inefficiencies

“stakeholders with varying agendas”

“sheer number of different officials and departments who need to consider and approve a settlement offer”

“range of stakeholders that need to be consulted and satisfied”

“lack of internal organization/coherence to carry out meaningful settlement discussions”

Mapping the Way Forward

Slide 11

 ISDS REFORM CONFERENCE

## • Possible Incentives to Settle?

- Focus is on the positives to settlement.
- \*Saving costs and time
- Weakness of case
- Certainty of settlement v. uncertainty of arbitration
- Desire to preserve long-term relationship

 Mapping  
the Way  
Forward

Slide 12

 ISDS REFORM CONFERENCE


## • Tackling the Obstacles – Suggestions

### **Suggestion 1**

Emphasize the range of remedies  
available in investor-state  
mediation

 Mapping  
the Way  
Forward


## Slide 13




• Tackling the Obstacles – Suggestions

**Suggestion 2**

Publish successful examples of investor-state mediations with sensitive information redacted




## Slide 14




• Tackling the Obstacles – Suggestions

**Suggestion 3**

Build mediation procedures into dispute resolution stages, even when the dispute is in arbitration  
(Prof Coe)




Slide 15



• Tackling the Obstacles – Suggestions

**Suggestion 4**

Take advantage of the new Singapore Convention, building mediation procedures into international rules and treaties



Slide 16



• Preview: Singapore Convention

**Article 1. Scope of application**

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that:

- At least two parties to the settlement agreement have their places of business in different States; or
- The State in which the parties to the settlement agreement have their places of business is different from either:
  - The State in which a substantial part of the obligations under the settlement agreement is performed; or
  - The State with which the subject matter of the settlement agreement is most closely connected.



Slide 17



## ● Preview: Singapore Convention

### Article 8. Reservations

1. A Party to the Convention may declare that:
  - a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
  - b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
2. No reservations are permitted except those expressly authorized in this article.

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Mapping  
the Way  
Forward

## Commentator

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### **Paul Starr**

**Partner**

King & Wood Mallesons

Paul Starr is asialaw's Hong Kong Disputes Star of the Year, and joint coordinator of King & Wood Mallesons' worldwide arbitration practice. Paul is Practice Team Leader in Hong Kong for Construction and Dispute Resolution. An honours graduate in law from Peterhouse, Cambridge University, England. Paul won a scholarship and the University's prestigious Squire Law Prize. Paul's team won Asian Legal Counsel Award for best arbitration practice. The team is also several times winner of Asian Legal Business Construction Practice of the Year award, International Cross-border Law Firm of the Year in Hong Kong and Arbitration Advisory Firm of the Year in Hong Kong.



Thanks to both of our speakers for such an erudite and concentrated presentation. Both of them have in such a short period of time offered so many thought-provoking comments.

I gained my international mediation experience of treaties at the Iran-US arbitral tribunal at The Hague in the early 1980s. I was a very young lawyer at the time, and my principal job was to smuggle in whiskey for the delegates at the tribunal because I was working for the Iranian Government at the time. My firm was working for the Iranian Government, and I needed a mediation because people were knocking at my door at midnight 1am, 2am, asking for drinks. They were all men, no ladies knocking at my door. There were very good lady delegates on the Iranian delegation, but only men knocking at my door. I needed the Head of Delegation – it was a lady – Mrs Faradi, to mediate for me the solution, and the solution was of course AESOP bottles, because AESOP bottles are whisky-coloured, and they were supplied by the hotel. So, it was very easy to fill the AESOP bottles with whisky and give those to the delegates, and they could take those to their rooms. The only trouble was sometimes they bubbled when full.

Another aspect of mediation was that, at some point, the Iranian Government decided: no more British lawyers in the tribunal chamber, so I had to mediate that with Tehran. That was quite a good news, because I was not qualified as a British lawyer at that time, so I was able to go into the tribunal chamber. If you look at the case of Bikoff and Eisenpresser against the Government of Iran, you will see only one foreign name in the delegates list – my own.

The third aspect of mediation was that, we had to walk out of this arbitration. The Government of Iran instructed us to walk out. We were told to get up and walk out shouting religious slogans in a foreign language. I managed to mediate that with Tehran. What we did was we had a tea break first. I told the opposition

that we were going to walk out and shout religious slogans, and I went to knock at the tribunal's door when they were having their tea and said, "I'm very sorry. We are going to walk out." And we then convened in the arbitration again and we were able to walk out shouting our slogans. Contrast that with something in Singapore that I did, where in fact the other side gave us no notice. They just walked out, that was very rude indeed. So that was a good mediated settlement there.

Based on what the speakers have told us, I want to make some observations and comments – thank you for giving me permission to do that. First of all, are government departments going to allow mediation of investor-State disputes if there is no mediation provision in the treaty? Now speaking from a commercial arbitration perspective in Asia, government departments in different Asian countries are sometimes quite frightened to embark upon a different form of dispute resolution from that described in the dispute resolution clause.

Now perhaps there is more hope with international investment treaty mediation, because I suspect and I believe that those types of arbitration and mediation will get elevated to the legal departments of governments, to the Department of Justice for example in Hong Kong, and to other departments in Malaysia and Singapore, where lawyers rather than civil servants, if I can put it that way, will decide whether or not to embark upon mediation. So, I think there is more hope perhaps in trying to persuade governments to mediate even where there is no optional or compulsory mediation clause. But secondly, I have got to give you my experience of acting for States with my London office in investment treaty arbitrations, where we were acting largely for former Soviet Union countries. And the mandate from the State is to go as slow as possible. Let us delay this. We want this to go on for years. We do not want to give the claimant anything. We are

not going to pay a single dollar. We will leave it and we will defer it. You have to read some of these cases yourselves to see what happened in those cases. Obviously, the government eventually did get clobbered, but they have decided quite deliberately to go very, very slowly. Now, as Lucy says, that is a question I think in part of educating governments, and we do try our best to do that. I think there are a number of ways that one could look at that, because Lucy has mentioned about remedies. I think not all claimants want money, which is the first thing to bear in mind. I had a case in Korea where a contractor, a rail contractor, was thrown off the railway. All the contractor wanted was reinstatement and did not want any money. Now we managed to threaten an international treaty arbitration in order to get that contractor reinstated onto the railway. But if that had not worked, I would ask the panel whether perhaps mediation might have been proposed for that, for we had already hinted that all we really wanted was reinstatement.

I think remedies are a very important consideration of that. The other aspect I really want to talk about, which I am not sure whether it has been touched upon, is bargaining power. I really want to focus now on the claimant, not on the State, and talk about bargaining power. Because for me working in a Chinese law firm, working on the Belt and Road Initiative, it is quite shocking to me. People always make lawyer jokes, but I think at times we need to laugh at the claimants. It is quite shocking to me how few claimants who are injecting lots of money into these projects do not negotiate their rights and their remedies, either in, for example, their dispute resolution clause or in other clauses of the contract – they are negotiating directly very often with governments. So, in Ghana, we were negotiating directly with the Ghanaian Government about supporting railway project. They have a plan – that is a good news – but many parties do not, and yet they have got very strong bargaining power. They do have an opportunity in my respectful submission to actually go to the government and try

and get further rights for themselves. So, it is not just looking at this from the point of view of the State to try to get this sort of mediation accepted.

To tell you a real story about May Day, May the first in China, a couple of years ago. On May the first, you cannot get a taxi. I was tendering for an investment treaty job and I was late for the tender, but could not find a taxi, it was pre-Didi – I could not find any taxi at all. I always tell my junior lawyers not to be late. I was late for this tender! Then an hour through the tender, the second nightmare occurred. An hour through it, I realised I was tendering against my own London office! My Beijing office had been too shy to tell me that I was actually tendering against my London office. So, I had to do what every good lawyer would do, think on my feet. I got the job for both London and us. So, that was pretty huge.

But the real nightmare was this: they had actually tried with their bargaining power on two projects in Africa, where they had injected a lot of money. They had tried to get a refund clause injected into the contract in the case of expropriation. The only trouble is they did not use lawyers. They cut and pasted a refund clause from another contract, and they put the wrong amount into the contract. It was 600 million US dollars short, but they had a go. My question is, why could they not have tried perhaps with benefit of course of lawyers, a mediation clause? They were negotiating again directly with this African government country. Of course, you cannot inject that into the treaty. But can you not have a clause that says with the government directly that, notwithstanding the contents of the treaty, we are going to give you a right to mediation, in the event of an investment-State treaty dispute?

So, I just put that view to ponder. I think more and more in this region and worldwide, we are going to find claimants with

much more power to be able to try and persuade governments to think differently about investment treaty arbitration, and I think more importantly today – investment treaty mediation.

## **SESSION II**

Appeal Mechanism for ISDS Awards

# Speaker

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## **Albert Jan van den Berg**

**Partner**

Hanotiau & van den Berg (Brussels, Belgium)

Professor Albert Jan van den Berg is Honorary President of the International Council for Commercial Arbitration, having served as President from 2014 - 2016. He is a Visiting Professor at Georgetown University Law Centre, Washington DC, and Tsinghua University, Beijing; Emeritus Professor at Erasmus University, Rotterdam; and a former Visiting Professor at University of Miami School of Law. Professor van den Berg is presiding and party-appointed arbitrator in numerous international commercial and investment arbitrations. He also acts as counsel in international commercial arbitrations. He is former President and Secretary-General of the Netherlands Arbitration Institute and Vice President of the London Court of International Arbitration.

# Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Conventions<sup>1</sup>

## I. INTRODUCTION

1. [Slide #2] The organisers of this conference invited me to address how an appeal mechanism for ISDS awards would interact with the New York and ICSID Conventions. The relevance of this question is evident given the importance of both treaties for international arbitration. Each Convention has more than 150 Contracting States and both have been thoroughly tested in numerous court decisions interpreting and applying their provisions.<sup>2</sup> Analysing the question is also timely as UNCITRAL Working Group III is currently discussing possible reforms of ISDS, including a potential appeal or court mechanism for ISDS disputes.

2. To put the question in context, there are more than 3,300 International Investment Agreements (IIA), which comprise Bilateral Investment Treaties (BIT)<sup>3</sup> and Multilateral Investment Treaties (MIT). IIAs can also be part of Free Trade Agreements (FTA) or in the form of an Investment Protection Agreement (IPA). Almost all of them provide for arbitration as a means of settlement of disputes between investors and host-States. Very few of them, less than 2%, contain provisions regarding an appeal mechanism. Attempts to establish an appeal mechanism for ISDS have failed in the past.

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1 The presentation of Professor Albert Jan van den Berg is based on this paper that he kindly prepared for the ISDS Reform Conference. His presentation slides and a list of abbreviations are set out at the end of this paper. Email: [aj@hvdb.com](mailto:aj@hvdb.com)

2 See the reporting of the court decisions interpreting and applying both Conventions in Part V of each of the 42 volumes of the ICCA YEARBOOK COMMERCIAL ARBITRATION as of 1976 (available at: <http://www.kluwerarbitration.com>). The court decisions on the New York Convention are indexed per topic and per country at [www.newyorkconvention.org](http://www.newyorkconvention.org).

3 The term “plurilateral investment treaty” is sometimes also used, indicating a limited number of Contracting States. An example is NAFTA. In this contribution, they are considered equivalent to BITs. The EU also prefers to use the term “plurilateral” as it concludes FTAs with countries outside the EU together with its 28 Member States.



3. As will become clear from this contribution, the interaction of a potential appeal mechanism with the New York and ICSID Conventions is multifaceted and highly complex. The interaction is analysed under a number of headings: the reasons for the appeal mechanism in ISDS (Section II); the appeal mechanism in practice (Section III); the legal regime governing current ISDS (Section IV); the legal regime governing an appeal mechanism (Section V); the nature and scope of appeal (Section VI); enforcement of the appeal award (Section VII); and setting aside or annulment of the appeal award (Section VIII). Concluding observations are offered in Section IX.

## II. REASONS FOR APPEAL MECHANISM

4. The matter of an appeal mechanism for ISDS awards has been the subject of debate for some 25 years.<sup>4</sup> The present discussion at Working Group III of UNCITRAL shows that a number of delegates have concerns regarding consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals. Reference to legitimacy is also regularly made. The UNCITRAL Secretariat analysed these concerns in a Note of 28 August 2018.<sup>5</sup> The Note gives an “illustrative list” of examples of divergent interpretations of substantive standards of protection, divergent interpretations with respect to jurisdiction and admissibility, and inconsistencies in procedural matters.<sup>6</sup>

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<sup>4</sup> See, generally, the Special Issue of ICSID Review Foreign Investment Law Journal Vol. 32 No. 3 (Fall 2017). For an historical context, see Chester Brown, *Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court*, *id.*, pp. 595-610 (also Vol. 32 No. 3).

<sup>5</sup> UN DOC A/CN.9/WG.III/WP.150 (28 August 2018).

<sup>6</sup> *Id.* paras. 14-18.

5. A word of caution here. The UNCITRAL list may create an impression of total chaos in the ISDS arbitration system. Closer analysis of the list, however, shows that the contradictory decisions of ISDS tribunals are limited to a few instances. If the measure complained of is the same in two cases but the standard in the relevant treaties is different, the two cases may be comparable if the treaty standard is similar, although even here the danger is that it is an exercise of comparing apples with oranges.

6. To give an example, the fair and equitable treatment (FET) standard under NAFTA is a minimum standard under customary international law. The FET standard as set forth in many other IIAs is interpreted either as an (evolving) minimum standard under customary international law or in an autonomous manner. Here, differing interpretations are not the result of some capricious arbitrators, but rather are due to differing treaty texts.

7. The FET standard is also a good example of why differing interpretations are offered. First and second generation IIAs contain broadly worded FET provisions, offering little guidance to arbitrators as to how to interpret them. Drafters of more recent, third generation IIAs are aware of this problem and have provided more detailed FET provisions.

8. These observations were also made at the 36<sup>th</sup> Session of UNCITRAL Working Group III held in Vienna, 29 October - 2 November 2018. The Working Group recalled that “a distinction had been made between divergence in decisions that could be justified and differing interpretations which could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty, or of the same procedural issue, when the facts were similar).”<sup>7</sup> The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to “unjustifiably inconsistent interpretations

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7 UN DOC A/CN.9/964 (6 November 2018), para. 28.

of investment treaty provisions and other relevant principles of international law by ISDS tribunals.”<sup>8</sup>

9. The Working Group then considered whether “limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions made it desirable to undertake reforms.” It answered this question in the affirmative.<sup>9</sup> The following is reported regarding the Working Group’s discussion of incorrect decisions:

On the meaning of “correct” decisions (including whether obtaining a correct outcome should be an objective of reform), it was mentioned that “incorrect” decisions would be those rendered where treaty provisions have been improperly interpreted by tribunals, not reflecting the intent of the parties to the treaty or contrary to the applicable rules of interpretation. It was also stated that decisions based on manifest errors of law or facts were also “incorrect”, for which there was a lack of mechanism to rectify the situation. It was stated that ensuring correctness might generally assist in obtaining consistency of decisions as well.<sup>10</sup>

10. The Working Group noted that the existing mechanisms of annulment and setting aside of awards were designed to address significant deficiencies in the arbitral proceeding, also referred to as “the integrity and fairness of the process,” but did not necessarily constitute a mechanism to address concerns arising from “incorrect” decisions.<sup>11</sup>

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<sup>8</sup> *Id.* para. 40.

<sup>9</sup> *Id.* paras. 54-63 (See also the Secretariat’s Note, *supra* n. 5, at paras. 19-26).

<sup>10</sup> *Id.* para. 57.

<sup>11</sup> UN DOC A/CN.9/WG.III/WP.149 (5 September 2018), para. 10.

11. It is submitted that divergent interpretations of treaty provisions do exist, but not on the scale suggested at the Working Group and elsewhere. Moreover, most of these divergences appear in awards dating more than a decade ago. Investment law, being a relatively new field of law, requires time to mature and assessment of inconsistency should be made on the basis of more modern jurisprudence.

12. In any event, assuming that a serious divergence of interpretations of IIA provisions exists, one would think that the first step to remedy the divergence would be to unify the *substantive* standards of investment protection. However, that approach is missing from the Working Group's mandate. The approach seems not to unify the differing substantive provisions in the 3,300 IIAs, but rather to offer a *procedural* solution in the form of an appeal mechanism or a multilateral court system.

13. Actually, consistency no longer appears to be the first priority for the UNCITRAL Working Group. The focus now is “predictability and correctness” of arbitral awards:

During the discussion in the Working Group, it was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity (A/CN.9/935, para. 26). Indeed, the Working Group considered that consistency and coherence were not objectives in themselves and that caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties, considering that the underlying investment treaty regime itself was not uniform (A/CN.9/930/Add.1/Rev.1, paras. 11, 17 and 18).<sup>12</sup>

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12. Secretariat's Note, *supra* n. 5, at para. 8.

14. The Secretariat's Note lists "Possible reforms on a multilateral basis", including:

- (a) introducing a system of precedent;
- (b) providing guidance to arbitral tribunals;
- (c) prior scrutiny of arbitral awards;
- (d) appellate mechanism;
- (e) system of preliminary rulings; and
- (f) setting up an international court system.<sup>13</sup>

15. As the topic of this contribution is the interaction of the ICSID and New York Conventions with a potential appellate mechanism, I will address possible reforms (d) and (f). The latter possible reform is advocated in particular by the European Union (EU).

### III. APPEAL MECHANISMS FOR ISDS IN PRACTICE

16. [Slide #3] The result of the extensive discussions about appeal mechanisms in ISDS during the last two decades is dismal: insofar as it could be researched, no appeal mechanism is legally or otherwise operative under any IIA.<sup>14</sup>

17. The discussions seem to have yielded aspirational language in a few IIAs. Out of the more than 3,300 IIAs, some 25 contain provisions that contemplate the possibility of an appeal mechanism in the future. Most of them seem to be inspired by the 2004 USA Model BIT.<sup>15</sup> It contains two types of provisions.

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<sup>13</sup> Secretariat's Note, *supra* n. 5, at paras. 37-47.

<sup>14</sup> With the possible exception of the Permanent Review Tribunal under Article 18 of the Protocolo de Olivos para la Solución de Controversias en el Mercosur of 18 February 2002, <http://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf>.

<sup>15</sup> These provisions in the 2004 US Model BIT originate in turn from the 2002 Trade Promotion Authority legislation in the US, 19 U.S.C. § 3802(b)(3)(G)(iv): "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements."

18. [Slide #4] The first type contemplates a *multilateral* agreement establishing an appellate body in the future. Article 28(10) of the 2004 US Model BIT provides:

10. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

19. The second type contemplates a *bilateral* appellate body in respect of which the Parties are to enter into negotiations within three years after the entry into force of the relevant IIA. Annex D to the 2004 USA Model BIT provides:

Possibility of a Bilateral Appellate Mechanism

Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

20. Each of the 25 or so IIAs contain either both types of provisions or one of them.

21. IIAs that contain both types of provisions (a multilateral agreement establishing an appellate body in the future and negotiations regarding a bilateral appellate body) include:

Singapore-USA FTA of 2003;<sup>16</sup> Chile-USA FTA of 2003;<sup>17</sup> Morocco-USA FTA of 2004;<sup>18</sup> Uruguay-USA BIT of 2005;<sup>19</sup> Peru-USA FTA of 2006;<sup>20</sup> Oman-USA FTA of 2006;<sup>21</sup> Panama-USA FTA of 2008;<sup>22</sup> Colombia-USA FTA of 2006;<sup>23</sup> Australia-Republic of Korea FTA of 2014.<sup>24</sup> Also, CAFTA of 2004 contains both types of provisions.<sup>25</sup>

22. IIAs that contain only the first type of provision (pertaining to a multilateral agreement establishing an appellate body in the future) include: Panama-Peru FTA of 2011;<sup>26</sup> Costa Rica-Peru FTA of 2011;<sup>27</sup> Nicaragua-Taiwan FTA of 2006;<sup>28</sup> and the CPTTP between Australia, Canada, Japan, Mexico, New Zealand, Singapore, and Vietnam of 2018.<sup>29</sup> Two IIAs that have not (yet) entered into force may also be mentioned: Protocol of Pacific Alliance between Chile, Colombia, Mexico and Peru of 2014;<sup>30</sup> Colombia-Costa

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16 Singapore-USA FTA of 6 June 2003 (entry into force on 1 January 2004), Article 15.19(10); Exchange of Letters on the Possibility of Bilateral Appellate Mechanism (6 May 2003).

17 Chile-USA FTA of 6 June 2003 (entry into force on 1 January 2004), Article 10.19(10), Annex 10-H.

18 Morocco-USA FTA of 15 June 2004 (entry into force on 1 January 2006), Article 10.19(10), Annex 10-D.

19 Uruguay-USA BIT of 4 November 2005 (entry into force on 31 October 2006), Article 28(10), Annex E.

20 Peru-USA FTA of 12 April 2006 (entry into force on 1 February 2009), Article 10.20(10), Annex 10-D.

21 Oman-USA FTA of 19 January 2006 (entry into force on 1 January 2009), Article 10.19(9)(b), Annex 10-D.

22 Panama-USA FTA of 28 June 2007 (entry into force on 31 October 2012), Article 10.20(10), Annex 10-D.

23 Colombia-USA FTA of 2006 (entry into force on 2012), Article 10.20(10), Annex 10-D.

24 Australia-Republic of Korea FTA of 8 April 2014 (entry into force on 12 December 2014), Article 11.20(13), Annex 11-E.

25 Central America FTA between Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, El Salvador, and USA of 5 August 2004 (entry into force on 1 January 2009), Article 10.20(10), Annex 10-F.

26 Panama-Peru FTA of 25 May 2011 (entered into force on 1 May 2012), Article 12.21(9).

27 Costa Rica-Peru FTA of 21 May 2011 (entered into force on 1 June 2013), Article 12.21(9).

28 Nicaragua-Taiwan FTA of 23 June 2006 (entered into force on 1 January 2008), Article 10.20(9).

29 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, 8 March 2018 (entry into force 30 December 2018). Many of the provisions of the CPTPP are identical to the TTP as the final draft of the TTP had already been prepared before the USA abandoned the negotiations. Article 9.23(11) TTP (also incorporated into CPTPP) provides: "In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings)."

30 Protocol of Pacific Alliance between Chile, Colombia, Mexico and Peru of 10 February 2014 (entered into force on 1 August 2016), Article 10.20(12).

Rica FTA of 2013;<sup>31</sup> and the Dutch 2018 Model Investment Agreement.<sup>32</sup> CETA, the EU-Singapore IPA and the Vietnam IPA contain similar provisions, but aim not only at an appellate body, but also a first instance tribunal. They will be discussed below.<sup>33</sup>

23. The IIAs that contain only the second type of provision (pertaining to negotiations for a bilateral appellate body) include two IIAs: China-Australia-FTA of 2015;<sup>34</sup> and the Canada-Republic of Korea FTA of 2014.<sup>35</sup>

24. The US Model BIT of 2012 has abandoned the aspirational provisions concerning negotiations of a bilateral appellate body within three years (the second type of provision). This Model is limited to the first type of provisions, which is worded as follows in Article 28(10):

In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

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31 Colombia-Costa Rica FTA of 22 May 2013 (not yet entered into force), Article 12.22(9).

32 Dutch 2018 Model Investment Agreement, Article 15, available at: <https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden>.

33 See ¶¶ 32-37 *infra*.

34 China-Australia FTA (ChAFTA) of 17 June 2015 (entry into force on 20 December 2015). Article 9.23 provides: "Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."

35 Canada-Republic of Korea FTA (CKFTA) of 22 September 2014 (entry into force on 1 January 2015), Annex 8-E.



25. The first type of provision pertaining to a multilateral agreement establishing an appellate body in the future has remained a dead letter to date as no such multilateral agreement has been concluded. The same can be said about the second type of provision pertaining to negotiation within three years of a bilateral appellate body as, insofar as it could be researched, negotiations, if any, yielded no result in that no bilateral appellate body has been set up.

26. Actually, the recently concluded USMCA of 2018, that will replace NAFTA, provides for ISDS in relations between Mexico and the USA, but does not contemplate an appeal mechanism.<sup>36</sup>

27. The ICSID Secretariat briefly considered the creation of an appeals facility in 2004.<sup>37</sup> It envisaged a single Appeals Facility which might be established and operate under a set of ICSID Appeals Facility Rules. An IIA then could provide that awards, made in cases covered by the treaty, would be subject to review in accordance with those Rules. The Secretariat at the time believed that the “Facility would best be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules arbitration and any other form of arbitration provided for in the investor-State dispute settlement provisions of investment treaties.”<sup>38</sup> A year later, in 2005, the ICSID Secretariat abandoned the idea for lack of positive response.<sup>39</sup>

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36 Protocol Replacing The North American Free Trade Agreement With The Agreement Between The United States Of America, The United Mexican States, And Canada of 30 November 2018. The Annex contains the Agreement. Chapter 14 concerns Investment. Annex 14-D pertains to Mexico-United States Investment Disputes. Canada is no longer involved in ISDS (except for legacy disputes under NAFTA for a period of three years). This seems to depart from the trade negotiating objective of “seeking to improve mechanisms used to resolve disputes between an investor and a government through . . . (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements,” Bipartisan Congressional Trade and Priorities and Accountability Act of 2015, Sect. 102(b)(4)(G)(iv), Publ. L. No. 114-26 of 29 June 2015 (<https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>).

37 ICSID Secretariat, *Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration*, 22 October 2004, paras. 20-23 and Annex, “Possible Features of an ICSID Appeals Facility,” available at: <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf#search=Possible%20Improvements>.

38 *Id.*, Annex, para. 1.

39 Antonio Parra, *THE HISTORY OF ICSID* (2012) pp. 251-254: “Many doubted the wisdom; most considered it premature at best” (*id.* p. 253).

28. [Slide #5] A decade later, the EU advanced a more far-reaching idea, that of a Multilateral Investment Court (MIC). According to a website that the EC dedicated to its idea:

The overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes. It would build on the EU's groundbreaking approach on its bilateral FTAs and be a major departure from the system of investor-State dispute settlement (ISDS) based on ad hoc commercial arbitration.

A Multilateral Investment Court, like the approach in the FTAs, would bring the key features of domestic and international courts to investment adjudication.

The idea is that the Multilateral Investment Court would:

- have a first instance tribunal;
- have an appeal tribunal;
- have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards and a dedicated secretariat
- be a permanent body;
- work transparently;
- rule on disputes arising under future and existing investment treaties;
- only apply where an investment treaty already explicitly allows an investor to bring a dispute against a State;
- would not create new possibilities for an investor to bring a dispute against a State;
- prevent disputing parties from choosing which judges ruled on their case;
- provide for effective enforcement of its decisions;
- be open to all interested countries to join.

For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreements.

Both the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it.

The EU now includes similar provisions in all of its negotiations involving investment.<sup>40</sup>

29. In this contribution, the EU approach as stated above and reflected in the FTAs (some of which are also called “IPA”) is referred to as the “EU Model.”

30. The EU’s position is summarised in a factsheet that the EC released on 7 July 2017 at the occasion of reaching the agreement in principle of the EU-Japan FTA:

Following the recent public debate, the Juncker Commission has fundamentally reformed the existing system for settling investment-related disputes.

A new system – called the Investment Court System, with judges appointed by the two parties to the FTA and public oversight – is the EU’s agreed approach that it is pursuing from now on in its trade agreements. This is also the case with Japan.

Anything less ambitious, including coming back to the old Investor-State Dispute Settlement, is not acceptable. *For the EU ISDS is dead.*<sup>41</sup> (emphasis added)

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<sup>40</sup> See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

<sup>41</sup> “A new EU trade agreement with Japan”, available at: [https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155684.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf), p. 6.

31. “*For the EU ISDS is dead*”: The statement is remarkable not only because one may wonder whether it is shared by countries outside the EU.<sup>42</sup> [Slide #6] It is also noteworthy because the bilateral treaties concluded by the EU (with Canada, Singapore and Vietnam), contain provisions similar to current ISDS.<sup>43</sup> As we will see in a moment, the main difference for the first instance is that the investor no longer has a say in the composition of the Tribunal.<sup>44</sup> Moreover, these three FTAs are inoperative at present insofar as the dispute resolution provisions are concerned, pending clarification by the Court of Justice of the European Union (CJEU) on whether they are compatible with EU law.<sup>45</sup>

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42 Japan does not seem to be convinced either. The FTA entered into force on 1 February 2019, but the IPA is still being negotiated, [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf) p. 2.l.

43 An overview of the status of the negotiations of FPAs and IPAs between the EU and various countries is available at: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf). The new EU-Mexico Agreement is agreed in principle on 21 April 2018. The text is still subject to “legal scrubbing”. The current text regarding Investment Dispute Resolution is contained in Chapter 19 and available at: [http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156814.pdf](http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf).

44 A number of other changes with respect to the usual ISDS provisions can be characterised as ISDS 2.0. See ¶ 165 *infra*.

45 With respect to the EU-Singapore FTA (EUSFTA), the CJEU opined that ISDS as contemplated by Chapter 9 falls within the competence shared between the EU and the Member States, which means that each Member State has to give its approval to the ISDS provisions (Opinion 2/15, 16 May 2017, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>). Thereafter, the ISDS part of the EUSFTA was split off into a separate IPA. It is “not binding under international law and will only become so after completion of the ratification process by each Party according to its internal legal procedures” (see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>). The EU Trade Committee has consented to the IPA but ratification from each EU Member State is still outstanding (see <http://www.europarl.europa.eu/news/en/press-room/20190124IPR24202/eu-singapore-free-trade-deal-gets-green-light-in-trade-committee>).

With respect to CETA, Belgium applied to the CJEU for an opinion pursuant to Article 218(11) TFEU (Opinion 1/17) regarding the question: “Is Chapter Eight (‘Investments’), Section F (‘Resolution of investment disputes between investors and States’) of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?” see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196185&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=909639>; the Advocate General concluded in Opinion 1/17 of 29 January 2019 that the mechanism for the settlement of disputes between investors and States provided for by the free trade agreement between the EU and Canada is compatible with EU law, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=10814547>; to date, the ECJ has not issued its opinion.

With respect to the EU-Vietnam IPA, it is also “not binding under international law and will only become so after completion of the ratification process by each Party according to its internal legal procedures” (see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>).

32. By way of example of the EU Model, the FTA with Canada, commonly referred to as CETA, provides for dispute resolution in the first instance under the ICSID Convention and Rules, ICSID Additional Facility Rules or UNCITRAL Rules. The main difference with current ISDS is that the Tribunal is composed of three Members selected from a panel of 15 Members who are appointed by the CETA Joint Committee.<sup>46</sup>

33. CETA also contemplates an Appellate Tribunal.<sup>47</sup> The same selection method applies. However, the appellate procedure is not available as the CETA Joint Committee is yet to adopt a decision on a number of administrative and organisational matters regarding the functioning of the Appellate Tribunal.<sup>48</sup> It is only after adoption of such decision that a disputing party may appeal an award rendered at first instance.<sup>49</sup>

34. The ICSID Secretariat is designated to act as Secretariat for the Tribunal.<sup>50</sup>

35. Both the first instance Tribunal and the Appellate Tribunal under CETA function on the basis of arbitration.<sup>51</sup>

<sup>46</sup> CETA, Article 8.27. Such an appointment method may raise questions because all arbitrators are appointed by one party only, here the States. See, e.g., Article 1028 of the Netherlands Arbitration Act (“If by agreement or otherwise one party is given a privileged position with regard to the appointment of the arbitrator or arbitrators, either party may, in derogation of the agreed method of appointment, request the provisional relief judge of the district court to appoint the arbitrator or arbitrators . . .”). A provision comparable to CETA Article 8.27 is contained in EU-Singapore IPA, Article 3.9(2) and in EU-Vietnam IPA, Article 3.38(2)-(9).

<sup>47</sup> CETA, Article 8.28. In the EU-Singapore IPA, it is called the “permanent Appeal Tribunal,” Article 3.10(1) as it is in the EU-Vietnam IPA, Article 3.39(1).

<sup>48</sup> The matters are according to Article 8.28(7) CETA: “(a) administrative support; (b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate; (c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case; (d) remuneration of the Members of the Appellate Tribunal; (e) provisions related to the costs of appeals; (f) the number of Members of the Appellate Tribunal; and (g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal”. The EU-Singapore IPA does not require further elaboration, see Article 3.19.

<sup>49</sup> CETA, Article 8.28(9): “Upon adoption of the decision referred to in paragraph 7: (a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance. . . .”

<sup>50</sup> CETA, Article 8.27(16); the administrative support for the Appellate Tribunal is still to be determined by the CETA Joint Committee (Article 8.28(7)(a)). A similar provision concerning the ICSID Secretariat for both the first instance Tribunal and Appellate Tribunal is contained in EU-Singapore IPA, Articles 3.9(16) and 3.10(14) and in EU-Vietnam IPA, Articles 3.38(18) and 3.39(18).

<sup>51</sup> See CETA, Article 8.41 which envisages enforcement under the ICSID Convention and New York Convention, respectively. A similar provision is contained in EU-Singapore IPA, Article 3.22 and in EU-Vietnam IPA, Article 3.57.

36. The Appellate Tribunal in CETA is a bilateral appellate mechanism. It is transitional in nature as the drafters of CETA aspire to an MIC:

Article 8.29 Establishment of a multilateral investment tribunal and appellate mechanism

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.<sup>52</sup>

37. The MIC is what the EU ultimately wants. The Council of the EU adopted the ‘Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes’ on 20 March 2018.<sup>53</sup> The Council instructed that negotiations pertaining to the MIC be conducted under the auspices of UNCITRAL and that EU Member States which are members of UNCITRAL are required to exercise their voting rights “in accordance with these directives and previously agreed EU positions.”<sup>54</sup>

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<sup>52</sup> A similar provision is contained in EU-Singapore IPA, Article 3.12 and in EU-Vietnam IPA, Article 3.41.

<sup>53</sup> <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

<sup>54</sup> *Id.* at para. 4: “In the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law shall exercise their voting rights in accordance with these directives and previously agreed EU positions.” See para. 4 et seq. *supra*. The EU submitted its views to UNCITRAL on 12 December 2017 (UN DOC A/CN.9/WG.III/WP.145).

38. On 18 January 2019, the EC submitted two papers to UNCITRAL Working Group III. According to the EC press release,<sup>55</sup> “the first EU paper sets out the EU’s proposal of establishing a permanent multilateral investment court with an appeal mechanism and full-time adjudicators.”<sup>56</sup> The EU believes that this is “the only reform option that can effectively respond to all the concerns identified in this UN process.” In the second EU paper, it makes proposals for a work plan for Working Group III.<sup>57</sup>

39. It is an open question whether the EU is able to convince the other members of UNCITRAL that the MIC is the way forward as an appeal mechanism for more than 3,300 IIAs that contain differing provisions of substantive protection. What the EU achieved to date seems to have convinced three States (Canada, Singapore and Vietnam) to include a *bilateral* appeal mechanism in their treaties, which, as mentioned, is similar to current ISDS but is presently inoperative in all three cases for reasons due to the EU legal system.<sup>58</sup>

40. Finally, when discussing an appellate mechanism for ISDS, reference is regularly made to the Appellate Body of the WTO.<sup>59</sup> The aspect of a standing body is interesting for purposes of comparison with an appellate mechanism for ISDS. However, the WTO model is less useful for ISDS as the WTO concerns a limited number of instruments, involves rather technical trade obligations, and is State-to-State only.<sup>60</sup> Moreover, current practice

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55 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972>.

56 Submission of the European Union and its Member States to UNCITRAL Working Group III, *Establishing a Standing Mechanism for the Settlement of International Investment Disputes*, [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf) (hereinafter “EU January 2019 Submission”).

57 Available at: [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157632.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf).

58 Mexico can be added as the text is in the state of legal scrubbing, see n. 43 *supra*.

59 See [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

60 See Mark Huber and Greg Tereposky, The WTO Appellate Body: *Viability as a Model for an Investor-State Dispute Settlement Mechanism*, n. 4 *supra*, pp. 584-585.

shows that the WTO is not the best example for an appeal mechanism in ISDS as its appointment process<sup>61</sup> and the precedential value of its panel and Appellate Body reports are called into question.<sup>62</sup>

## IV. LEGAL REGIME GOVERNING CURRENT ISDS

### A. Introduction

41. In the preceding two Sections, we reviewed the reasons given for establishing an appeal mechanism for ISDS awards and surveyed the current practice of appeal mechanisms. The practice is scant but the EU tries to give it a new impetus through its FTAs (the EU Model) and its active participation in UNCITRAL Working Group III.

42. Against that background, we turn to the question of interaction of a (potential) appeal mechanism with the ICSID and New York Conventions as it is important to know with what legal regime these Conventions would be interacting. To answer that question, we need first to determine the legal regime governing current ISDS. That is the subject matter of the present Section IV. Thereafter, in the subsequent Section V, we will consider the legal regime governing a (potential) appeal mechanism. These two matters need to be considered sequentially because an appeal mechanism may legally be dependent (or built) on the existing ISDS system (although it is not necessarily so).

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61 *U.S. blocks WTO judge reappointment as dispute settlement crisis looms*, <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC190>.

62 The United States recently criticised the Appellate Body report in *US Stainless Steel (Mexico)* in which the Appellate Body stated: “ensuring ‘security and predictability’ in dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicator body will resolve the same legal question in the same way in a subsequent case” (para. 160). See [https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB\\_Stmt\\_as-deliv.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_Stmt_as-deliv.fin_public.pdf) at para 63. According to the United States, the role of WTO adjudicators is to make findings which are “based on the text of the covered agreements, not the prior appellate reports” (para. 112). As regards jurisprudence of ICSID tribunals, see para. 94.



43. It is also important to note that, in all cases, the method of dispute settlement is by arbitration, be it (first instance) ISDS and an appeal mechanism. That the method is arbitration, is one of the prerequisites of the applicability of the ICSID and New York Conventions.

B. Current Legal Regime: Treaty-Based Only (ICSID)

44. [Slide #7] Many IIAs provide for ISDS under the ICSID Convention. A number of them gives an option to the investor between the ICSID Convention or the UNCITRAL Arbitration Rules (and sometimes the ICC, SCC or similar arbitration rules). Legally, the difference is significant, both in terms of control and enforcement (see Section D below).

45. The ICSID Convention provides for a self-contained ISDS treaty-based arbitration system, outside the reach of national arbitration law. Control is concentrated in the *ad hoc* annulment committee under Article 52 of the Washington Convention. The grounds for annulment in Article 52(1) are in essence not much different from the generally accepted grounds for review in setting aside proceedings under national arbitration laws (although the wording is not the same and somewhat narrower). However, there is a notable difference: the grounds for annulment in the ICSID Convention do not include a violation of public policy (except for corruption).

46. Enforcement of an ICSID award is automatic, without the possibility of a national court reviewing the award on the basis of grounds for refusal of enforcement (see in more detail Section VII.C below). Again, an alleged violation of public policy is not a ground for refusal of enforcement of an ICSID award.

47. ICSID is unique in that, at present, it is the only self-contained treaty regime for investment arbitration that is used in practice.

### C. Current Legal Regime: National Arbitration Law and New York Convention

48. If the investment arbitration takes place on the basis of the UNCITRAL Arbitration Rules, the arbitration is in principle governed by a national arbitration law.<sup>63</sup> That law is almost always the arbitration law of the place of arbitration. This follows from Article 1(2) of the 1976 version of the Rules, as confirmed in Article 1(3) of the 2010 version of the Rules:

These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

49. It is a generally accepted principle in international arbitration that the courts of the country whose law governs the arbitration have exclusive competence regarding the setting aside (annulment) of the arbitral award.<sup>64</sup>

50. Thus, an ISDS award resulting from an investment arbitration conducted under the UNCITRAL Arbitration Rules will be subject to the possibility of a setting aside action at the place of arbitration (the country of origin) and to an enforcement action under the New York Convention in other countries,<sup>65</sup> much in the same manner as an award resulting from an international commercial arbitration.

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63 These observations also apply to the ICSID Additional Facility Rules.

64 This principle is enshrined in Article V(1)(e) of the New York Convention which contains the ground for refusal of enforcement that the award “has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made.” Courts have unanimously affirmed that a setting aside by another court does not constitute a setting aside within the meaning of Article V(1)(e) of the Convention. See also n. 123 *infra*.

65 Enforcement of the award in the country where it is made under the New York Convention is possible if the courts in that country apply the second alternative of Article I(1) concerning non-domestic awards. At present, the courts in the United States apply the Convention to non-domestic awards made in the United States. For the meaning of the term “non-domestic,” see Albert Jan van den Berg, *THE NEW YORK CONVENTION 1958. TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981) pp. 22-28; see also by the same author, *Non-domestic Arbitral Awards under the 1958 New York Convention*, in: 2 *Arbitration International* (1986) 191-219.

51. The question of whether an arbitration under the UNCITRAL Arbitration Rules can be “de-nationalised” is examined at ¶ 120 below.

D. Differences between the Two Legal Regimes

52. [Slide #8] Graphically, this difference can be depicted as follows:

Table C - Investment Arbitration		
Action	Country of Origin	Abroad
Enforcement UNCITRAL	<ul style="list-style-type: none"><li>• National arbitration law</li><li>• If “non-domestic”: New York Convention</li></ul>	<ul style="list-style-type: none"><li>• New York Convention</li></ul>
Enforcement ICSID	<ul style="list-style-type: none"><li>• No “Country of Origin”</li><li>• Art. 54 ICSID Convention</li><li>• Automatic enforcement in all Contracting States</li></ul>	
Setting aside UNCITRAL	<ul style="list-style-type: none"><li>• National arbitration law</li><li>• Courts have exclusive jurisdiction</li></ul>	<ul style="list-style-type: none"><li>• Not possible</li></ul>
Setting aside ICSID	<ul style="list-style-type: none"><li>• No “Country of Origin”</li><li>• Art. 52 ICSID Convention</li><li>• <i>Ad hoc</i> Committee</li></ul>	

53. To give an example, in the investment arbitrations between Chevron and Ecuador, Chevron opted for arbitration under the UNCITRAL Arbitration Rules as it was permitted to do under the Ecuador-US BIT (rather than ICSID arbitration which Chevron was also permitted to choose).<sup>66</sup> Chevron and Ecuador then agreed to use the registry services of the Permanent Court of Arbitration (PCA) and The Hague as the (legal) place of arbitration. The result was that the arbitration was governed by Dutch arbitration law. For that reason, after it had lost the

<sup>66</sup> Ecuador-US BIT of 27 August 1993, Article VI(3)(a), see <https://investmentpolicyhub.unctad.org/Download/TreatyFile/1065>.

arbitration, Ecuador had to make the application for setting aside the award to the Dutch courts (at that time three instances).<sup>67</sup>

54. In case of non-compliance with the award, Chevron would have had to seek enforcement under the New York Convention in countries outside the Netherlands, with Ecuador having the possibility to resist enforcement on the grounds for refusal of enforcement listed in Article V of the Convention.<sup>68</sup> If Chevron had opted for ICSID arbitration, Ecuador would have had to make an application for annulment to the *ad hoc* Committee under the ICSID Convention. In the case of non-compliance with the ICSID award, Chevron would have had to seek enforcement under the ICSID Convention without Ecuador having the possibility to resist enforcement on any ground for refusal of enforcement.

## V. LEGAL REGIME GOVERNING APPEAL MECHANISM

### A. Introduction

55. [Slide #9] Having examined the legal regime governing ISDS in the preceding Section, we turn now to the legal regime governing a (potential) appeal mechanism. As the legal regime applicable to ISDS is governed by either the ICSID Convention or a national arbitration law, we will consider both legal bases again, but now in relation to a (potential) appeal mechanism. We will also consider a third possibility, which is a potential separate treaty for an appeal mechanism.

56. When considering these possibilities, it is important to keep in mind the distinction between the bilateral and multilateral appeal mechanisms.

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<sup>67</sup> Hoge Raad [Supreme Court], 26 September 2014, *Ecuador v Chevron*, ECLI:NL:HR:2014:2837.

<sup>68</sup> Enforcement in The Netherlands would be governed by the relevant provisions in the Netherlands Arbitration Act (Articles 1062-1063).

57. *Bilateral mechanism.* As mentioned, the number of existing bilateral appeal mechanisms in IIAs is currently very small. Examples are CETA, EU-Singapore IPA and EU-Vietnam IPA. Even these treaties are currently legally inoperative (and the appeal mechanism in CETA is also incomplete).

58. CETA, EU-Singapore IPA and EU-Vietnam IPA do not provide for a specific law applicable to the appeal mechanism. The legal regime governing the appeal mechanism in these treaties, therefore, must be deemed to be the same as the legal regime governing the first instance.

59. As observed, CETA, EU-Singapore IPA and EU-Vietnam IPA offer the investor the option for the first instance between arbitration under the ICSID Convention and the UNCITRAL Arbitration Rules. Depending on the option exercised by the investor, the appeal mechanism would be governed by the ICSID Convention or by the UNCITRAL Arbitration Rules and a national arbitration law. It will be examined in the next two Sections B and C whether and how the appeal mechanism could legally be governed by either legal basis.

60. *Multilateral mechanism.* A multilateral appeal mechanism does not (yet) exist. As noted, the establishment of such an appeal mechanism is contemplated by a number of IIAs (see ¶¶ 21-22 above). CETA, the EU-Singapore IPA and the EU-Vietnam IPA go a step further and contemplate an integrated multilateral mechanism (i.e. a multilateral investment tribunal and appellate mechanism).<sup>69</sup> The multilateral mechanism will require the form of a treaty. It will be examined in Section D below.

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<sup>69</sup> See ¶ 36 *supra*.

B. Appeal Mechanism under the ICSID Convention

61. As mentioned, if the investment arbitration is under the ICSID Convention, the legal basis for an appeal mechanism can also be treaty-based, without the applicability of a national arbitration law. The question here is whether the ICSID Convention would allow an appeal mechanism.

62. It is argued that the ICSID Convention would not permit an appeal mechanism because Article 53(1) provides that awards rendered pursuant to the Convention “shall *not be subject to any appeal* or to any other remedy except those provided for in this Convention.” (emphasis added) It is also argued that amendment of the Convention requires unanimous vote,<sup>70</sup> and that a unanimous amendment of the Convention is unlikely to be achieved in practice.

63. It is submitted that unanimity for an amendment depends on the proposed amendment itself. For example, if the amendment is to abandon annulment of the award for appeal, the amendment is not likely to make it. If, on the other hand, the amendment is to give an option between annulment and appeal (e.g., under an adapted version of the ICSID Facility Rules), potential approval by all Contracting States is likely as no-one loses anything.

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70 ICSID Convention, Article 66(1).

64. An alternative to an amendment of the Convention by all Contracting States would be that two or more Contracting States amend the ICSID Convention *inter se* in a separate IIA pursuant to Article 41 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).<sup>71</sup>

65. Some contend that such an amendment of the Convention is not allowed. It is argued that Article 41(1)(b) VCLT “requires that the modification *inter se* is not prohibited by the subject of the treaty. It is not necessary that the subject treaty specifically refer to *inter se* modification as such in its textual prohibition. It is enough that the subject treaty provides a clear prohibition of the modification sought to be undertaken.”<sup>72</sup> It is submitted that this reading of Article 41(1)(b) VCLT is unduly restrictive. The chapeau of Article 41(1) VCLT is not met in the case of the ICSID Convention because the Convention does not prohibit the modification of its Article 53(1). Moreover, the modification, being the introduction of an appeal mechanism, does not relate to a provision (i.e. Article 53(1) of the ICSID Convention) derogation from which is incompatible with the effective execution of the object and purpose of the ICSID Convention as a whole because an appeal mechanism will ultimately also result in a final award and may actually increase the legitimacy of ISDS.

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71 Article 41 VCLT provides:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - (a) the possibility of such a modification is provided for by the treaty; or
  - (b) the modification in question is not prohibited by the treaty and:
    - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
    - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Whilst the VCLT is not directly applicable to the ICSID Convention because the VCLT applies only to treaties concluded after the VCLT's entry into force (VCLT, Article 4), it is considered reflective of customary international law.

72 Nicolas Jansen Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, 18 Journal of World Investment & Trade (2017) Sect. II.2.

66. It follows that an amendment *inter se* is legally possible. Reference may also be made to the reasons given in the excellent report of 2016 by Gabrielle Kaufmann-Kohler and Michele Potestà (“Kaufmann-Kohler Potestà Report”).<sup>73</sup> The possibility of an *inter se* amendment is equally the view of the ICSID Secretariat in the aforementioned Discussion Paper of 2004.<sup>74</sup>

67. Furthermore, an amendment of the ICSID Convention *inter se* in a separate treaty is already State practice. For example, NAFTA provides that, rather than the Chairman of the Administrative Council of ICSID, the Secretary General of ICSID shall appoint the missing arbitrators in case of failure to constitute the tribunal.<sup>75</sup> USMCA refers the challenge of arbitrators to a decision in procedures under the UNCITRAL Arbitration Rules (decision by the Appointing Authority) rather than under the ICSID Convention (decision by the two remaining arbitrators).<sup>76</sup> As mentioned, CETA, and the EU-Singapore and EU-Vietnam IPAs, provide for ICSID as one of the options for first instance arbitration, but replace the ICSID appointment method of the arbitrators by a permanent panel.<sup>77</sup>

68. The issue of enforcement of the award rendered on appeal in an ICSID setting under a bilateral IIA in third countries is considered in Section VII.C below. Suffice it to mention here that it is critical for enforcement of an appeal award in third countries

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73 Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?*, CIDS, 3 June 2016, paras. 141, 200, 237-245, available at: [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf).

The Supplemental Report of 15 November 2017, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, is available at: [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf).

See also August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 *Journal of International Economic Law* (2016), 761, at 772-773.

74 N. 37 *supra*, Annex, para. 3.

75 ICSID Convention, Article 38. NAFTA, Article 1124. Another element that distinguishes NAFTA from the ICSID Convention pertains to the stay of enforcement of an arbitral award. Compare NAFTA, Article 1136 with ICSID Convention, Article 52(5).

76 USMCA, Article 14.D.6(6). ICSID Convention, Article 58. See also USMCA, Article 14.D.3(5).

77 CETA, Articles 8.23(2)(a) and 8.27; EU-Singapore IPA 3.6(1)(a); EU-Vietnam IPA 3.33(2)(a)/.



that an *inter se* amendment of the ICSID Convention is drafted in such a way that the appeal award can be considered an award for the purposes of Article 54 of the ICSID Convention.<sup>78</sup>

### C. Appeal Mechanism under National Arbitration Law

69. Assuming that the UNCITRAL Arbitration Rules or similar arbitration rules may be adapted to include an appeal mechanism,<sup>79</sup> the national arbitration law of the place of arbitration applies in principle to the mechanism and enforcement of the appeal award is governed by the New York Convention in other Contracting States.<sup>80</sup> That situation raises the question of whether an appeal mechanism is allowed by the arbitration law of the place of arbitration.

70. The arbitration laws of a few countries contain express provisions on arbitral appeal. In other countries, arbitral appeal is commonly practised.<sup>81</sup> An example is England where many commodity trade associations provide for arbitral appeal.<sup>82</sup>

71. Arbitral appeal is also common in the Netherlands in commodity and sports arbitration. In terms of legislation, probably the most detailed provisions on arbitral appeal are set forth in the Netherlands Arbitration Act as amended in 2015.<sup>83</sup>

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78 A residual application of the New York Convention may come to rescue in case of inapplicability of the ICSID Convention's enforcement regime, see ¶¶ 121-128 *infra*.

79 UNCITRAL Arbitration Rules, Article 34(2) provides: "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay." It can be assumed that provisions of arbitration rules, including the UNCITRAL Arbitration Rules, can be modified by agreement of the parties.

80 The question whether an arbitration under the UNCITRAL Arbitration Rules can be "de-nationalised" is examined at ¶ 120.

81 A number of arbitral institutions offer appellate mechanisms in commercial and sports context, such as American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), International Institute for Conflict Prevention & Resolution (CPR), International Arbitration Chamber of Paris (CAIP), JAMS, Court of Arbitration for Sport (CAS), and Shenzhen Centre for International Arbitration (SCIA).

82 See, e.g., England, V.V. Veeder, *National Report England*, in Lise Bosman, ed., *THE INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION*, Chapter VI.1(a).

83 Netherlands Arbitration Act 1986/2015, Articles 1061a – 1061l (application of other provisions of the Act *mutatis mutandis*; agreement regarding arbitral appeal; period of time for lodging appeal (three months, unless agreed otherwise by the parties); types of arbitral award against which appeal can be lodged; appeal in case of consolidated arbitrations; appeal in case of a first instance decision of lack of jurisdiction; appeal and *astreinte* [penal sum]; appeal and additional award at first instance; declaration of enforceability of first instance award notwithstanding appeal; binding force of first instance award; enforcement; setting aside and revocation.). An English translation is available at <https://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf>.

72. The legal framework and experience in practice in the Netherlands would offer a sound and tested legal basis for an appeal mechanism for ISDS arbitrations that take place in the Netherlands under the UNCITRAL Arbitration Rules or similar rules. It is particularly relevant for ISDS arbitrations under the auspices of the PCA in which the parties have agreed on The Hague as (legal) place of arbitration.

73. The consequence of an ISDS appeal mechanism governed by a national arbitration law is that control over the arbitration, including appeal, is exercised by national courts: in setting aside proceedings by the courts at the country where the award was made and in enforcement proceedings under the New York Convention in other countries.<sup>84</sup>

#### D. Appeal Mechanism in a Potential Separate Treaty

74. The future establishment of a multilateral appellate mechanism in a separate treaty is contemplated in some 25 IIAs (see ¶¶ 22-25 above). CETA and the EU-Singapore and EU-Vietnam IPAs go a step further and contemplate an integrated mechanism of first instance and appeal (see ¶ 60 above). As mentioned, none has materialised to date.

75. An interesting approach for a stand-alone treaty establishing a multilateral mechanism is offered by Kaufmann-Kohler and Potestà.<sup>85</sup> They argue that the Mauritius Convention on Transparency<sup>86</sup> can be a model for broader investment reform. In essence, under the Mauritius Convention, States consent that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply to existing investment treaties to which

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<sup>84</sup> See ¶ Section VII.D *infra*.

<sup>85</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, n. 73 *supra*.

<sup>86</sup> Adopted on 10 December 2014, entry into force on 18 October 2017, <https://uncitral.un.org/en/texts/arbitration/conventions/transparency>.

they are parties. The effect is that existing investment treaties are supplemented by the UNCITRAL Rules on Transparency.

76. On the basis of that concept of an Opt-in Convention, Kaufmann-Kohler and Potestà provide a design for an International Tribunal for Investments (ITI) as well as for an Appellate Mechanism (AM) for ISDS awards. They summarise their proposal in the following wording:

285. If the reform initiative centred around the ITI and/or the AM for investor-State arbitral awards were to be pursued, the Opt-in Convention would be the instrument by which the Parties to IIAs express their consent to submit disputes arising under their existing IIAs to the new dispute resolution bodies. While the Opt-in Convention would be primarily aimed at the existing IIA network, it would be without prejudice to the possibility that future investment treaties may refer to the new dispute resolution options, as States may deem appropriate.

286. The implementation of the Opt-in Convention would raise law of treaties issues which would need to be carefully considered. The paper has considered both the questions concerning the relationship between the Opt-in Convention and existing IIAs and the relationship between the Opt-in Convention and the ICSID Convention (in the situation where the Opt-in Convention were to extend the AM to ICSID awards).

77. As regards existing IIAs, Kaufmann-Kohler and Potestà observe that “the final objective of the exercise that is envisaged here is the implementation of a multilateral instrument aimed at producing changes to the network of existing IIAs.” They believe that “[u]ltimately, the multilateral instrument (the Opt-in Convention) and the IIAs will co-exist.”

78. In the EU January 2019 Submission, the EU confirmed its proposal for an instrument establishing a standing mechanism.<sup>87</sup> The standing mechanism would concern not only the appellate mechanism but two levels of adjudication: first instance and appellate tribunal. Accordingly, the instrument that the EU has in mind seems to be a stand-alone treaty for the entire dispute resolution between investors and States.

79. The EU considers it “vital” that the standing mechanism “be able to rule on disputes under the large stock of existing and future agreements” and therefore suggests a combination of accession to the instrument establishing the standing mechanism and a special notification (“opt-in”) that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism and in that regard adopts elements of the proposal of Kaufmann-Kohler and Potestà.<sup>88</sup>

80. However, it may be wondered how the approach as advocated by the EU can be reconciled with ISDS provisions in the existing 3,300 IIAs. The EU’s two-level proposal could be effective only if the ISDS provisions in the existing IIAs (i.e. the first level) are *replaced* by the provisions regarding the first level in the instrument establishing the standing mechanism. That goes much further in terms of amendment of IIAs.

81. The EU January 2019 Submission was previewed in an informative and thoughtful article in the ICSID Review by Colin Brown,<sup>89</sup> offering “Preliminary Sketches” (although more detailed than the EU January 2019 Submission).<sup>90</sup> He addresses: status and qualifications of adjudicators; first instance tribunal; establishing

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87 See ¶¶ 37-39 *supra*.

88 EU 2019 Submission, ¶ 38 *supra*, ¶ 35.

89 Directorate General for Trade of the EC, but representing his own views.

90 Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID Review N0. 3 (2017) pp. 673-690.

an appellate mechanism; ensuring consistency; appointment of adjudicators; institutional support; costs; adaptation over time; enforcement; State to State dispute settlement; and advisory centre for investment disputes. Colin Brown also discusses the opt-in approach advocated by Kaufmann-Kohler and Potestà and adds that the OECD has recently made use of the same technique of an opt-in treaty with respect to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 2017 to amend around 2,000 existing tax treaties (“BEPS Convention”).<sup>91</sup> The reference to the BEPS Convention is repeated in the EU January 2019 Submission.<sup>92</sup>

82. Enforcement of awards made under a specific treaty establishing an appellate body in an Opt-in Convention (Kaufmann-Kohler and Potestà proposal) or a standing mechanism (EU proposal) is considered in Section VII below.

#### E. Differing Legal Regimes Governing First Instance and Appeal

83. An intricate legal situation arises where the first level ISDS is governed by a national arbitration law, but the appeal mechanism would be governed by a treaty. Such a *dépeçage* may occur if the first instance offers an option between ICSID Convention and UNCITRAL Arbitration Rules and the investor opts for UNCITRAL Arbitration Rules. The consequence is that the first instance arbitration is governed by the arbitration law of the place of arbitration. If in this scenario an appeal is available under a mechanism governed by a treaty only (e.g., an Opt-in Convention), the process is subject to two different legal regimes, one of national arbitration law and the other of the treaty.

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<sup>91</sup> *Id.*, at 684-686.

<sup>92</sup> EU 2019 Submission, ¶ 38 *supra*, ¶ 36.

84. Specific treaty provisions may be tailored to amend or replace those provisions of national arbitration law, but drafting the treaty provisions in question is a challenge.

## VI. NATURE AND SCOPE OF APPEAL

85. To properly analyse the issues regarding the appeal mechanism in ISDS in relation to the ICSID and New York Conventions, it is also necessary to define what is understood by appeal.

86. Appeal needs to be distinguished from annulment or setting aside. It is a basic proposition that appeal aims at correcting errors of law and/or fact. Such a review means a review of the merits. Annulment or setting aside have as their purpose to ensure a fair procedure and to supervise proper jurisdiction.

87. The distinction does not exclude that appeal grounds include annulment grounds. The reverse is conceptually not permitted: it is a generally accepted principle of arbitration that the merits are not reviewed in setting aside actions by the national courts and in annulment actions by the *ad hoc* Committee of ICSID.

88. As regards the grounds for appeal, in a much-generalised manner, two systems can be noted. In Civil Law countries, appeal is frequently *de novo* with respect to facts and law. In Common Law countries, appeal is usually limited to a *de novo* review of legal issues, giving high deference to factual determinations made in first instance by using tests such as “plainly wrong” or “clearly erroneous.”

89. In both legal systems, recourse to a supreme court is nearly always limited to questions of law and manifest error in giving reasons. The recourse may further be limited by requiring leave to apply to the supreme court.

90. Also in both systems, appeal is a balancing act between finality (*lites finiri oportet*) and correctness. The principle of finality is one of the main drivers of any one-shot proceeding in most commercial arbitrations and until recently ISDS arbitrations. The occasional “incorrect” award was considered a price to be paid for maintaining the principle. That is no longer current thinking regarding ISDS as concerns have arisen about correctness (and to some extent consistency) with a number of stakeholders in ISDS. An appeal mechanism may alleviate those concerns. The question then is what are the scope and standard of review on appeal. To put it in a much-generalised way: a Civil Law system or a Common Law system?

91. To that question may be added another question: what may an appellate body do:

- affirm the award;
- reverse the award;
- remit the award to the first instance;
- modify the award; and/or
- substitute the first instance award by its own award?

92. The treaties that the EU concluded with Canada, Singapore and Vietnam are closer to the Common Law scope and standard of review on appeal. CETA, for example, provides in Article 8.28.2:

The Appellate Tribunal may uphold, modify or reverse the Tribunal’s award based on:

- (a) errors in the application or interpretation of applicable law;
- (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
- (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

93. Article 52(1) of the ICSID Convention contains the following grounds for annulment:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

94. The EU Model, therefore, has an appeal system that combines a traditional appeal in the Common Law sense with an annulment (setting aside) action.

95. The question whether and if so to what extent an appeal award can be subject to review is analysed in Section VIII below.

## **VII. ENFORCEMENT OF AN APPEAL AWARD**

### **A. In General**

96. The question of interaction between a (potential) appeal mechanism and the ICSID and New York Conventions is particularly important for enforcement of an appeal award.

97. If the appeal award is made within the framework of the ICSID Convention, its enforcement is governed by Article 54 (see ¶ 46 above). It provides for enforcement of “the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” No grounds for refusal can be invoked.

98. If the appeal award is made within the framework of the UNCITRAL Arbitration Rules or similar arbitration rules, its enforcement at the place where the award was made is governed by the arbitration law of that place, and in other countries by the New



York Convention, in which case the grounds for refusal of enforcement contained in Article V can be invoked.

99. This is the scheme contained in the EU Model (treaties with Canada, Singapore and Vietnam). By way of example, as Article 8.41 CETA (“Enforcement of awards”)<sup>93</sup> applies to “An award issued pursuant to this Section [F],” that article comprises both first instance and appeal awards. Article 8.41 refers in paragraphs 3(a) and 6 explicitly to enforcement under the ICSID Convention, and in paragraph 5 to the New York Convention.<sup>94</sup> The result is that there is no control by a national court in the case of ICSID appeal awards under CETA, whilst there is control by a national court on the basis of the grounds for refusal of enforcement listed in Article V of the New York Convention in the case of other appeal awards under CETA.<sup>95</sup>

#### B. Enforcement *Inter Se* and Third Countries

100. [Slide #10] An option is to include a self-contained regime for enforcement of the appeal award in the relevant IIA itself or in the treaty establishing the appeal mechanism (see Section V.D above). However, such a solution will be effective only in the States party to the IIA or treaty concerned. Third countries not party to the IIA or treaty are not bound by the enforcement provisions in the IIA or treaty. That is markedly different for the New York Convention and the ICSID Convention both of which have global coverage of more than 150 Contracting States. As a result, adoption of the self-contained enforcement regime by a large number of States would be required to make this regime effective.

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93 See for the full text of CETA, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

94 A similar provision is contained in EU-Singapore IPA, Article 3.22 and in EU-Vietnam IPA, Article 3.57.

95 CETA does not contain a waiver of the grounds for refusal of enforcement in Article V of the New York Convention (assuming that such a waiver would be possible, which is questionable).

101. As such adoption will probably take many years, it is more likely that the solution for enforcement of an award resulting from an appeal mechanism for ISDS is to be found by legally linking it in the IIA or separate treaty to either the ICSID Convention or the New York Convention. The incorporation by reference of the enforcement regimes of either the ICSID Convention or New York Convention into an IIA or separate treaty requires careful attention to a number of specific characteristics of these two Conventions. They will be analysed in turn below.

C. Enforcement Issues under the ICSID Convention

(a) **Enforcement of ICSID Awards In General**

102. [Slide #11] Enforcement of an ICSID Convention award is provided in Article 54, which does not provide for grounds for refusal of enforcement:

(1) Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

103. Notwithstanding the absence of grounds for refusal of enforcement in Article 54, enforcement of ICSID awards has given rise to the question whether the equation to “a final judgment of a court in that State” would subject the supposedly automatic enforcement to alleged requirements concerning the execution of local judgments.<sup>96</sup>

### **(b) ICSID’s One Award Scheme**

104. As regards the enforcement in third countries of the award rendered on appeal in an ICSID setting under a bilateral or multilateral IIA, it is to be noted that under the ICSID treaty scheme only one award can be rendered, and that all other rulings, interim or partial, are considered to be a “decision.”<sup>97</sup>

105. Taking into account ICSID’s one award scheme, the solution may be to characterise all decisions of the first instance and appellate body as a (provisional) “decision” and only the last decision on appeal as an “award.”<sup>98</sup> A variation is that the appeal decision finally goes back to the first instance tribunal which endorses it in the form of an award, which becomes enforceable as an ICSID Convention award. A similar solution is suggested by the ICSID Secretariat in the 2004 Discussion Paper regarding the possibility of an Appeals Facility:

8. An ICSID arbitral tribunal renders just one award, the final award disposing of the case. Earlier decisions of

96 *The ‘Automatic’ Enforcement of ICSID Awards: The Elephant in the Room?* GAR, 29 October 2013, <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2014/1036801/the-%E2%80%98automatic%E2%80%99-enforcement-of-icsid-awards-the-elephant-in-the-room>.

97 See Christoph Schreuer, *THE ICSID CONVENTION. A COMMENTARY*, 2nd ed. (2009) pp. 812-81 at ¶¶ 24-303.

98 To which may be added that if no appeal is taken within the prescribed period of time, the last “decision” will automatically be converted to an “award.”

the tribunal will be deemed part of the award and subject at that stage to annulment and other post-award remedies. In some other systems of arbitration, including arbitration under the UNCITRAL Rules, interim decisions of the tribunal may be made in the form of awards and possibly challenged immediately. To avoid discrepancies of coverage between ICSID and non-ICSID cases, the Appeals Facility Rules might either provide that challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions. It might be best to allow such challenges subject to certain safeguards. These could include a procedure for a party to proceed with the challenge only with permission of a member of the Appeals Panel, chosen in advance by the Panel members to perform this function, and a provision making it clear that the arbitration would continue during the challenge proceeding.

9. Under the possible Appeals Facility Rules, an appeal tribunal might uphold, modify or reverse the award concerned. It could also annul it in whole or in part on any of the grounds borrowed from Article 52 of the ICSID Convention. With the exceptions mentioned in the next sentence, the award as upheld, modified or reversed by the appeal tribunal would be the final award binding on the parties. If an appeal tribunal annulled an award or decided on a modification or reversal resulting in an award that did not dispose of the dispute, either party could submit the case to a new arbitral tribunal to be constituted and operate under the same rules as the first arbitral tribunal. The Appeals Facility Rules might, however, allow appeal tribunals in some such cases to order that the case instead be returned to the original arbitral tribunal.<sup>99</sup>

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99 ICSID Secretariat, *Discussion Paper*, n. 37 *supra*, at ¶¶ 8-9.

106. In the alternative (or additionally), the award of the ICSID appellate body may be enforceable under the New York Convention (see Section D(d) below). The drawback of this alternative is that the attraction of automatic enforcement of ICSID awards under Article 54 of the ICSID Convention without grounds for refusal of enforcement is lost.

### **(c) The EU Model and Enforcement under the ICSID Convention**

107. The EU Model raises the question of whether the appeal award is enforceable under the ICSID Convention in third countries. An example is the EU-Vietnam IPA. Article 3.57(8) (“Enforcement of Final Awards”) provides:

For greater certainty and subject to subparagraph 1(b), where a claim has been submitted to dispute settlement pursuant to subparagraph 2(a) of Article 3.33 (Submission of a Claim [submission to the ICSID Convention]), a final award issued pursuant to this Section shall qualify as an award under Section 6 of Chapter IV of the ICSID Convention.

108. Subparagraph 1(b) of Article 3.57 provides that “Final awards issued pursuant to this Section . . . (b) shall not be subject to appeal, review, set aside or any other remedy.” The Section includes an award by an Appeal Tribunal. Actually, an award by the first instance Tribunal is called a “provisional award” (Article 3.53), which becomes final in the circumstance described in Article 3.55 (no appeal; dismissal of appeal; modified or reversed on appeal; and remission to first instance Tribunal).<sup>100</sup> These provisions operate in the EU and Vietnam *inter se*, but it is an open question whether enforcement of the final award on appeal is enforceable as an ICSID Convention award in third countries. The use of the term “provisional award” until a final award has been rendered, i.e. until

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100 Similar provisions are contained in the draft of the EU-Mexico Agreement, Article 31, n. 43 *supra*.

a final award has been rendered, i.e. until after the possibilities on appeal have been exhausted, would indicate that the final award is intended to be an award enforceable under the ICSID Convention in third countries.

D. Enforcement Issues under the New York Convention

109. [Slide #12] The enforcement of an award resulting from a (potential) appellate mechanism that falls under the New York Convention may involve various issues.

(a) **Definition of Arbitral Award**

110. A first issue is whether the award is an arbitral award within the meaning of the New York Convention. The Convention itself does not provide a definition of what constitutes an arbitral award. The answer depends on the law applicable to the (potential) appeal mechanism.

111. If the appellate mechanism is governed by a national arbitration law (e.g. in the case of use of the UNCITRAL Arbitration Rules), the answer is to be found in that law. It is generally accepted that the question of whether a document constitutes an award is to be determined under the arbitration law applicable to the award, which is almost always the arbitration law of the place of arbitration.<sup>101</sup>

112. If the appeal mechanism is governed by treaty provisions (e.g. Opt-in Convention), an autonomous interpretation of the term “arbitral award” in both the New York Convention and the treaty may provide the answer. It would seem appropriate to distil the notion of what constitutes an arbitral award from what is generally understood by arbitration in the national legal systems.<sup>102</sup>

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101 Van den Berg, n. 65 *supra*, pp. 19-22.

102 *Id.* p. 44. See also Bernd Ehle, in Reinmar Wolff, ed., *THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS. COMMENTARY* (2012) pp. 34-35 ¶¶ 30-33 (Criteria Qualifying a Decision as an Arbitral Award).

## (b) Permanent Arbitral Body (Article I(2))

113. In respect of a standing mechanism for investment disputes resolution established by a treaty, encompassing both levels or the appellate level only, it is argued that such a standing mechanism is a permanent arbitral body within the meaning of Article I(2) of the New York Convention.<sup>103</sup> Article I(2) provides:

The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

114. Textually, the argument appears to be correct, provided that the parties (investors and host-States) have agreed to arbitration by the standing mechanism. According to the *travaux préparatoires*, the drafters had something else in mind.<sup>104</sup> Originally, the USSR had proposed to insert a provision to this effect in the ECOSOC Draft Convention of 1955, but the Committee deemed such a provision unnecessary.<sup>105</sup> At the beginning of the New York Conference of May-June 1958, the Czechoslovak delegate took up the USSR proposal, arguing that he did not agree that it was unnecessary and that it would tend to strengthen the Convention and help in avoiding certain difficulties which had been encountered in the past and might arise again in the future.<sup>106</sup> An entire session was devoted to this proposal.<sup>107</sup> The crucial question was whether the proposal would include permanent arbitral tribunals to which parties were obliged to submit their disputes (so-called compulsory arbitration). The Czechoslovak delegate emphasised that his proposal envisaged voluntary arbitration only. The Conference decided then to add “to which the parties have voluntarily submitted”.

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<sup>103</sup> Kaufmann-Kohler Potestà Report, n. 73 *supra*, paras. 148-155.

<sup>104</sup> See Van den Berg, n. 65 *supra*, pp. 379-380.

<sup>105</sup> UN DOC E/2704 and Corr. 1, para. 25.

<sup>106</sup> UN DOC E/CONF.26/L.10 and Rev. 1.

<sup>107</sup> UN DOC E/CONF.26/SR.8.

Upon instigation of the Drafting Committee, the word “voluntarily” was subsequently deleted as it was considered redundant.<sup>108</sup>

115. It is submitted that a decision by a standing mechanism would have been an arbitral award falling under the Convention even without the support of Article I(2). What is essential is an arbitration agreement regarding the standing mechanism.

### (c) Application to A-National Award

116. If an award resulting from a (potential) appeal mechanism is not governed by a national arbitration law, the question is whether such award can be enforced under the New York Convention.

117. The question whether an award can be enforced under the New York Convention without reference to an applicable arbitration law is answered in the affirmative by the Dutch Supreme Court and a US Court of Appeals.<sup>109</sup> Both decisions concerned a so-called “a-national” award (sometimes called “transnational”, “Stateless” or “floating” award). This is an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of either a special agreement of the parties (in the Dutch case) or a special treaty (in the US case).<sup>110</sup> Such arbitration, also called “de-nationalised” arbitration, rarely occurs in practice.<sup>111</sup>

118. Without an applicable (national) arbitration law, there is no longer an authority supervising the award in setting aside proceedings (including the validity of the arbitration agreement,

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108 UN DOC E/CONF.26/SR.23. Art. I(2) is considered superfluous, *inter alia*, by P. Sanders, “Commentary”, *ICCA Yearbook* Vol. 1 (1976) p. 207.

109 Hoge Raad [Supreme Court], 26 October 1973, *SEEE v Yugoslavia*, reported in I *ICCA Yearbook Commercial Arbitration* (1976) p. 196 (Netherlands 2B); US Court of Appeals for the 9th Circuit, 23 October 1989, *Gould v Iran*, reported in XV *ICCA Yearbook Commercial Arbitration* (1990) pp. 605-610 (US 100).

110 The Dutch case concerned an arbitration clause providing for two arbitrators, whilst the applicable arbitration law of the place of arbitration (Canton Vaud in Switzerland) required mandatorily an uneven number of arbitrators. The agreement for two arbitrators was considered to elevate the arbitration to a “de-nationalised” arbitration. The US case involved arbitration as provided by the Algiers Accords of 1981 which, following the hostage crisis in Iran, established the Iran-US Claims Tribunal.

111 See Van den Berg, n. 65 *supra*, pp. 28-43. The author has aligned his view to that of the Dutch and US courts referred to in n. 109-110 *supra*. See also Kaufmann-Kohler *Potestà* Report, n. 73 *supra*, paras. 156-157.



due process, excess of authority). The control is then left to the enforcement courts under the New York Convention, possibly in multiple countries, provided that the enforcement courts accept the applicability of the Convention to a-national awards.<sup>112</sup>

119. Practice, however, wishes to retain the possibility of setting aside the award in the country where made.<sup>113</sup> Exclusion of the possibility to have an award set aside would also lead to the incongruous situation where an ICSID award can be annulled by the *ad hoc* committee and enforced without scrutiny by the courts, whilst an UNCITRAL ISDS award cannot be annulled (set aside) and enforcement is subject to the grounds for refusal of enforcement under the New York Convention in multiple fora.

120. It is sometimes argued that it is possible to construe the phrase “the law applicable to the arbitration” in Article 1(2)/(3) of the UNCITRAL Arbitration Rules as permitting to agree on an arbitration without an applicable (national) arbitration law (see ¶ 48 above). In support of that argument, reference is made to the Iran-US Claims Tribunal in The Hague which operates under the Algiers Claims Settlement Declaration of 1981 and which adopted an amended version of the UNCITRAL Arbitration Rules.<sup>114</sup> It is controversial whether Dutch arbitration law applies, even though the Iran-US Claims Tribunal deposits its awards with the registry of the District Court at The Hague.<sup>115</sup>

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112 The question whether the control in a setting aside action before a national court can be replaced by an appellate body in a treaty is considered below at Section VIII.

113 Switzerland, for example, is one of the few countries where parties may agree to exclude the action for setting aside the award. It appears that in practice parties rarely agree to an exclusion agreement. See Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, ICSID Review - Foreign Investment Law Journal (2013) pp. 1-26. Other countries where setting aside can reportedly be excluded by agreement of the parties are: Belgium, France, Panama, Peru, Sweden and Tunisia, see UNCITRAL SECRETARIAT GUIDE ON THE NEW YORK CONVENTION (2016) p. 21.

114 See <https://www.iusct.net/Pages/Public/A-Documents.aspx>

115 Albert Jan van den Berg, *Proposed Dutch Law on the Iran-US Claims Settlement Declaration*, in: International Business Lawyer (September 1984) 341-344.

**(d) Residual Application of the New York Convention to ICSID and Other Awards**

121. A notorious question is whether an ICSID award can be enforced under the New York Convention (a question herein referred to as the residual application of the New York Convention). That question is relevant for enforcement of an ICSID award in a country that is not party to the ICSID Convention but is party to the New York Convention or where the enforcement concerns non-pecuniary obligations.<sup>116</sup>

122. The (potential) appeal mechanism for ISDS awards adds a similar question with respect to the case where two States have amended the ICSID Convention *inter se* for the purposes of the appeal mechanism and enforcement of the award resulting from the appeal mechanism is sought in a third country (see ¶¶ 64-67 above). The third country is not bound by the amendment of the ICSID Convention and hence the award may not be enforceable under the ICSID Convention in that third country. The question then is whether the appeal award can be enforced on the basis of the New York Convention.

123. This question is not hypothetical. It was noted before that it is doubtful that a final award on appeal under the EU-Vietnam IPA can be enforced as an award under the ICSID Convention in third countries (see ¶¶ 107-108 above). If such an enforcement is legally not possible under the ICSID Convention, the remaining option may be to enforce the award under the New York Convention.

124. It is submitted that enforcement of an ICSID award in these cases is possible under the New York Convention.<sup>117</sup> The

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116 Article 54(1) ICSID Convention is limited to enforcement of pecuniary obligations. See text quoted at ¶ 102 *supra*.

117 *Accord*, Schreuer, n. 97 *supra*, p. 1118 at ¶ 5, arguing that the question should be dealt with by analogy to Additional Facility awards; Van den Berg, n. 65 *supra*, pp. 99-100; David Quinke, in Reinmar Wolff, ed., n. 102 *supra*, pp. 482-483; *contra*, Bernd Ehle, *id.*, p. 75 and references given (the reference to “van den Berg, (1986) 2 Arb. Int'l 213, 214” is in error as the passage concerns merely a description of the self-contained system of the ICSID Convention).

New York Convention applies to the enforcement of an award made in another State. Arbitration proceedings under the ICSID Convention are conducted in Washington or another place as agreed by the parties.<sup>118</sup> The place of the proceedings is also the place where the award is made, unless the arbitral tribunal has indicated otherwise. That place meets the description of the field of application in the first sentence of paragraph 1 of Article I of the New York Convention of enforcement of an award made in the territory of another (Contracting) State.<sup>119</sup> The text of that provision does not contain any other requirement for the applicability of the Convention than that it is made in the territory of another (Contracting) State.

125. The arbitration and award under ICSID are governed by a treaty only (the ICSID Convention or its *inter se* amended version). As noted in ¶116 above, courts have interpreted the New York Convention as not requiring a link between the arbitration and award and the national arbitration law of the place where the award was made. Courts have also interpreted the New York Convention as being applicable to awards rendered under a treaty only (e.g., the Algiers Accords of 1981).<sup>120</sup> Within that perspective, an award made under the ICSID Convention or an *inter se* amended version would fall under the New York Convention if the award is made in a country other than where enforcement is sought.

126. In the alternative, the award can be considered “non-domestic” under the second sentence of paragraph 1 of Article I of the New

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118 ICSID Convention, Articles 62-63.

119 Article I(1) provides in the relevant part: “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal . . .” The limitation to an award made in another Contracting State applies if the enforcement State has availed itself of the reciprocity reservation of Article I(3) of the New York Convention (“When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”).

120 See n. 109-110 *supra*.

York Convention.<sup>121</sup> However, the alternative is less certain because the second option is discretionary in that an enforcement court may, but is not obliged to, consider an award as “non-domestic.”<sup>122</sup>

127. The residual application of the New York Convention may require further interpretation of the Convention’s provisions:

Article V(1)(a) refers, for the validity of the arbitration agreement, to “the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” The term “the law” in this definition may be interpreted as referring to the ICSID Convention or its *inter se* amendment.

Article V(1)(d) refers to “the law of the country where the arbitration took place” for matters pertaining to the composition of the arbitral tribunal and the arbitral procedure to the extent that the parties have not agreed on these matters. The agreement on these matters can be regarded as being encompassed by the ICSID Convention or its *inter se* amendment.

Article V(1)(e) refers to a setting aside of the award by “a competent authority of the country in which, or under the law of which, that award was made.” In the case of the ICSID Convention, the *ad hoc* committee deciding on annulment can be regarded as “the competent authority.” In the case of an *inter se* amendment of the ICSID Convention, the appellate body can be considered to be the equivalent of “the competent authority,” provided that the text of the *inter se* amendment is appropriately worded. The term “or under the law of which” may be interpreted as

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121 Article I(1) provides in the relevant part: “It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

122 For the meaning of the term “non-domestic,” see Van den Berg, n. 65 *supra*, pp. 22-28.

referring to the ICSID Convention or its *inter se* amendment.<sup>123</sup>

128. Whilst the residual application of the New York Convention is permitted with respect to an award rendered under the ICSID Convention or an *inter se* amendment, enforcement under the New York Convention means that there is a control by national courts over the award within the framework of the grounds for refusal of enforcement set forth in Article V of the Convention. Whether those grounds for refusal of enforcement can be waived is examined at Section (h) below.

### (e) Commercial Reservation (Article I(3))

129. Another issue is whether an award, whether rendered at first instance or on appeal, can be considered “commercial” within the meaning of Article I(3) of the New York Convention:

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof any State may . . . declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

130. The commercial reservation is made by approximately one third of the Contracting States to the New York Convention.

131. It is questioned whether an award resulting from an investment dispute can be considered “commercial.”<sup>124</sup> According

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123 The origin of the term “or under the law of which” is theoretical possibility offered by the Convention’s drafters to agree on an arbitration law that is different from the arbitration law of the place of arbitration, see Van den Berg, n. 65 *supra*, pp. 23-24, 350.

124 See Schreuer, n. 97 *supra*, p. 1122 at ¶ 19: “The underlying transaction may be classified as commercial but the host State’s act leading to the dispute, an expropriation or other act of public authority, may be classified differently. This may lead an enforcing authority to believe that the legal relationship is not commercial in the sense of a declaration made under Art. I(3) of the New York Convention.”

to the text of Article I(3), this would depend in the first place on the law of the country where enforcement is sought. Under many national laws, matters concerning expropriation are considered as pertaining to administrative law rather than commercial law.

132. A number of IIAs attempt to solve this question by including an express provision to the effect that the ISDS award is considered as “commercial” for the purposes of enforcement under the New York Convention.<sup>125</sup>

### **(f) Arbitration Agreement (Article II(1)-(2))**

133. The New York Convention requires an arbitration agreement in writing (Article II(1)-(2)). If an arbitration agreement referred to in Article II is lacking, enforcement of the award may be refused under ground (a) of Article V(1) of the New York Convention.

134. Article II(2) of the New York Convention contains strict requirements regarding the written form of the arbitration agreement: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” For avoidance of doubt, certain IIAs stipulate explicitly that consent and the submission of the claim shall be deemed to satisfy the requirements of Article II of the New York Convention for an “agreement in writing.”<sup>126</sup>

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125 Energy Charter Treaty, Article 26(5)(b); USMCA, Article 14.D.13(13); NAFTA, Article 1136(7).

126 See, for example, EU-Singapore IPA, Article 3.6(2):

2. . . . The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of:

(a) . . . .

(b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (hereinafter referred to as the “New York Convention”) for an “agreement in writing”.

**(g) Binding Award (Article V(1)(e))**

135. The question here is whether a first instance award can be enforced under the New York Convention pending arbitral appeal or during the period of time for lodging the appeal. The relevant provision of the Convention is Article V(1)(e):

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that  
...

(e) The award has not yet become binding on the parties ...

136. The Convention's predecessor, the Geneva Convention of 1927, required that the award had become "final" in the country of origin. The word "final" was interpreted by many courts at the time as requiring a leave for enforcement (*exequatur* and the like) from the court in the country of origin. Since the country where enforcement was sought also required a leave for enforcement, the interpretation amounted in practice to the system of the so-called "double-*exequatur*". The drafters of the New York Convention, considering this system as too cumbersome, abolished it by providing the word "binding" instead of the word "final". Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts.

137. Courts differ, however, with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the

applicable law in order to find out whether the award has become binding under that law.

138. Other courts interpret the word “binding” without reference to an applicable law. An argument in support of the autonomous interpretation is that if the applicable law provides that an award becomes binding only after a leave for enforcement is granted by the court, the “double-exequatur” is in fact re-introduced into the Convention, thus defeating the attempt of the drafters of the Convention to abolish this requirement.<sup>127</sup> Further, the autonomous interpretation has the advantage that it dispenses with compliance with local requirements imposed on awards, such as deposit with a court or even a leave for enforcement from the court in the country of origin, which requirements are unnecessary and cumbersome for enforcement abroad.

139. The autonomous interpretation contemplates in the first place the agreement of the parties as to when an award acquires binding force.<sup>128</sup> Such an agreement is usually contained in arbitration rules.<sup>129</sup>

140. The autonomous interpretation envisages in the second place that, failing an agreement of the parties on the binding force, the award becomes binding on the parties within the meaning of Article V(1)(e) of the New York Convention as of the moment when it is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.

141. The autonomous interpretation is in particular helpful for an appeal mechanism. The IIA can set forth whether a first instance award can be enforced pending arbitral appeal or the period of

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127 See, e.g., High Court of Justice, Queen’s Bench Division, Commercial Court, 27 July 2011, [2011] EWHC 1957 (Comm), *Dowans Holding v Tanzania Electric Supply*, reported in XXXVI ICCA Yearbook Commercial Arbitration (2011) pp. 363-366 (UK 93 sub 11-26).

128 Van den Berg, n. 65 *supra*, pp. 341-346.

129 See, e.g., UNCITRAL Arbitration Rules, Article 34(2): “All awards . . . shall be final and binding on the parties . . . .”



time for lodging the appeal. If no such provisions are contained in the IIA (or rules of procedure issued thereunder), the fall-back interpretation can be relied upon, i.e. the award becomes binding at the moment when it is no longer open to an appeal.

### **(h) Waiver of Grounds for Refusal of Enforcement (Article V)**

142. Can the grounds for refusal of enforcement in Article V of the New York Convention be waived in respect of enforcement of an award resulting from an appeal mechanism? This is an issue that arises under the EU Model which appears to attempt to exclude the grounds for refusal of enforcement.<sup>130</sup>

143. If the exclusion in the EU Model is an amendment of the New York Convention *inter se* (i.e. between the EU and the other Contracting State) it may be effective in the EU and the other State Party to the treaty but not in third countries party to the New York Convention.

144. If the exclusion in the EU Model is a waiver of the grounds for refusal of enforcement implied in the consent by the investor and the host State to arbitration, it is doubtful whether such a waiver of all grounds for refusal of enforcement is legally possible and acceptable to third countries.

145. Two types of waiver are generally recognised by the enforcement courts in the Contracting States to the New York Convention. The first type is the untimely objection to jurisdiction for lack of a valid arbitration agreement. Many laws and arbitration rules

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<sup>130</sup> The EU-Singapore IPA, for example, provides in Article 3.22(2) that “Each Party shall recognise an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligations within its territory as if it were a final judgment of a court in that Party.” That is language copied from Article 54 of the ICSID Convention. The words “as if it were a final judgment of the court in that Party” mean that no grounds for refusal of enforcement may be invoked against enforcement of the award. That is the situation under Article 54 of the ICSID Convention. However, Article 3.22 (“Enforcement of Awards”) does not only apply to enforcement of award rendered within the framework of the ICSID Convention (see Art. 3.22(6) of the EU-Singapore IPA) but also to enforcement of awards rendered within the framework of the New York Convention (see Article 3.22(5)). See also the draft of the EU-Mexico Agreement, Article 31, n 43 *supra*.

provide that the objection must be raised prior to submitting a defence on the merits in the arbitration.<sup>131</sup> The enforcement courts recognise that the untimely raising of the objection precludes a respondent in an enforcement action from relying on Article V(1)(a) of the New York Convention, which contains the ground for refusal of enforcement that there is no valid arbitration agreement.<sup>132</sup>

146. The second type is the waiver of objecting to an irregularity in the arbitration. Many arbitration laws and arbitration rules provide for a waiver of the right to object if a party fails to object promptly to any non-compliance with the procedural rules or a requirement of the arbitration agreement.<sup>133</sup> Again, the enforcement courts recognise that the untimely raising of the objection precludes a respondent in an enforcement action from relying on Article V(1)(b) of the New York Convention, which contains the ground for refusal of enforcement that a party's right to due process has been violated.<sup>134</sup> The same applies to objecting to irregularity in the composition of the arbitral tribunal or arbitral procedure, which is a ground for refusal of enforcement under Article V(1)(d) of the Convention.

147. It is theoretically conceivable to waive or contract out of other grounds for refusal of enforcement listed in paragraph 1 of Article V because they are to be asserted and proven by the party against whom enforcement is sought. Thus, parties can waive or contract out of the right to seek refusal of enforcement with respect to an award in which the tribunal has awarded more or different from what was claimed (Article V(1)(c)), or an award that

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131 E.g., UNCITRAL Model Law, Article 16(2); UNCITRAL Arbitration Rules, Article 23(2).

132 See court decisions under topic ¶ 303 at

<http://www.newyorkconvention.org/court+decisions/decisions+per+topic>.

133 E.g., UNCITRAL Model Law, Article 4; UNCITRAL Arbitration Rules, Article 32.

134 See n. 132 *supra*.

has not become binding or, though questionable,<sup>135</sup> an award that has been set aside by the court in the country where made (Article V(1)(e)).

148. The possibility of a waiver of the setting aside action in the country where the award is made is of little help as only a few countries allow parties to agree to such a waiver.<sup>136</sup>

149. In any event, the grounds for refusal of enforcement in paragraph 2 of Article V of the New York Convention are legally not capable of being waived or contracted out of. These grounds concern public policy which the enforcement court can apply on its own motion.

150. To the extent that the exclusion in the EU Model is to be considered as a waiver of the grounds for refusal of enforcement implied in the consent by the investor and the host State to arbitration, the issue is whether the text of the waiver in the EU Model is sufficiently clear to constitute a waiver. Under many laws, waiver requires specific language. The EU Model seems to lack such language with respect to the grounds for refusal of enforcement under the New York Convention.

151. It appears, therefore, that third countries are not bound by the (implied) waiver provisions in the EU Model in enforcement actions under the New York Convention in respect of awards resulting from the appeal mechanism.

## **VIII. ANNULMENT (SETTING ASIDE) OF AN APPEAL AWARD**

152. When considering a (potential) appeal mechanism and its

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135 See Albert Jan van den Berg, *Enforcement of Annulled Awards?*, The ICC International Court of Arbitration Bulletin, Vol. 9, (No. 2 1998) 15-21.

136 See n. 113 *supra*.

interaction with the ICSID and New York Conventions, a further issue is whether the decision rendered by the appellate body itself is subject to annulment or setting aside.

153. If the appeal mechanism has functioned within the framework of the ICSID Convention, the annulment would be governed by the above quoted Article 52 of the ICSID Convention, unless an *inter se* amendment provides otherwise.<sup>137</sup> If the appeal mechanism has operated within the framework of the UNCITRAL Arbitration Rules or similar rules, the appeal award is subject to a setting aside action before the national courts of the country where the award was made, again,<sup>138</sup> unless an *inter se* amendment provides otherwise.<sup>139</sup>

154. As noted, drafters of appeal mechanisms attempt to exclude the annulment or setting aside action regarding the appeal award, reasoning that two rounds of review are sufficient. They believe that setting aside (annulment) can be integrated into the appeal. An example is the EU-Singapore IPA and EU-Vietnam IPA.<sup>140</sup> CETA has a similar provision in Article 8.28(2) (“Appellate Tribunal”) of CETA, quoted at ¶ 92 above, which contains appeal grounds for both a review of the merits and for annulment of the first instance award.

155. Yet, CETA appears to be internally inconsistent with respect to recourse to annulment at ICSID and setting aside before national courts regarding the appeal award (which is called in CETA “final award by the Appellate Tribunal”).<sup>141</sup> In the part concerning the Appellate Tribunal, Article 8.28(9)(b) provides: “a disputing party shall not seek to review, set aside, annul, revise

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137 See ¶¶ 61-67 *supra*.

138 Typical grounds for setting aside (annulment) set forth in a national arbitration law are the grounds listed in the UNCITRAL Model Law 1985/2006, Article 34.

139 See ¶¶ 48-51 *supra*.

140 EU-Singapore IPA, Article 3.22(1); EU-Vietnam IPA, Article 3.57(1)(a).

141 CETA, Article 8.28(9)(d).

or initiate any other similar procedure as regards an award under this Section.”<sup>142</sup> However, in the part concerning enforcement of the final award, annulment by an *ad hoc* committee under Article 52 of the ICSID Convention and setting aside by a national court appear to be contemplated by Article 8.41(3) (“Enforcement of awards”):

A disputing party shall not seek enforcement of a final award until:

(a) in the case of a final award issued under the *ICSID Convention*:

- (i) *120 days* have elapsed from the date the award was rendered and no disputing party has requested *revision or annulment* of the award; or
- (ii) enforcement of the award has been stayed and *revision or annulment* proceedings have been completed;

(b) in the case of a final award under the ICSID Additional Facility Rules, the *UNCITRAL Arbitration Rules*, or any other rules applicable pursuant to Article 8.23.2(d):

- (i) *90 days* have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to *revise, set aside or annul* the award; or
- (ii) enforcement of the award has been stayed and a *court* has dismissed or allowed an application to *revise, set aside or annul* the award and there is no further appeal. (emphasis added)

156. [Slide #13] It is a difficult question whether it is desirable that the award of an appellate body be subject to an annulment or setting aside action. On the one hand, two rounds of dispute settlement would seem to suffice. On the other hand, in pursuit of the tenet of correctness, an appeal tribunal reviews the merits *de novo* or to a limited extent (in addition to a review of procedural

<sup>142</sup> The term “this Section” refers to Section F that concerns “Resolution of investment disputes between investors and States.” Section F covers both first instance awards rendered by the Tribunal and appeal awards rendered by the Appellate Tribunal. Somewhat confusingly, Article 8.41 (“Enforcement of awards”) provides in para.

3(b)(ii) that “enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.” (emphasis added)

integrity as is characteristic for annulment).<sup>143</sup> Should the merits review on appeal be subject to a review of procedural integrity in the same manner as the first instance award? The maxim *Quis custodiet ipsos custodes?* [Who will guard the guards themselves?] may apply here.

157. The answer to this question of who guards the guards is compounded by the fact that if enforcement of the appeal award is governed by the ICSID Convention, the national court does not engage in any review of the award, but if enforcement of the appeal award is under the New York Convention, the national court supervises the award within the framework of the grounds for refusal of enforcement set forth in Article V.

## IX. CONCLUDING OBSERVATIONS

158. [Slide #14] The ICSID and New York Conventions are crucial for the effective functioning of a (potential) appeal mechanism for ISDS, in particular with respect to enforcement on a worldwide basis. Interaction of such mechanism with either Convention should be carefully considered.

159. As we have seen, a (potential) appeal mechanism basically has three forms:

- (i) appellate body in a bilateral IIA;
- (ii) appellate body in a stand-alone Opt-in Convention;  
and
- (iii) appellate body as an integral part of a Multilateral Investment Court (MIC).

160. Form (i) can be envisaged for new IIAs. Less realistic is achieving an amendment of existing IIAs for the addition of an appellate body. Form (ii) is suitable for existing IIAs as it does not

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<sup>143</sup> See Section VI *supra*.

require an amendment of the IIAs as such and is based on a voluntary opt-in method if it is limited to an appeal mechanism. Form (iii) can be envisaged for new IIAs, but would require an amendment of existing IIAs because the MIC includes a first instance tribunal which would replace the existing ISDS in the IIAs.

161. All three forms raise complex questions regarding their interaction with the ICSID and New York Conventions. Under the ICSID Convention the one award scheme raises issues for an appeal mechanism.<sup>144</sup> The New York Convention raises a whole host of issues: definition of an arbitral award; what is a permanent arbitral body; does an a-national award fall under the Convention; is there a residual application to ICSID awards; does investment arbitration fall under the commercial reservation; is the definition of an arbitration agreement in writing fulfilled; when is the award made at first instance “binding” under the Convention; and can the grounds for refusal of enforcement be waived?<sup>145</sup> Appropriate and careful treaty design appears to be a challenge for the drafters. To draft legally suitable and workable solutions is a daunting task.

162. If an appeal mechanism is to be established, it seems that the ICSID Convention is the preferred legal platform for building the mechanism, mainly because it is a treaty dedicated to investment arbitration and it does not involve supervision and interference by national courts in enforcement and setting aside proceedings.<sup>146</sup> In that regard, it is critical for enforcement of an appeal award in third countries that an *inter se* amendment of the ICSID Convention is drafted in such a way that the appeal award can be considered an award for the purposes of Article 54 of the ICSID Convention.<sup>147</sup>

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<sup>144</sup> See ¶¶ 104-106 *supra*.

<sup>145</sup> See Section VII.D *supra*.

<sup>146</sup> Provided that the issue of who guards the guards can be resolved, see ¶¶ 156-157 *supra*.

<sup>147</sup> See ¶¶ 61-68 *supra*. A residual application of the New York Convention may come to rescue in case of inapplicability of the ICSID Convention's enforcement regime, see ¶¶ 121-128 *supra*.

163. Appeal may improve correctness of the decision, but not necessarily the accuracy.<sup>148</sup> It may also enhance predictability of the interpretation of the same or similar standard of substantive protection. However, the tenet of predictability is only relative as most cases are fact driven and also due to the differing treaty standards among the more than 3,300 IIAs.<sup>149</sup>

164. [Slide #15] It is, therefore, regrettable that, as noted, UNCITRAL Working Group III has excluded consideration of unification of the substantive standards.<sup>150</sup> No doubt that, as Stephan Schill argues in his brilliant PhD thesis of 2009, a “multilateralisation” of IIAs through convergence by interpretation occurs.<sup>151</sup> Indeed, not all differences in formulation always result in a difference of meaning. But that is as far as it goes. A tribunal is bound by the intent of State Parties to an individual IIA who negotiated the specific treaty language. There are differences in treaty language. The example given above is the differing provisions regarding the fair and equitable treatment standard.<sup>152</sup> A Multilateral Investment Court (MIC) cannot bridge those differences by a holistic interpretation, treating the differing texts as if they are virtually the same.<sup>153</sup> If that were the mandate of an MIC, States may be reluctant to agree to an institution with such a mandate as it would be prone to undermining the specific meaning of the treaty provisions they have negotiated with each other. The concept of an MIC is worth exploring, but it requires a prior unification of the substantive protection standards.

165. Finally, “legitimacy” is frequently used as a reason for introducing an appeal mechanism. The perception that a second

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148 See Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power*, 32 ICSID Review (2017) pp. 528-544.

149 See Section II *supra*.

150 See ¶ 12 *supra*.

151 Stephan Schill, *THE MULTILATERIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

152 See ¶¶ 6-7 *supra*.

153 This seems to be the view of Colin Brown in support of the MIC, n. 90 *supra*, at pp. 680-681.



instance has reviewed the decision of a first instance contributes undoubtedly to its acceptability. A closer look at the legitimacy argument in the ISDS context, however, reveals that it rather concerns the arbitrators, their ethics and the method of their appointment. It is submitted that the criticism is justified in large part. There are issues in the current ISDS with neutrality of party-appointed arbitrators, with repeat appointments, with “double hatting,” and with the fee structure. Recent IIAs and model BITs take this criticism into account. An example is the 2018 Dutch Model Investment Agreement: no longer party-appointed arbitrators but appointment of all arbitrators by an appointing authority from a panel; serious provisions regarding ethics; prohibition of “double hatting”; and one fee for all: the ICSID fee schedule.<sup>154</sup> These and similar measures can correct many of the shortcomings of the current ISDS. They can be considered to create an ISDS 2.0. When these and similar measures are implemented, is it necessary to adopt a time-consuming and expensive appeal mechanism for reasons of legitimacy?

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<sup>154</sup> Dutch 2018 Model Investment Agreement, n. 32 *supra*, Article 20.  
Available at: <https://www.rijksoverheid.nl/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden>

## Slide 1



ISDS REFORM CONFERENCE

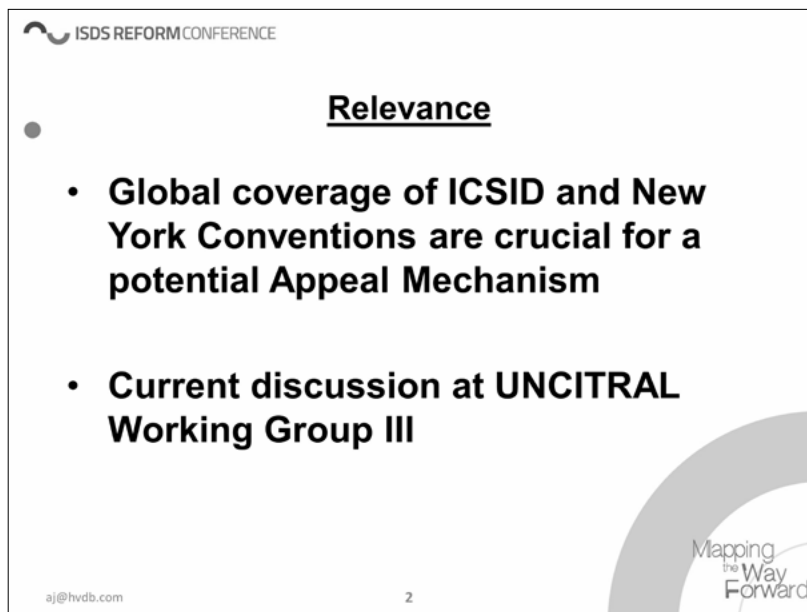
Mapping  
the  
Way  
Forward

**Appeal Mechanism for ISDS Awards:  
Interaction with New York and ICSID  
Conventions**

Professor Albert Jan van den Berg

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## Slide 2



ISDS REFORM CONFERENCE

**Relevance**


- **Global coverage of ICSID and New York Conventions are crucial for a potential Appeal Mechanism**
- **Current discussion at UNCITRAL Working Group III**

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2

Mapping  
the  
Way  
Forward


## Slide 3




**AM in Practice**

- **No appeal mechanism is legally or otherwise operative under any of the 3,300 IIAs**
- **Some 25 IIAs contain provisions that contemplate the possibility of an appeal mechanism in the future**

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## Slide 4



**25 IIAs Unsuccessful**

- **a multilateral agreement establishing an appellate body in the future**
- **a bilateral appellate body in respect of which the Parties are to enter into negotiations within three years**

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## Slide 5



**EU Proposal**


- **Creating a Multilateral Investment Court (MIC)**

***“For the EU ISDS is dead”***

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## Slide 6




**EU Model**

- **Bilateral appeal mechanism**
- **Future: Multilateral Investment Court (MIC)**
- **EU Model in:**
  - **CETA**
  - **EU-Singapore**
  - **EU-Viet Nam**
  - **EU-Mexico**

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- Options for Investors in Current IIAs**
  - Option usually between:**
    - ICSID Convention**
    - UNCITRAL Arbitration Rules or similar rules**

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Slide 8

Table C - Investment Arbitration		
Action	Country of Origin	Abroad
Enforcement UNCITRAL	<ul style="list-style-type: none"><li>National arbitration law</li><li>If “non-domestic”: New York Convention</li></ul>	<ul style="list-style-type: none"><li>New York Convention</li></ul>
Enforcement ICSID	<ul style="list-style-type: none"><li>No “Country of Origin”</li><li>Art. 54 ICSID Convention</li><li>Automatic enforcement in all Contracting States</li></ul>	
Setting aside UNCITRAL	<ul style="list-style-type: none"><li>National arbitration law</li><li>Courts have exclusive jurisdiction</li></ul>	<ul style="list-style-type: none"><li>Not possible</li></ul>
Setting aside ICSID	<ul style="list-style-type: none"><li>No “Country of Origin”</li><li>Art. 52 ICSID Convention</li><li><i>Ad hoc</i> Committee</li></ul>	

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## Slide 9




**Legal Regime Governing Potential AM**

- **ICSID Convention**
  - Amendment *inter se* (Art. 41 VCLT)
- **National Arbitration Law and NYC**
  - Via UNCITRAL Arbitration Rules or similar rules
- **Potential Separate Treaty**
  - Opt-in Convention
    - Kaufmann-Kohler and Potestà proposal
  - Fully integrated
    - EU Model

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## Slide 10




**Enforcement Regime for Potential AM**

- **Self-contained regime in IIA or separate treaty: not advisable**
  - Third countries not bound
- **Preferable to incorporate ICSID or NYC for enforcement of AM award**

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## Slide 11




**Enforcement of AM Award: ICSID**

- **ICSID Convention: Article 54**
  - No grounds for refusal of enforcement
- **ICSID's One Award Scheme**
  - Can be solved by naming last "decision" the award
- **EU Model**
  - Uses "provisional award" until "final award" on appeal

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## Slide 12




**Enforcement of AM Award: NYC**

- **Definition of Award**
- **Permanent arbitral bodies**
- **A-national award**
- **Residual application to ICSID Award**
- **Commercial reservation**
- **Arbitration Agreement in writing**
- **Binding award**
- **Waiver of grounds for refusal of enforcement**

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## Slide 13




**The Question**


- **Anthony Crockett's paper:**

***"Is an appeals mechanism for ISDS awards desirable and practicable?"***

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## Slide 14



**Practicable?**


- **A (potential) appeals mechanism for ISDS raises complex questions regarding its interaction with the ICSID and New York Conventions**
- **ICSID Convention is the preferred legal platform for building the mechanism**

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**Desirable?**

- **Start with unification of substantive standards of 3,300 IIAs**
  - **AM cannot “harmonize” substantive standards by a holistic interpretation**
  - **Model IIA**
- **Preference for ISDS 2.0**
  - **Remedy shortcomings in current system**
  - **More cost-effective and less time consuming**

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## Abbreviations

BIT	Bilateral Investment Treaty
CJEU	Court of Justice of the European Union
EC	European Commission
EU	European Union
EUSFTA	EU-Singapore FTA (2018)
EU Model	The EU proposed reform of ISDS.
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)
IIA	International Investment Agreement
IPA	Investment Protection Agreement
ISDS	Investor-State Dispute Settlement
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
NAFTA	North Atlantic Free Trade Agreement 1994
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Plurilateral	See footnote 3.
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
USMCA	United States-Mexico-Canada Agreement 2018

## Speaker

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### **Matthew Gearing QC**

**Partner**

Allen & Overy

Matthew Gearing is widely regarded as a leading arbitration practitioner; in particular he was appointed Queen's Counsel (England & Wales) in February 2014 and appointed Chairperson of the Hong Kong International Arbitration Centre in late 2016. Matthew has acted in a large number of complex and high-profile arbitrations around the world. As well as being a Queen's Counsel (England & Wales), Matthew is a Solicitor-Advocate qualified in Hong Kong. He routinely appears as advocate in his cases. He has also sat as arbitrator in a variety of matters, as sole and party appointed arbitrator and as Chair.

## **To Assess How to Strike a Balance Between Finality and Consistency of ISDS Awards, with Reference to International and Domestic Experience (Including the UK Experience)**

**M**y topic is how to strike a balance between finality and consistency of ISDS awards, and I am asked to refer to both international and domestic experience, and particularly that of the UK. It is certainly a tricky task, because balancing finality on the one hand and consistency on the other – those two concepts are sometimes seen as enemies of each other. Finality often connotes a final decision and endpoint – an end to the whole dispute to the whole matter within a defined period of time; not an open-ended, never-ending navel-gazing process. Consistency can, not always but can, be the enemy of finality because consistency involves or tends to involve the possibility of further processes and further periods of review to check and to validate the initial decision.

If there is a battle between those two concepts, then arbitration in international commercial arbitration, or frankly, indeed arbitration generally, tends to go for finality over consistency. It is very often said, and you can find hundreds of decisions of domestic courts all around the world, and hundreds of pieces of writing that will say things to the effect that the parties are agreeing. When the parties agree to arbitration, they are agreeing to the arbitrator getting the decision wrong. It is obviously right, that is, what they are doing within certain controls normally provided by national law. In the context of commercial international arbitration, there is not really any way to achieve consistency, because most of the decisions are private and confidential. We do not even know about all the decisions. Indeed, we only probably know about the

decisions of which we have had some personal experience, or some of which have leaked out into the public domain. Since there is no clear record of all of these decisions, there is certainly no way of checking or reviewing each one of them for interdependent consistency.

So, why then are we worried about consistency if arbitration goes for finality over consistency? Why do we worry about consistency in the context of ISDS? Basically, disputes under investment treaties are involved in the context of ISDS. There are two reasons: firstly, there is deemed to be higher public interest in disputes under investment treaties, and secondly, it brings the system or it can bring the system into disrepute if it is publicly known that there are apparently inconsistent decisions. Therefore, consistency is more important in the context of ISDS than in the context of international commercial arbitration.

One can see lots of examples of this. Personally, the example which always strikes me is the example of umbrella clauses. An umbrella clause is a label which has been given to a particular clause which appears in many, not all but in many, treaties. That tends to say something along the lines of the State will observe its commitments to the investor regarding the investor's investment or something to that effect. Since 2003, there has been a huge controversy about how one construes those clauses. In 2002, a Swiss Company, *Société Générale de Surveillance*, sued both Pakistan and the Philippines. Both cases were under very similar umbrella clauses but received two very different, obviously inconsistent, decisions from two ICSID tribunals in late 2003 and early 2004 as to how one interprets those umbrella clauses. Since then, the dispute has fragmented and splintered even more. There are now even further ways of interpreting those clauses. Now, why is that a problem? Essentially a lawyer has to give advice to clients about whether or not they have a good claim and whether or not their claim may

succeed. The problem with that is, for example, if you take an umbrella clause, you really cannot tell the client what the umbrella clause means with any great degree of certainty. You can say you possibly prefer one approach to the other, and one approach may be stronger, but it is all terribly uncertain. That erodes everyone's confidence in the system.

I am not going to go very much into ICSID awards because Professor van den Berg has just described the ICSID system very well, and I will not go into the essentially very limited review mechanism called annulment which is available under the ICSID Convention. All I would say, when we go to non-ICSID awards in a moment, is that about a third of all ICSID awards are submitted to an annulment committee. Between 2001 and 2018, 59 awards, that is 34% of all ICSID awards, were submitted to annulment committees. Now, what does that tell us? Even within the very narrow confines of what an annulment is supposed to constitute is that, parties either like to appeal or feel they have to appeal or challenge or review. I use appeal in its broader sense to refer to a decision. If we move towards a broader appellate mechanism, what we are going to have is more challenges and more appeals – probably more than 34%.

Let us now look at non-ICSID awards, mainly UNCITRAL awards. How does one challenge, review, or appeal, again in the broader sense, non-ICSID awards? The simplest and most straightforward example is making an application to the court of the seat, such as the court in London if the arbitration is seated in London. That has actually been happening for some time and provided some useful insights into the standards of review which might be applied.

There were a number of cases in the UK coming out of the Commercial Courts and the Higher Appellate Courts in London,

which have considered challenges in the broader sense to investment treaty awards. In particular, there are three cases which have considered jurisdictional challenges to investment treaty awards. All are significant. The first is the *Occidental v Ecuador* case, which went all the way up to the Court of Appeal. A very important question is essentially how one construes an exception for taxation measures, which one often finds in investment treaties. The question was whether the tribunal had acted within its jurisdiction or whether it had gone out with its jurisdiction. The English court found that the tribunal had to interpret the taxation measures exception and they found that the tribunal had acted within its jurisdiction.

That was an important decision because whether one is arguing an investment treaty case in England, Washington or wherever else it may be, if you have a taxation measures question, then you are obviously going to look at the two decisions of the English court in that regard. However, the most recent and perhaps most topical, if you like, is the *GPF v Poland* case. It is interesting because the investor had lost on jurisdiction, and the investor then brought a challenge on jurisdictional grounds under Section 67 of the English Arbitration Act against the award without going into the ins and outs of the decision. The Court of First Instance, that is, the Commercial Court in the UK, overturned the tribunal's decision. They said, "No, the tribunal is wrong." The tribunal was wrong to have declined jurisdiction in that case. In doing so, the court had to interpret extensively various provisions of the treaty, perhaps more interestingly, but behaving just as the English Commercial Court would in a normal commercial arbitration case. Then, rather than remitting the matter to the tribunal for a further jurisdiction decision, it replaced the tribunal's jurisdiction decision with its own finding of jurisdiction and then remitted the matter back to the tribunal, but only on the merits.

For some people, that goes too far, but that is certainly the way the English court works in the context of international commercial arbitration. What is interesting about that is, it behaved no differently with respect to the *GPF v Poland* award – no differently with respect to an investment treaty award than if it was dealing with a routine international commercial award.

There are other possibilities to review awards. Section 68 of the English Arbitration Act allows one to review or challenge an award if there has essentially been a serious procedural irregularity, normally involving something which is obviously unfair and some sort of procedural aberration. However, there have been no cases so far where an investment treaty award has been challenged in England on those grounds. Perhaps more interestingly, England has a facility to allow challenges to arbitration awards on the grounds that there has been an error of law and this is Section 69. However, there are certain thresholds and one cannot just go off and review every question of law. For that reason, it has not been applied in the context of investment treaty arbitration. Section 69 only applies to English legal errors. So, the English court can only act under Section 69 if it is an error of English law. If one is trying to think broadly or holistically, it obviously raises the question as regards whether there is means or scope to expand the type of mechanism under Section 69 to allow for a broader lead appeal to legal errors in the context of international treaty awards and ISDS awards.

It is worth noting Section 5 and Section 6 of our Arbitration Ordinance in Hong Kong are equivalent provisions to Section 68 and Section 69 of the English Act, even though those are opt-in provisions. They are not mandatory provisions, and they are very rarely used. But again, there is the germ of an idea if one wishes to explore it.



One other case I will mention where guidance and relevant regional guidance has been provided by a national court is the case of *Sanum v Laos*, which is a decision of ultimately the Singapore Court of Appeal, which is the highest court in Singapore. The Singapore court was considering a challenge brought by the Lao Government, the respondent in the arbitration, to the Permanent Court of Arbitration (PCA) tribunal seated in Singapore, making a ruling on jurisdiction as regards the application of the PRC-Laos BIT to Macau.

So that was quite an interesting question from a Mainland and a regional perspective, and that was looked at in great detail by the Singapore Court of Appeal who reached their decision as regards the application of the Mainland treaty. Quite a significant decision in the context of how one views the application of PRC BITs to different parts of the PRC.

There are a host of other decisions that I could look at in the context of the Netherlands, France, the United States and Canada. Most of those decisions are jurisdictional reviews, while our decisions are made under the relevant domestic equivalent of Section 67, where challenging parties are saying the tribunal has jurisdiction. That, as with England, is where one will find much of the jurisprudence.

Finally, we can see national courts will police and review jurisdictional excesses, at least, of investment treaty tribunals. They will do so where that national court is the court of the seat. That is really the starting point; however, since they are different courts, they are applying different national laws. They do not do so consistently, and they would not be expected to do so consistently. There is a possibility to expand a Section-69-type of process to bolt that in or to include that in some appellate review mechanism. I think as I said at the start, what one would have to accept very practically

is a good deal more of appeals, i.e. from 34% going up to 50% or 60%. Again, I use appeals in its broader sense.

To finish with a very practical point in the context of the current reality where the average investment treaty arbitration takes about three and a half to four years to achieve a final award. Many people and certainly many clients think that itself is a challenge to the legitimacy of the system. The appellate review of whatever nature is clearly going to take much longer. So, is one content to introduce an appellate system and say to a client, “Well, to the first instance or to the first decision, you are looking at three or four years, unless you get an exceptionally speedy outcome”. If the appeal is going to take for example, two more years, and you say, “Well, there is a 50% chance of an appeal either by you if you are disgruntled, or by the other side if they have lost”. Then, one is looking at an overall timeframe of five to six years, which is simply far too long from any commercial decision maker’s point of view. With that, I conclude I appreciate there are probably more questions than answers in what I have said and perhaps we have the opportunity to discuss that at the end.

## Speaker

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### **Zhang Yuejiao**

Professor of Law

Tsinghua University, China

Professor Zhang is the first Chinese legal adviser to the World Bank, the first Chinese director of the European Bureau of the Asian Development Bank, the first Chinese director of the West African Development Bank, and the first Chinese judge of the World Trade Organization (WTO). She has served as one of the seven members and Chair of the WTO Appellate Body, the global court of final appeal in international trade in Geneva, Switzerland between 2007 and 2016. She is a professor at Tsinghua University and Shantou University. In September 2017, Professor Zhang has been designated by the President of the World Bank to the Panel of Arbitrators of the International Centre for the Settlement of Investment Dispute (ICSID) for six years.

## **Whether an Appeal Mechanism for ISDS Is Desirable and Practicable in the Light of the Experience of the WTO Appellate Body and ICSID**

I would like to offer some personal thoughts on whether an appeal mechanism in the investor-State dispute settlement (ISDS) system is desirable and practicable in the light of the experience of the WTO Appellate Body jurisprudence and some of ICSID. My answer is rather simple – it shall be based on demand, i.e. the establishment of an appeal mechanism is driven by the need to safeguard the consistency, correctness, security and predictability in investment arbitration between a State and a foreign investor. Therefore, the introduction of appeal mechanism is of necessity, though it is quite difficult in practice. A lot of challenges are faced by introducing an appeal system for ISDS.

Firstly, the functions, history and contributions of WTO Appellate Body shall be reviewed. Why does WTO need a system of Appellate Body? The reasons are twofold. The first is the consideration on procedural efficiency and fairness. Historically, under the previous General Agreement on Tariffs and Trade (GATT) procedure, the establishment of a panel and adoption of its report could only be done by consensus of all the contracting parties. In practice, the consensus principle is characterised by the lack of efficiency and power-oriented approach; particularly the losing party could successfully block the establishment of the necessary consensus to adopt a report. Therefore, during the negotiation of the Uruguay Round, several major leading parties, including European Community and the United States, supported the idea of establishing an appeal mechanism and also indicated

interest in changing the consensus approval model for the WTO rulings.<sup>1</sup> Eventually, the WTO Dispute Settlement Understanding (DSU), the final act of the Uruguay Round, established a formal appealing system for panel reports and adopted a negative consensus method for the initiation of panel proceedings as well as for the adoption of Appellate Body reports and those panel reports that were not appealed.

To be specific, the spirit of negative consensus means all the parties to the disputes ultimately have a guarantee that the WTO rulings will be adopted unless all WTO members disagree with it. In other words, the WTO rulings are automatically adopted as long as the prevailing party is willing to support the report. To be brief, the WTO Appellate Body is with the final word in resolving trade disputes.

The second reason involves the requirement to correct the legal errors in the panel report. In addition to the structure of WTO dispute settlement mechanism, the panellists are not appointed on a full-time basis but on an ad hoc basis. With a large number of Covered Agreements – 60 – to be decided, the WTO ad hoc panels shall develop a consistent, coherent and predictable rule-based system. As the establishment and adoption of the panel reports become ‘automatic’ to correct the legal errors in panel reports, thus the establishment of an Appellate Body of seven members in WTO is of necessity. “Appeal is a balancing act between finality and correctness”<sup>2</sup>

However, the critical characteristic of the WTO Appellate Body jurisprudence is that only legal issues, particularly treaty interpretation and application, will be heard. According to DSU,

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1 Mark Huber Greg Tereposky, “The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism”, *ICSID Review – Foreign Investment Law Journal*, Volume 32, Issue 3, Fall 2017, p.552.

2 Albert Jan van den Berg, “Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Conventions”, para.90.

the Appellate Body has no power of remand if the Appellate Body cannot complete its legal analysis and return the unsettled case to the panel stage in WTO proceedings. The Appellate Body sometimes is hard to complete the legal analysis due to the lack of uncontested facts.

Although the appeal mechanism in WTO is far from perfect, in my personal view, it does ensure consistency, predictability and security in the dispute settlement system, and the WTO Appellate Body is efficient and plays a positive role in reality, being well received by WTO members and is called as the Jewellery of the Crown as the most successful function among the four WTO functions.

Historical facts show that WTO Dispute Settlement (DS) is far more efficient than GATT:

1. WTO DS has received more than 600 cases in 23 years, almost double that of GATT in 50 years;
2. The average time limits for closing a case is about 1-3 years shorter than International Court of Justice (ICJ) and ICSID;
3. The coverage of WTO DS involves wide-ranging activities, including trade in goods, trade in services, agriculture, Technical Barriers to Trade (TBT) Agreement, and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);
4. The principles of Most Favoured Nation (MFN), National Treatment, Transparency, Fair Trade, etc. are widely used in other international agreements;
5. Contribution of the WTO DS to the treaty interpretation of Vienna Convention is significant: frequent use of the terms “object and purpose”, “text and context”, “good faith”, “normal meaning”, and “supplemental tools for interpretation”, etc.; and
6. Case collection and Analytical Index are widely used by lawyers and arbitrators.

With regard to the reference value of the WTO Appellate Body, it is not the best example, but there are some similarities between the WTO Appellate Body and the Appellate Body for ISDS:

1. Disputes involve at least one Government, Government to Government in DS of WTO, and a private entity and a Government in ISDS;
2. 60 Covered Agreements of WTO are concluded by 164 member Governments – BIT, ICSID, UNCITRAL, New York Convention – all concluded or acceded by Governments;
3. Reasons for the establishment of WTO Appellate Body and the Appellate Body for ISDS are quite similar: too many panellists and arbitrators involved on ad hoc basis, legal errors and differences in interpretation and application of the Covered Agreements and the applicable laws, the Appellate Body's improvement of consistent interpretation of agreements, enhancement of security and predictability, and correctness of arbitral awards;
4. Mandate of the Appellate Body (Art 17 DSU): a standing Appellate Body shall be established by the Dispute Settlement Body (DSB) (Art 17.1 DSU). The Appellate Body shall hear appeals from panel cases. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel (Art 17.6 DSU). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (Art 17.13 DSU);<sup>3</sup>
5. Legal force: final decision and binding on parties. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute;
6. WTO Appellate Body has no power of remand, but the Appellate Body can complete legal analysis based on the uncontested facts;

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<sup>3</sup> van den Berg (n2) para. 95

7. Enforceability is similar: the Appellate Body decisions are binding and enforceable by parties. There are two measures to safeguard the enforcement. The first is to provide a watch list of those failed to enforce timely, at the monthly DSB meeting; the second is the winning party can take trade retaliation upon the approval of the DSB after the Reasonable Period of Time (RPT);
8. Selection of Appellate Body members: it shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. The Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally. They shall be unaffiliated with any Government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interests;
9. Harmonisation and interpretation of substantive rules: WTO interpretation of the Covered Agreements rest on Ministerial meetings; however, no interpretation is provided by the Ministerial meetings; and
10. WTO DS asks for prompt and positive solution of DS. 90 days are not realistic for all appeals, disregarding the size of the case and complexity of the legal issues. 90 days include the time for translation, holidays and weekends.



Currently, a pattern of judicial overreaching by Appellate Body is sharply criticised by some WTO members. Even the selection of the Appellate Body members has been blocked since 2017. The WTO dispute settlement mechanism is confronted with unprecedented political pressure. Theoretically, all the provisions in the DSU shall be respected sincerely. However, the increasing numbers of cases, the strict time limit of appealing proceedings, and the excessive dependence on narrow textual interpretation in dispute settlement are the major challenges needed to be addressed.

WTO Appellate Body has been functioning smoothly over the past 23 years and the WTO Appellate Body is unique among international organisations. Though the Appellate Body needs to be improved, its achievements cannot be denied. Both the achievements and weaknesses of the WTO Appellate Body mechanism could contribute, and as a reference, to the development of a successful appeal mechanism for ISDS.

As a proverb goes, “Don’t throw the baby out with the bathwater”. It means that we should protect the baby, that is the Appellate Body crown jewellery, and pour out only the ‘bathwater’ through constructive reform of Appellate Body. Do not destroy the Appellate Body! Thus, I have made some suggestions for the Appellate Body improvement as follows.

As regards to the procedure fairness of the Appellate Body, first of all, the documents issued by the WTO Appellate Body and the written submissions by the parties shall be reader-friendly.<sup>4</sup> Secondly, the 90-day time limit of appeal proceedings should be reconsidered. It is suggested that the DSU shall clarify that the 90 days means 90 working days excluding the time for translation, holidays and weekends. Thirdly, a person who ceases to be a member of the Appellate Body may complete the current appeal

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<sup>4</sup> Dispute Settlement Body (DSB) could issue orders on page limit of all documents, the Panel and Appellate Body (AB) reports should focus on a prompt and positive solution to the dispute by presenting “correct, clear and concise” reports, no presentation of advisory opinion.

if approved by the DSB.<sup>5</sup> The term of office of an Appellate Body member shall be reconsidered to extend to a six-year term.<sup>6</sup> Last but not least, experts, judges and lawyers shall be broadly representative of membership in the WTO,<sup>7</sup> while strict rules of code of conduct should be observed by all personnel involved in dispute settlement.<sup>8</sup>

In order to improve substantive fairness in the Appellate Body mechanism, the decisions of the Ministerial Conference, as the highest decision-making body of WTO, such as targeting on the authoritative interpretation, should be given more weight.<sup>9</sup> In practice, the WTO DSB should not interfere and interpret its member's internal law, which is always considered as a fact.<sup>10</sup> Furthermore, the Appellate Body shall be with the legal capability and competence to complete legal analysis,<sup>11</sup> as well as the right to

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- 5 The members of the AB continue to hear their current cases, with the authorisation of the AB and upon notification to the DSB, after they left office. This provision is specified in the Working Procedure of the AB and has not been unanimously adopted by the WTO members. In my opinion, the member of the AB shall continue to complete the disposition of the appeals to which he or she was assigned, since he or she is in the best position to deal with the current disputes. Thus, it is recommended that this kind of provision in the Working Procedure of the AB be approved according to the WTO decision making procedure.
  - 6 The AB members' term of office is four years and may be extended for a second term with a period of up to eight years. Due to the lack of clear rules on the conditions and procedures for the renewal of the first term in the DSU, the AB members may be at a loss before the expiration of the first term, and there is a great deal of uncertainty, which affects the work of the AB. To avoid the political interference by the big power to the independence of the quasi-judicial system, it is proposed to introduce a six-year term.
  - 7 For instance, according to the Article 8.10 of the DSU, one panellist from a developing country Member is needed, if the developing country Member so requests, when a dispute is between a developing country Member and a developed country Member. Importantly, in order to close the legal expertise gap between the developed and developing nations in WTO, training legal practitioners and enhancing the use of legal professionals from developing countries and new members are necessary.
  - 8 The WTO members unanimously hold the view that the AB member shall be unaffiliated with any government, and shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. To sum up, independence, impartiality, high moral, professionalism and a strong dedication to the multilateral trading system are the key requirements for all panellists, AB members, lawyers and staff working for the WTO dispute settlement, aiming for making their judgments with objectivity, justice, fairness, promptness and enforceability.
  - 9 Certain provisions of the Covered Agreements require modifications or legal interpretation. For instance, Article 17 of the DSU provides the AB shall complete its report in 90 days. As the highest decision-making body of WTO, the Ministerial Conference decisions should be given more weight.
  - 10 According to Article 17.6 of the DSU, the AB hears the legal issues and their interpretation of the panel report. For instance, the examination on whether the panel made an objective assessment of the matter and on the consistency between a municipal law and the Covered Agreement is a legal characterisation, where both legal issues are to be heard by the AB. In short, the distinction between the law and the fact shall be more specified.
  - 11 Due to the fact that the WTO does not provide the AB the power to remand cases, the AB, after overturning a legal interpretation or relevant legal conclusions of the panel report, has failed to get the facts undisputed by the parties or to obtain facts found by the panel in its report. Eventually, the AB could not make a conclusion of its judgment and had to decide some of the panel decisions are 'mooted'. The result of no substantial ruling by the AB, which is the highest and final stage of the WTO judgment, is unfair to the parties. Nor is it in line with DSU's undefined principle of prompt and positive solution of dispute. However, the quality and speed of dispute resolution may not be improved if the remand proceedings are established. The procedure of the AB returning an open case and the process of reorganising the panel will be complicated and time-consuming. Importantly, when a party to the appeal knows that its measure may violate the WTO Covered Agreement and the measure is about to return to a panel, it is also unlikely that the party will provide further evidence to convince its measure is illegal. It is suggested that fact-finding should be done well in the panel stage. The parties shall sign a "Statement of Facts", so that the AB may, after overturning a legal analysis and the relevant conclusion of the panel report, complete the legal analysis. DSU should formally recognise that the AB has the competence to "complete legal analysis".

issue ‘urgent and provisional measures’ to reduce the damage caused by deliberate illegal measures such as raising the tariffs by a member.<sup>12</sup>

Secondly, the current structure of ICSID arbitration shall be revisited. There are several differences between WTO adjudication and ICSID arbitration. As to the jurisdiction, the applicable law and targeted measures in ICSID arbitration are diversified. The ICSID Convention specifies that the relevant law is the law of the host State and applicable rules of international law and BITs. With 156 signatory States in the ICSID currently, the applicable law in ICSID arbitration includes at least 156 kinds of domestic law, whilst the WTO jurisdiction only covers the multilateral agreements referred in Annex 1 of the DSU. 60 Trade Agreements are binding on the WTO 164 members. For instance, 3,200 different BITs have different compensation criteria. Since there are different interpretation of the terms of BITs, such as qualification of a foreign investor and investment, it is hard to keep the investment arbitration system consistent.

Additionally, in practice, almost all the measures, not just the unlawful expropriation, could be targeted in ICSID arbitration. Take the fair and equitable treatment as an example. The obligation of the parties to investment agreements to provide to each other’s investments ‘fair and equitable treatment’ has been given various interpretations by arbitrators.<sup>13</sup> As a flexible standard, fair and

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12 The WTO dispute settlement mechanism is not crafted without the rules of provisional suspension or provisional injunction, nor does the WTO legal remedy have the retrospective effect. The party winning the lawsuit will suffer a loss without full compensation. Therefore, the WTO dispute settlement mechanism could introduce a system of “urgent and provisional measures” to fix this systematic defect, as well as to guarantee the members’ interest. In addition, the dispute settlement mechanism of the WTO could adopt an expedited procedure. The WTO dispute settlement mechanism shall encourage the parties to settle the dispute promptly and efficiently. The provisions for selection and appointment could be modified to accommodate the shorter time frame.

13 See The Organisation for Economic Co-operation and Development (OECD) (2004), “Fair and Equitable Treatment Standard in International Investment Law”, OECD Working Papers on International Investment, 2004/03, OECD Publishing. <http://dx.doi.org/10.1787/675702255435>.

equitable treatment could be legally involved in the majority categories of measures adopted by host States. To some degree, the ICSID Convention provides *ad hoc* arbitrators more discretion, when it compares to the WTO agreement.

In ICSID structure, an award rendered by an ICSID tribunal can be annulled by an *ad hoc* Committee, pursuant to Article 52 of the ICSID Convention. At present, more and more ICSID awards are applied for an annulment. Until recently, 42% of awards were applied for an annulment since 1971, while the rate of annulment remains low, only 5.97% of awards annulled in full or in part. Similarly, in WTO, almost 68.5 % panel reports applied for an appeal during the years 1995 to 2018.

The reasons why the number of an annulment application in ICSID is increasing are understandable. On the one hand, there may exist illegitimate or unjustified rulings in the first instance; on the other hand, the political motivation shall be taken into account. The losing party is willing to exhaust judicial remedies in international law since the cost of an annulment application is relatively low.

In my preliminary view, the design of the annulment mechanism in the ICSID Convention may be improved. First of all, while the WTO Appellate Body will hear all the legal issues in the cases, only five kinds of legitimate grounds of serious departure from a fundamental rule of procedure could be requested to trigger an annulment procedure in ICSID. The rights created in Articles 50 and 51 are obviously limited and not analogous to a right of appeal on the merits. Further, requests under these provisions, if allowed by the Secretary-General, will, where possible, be referred to the same tribunal which rendered the award. Applications under these provisions are also very rare.<sup>14</sup>

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14 Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 160-162.

Under Article 52(1) either party may request annulment of the award by an application to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

The application for annulment will be referred to a three-member *ad hoc* committee constituted for the sole purpose of the application. The members of the *ad hoc* committee are appointed from the ICSID Panel of Arbitrators.<sup>15</sup>

The annulment procedure is not analogous to a right of appeal on the merits in two key respects. First, if successful it leads to annulment of the award (in full or in part). The *ad hoc* committee decision does not substitute for the award; if the award is annulled, the same dispute can subsequently be referred to a new tribunal. Second, the annulment procedure may not be used to challenge the merits of the tribunal's decision.<sup>16</sup> Instead, the procedure is designed to ensure procedural integrity and due process.<sup>17</sup>

Unfortunately, if there are manifest errors of law or manifest errors in the application of the facts in arbitral award,<sup>18</sup> there will be no chance to correct the award in ICSID mechanism.

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15 ICSID Convention Article 52(2).

16 In some cases, *ad hoc* committees have been criticised for straying into the merits of the case in their annulment decisions. See, e.g. Paul Friedland and Paul Brumpton, "Rabid Redux: The Second Wave of Abusive ICSID Annulments" (2012) Vol. 27(4) *American University International Law Review* 727.

17 Reed, Paulsson and Blackaby (n 16) 162.

18 Pursuant to Article 8.28 of the EU and Canada Comprehensive and Economic Trade Agreement, the Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on:

- (a) errors in the application or interpretation of applicable law;
- (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and
- (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) or (b).

Firstly, the annulment in ICSID arbitration costs too much time. The time period in ICSID is longer than in WTO appealing proceedings. For instance, even after the award is partially annulled by the ad hoc committee, the losing party could apply again for annulling the other part of the rulings in the same award. As the proverb goes, “justice delayed is justice denied”. It is unfair to the disputing parties.

Secondly, transparency and public participation in ICSID arbitration proceedings may be improved. Some of the rulings in ICSID have not been published due to confidentiality reasons. In my view, the ICSID judgments, if relevant to public policy and with consent of parties, shall be accessed timely.

Thirdly, an appeal mechanism for Investor-State Dispute Settlement shall be feasible. Recently, as to the establishment of appeal mechanism in ICSID, there are at least two proposals. The first option is to expand the scope of review of ICSID awards and upgrade the annulment procedure to an appeal mechanism. More importantly, the legitimate grounds to apply the appealing proceedings shall include manifest legal errors and factual errors in ICSID award.

The annulment process is limited to the issues of procedural fairness, such as illegitimate jurisdiction, corruption and serious departure from a fundamental rule of procedure. Though it is argued that “serious errors of law” fall (to some extent) under Article 52(1)(b) of the ICSID Convention (“the Tribunal has manifestly exceeded its powers”), my view is that “the manifest excess of power” is quite different from the “serious errors of law”. The latter focuses on the substantive fairness, while the former is relevant to the terms of reference. Similarly, the 2004 ICSID Discussion Paper on an ICSID Appeals Facility suggested that the grounds for appeals might include a clear error of law.

Thus, the manifest errors of law shall be one of the legitimate grounds of ISDS appeal requests compared to the current version of Article 52 of the ICSID Convention for the reasons below. Firstly, compared with the function of the WTO Appellate Body mechanism, the annulment process with the jurisdiction on manifest errors of law will increase the efficiency of ICSID mechanism. It could prevent the motivation of the losing party from requesting for all the other forms of remedies. Secondly, the significant demand to safeguard the correctness of ICSID awards shall be valued. Doubtlessly, an award, without the errors of law corrected, is unfair to parties, as well as causing harm to the ICSID jurisprudence, affecting the integrity of the ICSID procedures and awards, and damaging the reputation of the *ad hoc* Annulment Committee. Thirdly, indeed, the UNCITRAL does not have enough budget and resources to build another appeal mechanism, thus the ICSID shall save the correctness and consistency by itself.

In practice, the implementation of this proposal involves amending the ICSID Convention, particularly, the manifest errors of law being one of the legitimate grounds of ISDS appeals and annulment requests, compared to the current version of Article 52 of ICSID Convention. However, the amendments to the ICSID Convention require the approval of all the 156 member States. It will be of great difficulty.

Moreover, extending the review scope of ICSID awards will correspondently increase the financial burden of World Bank, as well as the cost and time of the disputing parties. It shall be noted that the amount of human resources and budgets of World Bank devoted to investment disputes settlement is limited. In particular, only ten members are *ad hoc* arbitrators appointed by the President of the World Bank. Since the amount of the annulment application in ICSID is significantly increasing, due to limited resources, it appears that it is hard to establish an appeal mechanism in ICSID,

as there is a need for a team of lawyers to assist the appeal mechanism. But my view is that, it is much less difficult to modify the existing annulment *ad hoc* committee system within ICSID or create a new Appellate Body within the ICSID than establishing a new Appellate Body system from scratch within the UNCITRAL.

The second option is designing a new appeal mechanism in UNCITRAL. New York Convention is one of the key instruments in international arbitration. However, the challenges of this proposal are as below. First, it shall be evaluating the cost of designing an appeal mechanism by UNCITRAL. Until recently, UNCITRAL promotes its conventions on the approach of the model law. Indeed, UNCITRAL lacks sufficient budget, as well as governments' funding, to design a new mechanism, compared to the ICSID sponsored in the beginning by the World Bank.

Second, it shall be reconsidered about competing concerns of finality and correctness of awards. Personally speaking, almost all the commercial disputes could be interpreted as involving foreign investment. Thus, one of the parties, even in commercial disputes, will have the motivation to apply for the appealing proceedings as a litigation strategy. In this perspective, the finality of the awards under the New York Convention will be hindered.

Third, I doubt that the negotiating States are willing to make a new commitment to establish an appeal mechanism in UNCITRAL and ratify a new UNCITRAL convention. One of the proposals suggests introducing the appeal mechanism in ICJ. However, due to the limited jurisdiction and the shortage of expertise on investment dispute settlement, it is of little possibility to rely on ICJ to initiate an appealing proceeding.

In summary, it is desirable to establish an appeal mechanism in Investor-State Dispute Settlement system, though it will be harder than in WTO.



The reasons for an appeal mechanism for ISDS are mainly twofold: firstly, correction of manifest legal errors in the ISDS arbitral awards; and secondly, harmonisation of the interpretation of the BIT and MIC terms such as fair and equitable treatment.

In order to establish an appeal mechanism for ISDS awards, the first challenge is to make clear of the jurisdiction of an appeal mechanism. The correctness and consistency of investment decisions is of great importance to both the States and investors. Regardless of the different definitions and criteria employed by the BITs as well as the domestic law, the purpose to safeguard the investment and the right to regulate are exactly the same. Thus, the appeal mechanism could harmonise, rather than standardise, the investment adjudication, which will contribute to the consistency and predictability of the investment arbitration system.

UNCITRAL could use its best advantage position of calling for governmental conferences to answer the two demands by: first, formulating MIC, or guideline on interpretation of the main terms of BIT, Free Trade Agreements (FTAs) including expropriation, fair and equitable treatment, etc.; and second, preparing a code of ethics for all arbitrators for ISDS and procedures for the selection of ISDS arbitrators, as well as a training programme for all the arbitrator candidates.

A further question is how to deal with the conflict between ICSID Convention, the New York Convention and the appeal mechanism. On the one hand, the ICSID Convention shall be modified to answer the relationship between annulment mechanism and the appeal mechanism. Particularly, what is the order between these mechanisms? It is uncertain that whether the party to the dispute shall initiate an annulment mechanism before the application for an appealing proceeding. On the other hand, it shall be redefining the finality in the New York Convention,

supposing that the investment arbitral awards, outside the ICSID jurisdiction, would be applied for recognition and enforcement extraterritorially – since the New York Convention is the most significant international instrument in this domain.

Last but not least, measures are needed to address the current shortage of qualified arbitrators and international lawyers to support appeal work, particularly the need for wider representation of arbitrators for ISDS, and the shortage of arbitrators from developing countries. Either the permanent or *ad hoc* appeal mechanism shall be equipped with staff with high moral, independence, impartiality, expertise, dedication and professionalism. Unfortunately, nowadays the shortage of capable arbitrators and staff is another challenge for the establishment of an appeal mechanism.

Despite the difficulties and challenges, with the spirit of good faith and cooperation, we can overcome all the differences by seeking common grounds and peaceful settlement of disputes. Governments and private entities can jointly improve the ISDS, making it more efficient, economic, fair, just, timely and positive to serve all parties.

# Commentator

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## May Tai

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May specialises in cross-border China-related and Asian disputes, as well as contentious regulatory matters. She regularly advises governments, government-owned entities and commercial clients (including financial institutions and energy companies) in Asia, Europe and the United States, including acting as counsel and advocate in arbitrations under various rules and court proceedings. She has acted as an arbitrator in SIAC and HKIAC proceedings, and has also sat as an Emergency Arbitrator under the ICC Rules. May speaks five languages fluently, including Bahasa (Malaysian and Indonesian), Chinese (Mandarin and Cantonese) and English. She is a CEDR accredited mediator and an arbitrator in the HKIAC List of Arbitrators, and is qualified as a solicitor in England and Wales, and Hong Kong. May is based in Hong Kong but divides her time between Herbert Smith Freehills' Hong Kong, Shanghai and Beijing offices, managing and leading the three Greater China offices in her role as managing partner.

A lot has been said this morning, and much of it is very difficult to disagree with. In particular, we heard from Professor van den Berg who helpfully identified all of the very technical issues that would need to be resolved in order to introduce an appeal mechanism that would work in the context of the existing ICSID and New York Convention regimes. Mr Gearing shared the grounds of challenge under a number of domestic systems, and demonstrated that in these different jurisdictions very different standards of review are adopted. And this is another hurdle that we would need to overcome if there is no appeal mechanism that applies across the board. Finally, Professor Zhang shared her very extensive experience with the WTO appellate system, outlining its many successes in achieving consistent decisions efficiently as well as identifying some weaknesses in the process that could be improved. Now, that leaves very few other points that are not yet touched, but I will try to introduce a few newer concepts that have not been touched on.

The first one that I wanted to discuss is the concept of human weaknesses as opposed to systemic weaknesses. We have all heard this morning the benefits of having an appeal mechanism, such as consistency, correctness, accuracy, certainty, and predictability. These are all good aspirations. No one will argue with that. One should not discount, however, the human weakness to use the appeal mechanism as an opportunity to get a second bite of the cherry for the losing party and perhaps also at the same time to delay enforcement. I will refer to this first type of human weakness as the 'eternal optimism' weakness. For those of you who have read Mr Crockett's paper, you will know that 37% of ISDS decisions are made in favour of the State and if you add to that the 2% percent of cases where the tribunal finds that there is a breach but no damages are awarded, this adds up to 39%. While 28% are decided in favour of the investor, 23% are settled, and 10% are discontinued.

So, what do these unsuccessful parties do? We heard from Mr Gearing that, between 2011 and 2018, approximately 59 awards, or 34% of these unsuccessful parties, chose to annul their ICSID awards. Professor Zhang also included some very useful statistics in her paper, which I had the pleasure to read beforehand, saying that only 5.9% of these awards taken to annulment proceedings are annulled in full or in part. Now we all agree and have heard that annulment proceedings and annulment grounds are narrower than grounds for appeal. We also know from Professor Zhang's paper that in the WTO, 68.5% of cases are taken to the appeals process.

So, the question is, what is the opportunity cost of being able to fix what are a very small group of incorrect decisions, as revealed in the literature, via an appeal mechanism? Will the benefits be outweighed by the downsides, in terms of the time and costs incurred by parties seeking to use the appeal process to essentially try and get a better result for themselves? The downsides were covered earlier by some of the speakers, with Mr Gearing in particular emphasising the risk of prolonging what is an already complicated and long ISDS process. Of course, there is the obvious downside of higher costs to the public purse as well, especially legal costs.

Finally, one must assume that, there is not necessarily a higher chance of a successful outcome even if you allow for an appeal, because if you assume the same number of investors and States choose to appeal the first instance decision, and you assume that that first instance tribunal got it wrong in equal numbers for investor or State, then you are back to square one in terms of your chances of a successful ultimate outcome. This is a possibility no one can discount. I know from representing clients over the years that eternal optimism in the hope of a successful outcome eventually is a strong bias and is a human weakness.

A second category of human weakness, arbitrator weakness. Professor van den Berg already touched on some of these concerns in terms of the quality of arbitrators, their ethics, perhaps the method of appointment, double hatting concerns, etc. The one extra point that I would like to make is that, even in a legal jurisdiction like Hong Kong, it is very difficult to get good and consistent appeal decisions from judges notwithstanding the fact that they essentially come from the same legal tradition and training. In the international legal community, in the ISDS context, we are talking about arbitrators from different national, legal and linguistic backgrounds that will inevitably approach a case or a treaty from different perspectives. I guess you might call this the ‘we-are-not-all-cut-from-the-same-cloth’ weakness. I leave you with this thought – perhaps this was an intended consequence, as the world is, after all, a very complex and messy place. To find uniformity and consistency is difficult in these circumstances. There is a lot of merit also in the argument that you should fix what is broken – if people are really unhappy with the first instance decision. Maybe thought should be put into fixing that rather than seeking to find some sort of better decision-making mechanism in the form of an appeal process.

The third and final form of human weakness. I call this the ‘pay-peanuts-and-get-monkeys’ weakness, and it points to people like me, the lawyers. How parties and their lawyers choose to argue their case is very important. I think it is sometimes unfair that tribunals are being criticised for the so-called bad decisions, when they are actually required to stick to the arguments and authorities that are presented to them by the lawyers. Tribunals all know how frustrating it is that lawyers oftentimes present cases like ships passing through the night and do not address tribunals on the core issues that really matter to them. So again, this weakness will not change on appeal unless you change your lawyers.

In conclusion, by pointing out these weaknesses I am not suggesting that the appeal idea is a bad one, merely that there are some weaknesses in the system that will not be solved by having an appeal mechanism.

There is a second group of observations, which I categorise as ‘protecting sovereignty’ observations. I start my observations off with the question, what is the reason that so many States have suddenly stopped or at least gone cold on the idea of supporting an appeal mechanism? The United States being a primary example. The United States does not give reasons for this but I suspect that a big reason for its change of heart has to do with the perception that a State might lose sovereignty. What do I mean by that? Anecdotally, as a private practice lawyer, we always hear that BITs today involve long and lengthy negotiations. Gone are the days where diplomats show up for an afternoon, sign a BIT, play a round of golf and then go home. Instead, what we understand is that most countries now have a team of ISDS expert negotiators and discussions happen across many sessions over months, sometimes years. The evidence therefore is that preservation of sovereignty is still a primary motivation and this can be seen in the text of treaties, a point which was alluded to earlier.

Here is an example of the subtle but important differences that exist in different negotiated treaties – consider the Association of South-East Asian Nations (ASEAN)-China Investment Agreement. Fair and Equitable Treatment (FET) *refers* to the obligation of each party not to deny justice in any legal or administrative proceeding. The word “requires” is used in a separate ASEAN agreement. Under the ASEAN Comprehensive Investment Agreement, FET *requires* each member State not to deny justice in any legal or administrative proceeding. So, these are both ASEAN treaties, however, one uses the word *refers* while the other uses

*requires*. There is an argument that *requires* is arguably broader and more inclusive than *refers*. These differences are very subtle and while it could be that they were unintentional, it is more likely that they were intentionally chosen, raising the possibility that they carry different meanings. Could the State be intending the subtle differences? And could it be that the differences also reflect the different social, economic and political development and relative standings? Does it also reflect a standard that should change as the country develops further in the future? I point this out because I think that legal correctness and accuracy of treaty interpretation are often spoken of as though these are objective immovable standards that are easily ascertained by arbitrators. However, I ask whether we are actually denying a State its sovereignty by seeking consistency and uniformity across cases, across time periods and across interpretation of treaty provisions. The fact is that there are 3,000 plus treaties that contain similar but not identical standards and this combination shows us that it is very difficult to get consistency in treaties themselves, let alone in arbitration cases arising from disputes, when you introduce complicated facts, expert evidence, legal argument, etc. I think one would really require something like block chain technology before the tribunal could come up with a coherent, consistent and accurate chain of authorities. That perhaps could be the subject be the subject matter of next year's conference.





## **SESSION III**

Third-Party Funding in ISDS

## Speaker

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### **James Ding**

#### **Commissioner**

Inclusive Dispute Avoidance and Resolution Office, Department of Justice, Hong Kong Special Administrative Region of the People's Republic of China

Dr James Ding advises the government on various public and private international law issues, and participates in international negotiations. He has published on different subjects of international law and international cooperation, and has given presentations at various international and regional conferences, including the UNCITRAL 50<sup>th</sup> Anniversary Congress and the 2<sup>nd</sup> UNCITRAL Asia Pacific Judicial Summit in 2017. Currently he is also the Convenor for the APEC Economic Committee – Friends of the Chair on Strengthening Economic and Legal Infrastructure.

## To Consider Third-Party Funding in the Context of ISDS (Including Investment Arbitration and Investment Mediation)

First, I will talk about third-party funding for investment arbitration as compared to international commercial arbitration. Third-party funding for international commercial arbitration has been recognised as a valuable means of ensuring access to justice and as a potential solution to the high cost of international commercial arbitration. However, it seems that there are questions as to whether different considerations would apply in respect of the practice of third-party funding in investment arbitration because of the different factors involved. As compared to commercial arbitration, investment arbitration involves States and government, and it is interlinked with cross-cutting issues of public interest, regulatory discretions, and use of public financial resources, just to name a few. The discussion on third-party funding is also intertwined with the broader debate on the legitimacy of the ISDS systems that we have been discussing today, and it also adds further complexity to the consideration on the use of third-party funding in investment arbitration.

I understand that third-party funding has been the subject of discussions in the UNCITRAL Working Group III, and this issue is supposed to be further considered at the next meeting in New York in early April. I am not here to provide answers, but I will simply highlight some issues for the consideration of Working Group III. First of all, it seems that there is a lack of sufficient empirical data over the practice of third-party funding, and hence the debate of a third-party funding has sometimes been based on

perceptions and assumptions. In any event, based on the available information, it will be useful to recap some of the pros and cons of such practice in the context of investment arbitration. The discussion paper helpfully prepared by Eric Ng has comprehensively analysed some of the pros and cons of third-party funding in investment arbitration. On the one hand, supporters for the use of third-party funding will run on the classic notions of access to justice. In other words, third-party funding allows legitimately aggrieved parties to pursue claims that they might otherwise be unable to do because of the lack of financial resources. While it is sometimes argued that third-party funding may result in more marginal speculative and frivolous schemes, third-party funders are normally motivated by financial interests, and the due diligence contracted by the funders may act as filters of unmeritorious schemes. Moreover, the monitoring by the funders may have the benefits of resulting in more effective case management. From the perspective of investors, third-party funding may also mitigate financial risks of such investors resulted from the arbitration proceedings.

On the other hand, given the fact that governments are normally unable to assert claims against investors, some are concerned that third-party funding may lead to an even greater systemic imbalance between governments and investors, because third-party funding may provide additional avenues and opportunities for investors to make their claims. Furthermore, third-party funding may raise issues of cost allocations and some are concerned that such practices may encourage ‘arbitral hit and run’ strategy adopted by funders. Some are also concerned that third-party funding may cause further transfer of wealth from public sectors to private sectors, particularly as ISDS awards are paid from public resources and public funding. It is interesting to look at the *Phillip Morris v Uruguay* case, in which the respondent State received financial support from the Bloomberg foundations and its “Campaign for Tobacco-Free Kids”. However, it does not seem

that this kind of third-party funding for States will be a sustainable and workable business model in all cases.

As observed in the International Congress and Convention Association (ICCA) Queen Mary Task Force Report, which Professor Julian Lew QC is also part of it, the existence of third-party funding can create potential conflict of interests, which may arise as a result of repeated appointments of the same arbitrator by plaintiff funded by the same third-party funder, arbitrators serving on the board of the funder, and the relationship between funder and the arbitrator's law firm. Therefore, it is important to ensure that the issue of conflict of interests should be properly addressed.

The concern over risks of conflict of interests has been looked at under recent investment treaty drafting practice, which requires disclosure by the funding party of the existence and identity of the funders. The recent proposal of amendments to ICSID rules has also included disclosure requirements regarding the existence of third-party funding arrangements, the identity of third-party funder, and determination of the arrangement.

Against the above background, it may be useful to look at the approach adopted by Hong Kong. As one of the earliest pioneers in Asia, Hong Kong has conducted a reform on third-party funding for arbitration and mediation. The process started in 2013, when the Third-Party Funding for Arbitration Sub-committee of the Law Reform Commission was appointed to review the subject. We have subsequently conducted very comprehensive and careful consultation exercises in 2015 and 2016. An overwhelming majority of the responses supported amendments to the law to expressly allow third-party funding for arbitration and to develop clear ethical and financial standards for third-party funders.

As third-party funding of arbitration has become increasingly common in numerous jurisdictions, it is necessary for the

legal position of Hong Kong on third-party funding to be clear in order to maintain our competitiveness as one of the major centres for international arbitration in the Asia-Pacific region. In 2017, we passed the law to clarify that third-party funding of arbitration is not prohibited by the common law doctrines of maintenance and champerty, and the legislative provisions related to third-party funding on arbitrations have come into operations on 1 February 2019. Our reform on third-party funding has taken into account the concerns over transparency and conflict of interests, and safeguards have been included to minimise the possibility of conflict of interests being the subject of challenge to the arbitration process. We have come up with the Code of Practice which has just come into effect earlier this month.

One of the notable features is that we adopt a ‘light touch’ approach on third-party funding. In the law reform exercise, it has been observed that a light touch approach to regulation has been generally adopted in the jurisdictions where third-party funding is permitted, and the main trend is towards a light touch approach either by including statutory regulation of financial and conflictual issues or by self-regulations. Under the legal regime of Hong Kong, the Secretary for Justice has been appointed as the authorised body to draw up a Code of Practice that sets out those practices and standards, with which third-party funders are ordinarily expected to comply with carrying out activities in connection with third-party funding.

Under the Code of Practice, there are specific requirements regarding contents of funding requirements. For example, it shall set out clearly that third-party funder will not seek to influence the funded parties or the funded parties’ legal representative to give control or conduct of the arbitration to the third-party funder except to the extent permitted by law; the third-party funder will not take any steps that cause or are likely to cause the funded

party's legal representative to act in breach of their professional duties; and the third-party funder will not seek to influence the arbitration body or any arbitral institution involved. Under the regime of Hong Kong, an advisory body has been appointed by the Secretary for Justice to monitor and review the operation of the legislative provisions relating to third-party funding and the implementation of the Code of Practice. In discharging the functions of the advisory body, it may consider and decide whether and what detailed information, including complaints and findings of funders for violations of the Code of Practice, should be disclosed to the public. Moreover, under the Code of Practice, the funding agreement must also provide that the funded party may terminate the funding agreement, if it is reasonably believed that the third-party funder has committed a material breach of the Code of Practice or the funding agreement which may lead to irreparable damages. Since the Code of Practice and the law can be accessed easily online from our website, I will not go into any further details of its contents.

To conclude my presentation, I will briefly mention about investment mediation and third-party funding for investment mediation, because third-party funding is not confined to investment arbitration. While third-party funding of mediation may not constitute maintenance and champerty under common law, on the recommendation of the Law Reform Commission, Hong Kong has also taken additional steps to state expressly that third-party funding of mediation is permitted under Hong Kong law in its legislative amendments to the Mediation Ordinance. We believe such approach can help promote mediation services in Hong Kong, and further enhance Hong Kong's position as an alternative international dispute resolution centre.

With the rising popularity in the use of investment mediation as mentioned by our Secretary for Justice this morning, under the Closer Economic Partnership Arrangement (CEPA) Investment



Agreement between Hong Kong and the Mainland, we have investment mediation and mediation mechanism is the only detailed dispute resolution mechanism under the Agreement. We also encourage the use of investment mediation; indeed, we have conducted the first investment mediation training in Asia last year.

Currently we are still working on the Code of Practice for third-party funding for investment mediation because there are different considerations. The Inclusive Dispute Avoidance and Resolution Office of the Department of Justice shall continue to engage the mediation community and relevant stakeholders to consider how to address concerns over its practice.

## Speaker

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### **Julian D. M. Lew QC**

#### **International Arbitrator**

Head of School of International Arbitration,  
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Julian is a full-time arbitrator in international commercial and investment disputes. He accepts appointments as arbitrator in international commercial and investment disputes. He has been involved with international arbitration for more than 40 years as an academic, counsel and arbitrator. Before 2005, Julian was a partner and, for some years, the head of the international arbitration practice group of Herbert Smith. Professional expertise includes international transactions affecting investments, purchase and sale of corporate entities and assets, joint ventures, oil and gas exploration, development and production agreements, research and development and promotions of pharmaceutical and chemical products, mining and concession arrangements, distribution, agency, licensing contracts, infrastructure and construction projects, international trade finance, trading arrangements with developing countries, EC law and arbitration arising out of all such transactions. Julian has been appointed as a sole, presiding and co-arbitrator in arbitrations under the rules of all the major arbitral institutions and under United Nations Commission on International Trade Law (UNCITRAL) and Swiss Chambers' Arbitration Institution rules. He is Professor of International Arbitration and Head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. He has held these positions since the School's creation in 1985.

## **To Explore How the ISDS Reform Should Address the Concerns over the Use of Third-Party Funding in Investment Arbitration and Investment Mediation**

**W**e are at a crossroad in many ways, with investment arbitration and ISDS generally. ICSID has undertaken a review of its rules and the UNCITRAL Working Group III are also looking into a potential reform of ISDS. These are important days for the subject for one simple reason: investors are not going to stop investing and States are going to want the investment but will also need to run their jurisdictions as they consider appropriate. Under those circumstances, we need a system that works, in which criticisms can at least be answered. We have heard some of the criticisms about ISDS today: some are way over the top, some are justified, and that is what needs to be looked at. Today's session is therefore very timely.

It is interesting that we hear a lot about third-party funding, but there is very little empirical evidence on the number or percentage of investment arbitrations in which there is a third-party funder. The third-party funders are out there, promoting the business that they are now running. When we did a study at the School of International Arbitration in 2015 together with White & Case. We said in that survey that third-party funding was "relatively widespread". According to the Proposals for Amendment of the ICSID Rules of August 2018, there is a third-party funder involved in "at least 20 recent cases". One of the problems certainly is that we do not really know exactly what is going on behind the scenes between the third-party funder and the parties to the arbitrations.

I will touch on four specific points:

- First, does or can the existence of third-party funding give rise to a conflict of interest for arbitrators?
- Second, should the existence of a third-party funding arrangement be disclosed and if so, who should make the disclosure and what should be disclosed?
- Third, should the third-party funder be made a party in some way to the arbitration with specific rights and more importantly, specific obligations?
- Fourth, should the existence of a third-party funder justify a case for security for costs?

I do not have answers to these questions. I do think they are crucial, being the subject of debate at the moment. There are some answers that we have seen – they have been addressed by certain stakeholders, including the ICSID Secretariat through their Proposals for Amendment of the ICSID Rules; the UNCITRAL Working Group III, which is currently reassessing the features of ISDS in an effort to improve the existing framework, and is also looking at the issue of third-party funding. There has been – and will continue to be – discussions in many jurisdictions, including Hong Kong and Singapore – both jurisdictions have found a way to allow third-party funding. We see that there is also an attempt to regulate third-party funders.

With this background I come to my questions. Does and can the existence of third-party funding give rise to a conflict of interest for arbitrators? This is something which has been debated at length on various occasions. The concern is that an arbitrator may have some direct or indirect relationship with the third-party funder which is not disclosed and is in the background. In fact, rarely does one know whether there is a third-party funder involved, and the extent of its involvement in the underlying arbitration. Did the third-party funder have a say in the selection of the

arbitrator? That will not be known. The party being funded will be running this arbitration with its own lawyers. Did the third-party funder have an involvement in the selection of those lawyers, and the funder influencing the way the case is run? One can argue about whether that should be done or not, but that is a separate issue. The question I am focusing on here is the relationship between the third-party funder and the arbitrator, if any. It may well be that the third-party funder has participated in the choice of arbitrator and selection of an arbitrator it has appointed a fair number of times.

By analogy, the 2014 International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration require that an arbitrator should disclose if he/she has been appointed more than three times in the previous three years by the same law firm. This will not necessarily preclude the arbitrator being appointed, but this means that, such information should be and will be put out for consideration by the parties. The same situation can be applied where the third-party funder is involved with the selection of the arbitrators. To make such a disclosure the arbitrator will need to know the third-party funder involved.

The question is therefore whether the fact that an arbitrator is effectively being appointed by the party's funder (or even the third-party funder is not objecting to the appointment of the arbitrator) should be disclosed? Issues that may affect the independence or impartiality of an arbitrator would depend on the nature of the relationship between the arbitrator and the funder. It is interesting to see that the Hong Kong Code of Practice for Third Party Funding of Arbitration, issued in December 2018, has looked at that relationship and how far the third-party funder can get involved with issues concerning settlement of the funded party's legal rights and other issues. The Hong Kong Code of Practice for instance requires a funding agreement to set out clearly

that the third-party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the third-party funder.

The UK Code of Conduct for Litigation Funders 2018 also attempts to prevent the funders from taking control of the dispute and from causing the lawyers to act in breach of their professional duties. The funding agreement also must state whether or not (and if so how) the funder may provide input to the funded party's decisions in relation to settlements.

How do we know that the funder is actually taking that kind of action? The Singapore Institute of Arbitrators has also issued its own guidelines for third-party funders. Under the Guidelines 2017, the funder shall not seek to influence the funded party's legal counsel to cede control or conduct of the dispute to the funder except where and to the extent expressly permitted by the funding agreement. The guidelines also require that the funding agreement should clearly state if and the extent to which a funder may provide input to or influence the funded party's decisions on settlement and whether the funder may influence the funded party's lawyers to cede control or conduct of the dispute to the funder.

It is therefore an issue which has been looked at and has led to various degrees of regulation in certain jurisdictions. The real problem remains that it will not always be known whether there is a third-party funder, what its role is, how it is influencing the way the arbitration is being run, and what the effect will be if it does influence the arbitration. That question was touched on by Dr James Ding earlier. The third-party funder may be involved in litigation in various other countries as well and might have great respect for the individual arbitrator, seeking expert opinions from that arbitrator in a particular context or an expert opinion from somebody else who is in the same law firm as that arbitrator. The

fundamental issue this situation creates is the need for transparency and disclosure.

The parties, the other arbitrators, the institution – where there is an institution involved – will have no knowledge of the third-party funder unless there is a disclosure. If there is disclosure, what should be disclosed and who should make the disclosure? What are we looking for? What information is needed to determine whether the independence or impartiality of the arbitrator, or the integrity of the arbitration, is affected by the presence of third-party funding? I do not in any way want to suggest that there is or will be a problem, but one wants to avoid the problems.

We have heard from several panels today that when something goes wrong, that leads to delay. There may be difficulty with enforcement if details of third-party funding become known after the hearing, leading to challenges/appeals due to the unknown and undisclosed third-party relationship with an arbitrator – even if the arbitrator himself/herself was unaware that such a relationship existed.

The information we might need to know is if there is a relationship, how many times has the funder been appointing a particular arbitrator and various other issues which may involve the arbitrator having a stake in the third-party funder. There have been discussions where the third-party funders have been looking for additional investors and have taken the view that this is something which they wish to invest in. Is the arbitrator himself an investor of the funder and/or has he/she any influence in how and where (which case) the funds are to be invested? What should then be disclosed? The existence of the funder and then the name of such funder. Most rules also require disclosure of the address of the funder.

A more complicated issue is the disclosure of the funding agreement either in its physical form or at least of its key terms. As the funding agreement is a commercial agreement, it might contain confidential or privileged information. One might well argue that it should not be disclosed to any third party – including the party's opponent and the tribunal. The funding agreement is a third-party matter to the arbitration and yet affects or it could affect the right or effectiveness of the arbitration.

Most arbitration laws and rules requiring disclosure actually go for the minimum: the existence, name, and address of the third-party funder. The Proposals for Amendment of the ICSID Rules suggest that disclosure should go beyond the mere identity of the funder “where appropriate” to include “details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability”. Similar provisions are found in the recent Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017 and the China International Economic and Trade Arbitration Commission (CIETAC) Investment Rules 2017 which address both disclosure of the fact of third-party funding and its effect on costs. The information disclosed should be updated as the arbitration proceeds. One question is, whether the third-party funder has any involvement in settlement discussions between the parties.

I would like to now address the issue of privilege. The funding agreement may in fact contain legal/litigation advice which is covered by privilege. If funding agreements get out, competitors in every industry may be interested in knowing and will be very happy to see what other competitors are doing. One of the objections to handing over a document will be to allege that they are privileged/confidential. This is a consideration that will need to be considered.



The difficulty which remains is where the arbitrator does not know of the involvement of the third-party. What is then the problem? One question could argue that, even if an arbitrator is regularly appointed or at least has been appointed on several occasions by a particular funder, is that arbitrator's independence and impartiality likely to be affected by the mere fact of regular or repeated appointments if the arbitrator does not know that a funder might be behind? Normally, a party appointed arbitrator would know he/she had been appointed by a party, through the instrument of the law firm representing that party. He/she will not know that a third-party funder played a role, if any, in the appointment.

If necessary, what should be disclosed? I suggest there are four possibilities:

- The party being funded
- The funder itself
- The lawyers for a party who are being paid
- The arbitrator in question

Let me leave you with a matter that I am not going to deal with now: is there a difference in an early stage of a case where the lawyer representing one of the parties is itself funding the case by agreeing a lower fee through some kind of a conditional fee or a percentage success rate? I will not discuss this issue further here.

The general trend is to require disclosure from the funded party. That may be an obvious point, but it is worth raising it. Funding can come in many ways. A party could go to its bank and says, "could you fund me?" and the bank says, "yes, we will fund you, but I want a mortgage on your property; if you do not succeed in this case, we can take over that property". That is a third-party funder and the bank might want to know what the case is about. They might want their own lawyers to look at the case before making

a large facility of several million pounds.

There is therefore the first question: does the funded party have to make a disclosure of third-party funding? There may also be an obligation on the third-party funder. The Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 provides that a third-party funder must remind the funded party of its duty to disclose the existence of the third-party funding in accordance with the Arbitration Ordinance, but is itself under “no obligation to disclose details of the funding agreement” except as required by the funding agreement, as ordered by the arbitral tribunal or as otherwise required by law. Perhaps one other option could be for the funder to come upfront to inform the tribunal that it is supporting one of the parties.

Leaving professional conduct rules aside, but it is also interesting to see that various regulations also now impose requirements for arbitrators to disclose third-party involvements they may have. The IBA Guidelines provide that arbitrators must disclose “relationship, direct or indirect, ... between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.

There may be a problem if the parties do not know the arbitrator has a relationship, however tangential, with a company supporting one of the parties and with an interest in the outcome. The ICC Guidance Note on the ICC Rules of Arbitration 2017 invites disclosure by the arbitrators of their relationships with any entity or person having a direct economic interest in the award to be rendered. This would cover the arbitrator’s relationship with a third-party funder. ICSID’s proposed Revised Schedule 2 provides that arbitrators must sign a declaration that they have no conflict of interest with a funder, whose identity has been disclosed in the proceedings.

There is a move to now impose a requirement of disclosure to bring out the existence of third-party funding. Absent disclosure, parties and arbitrators may be unaware of existing conflicts of interest. Imagine the situation if this comes out three, four, five years down the line. A third-party funder, some of the big ones may well have to put something into their accounts that they are involved in a piece of litigation. What happens when the funder has a great success which is publicised? If their relationship is with an arbitrator, then identified, that could result in a challenge to the award.

All of those issues are undesirable, because they interfere with the arbitration process. One of the advantages that we hear about third-party funding is to assist access to justice. It does assist access to justice; however, if it engages other complications, then one has to again look at it from the point of view of its efficiency and efficacy.

Let me turn now briefly to the issue that perhaps raises the most discussion: whether the third-party funding gives a non-funded party a right to security for costs.

This presumes that a party has third-party funding, it must be impecunious, or that if they lose and if costs are awarded against them, it is likely that they will not pay. Security for costs was originally a mechanism to protect a respondent against a claimant who if unsuccessful would seek to avoid paying costs. England has long been a centre for litigation, and many people come from all over the world to use the English courts to resolve their disputes. If those parties lost their case, they could hotfoot it back to wherever they came from, and not to pay the costs which were awarded.

Many countries around the world do not have any provision for the loser to pay the costs. In international arbitration, generally, there is also no obligation for the losing party to pay the

costs. It has however become frequent in international commercial arbitration and increasingly common as well in investment arbitration for tribunals to order that they do so.

The question is whether as soon as there is a third-party funder, there should be security for costs. There have been cases and instances where this issue has arisen. I would refer you to Eric Ng's paper, which deals with this and the history of it. You will find it a very easy to read and informative paper.

The question that arises is whether there should be some obligations to pay security for costs when third-party funding is disclosed. It is an important question because one does not want to preclude access to justice by requiring somebody to put up costs. We also know the exceptionally high level of costs that are in international arbitration.

There is another issue when assessing costs. The third-party funder may be taking a percentage of success. It is buying into a claim, having made their own assessment and thus receiving a share in the success. If the party claims for argument's sake, USD 50 million dollars of damages and it is successful. It recovers its legal fees. That party may say it had to bring this case to recover what the tribunal has decided it is entitled to, and that would cost a significant quantum in lawyer and other costs.

Let us look at a practical problem: assume a claimant, who is funded, is claiming USD 60 million, with USD 10 million expected to go to the funder if successful under the terms of the funding agreement. In this scenario, has not the funder become a party to the arbitration? Should this be disclosed? That needs some consideration.

In that context, I raise my last issue. A funder has a direct interest in the arbitration because it wants to succeed. Funders are very astute business people. They make a calculation that, by

investing in an arbitration it will recover more than its risk investment, lawyers, experts and arbitrators' costs. The funder builds into its financial picture what it thinks is in the benefit and risk of the case. If they do not think there is profit there, the funder will not do the deal.

If that is the case then the question is, if they are successful that is fine. If they are not successful, should they be taking on the responsibility for the costs that were awarded against the unsuccessful claimant? To do that you need to have authority, and tribunals will not have jurisdiction to order a third-party funder. One way might have been an order for security for costs, which the funder will have to cover in some way if the party itself is unable to do so. Another possibility, in some cases (but not in treaty-based arbitrations) may be to find a mechanism to bring the third-party funder into the case – which would require the other party's consent – which would have the advantage that the tribunal could then make an order of costs against the third-party funder.

There are other issues. If the third-party funder knows what is ongoing in that case, shouldn't it and the members of its staff also be subject to the obligations of confidentiality and to the obligation to respect any orders that are given by the tribunal? I will leave you with those thoughts.

## **SESSION IV (DAVOS-STYLE)**

Appointment of Arbitrators  
and Related Issues

## Moderator

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### **Caroline Nicholas**

#### **Head of Technical Assistance and Senior Legal Officer**

International Trade Law Division,  
United Nations Office of Legal Affairs (the UNCITRAL Secretariat)

Caroline has served as Secretary to UNCITRAL's Working Groups I and III, leading UNCITRAL's work on Investor-State Dispute Settlement, Online Dispute Resolution and Procurement and Infrastructure Development. She publishes widely on UNCITRAL topics, and teaches at the post-graduate level in several UK and European universities. Prior to joining UNCITRAL, she handled Kuwaiti Government claims at the United Nations Compensation Commission, and practised as a solicitor in the City of London and Hong Kong.

## Moderator

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### **Sun Huawei**

**Partner**

Zhong Lun Law Firm

Ms Sun specialises in international commercial and investment treaty arbitration and has represented Chinese and foreign clients in cases conducted under the ICC, UNCITRAL, LCIA, SIAC, HKIAC, ICSID and CIETAC arbitration rules. She has significant experience working as counsel or arbitrator on disputes involving cross-border M&A, energy and resources projects, financial products and construction projects, with governing laws including English law, Hong Kong law, Singaporean law, French law, Swiss law, Dutch law, Malaysian law and Chinese law. Huawei has advised MOFCOM on various investment treaty issues and recently achieved victory for China in *Ansung v China* (ICSID Case No. ARB/14/25).



## Speaker

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### **Meg Kinnear**

#### **Secretary-General**

International Centre for Settlement of Investment Disputes (ICSID),  
World Bank

Ms Kinnear was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, she was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. From October 1996 to April 1999, Ms Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada. Prior to this, she was Counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996), where she appeared before federal and provincial courts as well as domestic arbitration panels. Ms Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. Ms Kinnear has published numerous articles on international investment law and procedure and is a frequent speaker on these topics.

## Speaker

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### **Brigitte Stern**

Professor Emeritus

The University of Paris I – Panthéon-Sorbonne

Professor Stern was a Member and the Vice President of the United Nations Administrative Tribunal (UNAT) from 2000 to 2009, as well as a member of the ADB and ATBIS Tribunals. She has served as a Consultant and Expert for international organisations, and has been acting as Counsel before the International Court of Justice. Brigitte Stern is now active in international dispute settlement, and serves as an Arbitrator (Sole Arbitrator, Member or President) in numerous ICSID, ICC, NAFTA, SCC, Energy Charter Treaty, SIAC and UNCITRAL arbitrations.

## Speaker

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### **Stanimir A. Alexandrov**

#### **Principal**

Stanimir A. Alexandrov PLLC

Mr Alexandrov has served as an arbitrator in dozens of investor-State cases and numerous commercial arbitrations. He has been appointed to the panels of arbitrators of various arbitral institutions and was designated by the Chairman of ICSID's Administrative Council on ICSID's Panel of Arbitrators. Until August 2017, he was co-leader of the international arbitration practice at Sidley Austin LLP. Mr Alexandrov is consistently listed by various publications as a leader in the field of international arbitration. Before entering private practice, Mr Alexandrov was Vice Minister of Foreign Affairs of Bulgaria. He has taught courses in international law and arbitration for over 20 years and is a professor at The George Washington University Law School in Washington. Mr Alexandrov has a Master's and a Doctoral degree in international law from The George Washington University Law School and a degree in international law from the Moscow Institute of International Relations.

Caroline Nicholas:

We have a very challenging topic before us, and I thought it might be helpful to say a couple of words about the UNCITRAL process for those of you who are not familiar with it. UNCITRAL has been tasked with the possible reform of investor-State dispute settlement in one of our working groups, which is a group of UN member States, international organisations and some international NGOs, who are looking at the questions that we have been considering today. One of them is the question of arbitrators and related issues. This is a key question as we have heard for the legitimacy of the ISDS regime. (Since it is so varied, we tend not to call it a system but a regime.) When discussing these issues, our member States move very much from practice to policy. Given that, I am extremely grateful to the organisers for allowing us to be here. UNCITRAL takes its decisions on the basis of consensus. We have heard a lot about mediation this morning. Many of the approaches needed to achieve consensus on issues as difficult as this require a mediation type approach, rather than zero-sum game negotiations. So again, I would like to thank everybody in advance for their constructive contribution to the issues, which I can then take back and feed into the UNCITRAL process. I would like now just to allow my co-moderator to say a few words as well.

Sun Huawei:

Thanks Caroline. It is a privilege and honour to be part of this panel. I do not think I need to waste time to introduce our three distinguished well-known panellists. Without further ado, let us proceed to Meg's topic.

## **To Examine the Pros and Cons of Various Methodologies in the Appointment of Arbitrators (e.g. Party-Appointment, and Appointment by Appointing Authority and Roster)**

Meg Kinnear:

I am going to set the context for this panel by talking about who appoints investors-State arbitrators. I want to identify the main forms of appointment and I have been asked to talk about the strengths and the weaknesses of each. I would like to make it very clear that I am doing this as a survey or descriptively, and not as an advocate of any particular position or making any particular endorsement. I am going to leave the advocacy on those exciting issues to Professor Stern and Professor Alexandrov.

I have a short PowerPoint to look at the different methods of appointment. There are a number of ways to appoint, but what we see most often in investor-State arbitration is party appointment. While we talk about these methods as different ways, you should recognise that usually you have a hybrid. By that I mean that is usually you will find some kind of an initial appointment mechanism, usually party appointment, but if that does not work, you need some type of default mechanism to make sure that a tribunal actually is constituted, and that you can go forward in the case. So, usually you have a variety of mechanisms and they are used sequentially.

The most frequently seen approach is party appointment. And normally, (obviously) each party is able to appoint their own arbitrator. Frequently, parties will be expected to

jointly agree on a chair. If that does not work, then they often will go to an institutional appointment or to an appointing authority. You will not be surprised to know that usually parties are able to exercise their right of party appointment with their own arbitrator. When they need to go to the default appointment option, it is most frequently to appoint tribunal chairs.

You will also not be surprised to know that parties frequently are able to nominate the whole tribunal by agreement. For example, in the recent statistics at ICSID, approximately 70% of all cases were tribunals where the entire tribunal was constituted by the parties. So only in about 30% of the cases was ICSID asked to actually step in and to help the parties. I can say that almost in 99.9% of those cases where ICSID was asked to assist, it was assistance with appointing a chair and not a party nominee.

In terms of pros and cons about party appointment, there are obviously a number of views. The most important thing about party appointment is that it is strongly favoured by parties. And this is not just by claimants. It is fair to say that both claimants and respondents strongly value the right to appoint their party nominee. A recent survey in 2017 found that 82% of those counsel surveyed strongly favoured party appointment. There are a number of reasons for this preference for party appointment, but in particular, it gives parties a sense of control over the process and in particular control over the background and expertise of the arbitrators that counsel will be pleading their case before. It also gives parties a lot of confidence that their view will at least be put forward to the co-arbitrators and it will be understood. While an arbitrator obviously is not an advocate of a party's position, parties feel confident that

using party appointment means that at least the perspectives of each party will be adequately addressed and considered by the whole tribunal.

The other major advantage of party appointment is that, parties feel that it gives greater legitimacy to the process and that is especially important at the end of the day when you have to enforce an award. If you have an award that was issued by three party-appointed arbitrators, many parties feel it becomes much easier to say to a client that this is a legitimate award and we must enforce it and abide by it.

Of course, there are also critiques of the party appointment system, and I will list the main ones for your consideration.

The first is the time that party appointment takes. Again, looking at ICSID statistics, and I think they are typical of most investor-State cases, it takes an average of about four to six months to put a party-appointed tribunal in place. That represents the time it takes for the parties to nominate their own person and then to have a discussion about who the chair might be and to actually get those three persons constituted into a full tribunal. You can debate whether this is a good or a bad use of time. I think many would suggest that even though it sounds like a lot of time, it is actually a very good use of time and an important and valuable way to start off the process.

The second set of issues could be put under the rubric of partiality or partisanship, and these of course, are the most debatable. I would like to preface this part of the remarks by saying you should also bear in mind that some of these critiques may be based more on perception than reality. They are certainly debated but they at least need to be named as some of the commonly heard critiques of party

appointment. So, the first is the question of whether party appointment leads to gamesmanship, i.e. always trying to find the arbitrator who is going to see the world exactly your way and therefore help you win the case. Frankly, you would not expect a party to do much else, would you? But a lot of the critique of party appointment is that it leads to huge time and cost and gamesmanship in studying past awards, studying speeches, trying to be very analytical about who might be just the right person, and the like. You also hear critique that party appointment leads to what can fairly be called stereotyping. And again, rightly or wrongly, I think I could probably do a quick survey in this room and ask if you think arbitrator X is pro State or pro investor, and get a fairly consistent result. A lot of these perceptions are strongly held. I think many of them quite frankly, are wrong, but they are certainly strongly held within the profession. Another aspect of this partiality, critique of party appointment is the view that there is such a desire for reappointment on the part of arbitrators that a party-appointed arbitrator is going to try somehow to bend towards what their appointing party would like. Again, I think that does not hold much water, but it is certainly a critique that you hear.

The final point under this rubric is the question of whether party appointment puts an inordinately strong emphasis on the views of the presiding arbitrator. There are those who assume that the two-party appointees basically balance each other out, and therefore the chair will be the most important voice and not just one among the three. These are critiques that you will hear about party appointment and partiality.

You also hear critiques that I think could be put under the rubric of accountability or capacity. The question is, are parties best suited to select arbitrators? What kind of



merits accreditation process do they go through? Certainly there are no screening mechanism similar to those of judges who go through significant scrutiny processes in many jurisdictions. So, are parties the best ones to appoint the arbitrator? Or should it be an impartial appointing authority or other standing body?

A related discussion of recent is about asymmetry of information. In other words, how does the party know when they come to the process, especially when it is their first or second time doing an investor-State case, who are the arbitrators to consider and select from? A lot of efforts have been made of recent to get that information out to parties. For example, at ICSID, we have put many arbitrators' CVs on the website. There is another project by Catherine Rogers that provides substantial details on arbitrators and their awards with the goal of making more information publicly available.

The final critique of party appointment is the question of lack of diversity. This reduces to something fairly simple: if you are a party selecting arbitrator, diversity may not be your first and foremost consideration. However, there is increasing awareness in the profession at large about diversity. We have seen institutions leading the way with more diversity in terms of candidates proposed for appointment. Those are the kind of pros and cons that we hear about party appointment. It is fair to say that despite all of the cons I have mentioned here, party appointment is very strongly supported. It is the norm in investor-State dispute settlement. Frankly, I think it is seen as one of the main strengths of the system.

The second type of appointment is institutional or appointing authority appointment. That is where a neutral third party, for example, an arbitration institution like ICSID or

a named appointing authority, will be the appointer. They are not usually the primary appointer and this is usually found in a default appointment situation. There are pros and cons to those methods. The pro obviously is that an appointing authority is seen as someone quite impartial, and someone with no interest in the outcome of the process other than the overriding integrity of the process. They often also have the advantage of being up to date and having extensive knowledge of a large number of arbitrators. They know who are the people available in the system. I think that is especially true of institutions who see arbitrators on a daily basis and actually doing their job in a variety of cases. In terms of the reasons you might not favour appointing authority or institutional appointment is that, parties feel they have little or no control over whom the institution appoints. Certainly there are some mechanisms that minimise this concern. For example, sometimes parties will ask the appointing institution to name persons with specific expertise, for example, knowledge of public international law, experience in ISDS cases, or whatever type of criteria they think is the most important for their case.

Another method of appointment is selection from a roster. There are not many rosters of investment arbitration and not that many rosters are used. Probably the ICSID panel of arbitrators is the one that is used the most often and again, it is used generally in a default situation where the chairman of the ICSID Administrative Council is asked to name arbitrators because the parties have been unable to agree on nominees. The other main use of the ICSID panel is in the annulment process. All members of ICSID annulment committees are appointed from the panel of arbitrators and therefore it is especially important. Roster has the advantage that it is pre-populated, so appointment from a roster can be done fairly quickly and presumably,

all of the people on a roster will meet the requirements. This means that an important factor in developing a roster is how you define the requirements for actually being named to it. Almost all rosters have a minimum level at least of qualifications, and these are an important aspect of designing effective rosters.

Another frequently used form of appointment are appointments through list processes, and there are a number of different kinds of lists that are used. The one you probably know the best is the strike and rank. The idea of such a list is to name perhaps five people and each party can veto one of those persons and then they rank the remaining ones in the order of preference, and the person who has the least votes is the most popular and therefore gets selected. That is the basics of how strike and rank list works. We often see this used by the parties.

At ICSID we have something that is similar to, or inspired by, a list, which is a ballot. The difference between a list and a ballot is that with a list, you will end up with a nominee for appointment. The arbitrators are ranked one, two, three, four and you will get someone at the end of the day. The ballot process is slightly different in that it gives parties an option, maybe five people, and the parties say whom they would agree to have. If they both agree on a particular nominee, that nominee will be appointed. One of the advantages of the ballot is at least you have got some consensus, that is somebody who has been agreed to by both parties.

I have also listed a category here that I call 'other', which quite frankly is limited only by the imagination. We have had some wonderful examples of this at ICSID, such as coin flips to pick an arbitrator. We have also had some interesting

methods, for example where parties say, “All right, I’ll compile a list and you have to pick from my list and vice versa.” We see all sorts of interesting combinations; however, what you will see most often is party appointment.

The last thing I wanted to just go through is the question of qualifications or characteristics. I think almost all sets of rules will have mandatory qualifications and the basic ones will be with respect to expertise, knowledge of international investment law, international trade law and public international law – these are the key ones you see in investor-State.

Second, the usual mandatory qualification is independence and impartiality. Some sets of rules include nationality, in other words, that you cannot be a national of either of the disputing parties. Those are the usual mandatory qualifications.

There are also a lot of what I would call optional qualifications that are worth thinking about when you are using any kind of appointment. For example, you want to think about language: what is the language of the documents, the language of the parties and does this arbitrator have enough fluency in that language or in the multiple languages being used to really understand the case? Secondly, obviously experience is key. Third, considerations like gender, regional origin and other criteria that we often think about as diversity.

Those are really some of the basics about appointment and I hope they give you the basics and now we can get into our Davos-style discussion!

## Slide 1

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## ARBITRATOR APPOINTMENT

Mapping The Way Forward:

ISDS Reform Conference

Hong Kong


February 13, 2019

Meg Kinnear

Secretary-General, ICSID



## Slide 2

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## WHO APPOINTS ISDS ARBITRATORS?

- Party Appointment
- Appointment by co-arbitrators
- Institutional Appointment
- Appointment by Appointing Authority
  - or a combination of the above

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Slide 3

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## PROCEDURES FOR APPOINTMENT OF ARBITRATORS

- Roster – how compiled & maintained?
- List – “strike and rank”
- Ballot – need consensus to make appointment
- Other

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Slide 4

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## QUALIFICATIONS AND CHARACTERISTICS

- **MANDATORY QUALIFICATIONS – e.g.:**
  - Expertise
  - Independence/Impartiality
  - Nationality
- **OPTIONAL QUALIFICATIONS – e.g.:**
  - Language
  - Experience
  - Gender
  - Regional origin

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## Slide 5

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Caroline Nicholas:

Thank you very much, Meg. As said at the outset, part of the success of any reform effort, particularly in the UNCITRAL context, is listening. We have heard very useful background facts about how the system works from the ICSID perspective. I think it is very important to remind ourselves that both perceptions and empirical data are relevant in discussing this question. Both are often cited and we need to bear in mind that we do need to take account of them. Putting emphasis on independence and impartiality, the key characteristics that Meg has just outlined, is indeed a prism through which UNCITRAL is looking at this question. To what extent does the current arrangement compromise or promote independence and impartiality? I think there is no debate that people want these qualities as a defining characteristic of the adjudicators.

We are now moving to Davos-style discussion and our remaining speakers are not going to be presenting materials. It is very important not just to look at the criticisms, which we have heard and many of them have been made for quite some time now. If there is going to be reform, we do not just want to make something different, we want to make it better. One of the key things that we need to think about is, what are the reform options and what might be the pros and cons of those? Our second speaker, Professor Stern, is going to look at the question of the desirability or lack of desirability of changing the party appointment mechanism. What if we do not have *ad hoc* arbitrators anymore? We will have full-time judges and perhaps the first question to think about that is whether we still have arbitration in that context.



## To Examine the Desirability (Or Undesirability) of Replacing Ad Hoc Arbitrators by Full-Time Judges

Brigitte Stern:

This is indeed a very important question. Maybe, I will start with one remark. There are a lot of criticisms to the existing system as you have just mentioned. They come from all parts, although they have been started by NGOs. However, NGOs nowadays do not seem to welcome a permanent court either. If we listen to NGOs – now they seem to be followed by everybody – what they actually call for is plainly giving up the whole system of ISDS, whether it is through *ad hoc* arbitrators or a court, they just want the State to be sovereign.

This is in line with a strong worldwide movement against globalisation. I will translate for you a few lines of views related to the new proposed court that were written in a French newspaper after the Comprehensive Economic and Trade Agreement (CETA) has been signed. “In response to the growing challenge to this mechanism, the European Union claimed to have reformed it by establishing a permanent tribunal. While some improvements have been made in terms of procedure and transparency, this pseudo reform has not changed the rules of the game or bridged the flaws of this system”. Maybe, the new system is not very welcome.

I will now answer your question more precisely, and ask whether the new proposed investment court is arbitration or not. Before answering this question, we have to ask, “what is the essence of arbitration?”

Arbitration is a means of settlement of a dispute by a person or an entity chosen by the parties to the dispute, having been entrusted to render a binding decision based on the rule of law. The important thing here is that the dispute is settled by someone chosen by the parties. Thus, the consent to the composition of the arbitral body is the first fundamental principle of international arbitration.

Another important feature of investment arbitration comes from the fact that it was introduced in order to depoliticise investment disputes between foreign investors and States by replacing the existing mechanisms under the State courts where national politics were at work and diplomatic protection where international politics interfered.

In other words, the fundamental principles of international arbitration are the consent to the arbitral body and depoliticisation. I will discuss these two aspects to see whether the international court, which could appear, is in line with these two elements.

Let us first look at consent to the arbitral body. Concerning consent, I think we have to be very clear here. It is of utmost importance not to forget that no participant in the international community, be it a State, an international organisation, or a legal person has an inherent right to arbitration or to a jurisdictional recourse. There is a big difference between national law and international law. In national law, when you have a right, you have a tribunal. In international law, it is not the same – you have a lot of rights that cannot go to a tribunal. To go to an international tribunal, you need a specific consent. For example, a State cannot sue another State unless there is a specific consent to that effect such as a declaration recognising the compulsory jurisdiction of the International Court of Justice. In the

same manner, in the framework of BITs, investors cannot go to arbitration if there is no State consent. So, consent is needed to go to an international court or to an international arbitration.

The difference between a court and an arbitration is that, it is not only a general consent to an arbitral mechanism that is needed in arbitration; in arbitration you need consent to the people who are going to solve your dispute. Therefore, there is a theoretical reason – almost a philosophical reason I might say – why the proposed court is not arbitration, and this is because both the consent of the parties to the process and the consent of the parties to the arbitrators pertain to the essence of arbitration.

This is why I would like to stress that all the various projects of replacing *ad hoc* arbitration by permanent judges come at a very high price, i.e. dismantle what we know to be a keystone of arbitration, which is consent to the arbitration body. I think what Meg has said earlier was very important. She insisted that parties are very much in favour of party-appointed arbitrators and, of course, this will not happen anymore with the court. What legitimates arbitration is that it is an arbitral tribunal in which both parties have confidence. How can this be achieved better than by the current system? Of course, the freedom to select the persons entrusted with solving one's dispute is very central. In conclusion, I think that a choice of an arbitrator by each party is a gift of the autonomy of will in arbitration; and I think we should welcome that gift and do not throw it away. I do not see how a permanent court would adhere to this basic feature of arbitration, which is consent to the arbitral body chosen by the parties in dispute. Thus, on this first point, I think an investment

court is not in accordance with one of the basic features of arbitration.

Now, let us look at depoliticisation. If we look back into the past – I want to remind you all that ICSID was specifically created in order to depoliticise disputes between States and foreign investors – by granting to the latter a direct cause of action against a State which has interfered or which has been alleged to interfere with their investment. Before that, what could foreign investors do? They had only two possibilities: first, go to the host State legal order, trying to have their right enforced in the courts of the host State. Everyone here sees the political dimension resulting from the State being both judge and party. Second, ask for diplomatic protection, which is not always granted. The State does it only if it feels it is not in contradiction with its political interests. Here we had political consideration in the relation between two States, the host State of the investment and the national State of the investor. In order to get out of this dilemma between Scylla and Charybdis, to circumvent both internal politics and international politics, ICSID was created and arbitration was resorted to for dispute settlement. I take here the words of Jan Paulsson, “an arbitration that simply favours neutrality”.

There is a risk trying to change the system that we will have even more politics. It looks to me like a step backwards. It appears that for the investment court(s), probably States will nominate the members of the court(s). This creates a first problem: it is a choice by only one of the parties to the investor-State disputes. This is not at all a step forward and certainly introduces again politics. The second problem: indeed, who will be the nominees of the States? Probably retired diplomats, retired judges, civil servants that have

the State and have always been on good terms with the State. I think it might be re-politicised and I can see how it would work.

A few years ago, I was elected as a member of the United Nations Administrative Tribunal, and here we were elected by the States, that means the General Assembly. I had to go to New York to lobby, I did not really lobby, but you had to present yourself and say “I’m the best”, etc. I think politics will enter into the realm again.

In conclusion, basic features of arbitration are consent to the body which deals with the dispute and depoliticisation. I think the court does not bring any amelioration at all to the existing system.

Caroline Nicholas:

Thank you very much Professor Stern for speaking very concisely on what is actually a very challenging issue. Perhaps I will hand over to my co-moderator to open the floor for some thoughts and questions.

Sun Huawei:

Professor Stern has a strong view that the investment court will not be like arbitration. So, I would like to hear the two panellists’ views whether you agree with this proposition or not. How do you see the difference between the permanent court and arbitration? Meg, please.

Meg Kinnear:

The main point that I want to make here is, what we all care about is dispute settlement. So, I do not fuss about the label arbitration, but what I think is really key is the design and the architecture. Professor Stern has put her finger right on the key thing, which is politicisation. Any route

towards some kind of a court I think needs to be very, very cautious about having very clear merit requirements for candidates and a clear and transparent selection process so that you do not get into that exact problem about politicising, about candidates having to go and lobby about my candidate and your candidate and all of those kinds of issues.

Brigitte Stern:

How are you going to avoid this?

Meg Kinnear:

I think you have to put your best effort forward, which as I said, clear, objective, merit-based standards. I mean, you do your best and we do this with State to State dispute settlement. Some would say certain examples are more successful than others, and that is why I said, it is the design and architecture of the system that is going to be key to its success.

Stanimir A. Alexandrov:

I would like to pick up on one point that Brigitte made, which is that nobody has an inherent right to arbitration. It is a fundamental tenet of arbitration that it requires the agreement of the parties. What the parties are entitled to, once they agree to arbitrate a dispute, is that they determine who decides their dispute and how. That is another basic tenet of arbitration, typically referred to as the autonomy of the parties. If we agree with those fundamental principles that the parties have the right, once they agree to arbitration, to decide who decides their dispute and how, then we have to agree that they have the right to constitute the tribunal, i.e. to appoint the arbitrators and to agree on the presiding arbitrator. They have the right

to agree to procedures based on the institutional rules that they have selected, but they can modify them by agreement. Once the parties agree to arbitrate, they have control – by mutual agreement – over who decides their dispute and how.

Disputes are different. Even in investor-State arbitration, we have disputes about hundreds of thousands of dollars, or hundreds of millions of dollars, or billions of dollars. You have one arbitrator or three arbitrators; you have an accelerated procedure, or a bifurcated, or a trifurcated procedure, and so on and so forth. Creating a permanent adjudicatory body to resolve those disputes will take away from the parties those basic rights to tailor the process to the specifics of the dispute. In other words, it will take away the parties' autonomy, a basic tenet of arbitration. Is that good or bad? I am not taking a position on that at the moment. My point is different: if we think of replacing international arbitration with something different, such as international adjudication before a permanent international body, there will be a gap and something else, some other mechanism or procedure, will fill in that gap. Parties to disputes will still want their autonomy to decide who and how to resolve their disputes and that autonomy will not be offered to them by a permanent international adjudication body.

Sun Huawei:

So we are discussing who appoints the arbitrators. It reminds me one method of appointment which Meg mentioned under the current mechanism: the roster. In the roster, there are some appointees by the States. Would this roster resemble somewhat to the future investment court mechanism? I would be interested to hear the views.

Meg Kinnear:

Most rosters are quite large and often many people on a roster do not end up even ever hearing a case. The indicative list for the WTO certainly has a roster, but we do not see these people doing the cases frequently. So much of it boils down to the number of people on your roster and the number of cases that they have to service.

Brigitte Stern:

I was on the roster of ICSID for 10 years without any nomination. Having been nominated by a party, I was nominated frequently afterwards. I just want to say that you can be on a roster very long; young people, don't despair!

Caroline Nicholas:

That sounds like nobody ever got fired for buying IBM. The old adage about computer equipment has its applications here. I think we have another question for Professor Stern but I just want to ask our panellists to comment on the following: we tend to think of the State as the respondent – that is our default position, but many States are looking at the position of their own investors. Do you think there is any change in what has just been said as the nature of some of the States' interaction with the regime is slightly changing with capital exporting States becoming more common?

Brigitte Stern:

It will all depend on which States are going to nominate. For example, we have five nominated by Canada, five nominated by Europe and five whoever. I am not sure whether they are going to take an unknown arbitrator. It is very difficult to answer your question because it depends on which State will be there. Probably the equilibrium existing today will not be changed that much.



Meg Kinnear:

I think there is also another interesting way to look at this. Certainly in the treaty context, States are more often respondents. However, I also think we are starting to see much more use of, and I make a bold prediction, we will see even more use of contracts and investment contracts where States may as well be claimants as much as they will be respondents. We are heading into a different world. The other thing that we are seeing a lot more of is even in the treaty-based world, you have a lot more treaties and so the parties are different. They are different pairs and that is in particular to the north, south, south-south and those kinds of distinctions.

Stanimir A. Alexandrov:

I was going to make the exact same point that Meg has made. We keep thinking about disputes based on an investment treaty and we forget that in 1965, when the ICSID Convention came into existence, the drafters were probably thinking more of contractual disputes where States do not necessarily have to be only respondents.

Caroline Nicholas:

Thank you very much. Professor Stern, perhaps you might like to give us some thoughts on what an investment court might be like and whether you think it is realistic that we may end up with one.

Brigitte Stern:

Before saying whether the court will appear and what it would look like, I would like to see whether such a court would alleviate the criticisms against the current state of things. To answer this question, maybe I should just summarise what are the criticisms to see if the court will

alleviate them. I think there are two main critiques – I do not speak of all the critiques because there are too many and we do not have enough time. First, it is a small club. Second, there can be bias and repeated appointments; so, there can be inconsistency.

First, the small club. It is indeed a small club today, but nothing prevents this club to welcome new members. Nowadays, there is no limit to whom can be appointed as an arbitrator, the only limit being the self-restraint, the pusillanimity of States, and investors will prefer to know the person and choose someone they know instead of a new-comer. Now, replacing arbitrators by permanent judges will simply replace 40 arbitrators appearing in 50 cases and many more arbitrators altogether by 50 judges appearing in hundreds of the cases. So, the club has indeed shrunk with the court, reducing diversity in the playing field. I think the small club problem is not solved by the court. It might even aggravate the problem.

Bias and repeated appointment, what do we say? Everybody has mentioned that some arbitrators might be influenced by those who have nominated them. I reject such critique and I want to say that impartiality and independence are inherent in the arbitrator's personality or are inexistent. To be or not to be independent does not depend on who nominates you but on who you are. Of course, if you say that the arbitrator nominated by States are in favour of States and the arbitrator nominated by investor are in favour of investor, if you accept this which I do not accept, then the court is going to aggravate this because, it would mean that the judges will be in favour of States, if the mentioned premise is accepted. I do not think it is true but this is what comes out of the critique. In other words, there

is no improvement on the question of bias if *ad hoc* arbitrators are replaced by permanent judges. And what about repeated appointment? I mean, you always see the same people but with a court you will see even more of the same people, so, I am not sure if this helps.

Last point, inconsistency. Today, it is said that you have inconsistent decisions. I am not so sure – even I think inconsistency is part of life. I mean, when contradictions stop, it is death. I think inconsistency in itself is not necessarily something bad, and in fact if you look at how things develop, I think that consistency is not the ultimate aim in itself. Today I have the impression that there is dialectic between different positions when there are contradictions, and at the end of the day, the best solutions come out.

Now let us look at the court. Suppose there is an issue presented to the court the first day the court meets and then they take a decision, and the decision is completely wrong, for 15 years you are going to have a consistently wrong jurisprudence. I think the jurisprudence of the court might be coherent, but I am not sure it is the best result if it is coherently wrong. I prefer the present solution where you have a community of people who have contradictions.

Caroline Nicholas:

Thank you very much.

Brigitte Stern:

So the result as you might have understood is that I do not think that a permanent court will solve anything. Sorry to be so clear.

Caroline Nicholas:

Actually, when you work in a diplomatic environment, it is very nice to hear somebody being very clear.

Sun Huawei:

Thank you very much, Professor Stern. Let us move to the next topic. Stanimir, I know you are going to give us some very interesting scenarios to test our ability to identify the issues.

## **To Explore How the ISDS Reform Should Tackle the Issues of Double Hatting, Issue Conflicts and Improving the Arbitrator Challenge Procedures**

Stanimir A. Alexandrov:

I hope this will be of interest to the audience. What I would like to do is to make the audience work. Why should the speakers work if they can make the audience work? I am going to give you a hypothetical and then four scenarios on the basis of that hypothetical. Please be attentive because I am going to ask you to vote on those scenarios. I have made the hypothetical as simple as possible, which does not reflect my view of the audience; it is just because we do not have enough time. Here is the hypothetical: there is a legal question that has only two answers, black or white; there is no grey area. That legal question is of such a nature that it disposes of the case. If the answer is white, one party wins. If the answer is black, the other party wins. A case is brought before a tribunal and that legal question is presented as part of the case. An arbitrator is appointed.

I will first give you four scenarios, and then ask you to vote on the conflict that those scenarios may present. I have arranged the scenarios in alphabetical order to avoid any bias. First, the academic: the arbitrator is an academic who has written a scholarly article on that very legal question and has given a categorical answer, black or white, does not really matter which one. Scenario number two, the arbitrator: the arbitrator appointed to this tribunal has served on a prior tribunal where the tribunal has faced that same legal question and the arbitrator has given an answer, black or

white, does not matter which. And to avoid the situation where arguably this is not the view of the arbitrator but a compromised view of the tribunal, let us slightly amend this scenario and say that arbitrator in the previous case has issued a dissenting or a concurrent opinion. In other words, she or he has expressed her or his own view, rather than joined the view of the other two arbitrators. Scenario number three, the expert: the arbitrator has served as an expert in a previous case, a legal expert on that very legal question, and has expressed his or her sincere belief that the answer is black or white. Scenario number four, the lawyer: the arbitrator has been a lawyer in a previous case representing a party and has argued zealously that very legal question on behalf of her or his client in favour of an answer, either black or white. These are the four scenarios.

What I would like to do now is to combine the Davos-style discussion with a voting procedure that they use in the UN. We will first vote on each of the four scenarios. Then, after the vote, those of you who want to explain your vote will have 45 seconds. Let's vote. Can those who believe that all of those four scenarios present a serious conflict, raise your hands? Thank you. Can those of you who believe that all four scenarios do not present a conflict at all, raise your hands? Thank you. Scenario one, the academic; those of you who believe that this scenario presents the most serious conflict, please raise your hands. Scenario two, the arbitrator; those of you who believe that this presents the most serious conflict, please raise your hands. Thank you. Scenario three, the expert; those of you who believe it presents the most serious conflict, please raise your hands. Thank you. Now, scenario four, the lawyer; those of you who believe that the lawyer scenario presents the most serious conflict, please raise your hands.

With the indulgence of the moderators, what I propose to do is to offer an opportunity to those of you who want to explain your vote or your abstention, as the case may be. I would like to have five minutes at the end to give you my answers.

Audience 1:

Since the academic does not depend on that for his living – he has a job, teaching in an education institution, there is no need for being biased. As his publication is publicly available, everybody can read it. This is my view.

Audience 2:

Regarding conflicts of interest of arbitrator, I would like to share an observation with reference to the example of the confirmation hearings for Supreme Court justice candidates in the United States. During the examination in such hearings, a Supreme Court justice candidate may be questioned as to whether his previous court decisions may give rise to concerns of conflicts of interest when adjudicating future cases as a Supreme Court justice. That Supreme Court justice candidate may actually say, “Yes, I have made that previous decision, but it doesn’t mean that, given another set of arguments, I, being an independent judicial officer, will not review that decision. I will be independent once I’m appointed to the Supreme Court”. In the context of ISDS, that will be the kind of answer giving rise to the consideration as to whether that answer is acceptable or would raise the question of conflicts of interest.

Stanimir A. Alexandrov:

I think you are right in making an observation about the confirmation hearings in the United States when Supreme Court justices are being confirmed. The candidates avoid answering questions on the substance of legal issues. There was a joke about a Supreme Court justice candidate. When he was asked whether he would like plastic or paper bags in a grocery store, he said, "I don't think it's appropriate for me to answer that particular question at this particular point of time". That same candidate most likely was a judge at the appellate level and most likely did take positions as a judge on many legal issues, and the candidate has a record of views on specific legal issues.

Brigitte Stern:

I would like to say something on two of your scenarios, if I understood you correctly, that raise what is called the issue conflict. I don't think it is a good way to see things, because if you say to an arbitrator there will an issue conflict because you took this decision and you might take the same decision. So, one of the answers is the answer you just gave. I can change my mind but I would go much further. I would say I might not change my mind, but this do not mean that I am biased. I will give an example. If I say there is a principle of non-retroactivity of treaties, should I change my mind because there is another party? I should not change my mind; and precisely if I do not change my mind, I am not biased. I think the problem is not often seen correctly.

For the academic, I think the academic freedom is something extremely important, and you might know of a case with which I am in strong disagreement. In one case, two arbitrators were challenged because they took a certain decision in a



case. The challenge was decided by the President of the International Court of Justice. One arbitrator was not challenged because he just took the decision and the other was challenged because he took the decision and after that he wrote an article as an academic. I think this is not proper. You can say something as an academic and not be chastised for that. I think you have the academic liberty, but my most important point was on issue conflict.

Caroline Nicholas:

Thank you. Meg, have you got some thoughts on this?

Meg Kinnear:

I think it gets right down to this whole idea that double hatting is a proxy for conflict. We are not looking at it from the right direction – what we are trying to do is to find a tribunal that can decide with an open mind. The really hard point of all is actually defining it. It is extraordinarily difficult, but we try to define conflict as wearing two hats. That is both over- and under-inclusive, depending on the facts, and the real thing we have to grapple with is what exactly is a situation that makes you concerned legitimately and reasonably that a tribunal might not decide on the facts in front of them.

Caroline Nicholas:

Thank you.

Audience 3:

My vote is that none of these situations in principle creates a conflict of interest. If there is a conflict of interest, there should be a reason that we might expect the arbitrator will be biased in favour of one of the parties. In a separate arbitration tribunal, that arbitrator decided when the

parties are different, when the subject matter is different. However, regarding the same legal issue, we should not take into consideration that this arbitrator might be biased.

Audience 4:

I think what we are looking for in terms of impartiality is really an open mind rather than an empty mind. Judging from this angle, I think probably the least biased would be the lawyer because he or she would probably be the person who knows the best arguments for the other side.

Audience 5:

I voted that none of the four scenarios present a conflict of interest issue, precisely for the same reason that Professor Stern has just said. I do not see any issue if you are already having a view on an issue, in the way that you framed the question, which is a legal question which has a binary outcome, black or white.

Audience 6:

I have a question on the quality of arbitrators. Ms Meg Kinnear has mentioned that in the presentation slide – impartiality and independence. I think that the qualities have to be clarified because we cannot know what kind of a person is independent and impartial by these criteria. As far as I understand, a person who has more diverse quality in terms of languages or cultural bases is more likely to be a person who can decide in a more impartial or independent manner in arbitration.

Caroline Nicholas:

Thank you. I think that raises a very interesting question about the difference between active or conscious bias and perhaps our own inherent flaws as human beings.

**Audience 7:**

Thanks a lot for such an entertaining session. I just want to add and complement the position about that none of the cases is supposed to have any conflict of interest. If we will look at the conflict of interest as offensive phenomena, we should prove that, there is a linkage between the action and the result. What I mean by action is the previous decision of the arbitrators and result is their decision in the present case. So, if there is not any reason for us to identify that, there is something in their action that precludes these arbitrators to make the black or white decision in the present case, we cannot prove that there is a conflict of interest.

Moreover, judging by practice, for instance, in the case of Zambia against Argentina, that was about the MFN clause – jurisdictional clause using for the conflict resolution clause. There was an arbitrator who actually changed his mind and changed his decision while deciding on the same issue. If we will add some more information to these four cases, probably it will be more complicated; but, for your mentioned scenarios, I think there is nothing to be afraid of.

**Stanimir A. Alexandrov:**

That is a very good point. Now, I would like to give you my answer. Actually, I have two answers on two different levels. My first answer goes with scenario by scenario. First, the academic. The point that you made: you need an open mind, not an empty mind. The academic has taken a position on the legal issue. Any one of us who has any experience in investor-State arbitration has dealt with the same legal issues over and over again. If you want to find somebody who has an empty mind, you can go to somebody who has zero experience; he has never heard of the legal question and has

never formed a view on it, but that is clearly not the right way to go forward.

Of course, as Brigitte said, there are decisions and challenges that are based on the existence of conflicts in such situations. Every time one expresses a view, one can subsequently be challenged on the basis of an issue conflict. This is why I have mastered the art of speaking at conferences and writing articles without saying anything meaningful. But that is not the way it should be because each one of us should be entitled to express views on legal matters. When one criticises investor-State arbitration for lack of consistency, which is one of the arguments in favour of a permanent court, one should keep in mind that there is consistency because the views of arbitrators and academics on legal questions are consistent. They have expressed an academic view or a view as an arbitrator on certain legal questions; they will presumably adhere to that view. This is actually evidence of lack of bias, because regardless of the interests of the parties involved in each particular case, the arbitrator is consistent in her or his views on a specific legal question.

To a large extent the same answer goes to the expert. The expert has a view on the legal question that is in accordance with her or his sincere beliefs, as the oath requires. If that expert is subsequently appointed as an arbitrator, that expert should have the same view, an open mind but not an empty mind.

With respect to the lawyer, it is a bit more complicated, because on the one hand, the lawyer has less of an issue conflict. When one acts as a lawyer, her or his own views does not matter. It is what is in the best interest of the client that matters, and the lawyer will present those arguments that

are in the best interests of the client. A lawyer will argue for “white” in one case and for “black” in another case, and will do that without considering that she or he is biased because, again the lawyer’s role is to zealously represent the interests of the client. The issue with the lawyer is therefore slightly different. If the lawyer sits as an arbitrator in another case where the same legal issue comes up, the argument is that the arbitrator will decide the case in a certain way to help herself or himself in a case where she or he acts as a lawyer, and where the same legal question has arisen. There may be scenarios where indeed there might be a conflict. If you are a practicing lawyer in investor-State arbitration and you represent the investor in five cases and the government in five other cases, by deciding the legal question one way, you help your clients in five cases but prejudice your clients in five other cases. Moreover, when deciding a legal question as an arbitrator, you do not know who you will represent in the next few years of your professional life as a lawyer and whether, by deciding the issue one way or the other, you would help your future clients or hurt them. Thus, the idea that, as an arbitrator, one will decide a legal question depending on the interests of one’s clients as a lawyer, may sound objectionable in theory, but as a matter of practice just does not work.

Now, let me give you my second answer, which is an answer on a different level. I want to preface that answer by telling you a very short story. I was arguing a case on behalf of a State and I was arguing that the investment was not made in accordance with the laws of the host State and therefore there was no jurisdiction. I argued that the investment was not protected by the BIT, which included the requirement that the investment had to be made in accordance with the laws of the host State. The issue was a permit to build a

highway and I was arguing that the permit was not granted in accordance with the domestic law. One of the arbitrators asked me this question, “Mr Alexandrov, so let’s say the host State law requires that the safety fence around the highway is no less than 200 centimetres. The investor builds a safety fence of 199 centimetres. Are you telling me that this investment, which is not in compliance with the requirements of domestic law – by one centimetre – does not deserve protection under the BIT?” You have to give an answer right away. What can you say? If you say, “Of course, this investment does not deserve protection because it’s a violation of the domestic legal requirements”, then you look ridiculous because the “violation” is just one centimetre. But if you say, “It is just one centimetre, it doesn’t matter”. Then, you are on a slippery slope. What if it is two centimetres or three centimetres? When does it begin to matter? So what do you say? What I said was, “Mr Arbitrator, this is not our case!” In other words, you attack the premise of the hypothetical that you are given. My second answer is exactly that: I will attack now my own hypothetical.

I have given you an unrealistic hypothetical. I described a legal question having two characteristics. One was that it only had two answers, black or white. The other one was that it was dispositive of the case. How many times do you see a legal question that arises in investor-State arbitration that has those characteristics? In 99.9% of the cases, the answer depends on the facts. But if the answer depends on the facts, you cannot have an issue bias. In how many cases have you seen a legal question which is black and white and there is no grey area? Let me give you one example, the MFN clause. There is so much discussion about the MFN clause, whether it applies to substantive obligations, to

procedural rights, etc. I have identified at least 11 types of MFN clauses in investment treaties. They apply differently, depending on their languages.

Caroline Nicholas:

Thank you very much. I will hand over to Huawei to close our discussion.

Sun Huawei:

Thanks very much for the panellists' interesting discussion. I really wish that we could have more time but we have to stop here. Hopefully this session has helped us identify the real concerns of the current mechanism and we can leave the discussion with a better answer to the question whether the party autonomy or party appointment is a sin, and whether the sin needs to be rectified. This is wisdom collecting exercise and I hope that at the end of the day, the decades of ISDS experience will only be replaced by a better and more competitive mechanism, if it will be replaced at all. Thank you.

# OXFORD-STYLE DEBATE

## The Permanent Investment Court System Is the Solution to the Concerns over ISDS

*Note: Debating positions are assigned by the organisers and do not necessarily  
reflect the positions (if any) held by the speakers.*



## Moderator

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### Chin Leng Lim

Choh-Ming Li Professor of Law

The Chinese University of Hong Kong

Professor Lim is of Keating Chambers, London and he has advised and represented sovereign governments and private clients in complex public and private international law matters and disputes. For the past decade, he was Professor of Law at the University of Hong Kong. In 2017 he was appointed Choh-Ming Li Professor at the Chinese University of Hong Kong. His latest writings include Lim, Ho and Paparinskis, *International Investment Law and Arbitration* (Cambridge University Press, 2018). Professor Lim is also a Visiting Professor at King's College, London and served three terms on an advisory committee of Trade and Industry Department of the Hong Kong SAR. He once worked as a government international lawyer, and at the United Nations.

## Speaker

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**Shan Wenhua**

Dean

School of Law and School of International Education,  
Xi'an Jiaotong University

Professor Shan is the Vice President, Judicial Case Academy, Supreme People's Court, PR China; Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, UK. Having completed his PhD at Trinity College, University of Cambridge, he has served as Yangtze River Chair Professor of International Economic Law (by Ministry of Education, China), "State Specially Recruited Expert" and "State Council Special Allowance Expert" by the Central Government of China; Member of the International Commercial Expert Committee of the Supreme People's Court; Conciliator of the International Centre for Settlement of Investment Disputes (ICSID); Founding President of the Commission for Selection and Disciplining of Judges and Prosecutors of Shaanxi Province. His primary area of research: international investment and arbitration law, in which he authored a dozen books by publishers including Oxford University Press and numerous articles in journals such as *European Journal of International Law* and *American Journal of Comparative Law*. He has been closely involved in some key international investment treaty negotiations and arbitration cases.

## Speaker

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### **Stephan W. Schill**

Professor of International and Economic Law  
and Governance

University of Amsterdam

Stephan heads the European Research Council-funded research project “Transnational Public-Private Arbitration as Global Regulatory Governance”. He is admitted to the bar in Germany and New York, is a Member of the ICSID List of Conciliators, and acts as arbitrator in investor-State arbitrations. He also serves as General Editor of ICCA Publications and Co-Editor-in-Chief of *The Journal of World Investment & Trade* and has published widely on international investment law, investor-State dispute settlement, general international law, EU law, and comparative public law.

## Speaker

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**Emmanuel Jacomy**

Partner

Shearman & Sterling

Emmanuel is a partner in Shearman & Sterling's International Arbitration practice, based in Beijing and Singapore. He has extensive experience acting as an arbitrator and counsel advising companies, State-owned entities and governments in international commercial and investment treaty arbitrations, with particular focus on investment, oil & gas, energy and mining disputes, as well as disputes having an Asian nexus. He was part of the team that secured the USD 50 billion victory in the landmark Yukos arbitration, and is also involved in the setting aside and enforcement proceedings concerning these awards. Emmanuel Jacomy is an Adjunct Professor at the University of International Business and Economics (Beijing), and regularly speaks on issues of investment arbitration and international commercial arbitration. He holds a Master (DEA) of International Economic Law from The University of Paris I – Panthéon-Sorbonne and a Master of Science in Management from HEC School of Management. A French national, he is a native French speaker and is fluent in English and Mandarin. He is qualified to practice in France, the UK and Cambodia.

## Speaker

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### **Brigitte Stern**

Professor Emeritus

The University of Paris I – Panthéon-Sorbonne

Professor Stern was a Member and the Vice President of the United Nations Administrative Tribunal (UNAT) from 2000 to 2009, as well as a member of the ADB and ATBIS Tribunals. She has served as a Consultant and Expert for international organisations, and has been acting as Counsel before the International Court of Justice. Brigitte Stern is now active in international dispute settlement, and serves as an Arbitrator (Sole Arbitrator, Member or President) in numerous ICSID, ICC, NAFTA, SCC, Energy Charter Treaty, SIAC and UNCITRAL arbitrations.

Chin Leng Lim:

The debate motion is this: “The Permanent Investment Court System Is the Solution to the Concerns over ISDS”. We are coming in quite high on a topic that has been touched upon throughout the day. The format is somewhat unusual; it is an Oxford-style debate. While we have two speakers for the proposition and the speakers for the proposition are Professor Shan and Monsieur Jacomy beside me; and we have two speakers for the opposition and the two speakers for the opposition are Professor Schill and Professor Stern. I am asked to remind the audience that the position or the positions taken in this debate do not necessarily reflect the real positions – the real convictions – of the members participating in this debate. This is going to be a slightly challenging task for the debaters, because I have structured it as such, simply to make life a little bit more interesting but difficult for them. Instead of speaking in pairs with the speakers for the proposition followed by the speakers for the opposition, what will happen is that Professor Shan will be the first speaker for the proposition. He has the task of defining the motion before laying out his side of the case, after which Professor Schill will come in as the first opposition speaker. He may or may not choose to rebut what Professor Shan has just said. In fact, he can dispute Professor Shan’s definition of the motion. Thereafter, Monsieur Jacomy will come in and may seek to rebut Professor Schill’s points before laying out the remainder of his case with Professor Shan. And our last speaker is the second opposition speaker, Professor Stern; she has the last word.

This is going to be quite tricky. It reminds me of two stanzas of a certain poem that’s probably well known to some people here:

The brooding East with awe beheld  
Her impious younger world.  
The Roman tempest swell'd and swell'd,  
And on her head was hurl'd.

The East bow'd low before the blast  
In patient, deep disdain;  
She let the legions thunder past,  
And plunged in thought again.

That's what we're going to do and it's with a view towards forming our own thoughts about the European proposal for a permanent investment court. Now I give the floor to Professor Shan Wenhua of Xi'an Jiaotong University.

Shan Wenhua:

Thank you, Chin Leng, for the interesting and insightful introduction! As a Chinese scholar who has spent some time in Europe studying China-EU investment relationship, I am particularly excited to have this opportunity to debate with an European colleague against two other leading European experts, for a proposal promoted by the European Union (EU) to reform a system designed and first practiced by European States!

The motion today is "The Permanent Investment Court System Is the Solution to the Concerns over ISDS". Mr Jacomy and myself are on the proposition team, speaking for the motion. As the first speaker, according to the convention, I will first define the motion and the terms, then I shall try to elaborate on the concerns over ISDS and assess their nature. My colleague, Mr Jacomy, will then explain how the Permanent Investment Court (PIC) provides solutions to such concerns.

ISDS has now become a buzzword. Obviously, it is not ISIS. But to some, it is equally evil. As said by the EU Trade Commissioner Cecilia Malmström, “ISDS is the most toxic acronym in Europe”. Also, ISDS has been blamed for triggering the ‘legitimacy crisis’ of the entire international investment treaty system!

What exactly is ISDS? ISDS stands for investor-State dispute settlement, under which a foreign investor can bring a case to an international arbitration tribunal in accordance with an investment treaty, a domestic legislation or an investment contract between the two parties. In contrast, the PIC is a new mechanism for solving investor-State disputes, which departs significantly from the current ISDS mechanism. Essentially, the ISDS mechanism is based on commercial arbitration mechanism, while the PIC is a judicial mechanism, which was first proposed by the EU and has since been included in some recent EU BITs, such as the ones signed by Canada and Vietnam. In this proposition, we will argue that the current ISDS mechanism has resulted in systemic and fundamental concerns of global scale, which calls for a systemic and fundamental overhaul at a multilateral level.

The answer to this question is now rather straightforward, as the Working Group III of UNCITRAL has systemically identified them after extensive discussions and consultations with member States and other stakeholders. They include three categories of main concerns:

(i) Concerns relating to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, including: a) concerns related to unjustifiably inconsistent interpretations of investment treaty provisions (e.g. MFN clause, umbrella clause) and other relevant



principles of international law (e.g. whether the FET standard is equivalent to the customary international law minimum standard of treatment of aliens?) by ISDS tribunals; b) concerns related to the lack of a framework for multiple proceedings brought in accordance with different instruments such as investment treaties, laws, and agreements; and c) concerns related to the limited mechanisms to address inconsistency and incorrectness of decisions (e.g. inadequacies of the ICSID annulment mechanism and domestic court procedures).

(ii) Concerns relating to arbitrators and decision makers, including: a) concerns related to the lack or apparent lack of independence and impartiality of decision makers (e.g. repeated appointments, conflicts of interest, issue conflicts, double-hatting, code of conduct); b) concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms (e.g. ICSID amendment proposal including publication of decisions or orders on challenges); c) concerns about the lack of appropriate diversity amongst decision makers (e.g. gender and geographical diversity); and d) concerns with respect to the mechanisms for constituting ISDS tribunals (e.g. party autonomy, information asymmetry, expertise in public law and international law).

(iii) Concerns relating to cost and duration of ISDS cases, including: a) concerns with respect to cost and duration of ISDS proceedings (e.g. too expensive); b) concerns with respect to allocation of costs by arbitral tribunals in ISDS (e.g. loser is the one to pay); and c) concerns with respect to security for cost (e.g. unable to recover costs in defending unsuccessful, frivolous, and bad faith claims by investors).

Those are the concerns identified by the Working Group III, which believes reform is desirable. There may be other concerns to be added to the agenda such as third-party funding, but those clearly are the main ones.

Now let's take a closer look at the concerns and we shall find that they are systemic and fundamental by nature and global in scale.

First, the concerns over ISDS are of systemic nature, as they cover the major aspects of the ISDS mechanism, ranging from decision-makers, to outcomes, and to the costs and cost allocation. As pointed out by the EU, the concerns over different aspects are closely interlinked. The quality of the outcomes/decisions depends on the quality of the decision makers; and the quality of decision makers also impacts on the costs. The cost of arbitration, in turn, is not only closely linked to both the qualifications and appointment of the decision makers, but also relates to the consistency of the decisions, as money would unlikely be wasted on arguing for a claim upon which a consistent negative decision has been made. The systemic nature of the concerns requires a holistic approach towards ISDS reform, as a patchy approach could not effectively address the concerns in a comprehensive manner.

Second, the concerns over ISDS are of fundamental nature as they reflect a fundamental flaw of the ISDS mechanism – that is a mismatch between primarily public law disputes with an essentially private law dispute settlement mechanism. As said, ISDS is essentially a commercial arbitration mechanism. Yet, investor-State disputes are typically public law disputes as most of them arise out of vertical regulatory relationship between the host government and foreign

investors. As relevant research has demonstrated, under domestic or international systems, such disputes are typically solved by public law methods, i.e. by permanent bodies with full-time and tenured adjudicators to decide on the disputes. This is because only such methods can guarantee fundamental public law requirements such as accountability, consistency, coherence, independence, predictability and transparency.

It is well known that commercial arbitration mechanism is designed to solve private disputes out of horizontal business relations, rather than vertical and regulatory relationship. To solve vertical and regulatory disputes such as investor-State disputes, arbitration mechanisms have to engage systemic and fundamental changes to make sure that they can meet such public law requirements. The concerns voiced against the current ISDS mechanism precisely reflect the public law requirements, which are commonplace in public law dispute resolution mechanisms.

One may be curious how such a mismatched system was created and developed. A short answer is that the current ISDS system is not quite the same as it was first conceived and designed. Indeed, the ISDS mechanism was designed and put into place in the 1960s, aiming primarily at settling investor-State disputes arising out of investment contracts. The most important achievement of such effort was the establishment of ICSID in 1966, which is by far the most prominent institution for ISDS. The drafters of the ICSID Convention estimated that around 90% of the cases would be under investment contracts and concessions. However, as it turned out, over 70% of the ISDS cases are based on investment treaties. In contrast, only less than 20% of the

cases are based on investment contracts.

It is believed that the first treaty-based ICSID case has triggered such an unexpected development. The case, *AAPL v Sri Lanka*, actually happened to be brought by a Hong Kong investor, AAPL. (So, I was not surprised at all that such an important meeting is taking place in Hong Kong today!) In a decision rendered in 1990, the tribunal first adopted an interpretation of relevant provisions of the ICSID Convention, which has ever since been followed, that foreign investor's treaty claims can be made on the understanding that the parties' consent to ICSID arbitration can be 'perfected' just by foreign investors accepting a host State's offer to arbitrate under a valid investment treaty, no specific consent from the host government on the submission of the particular case at issue is needed. The latter has been an understanding held at least by some. For instance, in the process of deliberating on whether or not China should ratify the ICSID Convention, some eminent scholars have expressed the view that the Convention would allow the Chinese government an opportunity to grant consent when a particular case is brought before the ICSID by a foreign investor. Indeed, Professor An Chen, a leading scholar of international investment law from Xiamen University and the first Chinese citizen appointed to sit in the ICSID arbitration tribunals, still vocally adheres to this position. However, such voice has not been taken seriously in arbitration practice and the AAPL position has been accepted ever since it was adopted, which effectively opened a 'floodgate' in investment treaty arbitration. So, a single case, the AAPL case, actually opened a 'floodgate' for the hundreds of investment treaty arbitration cases the world has witnessed so far. This story vividly demonstrates not only how such a mismatch (between public law disputes

and private law solutions) was developed, but also the tremendous importance of containing the expansive or abusive interpretation tendency that arbitration tribunals may sometimes entertain, which can lead to disastrous consequences. Indeed, only against such background, one may be able to fully appreciate the concerns over ISDS and assess whether and how they should be addressed.

Looking from the perspective of the stakeholders, it can be seen that the concerns have gone well beyond the scope of a few States, or a particular region, but have become a concern of global scale. Today, not only the EU is interested in ISDS reform, States from Asia, Africa, North and South America and the Pacific regions are all talking about ISDS reform or the investment treaty regime as a whole. Indeed, there is hardly any State that is fully satisfied with the current ISDS mechanism. A consensus has been reached on the desirability to reform it, as demonstrated in the latest reports of Working Group III of UNCITRAL.

Not only are States not happy with the current system, other stakeholders have also voiced their concerns. For instance, in the legal community, International Bar Association has recently published a report that confirms increasing consistency, efficiency and transparency does foster the legitimacy of the mechanism. In the business community, the ICC FDI policy statement “strongly endorses the inclusion of effective and independent dispute resolution mechanisms in all investment agreements”; it also “supports increased transparency and the establishment of rules to avoid conflicts of interest in investor-State dispute settlement”. Clearly ISDS reform has become a global concern, which

can only be resolved effectively by a multilateral approach.

To conclude, the concerns voiced against the ISDS mechanisms are multi-faceted and wide-ranging, but they are only manifestations of the fundamental problem of the system, that is, a straightforward private law dispute settlement system such as the current ISDS mechanism does not fit for public law disputes. To settle investor-State disputes, a new public law mechanism has to be created afresh, or the current ISDS mechanism has to be systemically revised and structurally re-balanced, making sure that such public law requirements are satisfactorily met. Since the concern over ISDS has become a global topic, ISDS reform is best implemented on a multilateral platform, rather than on bilateral or regional basis, to guarantee effectiveness and efficiency.

Chin Leng Lim:

Thank you, Professor Shan. Now we probably should hear a different point of view. Professor Schill from the University of Amsterdam, the floor is yours.

Stephan W. Schill:

The organisers have surely put us at a disadvantage here. Not only do the Europeans in this debate have to attack the European Commission's proposal, but we actually are operating with a huge jet lag. In Europe, it is now 10 o'clock in the morning and we have just spent our night staying awake for this great conference.

Now, let me set out our roadmap and let me start with clarifying the agreements and disagreements we have with the proponents.

We agree that the concerns identified in the UNCITRAL process are real concerns, that is, concerns relating to consistency, coherence, predictability, correctness, independence, impartiality, diversity, costs, and duration. These concerns should be addressed through appropriate reform. We also agree that the Multilateral Investment Court (MIC) suggested by the proponents and the European Commission would address these concerns. A permanent court would create consistency and predictability, and reduce costs and duration. There would be no time lost in the appointment of arbitrators and in re-litigating legal issues once they are decided; and this court could ensure independence and impartiality.

We also agree on the need for having an international forum for investor-State disputes. So, if the alternative is no ISDS or the MIC, we would go for the MIC.

But we disagree that the MIC is *'the'* solution to the concerns over ISDS. There are three categories of counter-arguments against the MIC that we will put forward. First, the MIC is not a panacea; it creates new problems that are significant and unaddressed. Second, there are problems with ISDS that the MIC does not address. These are the two types of categories that I'm going to focus on in my part of the argument. There is a third category of concerns that Professor Stern is going to focus on – there are problems with ISDS for the solution of which one does not need the MIC.

Let me preface my remarks with briefly speaking on the normative framework that I think one should address to analyse the legitimacy concerns for any form of investor-State dispute settlement.

The problems with ISDS arise from a tension between investment protection, investor-State arbitration and values of constitutional law. These values are notably the rule of law, democracy – or sovereignty or self-determination, however you want to call it – and the protection of human rights. The involvement of constitutional courts – I am thinking here of the German Constitutional Court, or also the Court of Justice of the European Union – are a testament to that tension. All of the concerns identified at UNCITRAL are rule of law concerns, that is, consistency, predictability, independence, and impartiality of arbitrators or judges, and costs and duration (which concerns access to justice). However, many concerns with ISDS are not pure rule of law problems, but they concern the other prongs of constitutional law, namely democracy, sovereignty, self-determination or the protection of human or fundamental rights. Many of the objections to the MIC I will formulate relate not principally to the rule of law concerns, but to the other constitutional concerns.

Let me turn to the first set of counter-arguments against the MIC, i.e. the new problems that the MIC raises, but does not address. First, the MIC may result in further minimising the role of domestic courts. The MIC intends to exclude, to a large extent, parallel or subsequent proceedings at the domestic level in domestic courts and at the international level before the MIC. In respect of disputes with countries with weak domestic courts, foreign investors will certainly choose to go to the MIC. This siphons away disputes from domestic courts and creates no incentives for States to improve their domestic court systems. One problem for investor-State relations, which is the lack of trust in domestic courts, at least in some



countries, will therefore not be addressed, but rather aggravated. The MIC thus creates an additional layer of problems that the present system does not pose to the same degree. Present-day ISDS has frequent examples of prior domestic court involvement.

The second new problem: becoming a powerful multilateral lawmaker. The MIC is not just about settling individual disputes. The MIC would also become an important lawmaker that further develops and expounds the meaning of treaty standards such as fair and equitable treatment, the concept of indirect expropriation, the extent of the right to regulate, the limits of regulatory powers to protect competing concerns, such as the environment, labour rights, fundamental rights, indigenous rights, so on and so forth.

For this to happen, look no further than the existing ISDS system where arbitral tribunals are the principal points of reference for understanding what investment law standards mean, even though they are not binding precedents. Pick up any book on investment law: it is the cases that explain the meaning of treaties and often enough push the boundaries both in favour of protection of investors and of competing concerns. Just think of the *Urbaser v Argentina* case where a tribunal held that the international human right to water could impose obligations on foreign investors.

The MIC would do the same and become a lawmaker. But it would do so for all members, all investment agreements, and all future cases, not only for the individual cases before it, given that its rulings would become real precedents that the MIC would continue to follow in the future. The MIC would be a powerful multilateral lawmaker that would

create significant demands on legitimacy and for democratic control. These legitimacy demands are not addressed and the question is whether States want to create a new permanent court that has these respective powers.

If we look at the disillusion many States have with the jurisprudence of other permanent courts, whether it is the International Court of Justice, the International Criminal Court or the WTO Appellate Body, we think the creation of the MIC would create new problems that are not necessary to create and that the MIC can neither avoid nor address.

The final new problem the MIC creates is an issue of trust of the parties. Investor-State arbitration has had the great benefit of trust by the disputing parties in the dispute settlers. Party appointment gives a sense of ownership. The MIC, by contrast, does away with party appointment and therefore risks estrangement of parties and court. Will MIC judges be balanced both in relation to investors and in relation to States?

Let me now turn to the second set of arguments against the MIC: problems that the MIC does not address, there are three.

First, there is a lack of substantive harmonisation. One important aim of the MIC is to create greater consistency and coherence, but the MIC does not address one important source of inconsistencies. These are the more than 3,000 bilateral, regional, and sectoral investment treaties. As long as the substantive law is not harmonised, the idea of a multilateral court achieving consistency is elusive.

Second, the lack of investor duties and their enforcement. One key point of criticism of ISDS is the lack of obligations

on foreign investors. Investment agreements create for the most part only investor rights, but do not provide for investor duties and obligations. ISDS gives investors access to a forum to enforce their rights, but it does not allow those affected by investor misconduct, think in particular of environmental harm, to sue investors and to have access to an effective international legal remedy. Instead, they are in the domestic courts that, to a large extent, we consider to be insufficient to provide the necessary protection and dispute settlement functions for foreign investors. The MIC does not address this problem. It does not tackle the problem of creating a multilateral code of conduct that lays down investor obligations. Moreover, the MIC does not address the asymmetric dispute settlement structure, which provides investors with international recourse and a forum, but does not for those harmed by investor misconduct. The MIC therefore is not the solution to an important concern over ISDS.

The third problem the MIC does not address is the lack of sufficient political support outside the EU. Such support would, however, be needed for the MIC to solve those problems that it can resolve. If we take what States do in their recent investment agreements, or announce in model bilateral investment treaty, as an indication, there are, apart from the MIC, three other main models for the future of investment dispute settlement.

The first is the model of reformed investor-State arbitration contained in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which builds on the Trans-Pacific Partnership (TPP). The substance of this agreement has the imprint of major global actors, including the United States, which was to become a party to the TPP,

Japan, Australia and other countries in Latin America and Asia. These States consider that many concerns over ISDS can be reformed through reformed investor-State arbitration. The second is the Model BIT of India, which contains the reintroduction of the exhaustion of local remedies – it wants to veer investor-State disputes back into domestic courts. And third, the model of Brazil is to see investment disputes settled not in investor-State proceedings, but through State-to-State arbitration.

All States supporting any of these alternative models are highly unlikely to adopt the MIC for investment dispute settlement. Without multilateral support, however, the MIC cannot solve the problem it wishes to solve in particular to the extent there is a need for a system-wide consistency and coherence. To be acceptable to States supporting other models for investment dispute settlement, the MIC would need to be built with an open architecture in mind, accommodating both sides, i.e. States that would use the MIC and States that prefer using other models of investment dispute settlement.

If you are interested in how such a model would look like, I'd refer you to a paper I have written together with Geraldo Vidiga, a colleague at the University of Amsterdam. It is entitled "Cutting the Gordian Knot: Investment Dispute Settlement à la Carte".<sup>1</sup> We have developed a model that shows how the EU's idea of creating a multilateral investment court can actually be integrated into a broader dispute settlement framework, which also allows arbitration both between investors and States, and at an inter-State

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<sup>1</sup> See Stephan W. Schill and Geraldo Vidiga, *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*. RTA Exchange (International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB) 2018) <[www.ictsd.org/sites/default/files/research/rta\\_exchange\\_-\\_investment\\_dispute\\_settlement\\_-\\_schill\\_and\\_vidiga.pdf](http://www.ictsd.org/sites/default/files/research/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidiga.pdf)> accessed 13 March 2019.

level to persist. This model would also allow parties to use the MIC just as an appellate mechanism, to the extent they so choose. The MIC on its own would not be able to address the concerns over ISDS, but could at the most do so together with other systems of investment dispute settlement.

Finally, there is an issue the MIC has difficulties addressing, and we have had an entire panel discussion on that earlier today. That problem has to do with the enforcement of MIC rulings. The New York Convention and the ICSID Convention allow almost worldwide enforcement of the pecuniary obligations arising under ISDS awards. Will the MIC rulings qualify as foreign arbitrary awards under the New York Convention, even though the Convention mentions permanent arbitration bodies? If we consider the jurisprudence on the Iran-United States Claims Tribunal, there is at least a significant risk that MIC rulings will not be enforced under the New York Convention. The MIC in other words would need to create an entirely new enforcement regime to which a large number of States would need to adhere. The question then is: can the MIC deliver such an important regime?

Let me conclude. All in all, I submit that, even though we agree that the MIC would address the problems identified at UNCITRAL, it would create a number of new problems: minimising the role of domestic courts, becoming a powerful lawmaker at a multilateral level, and the need to create trust among the parties. It would also not resolve other problems such as the lack of substantive harmonisation, the lack of investor duties and their enforcement, and the lack of sufficient political support. For all of those reasons we do not think that the MIC is *'the'* solution to the concerns over ISDS. With that I rest my case. Thank you.

Chin Leng Lim:

Ladies and gentlemen, we should move on to the second speaker for the proposition, Monsieur Jacomy from Shearman & Sterling. Monsieur Jacomy, the floor is yours.

Emmanuel Jacomy:

Thank you Professor Lim. I really want to thank my co-panellists, Professor Shan and Professor Schill for their brilliant exposition. I must say that I am a little surprised of the amount of agreements we have with Professor Schill. I think Professor Schill and I are in agreement on the diagnosis here, namely that the current ISDS system is ill, and that something must be done. Maybe more surprisingly, Professor Schill and I also agree and I quote, that “the permanent investment court system would address the concerns over ISDS”. Wait – what was the motion for today? “The Permanent Investment Court System Is the Solution to the Concerns over ISDS”. So, I think we have already won at least 95% of the motion.

And I am glad, Professor Schill, that you did not adopt the position of many arbitration practitioners, counsel and arbitrators alike, who try to convince us that the current system is actually fine, that its critics have not understood anything, that all is for the best in the best of all possible worlds in investment arbitration. This sounds like a polar bear trying to convince us that global warming does not exist. Well, global warming does exist and, likewise, in the world of investment arbitration, there are fundamental problems, and we seem to all agree on that diagnostic on this panel. Now what we disagree on it seems, is the solution, and notably whether the proposed permanent investment court is the only treatment available to cure the patient.

And what you have heard just now or this morning, and what you will probably hear again from Professor Stern, is that we do not need such a fundamental change as a permanent investment court to address the concerns over ISDS. You have heard that limited changes are sufficient and that, in fact, some changes have already been made to address the system's failures. That is the so-called "ISDS 2.0", and we have heard all that this morning. But this makes me think of the captain of the Titanic, who thought he would be able to avoid the fatal crash by taking a slight detour on the way to the iceberg. And of course we all know that it did not work; we all know the end of the story: when the captain realised that a slight detour was not enough, it was already too late. The truth is that the ISDS boat is about to sink, and what we need to do to rescue it is not creating "ISDS 2.0", but a fully new operating system. That operating system is the EU proposal for a permanent investment court.

Now in the limited time I have I will recall the main features of the proposed permanent investment court and I will show how these features address the criticism against the current system.

What are the main features of the proposed permanent investment court? Number one: as we all know, a permanent court with two levels of adjudication. Number two: full-time adjudicators with strict qualifications and ethical requirements. Number three: an effective enforcement regime.

The starting point of the proposal is to replace the hundreds of *ad hoc* tribunals and arbitrators by a permanent court and a limited number of judges. And here you will see that I have reproduced a small table that compares the current

system with the proposed permanent investment court system.

So, what do we see? In the current system, we have hundreds of arbitrators who become *functus officio* at the end of each case, and who can take decisions diametrically opposed to the decisions of other tribunals applying the same treaties or very similar treaties. And why would they do that? Because, as we have seen this morning, there is no rule of precedent in investment arbitration. As a very eminent arbitrator stated – and I do not want to give any name so let us call her Professor Brigitte S., “Arbitrators have a duty to decide each case on its own merits independently of any apparent jurisprudential trend”. And she is right! This is the current system, but this is precisely the reason why, in the current system, you get inconsistent decisions which are completely unpredictable.

And it is true – I agree on this with Professor Schill – that there are variations in language from treaty to treaty, and a permanent investment court will not solve that difficulty. And indeed we do not want a court that legislates for the States, but this is not what the proposal for a permanent investment court implies. What the permanent investment court is intended to solve is the inconsistency between decisions of tribunals applying the same treaty or similar provisions in similar treaties. And Mr Matthew Gearing this morning gave us a few examples: the umbrella clause, for instance, but there are many others. To use the words of Mr Matthew Gearing himself, it is because of these decisions that everyone’s confidence in the system has been eroded. So in the new system, these types of inconsistent decisions are much less likely to occur, with a number of judges that will be much more limited, and who will be bound by a sense of continuous collegiality.



Inconsistent decisions are even less likely to occur than another major proposal of the permanent investment court is to introduce an appeal mechanism, precisely to ensure the consistency and correctness of decisions. Now critics of the proposed investment court say, and I am sure Professor Stern will say that, “Well, wait a minute, if you introduce an appeal mechanism, it will take twice as long and it will cost twice as much”. And here I say, “No, it will not”. For three reasons: number one, because in the current system, there is already a possibility of annulment. As we all know, annulment proceedings take a lot of time, and they will be replaced by the appeal mechanism in the new system. Number two, because, in the proposed system, appeals will be limited to errors of law or manifest errors of facts. In other words, there will not be any *de novo* review of the facts. Number three, and perhaps most importantly, because the new system will generate consistency and predictability, and therefore reduce costs. Today, because there is no rule of precedent and there is no jurisprudential trend, counsel in investment arbitration cases have to raise every single possible legal argument before the tribunal, because you never know whether your tribunal will rule on the relevant legal issues in the same way as other tribunals. If we have a system in which important legal issues are settled once and for all, counsel will not need to repeat the same arguments again and again.

In the current system, there are also no or only a few mechanisms to avoid parallel proceedings. This is the reason why, in a case like *Ampal v Egypt*, where the claimant commenced five different proceedings against the State based on different instruments, the parties had to re-plead the same arguments five times. Same lawyers, same witnesses, same experts five times – what an incredible waste of time

and costs. In the new system, that will no longer be possible. Finally, the new system will also prevent frivolous claim. So, we submit that this new system obviously offers enormous advantages in terms of consistency, coherence and predictability, as well as it will reduce the costs, number, and duration of proceedings.

Turning now to the second main area of criticism against the current system: the arbitrators themselves. Here we are touching upon a fundamental difference between commercial and investment arbitration. While in commercial arbitration, decisions of arbitrators only affect private parties; in investment arbitration they can affect hundreds, thousands or millions of people. And therefore, what matters is not so much whether the arbitrators are impartial and independent, but whether they are *'perceived'* as being impartial and independent by the people affected by their decisions. As the chief justice of the English courts said in 1924, "Justice should not only be done but should manifestly and undoubtedly be seen to be done". So, to respond to the earlier comments of Professor Stern, the problem is not so much that there is a small elite of arbitrators deciding all cases, who will be replaced by an equally small number of judges; the problem is that arbitrators in the current system are perceived as not being impartial by the people.

Whether we like it or not, there is a widespread perception, among the public, that arbitrators involved in investment arbitration lack impartiality, that they are not sufficiently qualified in matters of public international law, and that they are chosen among a very small elite group of white European males. This is no longer sustainable, and creating yet another code of "Ethics 2.0" will not solve the problem. What we need is something fundamentally new that will,

at the same time, address that criticism and send a strong message to the public in order to address the legitimacy crisis. This is the proposed permanent investment court. You see that, in the current system, double hatting is allowed. This will be abolished by the permanent investment court, with no external activities allowed for judges. In the current system, remuneration of arbitrators depends on the number of cases and therefore, the more cases they get, the more money they earn. This will also no longer be possible in the permanent investment court system, which provides for a fixed remuneration of judges, independent from the number of cases they will be assigned to. In the current system, the appointment of arbitrators depends in large part on parties and counsel decisions and, therefore, arbitrators are under pressure to secure repeated appointment. This again will be abolished in the new proposed system, since the proposal for a permanent investment court provides that judges will benefit from a non-renewable, long-term and secured tenure.

Now we have heard some critics argue that the new proposed investment court will be biased towards States, since States will be appointing all judges, but that is a misconception. It is true that a State, at the time it becomes respondent in a specific dispute, might have an interest in appointing an arbitrator who is perceived as pro-State – rightly or wrongly. But that is not the case at the stage of the appointment of permanent judges on the proposed permanent investment court, because at this stage, a State will not know whether it will be respondent in an arbitration, or whether its investors will be claimants in an arbitration. Therefore, when a State appoints permanent judges, its interest is to appoint judges who will be neutral and might rule equally in favour of the State if it becomes respondent in an arbitration, or in

favour of the investor if one of its investors becomes claimant in an arbitration.

Finally, in the current system, there is no strict requirement for arbitrators to have public international law qualification or experience. There will be strict qualification requirements and screening in the proposed investment court system. To respond to the criticism we have heard this morning that judges appointed to the future proposed investment court will be retired, incompetent diplomats, and that the appointment process will be politicised – that is not necessarily the case, and there are effective ways of preventing the politicisation of the appointment of judges. Look at other courts like the International Criminal Court; look at the ICJ. Who would argue that the ICJ judges are incompetent and cannot act as arbitrators in investment arbitrations? They are in fact so competent that they are frequently appointed by parties in investment arbitrations, so frequently that the ICJ has just issued a regulation preventing them from doing so. So, it seems that judges appointed by States on permanent courts are very well appreciated by the parties in investment arbitrations.

Now my final point is of course diversity. We have talked a lot about diversity this morning. In the current system, as we have seen, there is very little incentive for parties and counsel to promote diversity. Now just like the ICJ, the proposed permanent investment court will require that judges be elected based on equal representation of legal system, geographic origin, age and gender.

We submit that all of these changes are the solutions and the only solutions to the concerns surrounding the perceived lack of impartiality, qualification and diversity of arbitrators.

And I must say that they also address concerns regarding the costs and duration of proceedings. Why? Because today a significant amount of time and costs are spent on the appointment of arbitrators. It takes on average between five to nine months to do so, and it represents a significant amount of costs because, as part of the due diligence process, counsel will make sure to read all writings of the prospective arbitrators, to try and assess whether they are suited for the case. This is what Ms Meg Kinnear called “the gamesmanship” earlier this afternoon. Let us take an example: imagine that you want to appoint Professor Schill as an arbitrator in your case. You will have to go to the website, download all 184 publications of Professor Schill in English, in German and in Spanish, and read them. If you want to appoint Professor Stern as an arbitrator, it is even worse, you will have to go to the website of the Panthéon-Sorbonne University and download her 207 publications, and 157 of which are in French. You can imagine the amount of costs it represents for counsel to go through all these publications. Well, you will not have to do all that when Professor Schill and Professor Stern are appointed as judges to the new permanent investment court.

Now last but not least, I want to talk about enforcement. Professor Schill raised a number of issues concerning enforcement and here, for the lack of time, I will refer to the presentation of Professor Albert Jan van den Berg this morning which also listed concerns regarding enforcement. And we saw with Professor van den Berg that none of these concerns is actually insurmountable. The permanent investment court can be considered as a permanent arbitral body for the purposes of the New York Convention, and national awards can be enforced, etc.

What I want to point out now, however, is another major drawback of the current system that relates to enforcement, which the permanent investment court system might solve, namely difficulties of enforcement arising from State immunities. Even under the current ICSID system, in which the recognition and enforcement of the awards in national courts is not necessary, the ICSID Convention expressly preserves the States' immunities of execution. This makes enforcement of awards against States extremely difficult when States do not want to voluntarily comply. Take the example of this man: his name is Frank Sedelmayer. Mr Sedelmayer had won an award against the Russian Federation, which the Russian Federation refused to pay. It took him sixteen years and eighty proceedings in various countries to recover USD 10 million. At least he recovered them, that is why he looks so proud in the picture. But take the other example of this company called Noga: it was a Swiss company which also had won two awards against the Russian Federation and again, the Russian Federation refused to pay. It took Noga twenty years and USD 40 million of legal fees to recover zero. And the company went bankrupt. That is a significant problem in the current system, which has been pointed out by a number of authors.

And again, I will not give any name but let us call this author the Dutch uncle. He said about this problem, "The rather shocking result in practice can be that a private party after having put all efforts in an arbitration against a State, and having obtained an award in its favour, finds himself unable to collect the money to which he is entitled under the award. If a State agrees to arbitration it is deemed to have accepted all its consequences including compliance with an unfavourable award. In the latter case, the State's assets, like assets of a private person, should be capable of execution. In other words,


waiver of immunity from jurisdiction should imply waiver of immunity from execution”. Part of the proposal for the permanent investment court is to have what they call an effective enforcement mechanism. The European Commission has not given any details as to how it envisages to do so, but one option would be to provide that member States of the permanent investment court undertake to waive their immunity of execution at the stage of enforcement. This would of course considerably reduce the costs and duration of enforcement proceedings.

To conclude this second proposition, I do not think anyone will be surprised by this, but I would like to give the floor to an author who summarised very well why a permanent investment court is an ideal solution to the global systemic and structural concerns surrounding the current ISDS system.


And this is what he said, “The creation of a permanent body could ensure the coherent and consistent application of international investment law, contribute to its further development, and help alleviate many of the other legitimacy concerns the present ISDS system has raised.”

This summarises very well what I have just argued. Now I will let you guess who this very enlightened author is – no one else than Professor Schill himself. Thank you very much.

Slide 1



Mapping  
the  
Way  
Forward




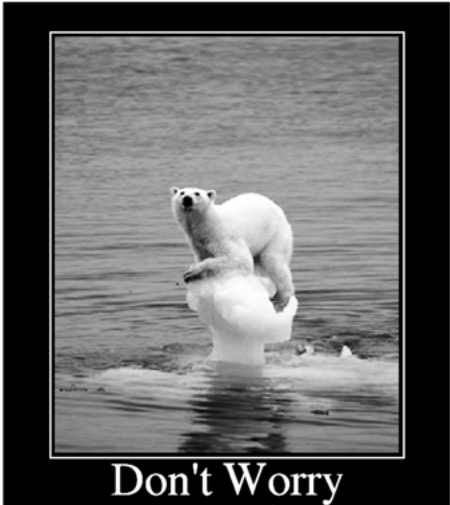
**The Permanent Investment  
Court system is the solution  
to the concerns over ISDS**

*Second Proposition  
For the Motion*

**Emmanuel Jacomy**

Slide 2

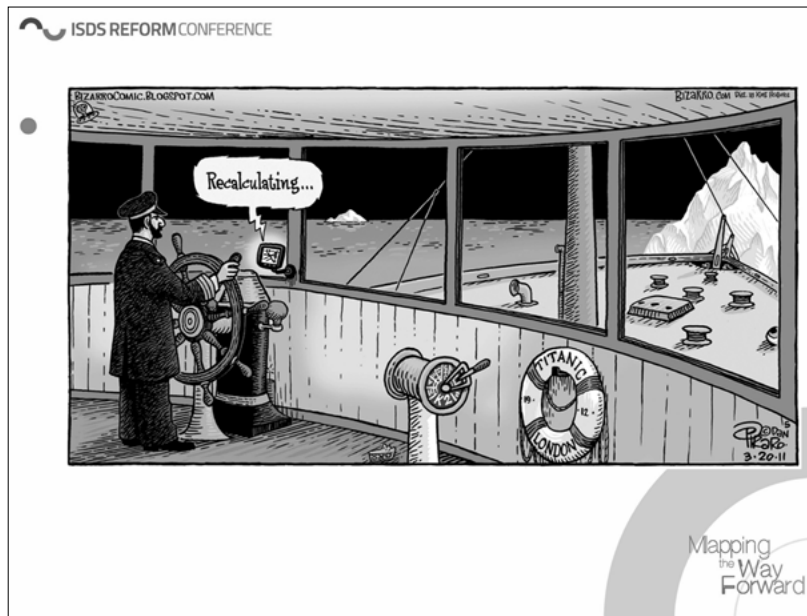




Mapping  
the  
Way  
Forward



## Slide 3



## Slide 4


ISDS REFORM CONFERENCE

## MAIN FEATURES OF THE PIC

1. **A permanent court with two levels of adjudication**
2. **Full time adjudicators with strict qualifications and ethical requirements**
3. **An effective enforcement regime**

Mapping the Way Forward

Slide 5




A PERMANENT COURT WITH TWO LEVELS OF ADJUDICATION

Current system	Proposed PIC
Ad hoc Tribunals	Permanent Court

How does it address the current concerns?

- Consistency, coherence and predictability



Slide 6




“[A]rbitrators have a duty to decide each case on its own merits, **independently of any apparent jurisprudential trend**,”

Professor Brigitte S.



Slide 7




### A PERMANENT COURT WITH TWO LEVELS OF ADJUDICATION


Current system	Proposed PIC
Ad hoc Tribunals	<b>Permanent Court</b>
Hundreds of arbitrators	<b>Limited number of judges</b>

*How does it address the current concerns?*

- *Consistency, coherence and predictability*
- *Cost and duration of proceedings*



Slide 8




### FULL TIME ADJUDICATORS WITH STRICT QUALIFICATIONS AND ETHICAL REQUIREMENTS

Current system	Proposed PIC
Ad-hoc arbitrators	<b>Permanent judges</b>

*How does it address the current concerns?*

- *Lack of impartiality, qualifications and diversity of arbitrators*



Slide 9




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“[J]ustice should not only be done  
but should **manifestly and  
undoubtedly be seen to be done**,,

Lord Chief Justice Gordon Hewart



Slide 10




-

**FULL TIME ADJUDICATORS WITH STRICT  
QUALIFICATIONS AND ETHICAL REQUIREMENTS**


Current system	Proposed PIC
Ad-hoc arbitrators	Permanent judges

*How does it address the current concerns?*

- Lack of impartiality, qualifications and diversity of arbitrators
- Cost and duration of proceedings




Slide 11



ISDS REFORM CONFERENCE

<http://www.uva.nl/en/profile/s/c/s.w.b.schill/s.w.b.schill.html>



Photographer: Jeroen Oerlemans

prof. dr. S.W.B. (Stephan) Schill

International and Economic Law and Governance  
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Public International Law

184

publications

Publications

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[academic \(31\)](#)

[professional \(3\)](#)


[popular scientific \(1\)](#)

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Mapping the Way Forward

Slide 12



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207

publications

PUBLICATIONS

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[\*] L'ouvrage indique une publication ou un ouvrage ou deux ou trois autres ouvrages désignés (ils concernent donc des publications ou des livres ou des autres ouvrages désignés)

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Mapping the Way Forward

Slide 13




- ### EFFECTIVE ENFORCEMENT REGIME


Current system	Proposed PIC
Recognition and enforcement subject to national courts for non-ICSID awards	<b>Stand alone review mechanism</b>
No waiver of immunities of execution	<b>Waiver of immunities?</b>


*How does it address the current concerns?*

  - Cost and duration of proceedings*




Slide 14




- 

# NOGA



Slide 15




- “ The rather **shocking result** in practice can be that a private party, after having put all efforts in an arbitration against a State and having obtained [an] award in his favour, finds himself unable to collect the money to which he is entitled under the award. [...]


If a State agrees to arbitration, it must be deemed to have accepted all its consequences, including compliance with an unfavourable award.

**If in the latter case it does not carry out the award, the State's assets, like assets of a private person, should be capable of execution.** In other words, waiver of immunity from jurisdiction should imply waiver of immunity from execution. This rule is nothing other than an application of the principle of pacta sunt servanda ”

**Professor Alfred van den B.**



Slide 16




- EFFECTIVE ENFORCEMENT REGIME**

Current system	Proposed PIC
Recognition and enforcement subject to national courts for non-ICSID awards	<b>Stand alone review mechanism</b>
No waiver of immunities of execution	<b>Waiver of immunities?</b>

*How does it address the current concerns?*

- *Cost and duration of proceedings*



Slide 17

 ISDS REFORM CONFERENCE

- “ The creation of a **permanent body** could ensure the **coherent and consistent** application of international investment law, contribute to its further development, and help **alleviate many of the other legitimacy concerns** the present ISDS system has raised ”



Mapping  
the  
Way  
Forward



Chin Leng Lim:

Thank you. I give the floor to Professor Stern from the Université of Paris I – Panthéon-Sorbonne.

Brigitte Stern:

Good afternoon. I feel myself in a very odd situation. Usually, I'm quite in favour of change, improvement, innovative solutions, but here today I'm compelled to argue – and argue very strongly – in favour of the *status quo*.

Before doing so, I just want to note that our opponents have defined ISDS – even comparing it to ISIS – but they have not given a name to the new institution. Some people name it PIC, Permanent Investment Court; some people name it MIC, Multilateral Investment Court. So, we could call it PICMIC maybe or why not 'Fifteen-Headed Hydra', as suggested by my colleague Charles Brower.

That being said, my distinguished colleague Stephan Schill has brilliantly and quite convincingly argued that PICMIC will be very difficult to emerge, as it faces a lot of problems, one of them being that such institution is not politically widely accepted outside the EU. And so it doesn't appear to have worldwide legitimacy. For my part, I will try to show that even if the PIC were to happen, probably not in the near future – sorry for UNCITRAL – it would not cure the alleged defaults of the present ISDS system.

Why is that so? For two main reasons: first, because some of the alleged defaults are inexistent and therefore do not need to be cured; second, because some of the alleged defaults will not be alleviated by the PIC and might to the contrary even be aggravated.

To begin with some flaws that are alleged, but do not exist

in my view, I will argue that some critics are quite disconnected from reality and therefore do not need to be corrected by the installation of a PIC. We are here in the era of post-truth which is even worse than the era of fake news. In the era of post-truth, objective facts are less influential in changing public opinion than appeals to emotion and personal belief. In our post-truth era, two ideas are widespread: ISDS is against democracy; ISDS is against transparency.

Let's first look at the idea that ISDS is against democracy. I will give you here an interesting example of the systematic criticism of investor-State arbitration by NGOs totally disconnected with objective reality. I will read for you the title and some extracts from an article published after the release of an arbitral award, by a tribunal on which I was sitting, *Pac Rim v El Salvador*, concerning a gold mine in the country. Of course, when you do gold mining you use cyanide, which might create water pollution. Therefore, El Salvador has ended the investor's mining licenses in order to protect the population and the environment.

Let's now look at the mentioned article from an NGO. First the title: "There Are No Winners: Investor-State Arbitration Is Against Democracy". That's the title of the article. Then, some extracts: "Civil society groups world-wide that have allied with Salvadorian Community, an organisation working on mining and environmental issues, reacted to today's decision by the controversial ICSID. Regardless of the outcome, the arbitration has had a chilling effect, what we have now is a clear example of what is wrong. El Salvador's experience confirms a threat to human rights and environment that occur when a corporation brings a suit to ICSID. El Salvador had to pay more than USD 12 million to defend itself". So, according to you, who won?

Who do you think won in this case? If you read this you have the impression that the investor using cyanide won, but it's completely wrong, El Salvador had a full win in the case, which means that El Salvador's policy of protecting the population and the environment was upheld by the tribunal. Moreover, there were also fake news in this article, because it said that El Salvador had to pay its expenses while in fact the tribunal ordered the investor to pay the legal costs of the country. So, it's completely wrong and what I would like to convey here, is that quite often criticism against investment arbitration, is not rooted in reality but in rhetoric and ideology. States today are more or less adopting discourses that are the same as those of NGOs without necessarily analysing the objective situation.

Second idea widespread in this era of post-truth, ISDS is against transparency. It might have been true some time ago, but now transparency has made its way in ISDS. The intervention of *amicus curiae* in international economic law is continuing to grow even in commercial disputes and of course in disputes between foreign investors and States.

I can remind you the genesis of this, the dispute settlement mechanism of WTO has started and first opened the door to people by accepting *amicus curiae* briefs to be presented in the famous *Shrimps–Turtles* case in 1998. The pebbles thrown in international waters by WTO have then developed in concentric waves, first North America Free Trade Area (NAFTA), now ICSID. Indeed, an arbitration tribunal in the framework of NAFTA, in the *Methanex* case against the United States, accepted *amicus curiae* just in 2000 and so did a tribunal in 2001, in another NAFTA case, *UPS v Canada*. This new approach was confirmed by the awards rendered by an ICSID arbitral tribunal in 2005 in two

related cases: *Aguas Argentina* and *Aguas de Santa Fe*, both cases against Argentina. And it is worth noting – that’s quite interesting I think – that it took less than a year from the first decision of an ICSID tribunal accepting the principle of *amicus curiae* to take shape in a new rule in Article 37 of the new ICSID rules adopted in 2006. I think it is also interesting to note that this development shows the subtle interplay between arbitrators and States. Arbitrators sometimes, I mean when a rule is very clear, have just to apply the rule. But when there is a space for innovation, arbitrators might innovate, and then States might accept the innovations. This is what happened with *amicus curiae*.

In other words, present-day system is quite transparent. However, I would also like to add something: in my experience, although intervention of civil society into the hearing room was a fierce fight, now that the fight is won, transparency doesn’t interest people anymore. It’s like the forbidden fruit whose taste disappears when it is no longer forbidden! I can testify of the disinterest of the friends of the arbitral tribunal, in showing you a picture [*A picture of a room full of empty chairs is projected on the screen*]: that’s the room prepared for the *amici curiae*, for the friends of the court, next to the hearing room in an arbitration in which I was sitting, so that they could follow the debate. And you see, this is the stunning picture of the interest in transparency; because nobody was there, the room remained empty.

These two first inexistent critics having been eliminated, let’s turn to some critics that might be justified but which the PIC will not alleviate.

I’m not going to speak about costs. The costs are the costs of the lawyers; the costs of the arbitrators compared to the lawyers are very small. The court will have no influence on

the costs of the lawyers. I'm not going to speak either about enforcement because ICSID arbitration has the most efficient system for the enforcement of awards, because they are like judgments in all the countries having ratified the ICSID Convention: you don't even need *exequatur*; how can one find a more friendly enforcement mechanism?

I will deal with other often heard critics, the restricted number of arbitrators, political bias of arbitrators, and inconsistency of awards.

Concerning the restricted number of arbitrators, well, I think this is a normal result from the existing system. There are a limited number of States, and there are not so many experienced arbitrators dealing with this kind of disputes. Let's say one hundred for example. The critics of the system say, the same arbitrators should not be repeatedly nominated. It is just like asking two tennis players in the top ten, say Nadal and Federer, not to play against each other more than once. Or it's just like asking Argentina which was faced with more than fifty arbitration cases after the 2000 economic crisis to choose fifty different arbitrators, while facing always the same arbitrator on the claimant's side. Would a PIC solve the problem of the small number composing the group of busy arbitrators? I think the answer could be given by one of my grandchildren, probably the three-year-old one, who would just say, "But Mamy, fifteen is much smaller than one hundred, you don't know that?"

Concerning now political bias, the critics of the system often say that arbitrators are more or less politically oriented. I think this argument is based on an unarticulated but quite present premise that an arbitrator nominated by a party is not truly impartial. My answer is that experienced and reputable international arbitrators are impartial and

independent. And if they are not, they quickly lose their reputation and cease to be interesting potential nominees for well advised parties.

Even if it were true that arbitrators are politically oriented, how would a court composed of judges exclusively nominated by States alleviate this? I consider that it would even aggravate the situation, because States would nominate what I would call “institutional people”. But some people are not institutional people; some people are just what we would call in French *‘des électrons libres’* [In English: free riders]. Such kind of person would never be nominated by States to the PIC, although they are, in my view, quite essential to the diversification of points of view and bringing richness to the debate.

Last but not least, our opponents have insisted very much on the existence of contradictory decisions. But, life is not *‘un long fleuve tranquille’* [In English: a long and calm river]; life is full of contradictions, they only disappear with death. I think the pursuit of some coherence is justified. However, the best way to reach such a goal is through a dialectic approach to overcome the contradictions. The present system allows this. There are indeed only a few existing cases of fundamental contradictions. But contradictions can be addressed by dialectic and there is today a cross-fertilisation among different positions. In the long run, the inconsistencies are resolved in favour of the best approach. This arbitral process of converging by emerging consensus is tailor-made to fit with the evolutionary character of international law, especially investment international law.

As a result, it may better serve the interest of the stakeholders, foreign investors and States, not to quickly set in stone case law solutions that may later prove inappropriate (which is a

problem that might well happen with a standing body). In other words, how would a permanent court deal with coherence? I can admit it might be more coherent but not necessarily more just. What do I mean when I say that? Well, if the first decision of a permanent court on an issue is wrong, then such decision has a good chance to be repeated by the same court and thus the decision will be coherently wrong or wrongly coherent for a certain time.

I hope that you are now completely convinced that the PIC will not solve any supposed default of the present system of ISDS. I insist and repeat that the PIC solves nothing. The present system works efficiently. The present system – I say it again – works quite efficiently and it would be a much better policy not to throw out the baby with the bathwater. Lots of babies have been thrown out today, but it would be more useful to try to bring about some marginal ameliorations – and the work of ICSID in proposing new rules goes in this direction – to ameliorate the system which exists rather than to throw everything out, in order to create a new system with lots of new problems.

Before I conclude, I want to take a last example to illustrate why an international court will not be the universal panacea that our opponents pretend it to be. We have heard several times today – many, many times in fact – that one of the criticisms against the system is the so-called double hatting of some arbitrators. [*Professor Stern puts a hat and then a cap on her head.*] Now, I ask you to close your eyes – for five seconds. Now you can open your eyes. [*Professor Stern wears a judge's wig.*] So, do you think that if one wears a judge's wig, better justice will be rendered?

Thank you very much.

Chin Leng Lim:

You can't imagine the amount of work the speakers have put into this. So, ladies and gentlemen, please join me in thanking Professor Shan, Professor Schill, Mr Jacomy and Professor Stern. Thank you very much to all of you.





**CLOSING**

## Closing Remarks

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### **Teresa Cheng GBS SC JP**

**Secretary for Justice**

Hong Kong Special Administrative Region of the People's Republic of China

Ms Teresa Cheng, SC, is the Secretary for Justice of the Hong Kong Special Administrative Region. Prior to her appointment as the Secretary for Justice, Ms Cheng was a Senior Counsel in private practice, a chartered engineer, a chartered arbitrator and an accredited mediator. Apart from being a Past Chairperson of the Hong Kong International Arbitration Centre, Ms Cheng is also a Past President of the Chartered Institute of Arbitrators, Past Vice President of the International Council of Commercial Arbitration and Past Vice President of the ICC International Court of Arbitration. Ms Cheng served as Deputy Judge/Recorder in the High Court of Hong Kong from 2011 to 2017. Besides, Ms Cheng is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators and was a member of the World Bank's Sanctions Board.

Thank you very much. What a wonderful event and I must say I enjoy the debate and every wisdom that has been shared by the distinguished speakers throughout today's conference.

Let me start by looking at it in this way, can we map the way forward for ISDS reform? I will do my best now to try and see, from the discussions today, whether there are ideas on the way forward. I shall start with the session on investment mediation and refer to the excellent speeches from Professor Jack Coe and Professor Lucy Reed, and bring together a few points that I would like to share. The first thing is the number of mediators. The shadow mediator mechanism suggested by Professor Coe is possibly a very good idea, because I will compare that with the umpire in arbitration, especially in the case of maritime arbitration, where you have an umpire who will never have to write the award unless the other two arbitrators do not agree with each other. So, shadow mediator mechanism may be something that we can develop. How to structure the process of merging mediation with arbitration, the timing of mediation, how mediation can become institutionalised and the development of a mediation protocol are, I think, matters worth looking into.

Because of the scope of the dispute settlement system under ISDS, one is looking at not just arbitration, but also mediation. Let us first talk about the 'objective fact'. Unfortunately, the 'objective fact' has been developed in a way that most arbitrators may think the concerns over ISDS are not accurate. Yet, the perception over such concerns will nonetheless have to be addressed. So, I think investment mediation is actually a very important way forward for ISDS reform.

Both Professor Coe and Professor Reed have pointed out the importance of training, and training not just on mediation skills but also on international investment law. In this regard, I have

to say that we have taken up that challenge last year by organising the first course in Asia on international investment law and investment mediation in Hong Kong. We look forward to working with ICSID and the Asian Academy of International Law again on organising such training in the future. Investment mediation is a very important feature if we are to give ISDS a new life and a new look, something that may have been overlooked in the past.

Then we move on to investment arbitration. In my view, investment arbitration has actually been under a lot of unfair criticisms. I entirely agree with Professor Brigitte Stern's view that some of the concerns over ISDS are not really true. Nonetheless, that is a perception battle that has unfortunately been lost. So, how do we deal with it? I start by reminding myself that, flexibility is a very important feature of arbitration. There are a lot of things that can be done during arbitration or in the institutional rules to address some of the concerns over appointment of arbitrators. Ms Meg Kinnear has, in her presentation and in the discussions in the Davos-style session, highlighted a number of ways through which the concerns over arbitrator appointment can be addressed. If there are things that can be done, that might address some of the criticisms over ISDS.

Indeed, from the discussions in the Davos-style session, we may wish to have another conference to specifically explore the issue of conflict of interest, because that issue has been talked about so much as if it is a day-to-day matter and arbitrator challenges are almost like a norm now. The issue of conflict of interest needs to be considered in a very systematic way and that is a subject which we may take up in a future conference, so that key issues including double hatting, and perhaps also the 'judge's wig', can be discussed.

Another issue on investment arbitration is the criticism over inconsistencies in ISDS awards, and I must say that the phrase

used by Professor Stern, “When contradiction stops, it is death”, is so correct. When you have two lawyers, you probably have three opinions. So, what is wrong with having some contradictions? Inconsistencies are actually not that bad. Just like in the common law system where you may have a dissenting opinion which later on becomes the law. Inconsistent decisions in investment arbitration may not necessarily give rise to a lack of rule of law, which is what we are talking about here, legitimacy. The situation of inconsistencies in ISDS awards may have been over-exaggerated.

Nonetheless, if inconsistencies in ISDS awards are indeed a problem, we have, in the session dealing with ISDS appeal, looked at the question of whether an appeal mechanism is a way to provide consistency and coherency of the legal results in ISDS. I thank the speakers for putting together a very informed discussion, which leads me to think that maybe if we have to adopt an ISDS appeal system, there may be a number of matters that we want to look into.

First, we should consider which body can implement the appeal system. There are suggestions of establishing a multilateral permanent investment court and setting up a permanent appellate body similar to the WTO Appellate Body – both require a lot of political will for entering into a new treaty to realise the arrangements. So, if we are looking at whether the establishment of an ISDS appeal is desirable and practical, reference should be made to the suggestion by Professor Albert Jan van den Berg that there may be a way out under the ICSID Convention, through an *inter se* amendment between two or more contracting States to the Convention. If ISDS appeal mechanism is something that we want to pursue, we may want to look into Professor van den Berg’s suggestion and see whether a practical and effective arrangement of ISDS appeal can be adopted, in order to address the comments of those who are concerned with inconsistencies in ISDS awards.

But I remind you all and I repeat what Professor Stern has said, “Do we want to be coherently wrong necessarily?” Sometimes it may be good to have some inconsistent results so that the majority decisions can be swayed gradually in another way. On the question of which body can implement the ISDS appeal mechanism, Professor van den Berg said it is doable via an *inter se* amendment to the ICSID Convention. So, we may want to look at ICSID as a potential body for the establishment of the ISDS appeal mechanism.

What about the appeal procedures and what about the grounds of appeal? When we talk about consistency, we are looking obviously in the context of treaty-based ISDS, thereby the applicable laws under the bilateral investment treaties. From that angle, I would like to perhaps draw an analogy from what Mr Matthew Gearing talked about in his presentation, in the context of what the English legal system has, and which, if I may add, Hong Kong also has, and that is appeal on points of law.

In order to avoid people delaying the process for resolving investment disputes, the appeal process should not be automatic or as of right. One should do what Section 69 of the English Arbitration Act or the opt-in appeal provisions under Schedule 2 to the Hong Kong Arbitration Ordinance does, that is putting in place a leave to appeal procedure under which the party seeking appeal will be required to first obtain the permission of the court before the court hears the appeal on points of law. So, you have a hurdle to overcome before the case goes to appeal. In other words, you have to satisfy the ISDS appeal body, either that ‘the arbitrator was so obviously wrong, so wrong that he cannot be right’ or alternatively in the English jurisprudence nowadays, something that amounts to ‘general public importance’ that needs to be looked at by this particular appeal body. I think that if we are to introduce an ISDS appeal system, the leave to appeal procedure is something that is

well worth considering. Otherwise, ISDS will become a prolonged procedure when cases are taken to appeal.

On the issue of ISDS appeal, one must consider whether national courts may not be the best place for the adjudication of the appeal cases for investment arbitration. Some national courts may not have given sufficient weight to the intention of the contracting parties to the treaty when interpreting it. Under international law, the intention of the contracting parties is critical to the interpretation of the treaty. As such, the ascertainment of the intention of the contracting parties to the investment treaties may be better left to people who, like our distinguished speakers in today's conference, are well versed with international law and work in the international regimes.

There are a lot of attractions in Professor van den Berg's suggestion on ISDS appeal, although I think Professor van den Berg has highlighted that he does not entirely agree to the view that something needs to be done on inconsistencies in ISDS awards and, indeed, he has also identified a number of technical difficulties involved in the establishment of an ISDS appeal mechanism.

Now, another topic on ISDS reform that is also interesting and it is third-party funding. Professor Julian Lew has highlighted a number of questions that have to be asked in the context of investment arbitration. Hong Kong is starting to implement a new code of practice for third-party funding of arbitration. We will no doubt be observing how the new code of practice operates. Yet, the implications of the practice of third-party funding in investment arbitration may well be different from those in the commercial arbitration scene. Of course, it is also necessary to consider the practice of third-party funding in the context of investment mediation.

Going back again to where I started my closing remarks,



that is investment mediation. Why can't we do something about investment mediation? One of the suggestions raised by the speakers was that, investment mediation mechanism should be provided in the investment treaties and the mechanism should have certain rules. Questions such as how we are going to ensure the suitability and qualifications of mediators for investment disputes have been asked. In this regard, reference can be made to the CEPA Investment Agreement between the Mainland China and Hong Kong, in which mediation is included as a dispute settlement option. A set of rules for investment mediation has been set out in the CEPA Investment Agreement. Those rules may not be perfect and that is why, I would like all of you to take a look at them, if you have time, and give us your feedback and suggestions. Nonetheless, the mediation rules under the CEPA Investment Agreement may serve as a model by which we can help develop the ISDS through the adoption of investment mediation model rules.

I hope I have at least provided a rough sketch of the way forward for ISDS reform based on the discussions today. Before I end my closing remarks, I have to thank the organisers, the helpers of the conference who have been running around and sorting things out, as well as the eminent and esteemed speakers for putting together not only informative, but also very entertaining and very witty discussions today. I think that the large number of audiences present in the conference room is a testimony to the excellence of the speakers and the impressive insights they have shared with us here. I am most grateful to each and every one of you for taking your time to come and share your wisdom with us here in Hong Kong. I will also say that from those wisdom, we are going to take the matter forward and see what we can do, together with the Ministry of Commerce and the Ministry of Foreign Affairs of the People's Republic of China, in participating further in the work of UNCITRAL Working Group III and, indeed, in looking at the overall ISDS reform in the bigger picture. Thank you very much.

# PAPERS

# The Future of Investment Dispute Resolution in the Light of the EU Proposal for a Multilateral Investment Court and the CJEU Judgment in *Achmea*<sup>1</sup>

Judge Christopher Vajda<sup>2</sup>

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1 Speech delivered on 30 October 2018 at the Asian Academy of International Law, Hong Kong. Updated to include the Opinion of Advocate General Bot in Opinion 1/17 delivered on 29 January 2019.

2 Judge at the Court of Justice of the European Union. All opinions are expressed in a private capacity.

## I. INTRODUCTION

In accordance with general economic theory, bilateral investments create economic growth.

As their name suggests, Bilateral Investment Treaties (BITs) are Treaties between two or more States, aiming to facilitate cross-border private investments.

Let us take the example of the Comprehensive Economic and Trade Agreement (CETA), between the EU and Canada.

Imagine on the one hand a Canadian maple syrup producer. Maple syrup is made from the maple tree, the leaf of which figures on the Canadian flag. It is an extremely sweet delicacy, which typically goes with desserts. The production of maple syrup requires cold winters, which makes Canada the ideal place to produce it.

On the other hand, we have Belgium, a nation that is proud of its desserts like waffles. Typically, Belgians do not put maple syrup on waffles. They can buy it in shops, but it is rather expensive compared to domestically produced sugar or other sweet toppings.

Imagine now that our Canadian maple syrup producer wants to commercialise maple syrup in Belgium. In order to make it competitive with other typical waffle toppings, the company decides it will ship the syrup in bulk from Canada to Belgium first, and package it in Belgium.

So our Canadian producer decides to start building a packaging plant in a village called Pearville. Pearville is renowned for producing syrup made of pears, which, unsurprisingly, is a traditional topping on waffles. Half of the village works directly or indirectly for the pear syrup producer.

Although in the short run, the maple syrup packaging plant might provide for new jobs in the village, the inhabitants fear that consumers might prefer the exotic maple syrup to the ordinary pear syrup as

a topping for their waffles, leading to the decline of the pear syrup industry.

Under the pressure of the inhabitants, the mayor of Pearville therefore promises to do everything within his power to stop the Canadian producer from building a maple syrup packaging plant in the village. As such, he refuses to grant building permits, seeks to impose special taxes and even re-routes roads to make the site of the future packaging plant less accessible.

Our Canadian maple syrup producer is obviously not amused. How can it challenge such action? In front of a Belgian court, with Belgian judges, who might prefer pear syrup on their waffles? This is where BITs come in to protect private investments against discrimination or arbitrary treatment in the host country.

Traditionally, BITs provide for arbitration as a dispute settlement mechanism for investment disputes. Therefore, under a traditional BIT, our Canadian maple syrup producer could bring his case before an arbitration tribunal.

CETA foresees in a new form of investment dispute resolution. As such, it envisages the establishment of an independent and permanent investment court.

In this talk, I will first trace back the origins of arbitration as a form of investment dispute resolution. Subsequently, I will discuss the EU's approach to such arbitration, and briefly set out why it is such a sensitive issue. Finally, I will address the proposal to establish a permanent investment court.

## **II. INVESTOR STATE DISPUTE SETTLEMENT (ISDS)**

The idea to subject foreign direct investment disputes to arbitration originated in the 1960s.

The World Bank wanted to favour foreign direct investments in a context where new States emerged following their independence

from former colonisers.<sup>3</sup> As today, State sovereignty was a buzzword at that time. Proposing stringent rules on those new States to protect foreign direct investments seemed, as such, a bad idea.<sup>4,5</sup>

In that context, the World Bank's General Counsel Aron Broches came up with the idea, not to regulate foreign investments directly, nor to set up a new body to try investment disputes, but to facilitate the arbitration of such disputes.<sup>6</sup>

Under the rules of the International Centre for Settlement of Investment Disputes, or ICSID, if both parties agreed, the dispute would be removed from the host State's judiciary and be resolved by an arbitral scheme that would provide for the enforceability of the awards.

In other words, ICSID simply provides for a forum, and not the rules, for dispute resolution.

This solution suits both investors, since they avoid the risks of seeking to enforce their investment rights before a foreign court that might be hostile to their interests in case their investments go wrong, and States, since they do not see their sovereignty eroded by a foreign court.

Under the ICSID rules, the law applied by the arbitral tribunal will be agreed upon by the parties. In practice this will often be the rules

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3 See, for example, Resolution 1815 of 1962, Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations A/RES/17/1815 "1. Recognizes the paramount importance, ... of ... The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; The principle of sovereign equality of States."

See also, particularly in the context of investment law, General Assembly Resolution 1803 (XVII) which provides that States and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and that "Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution." For an overview of the legal interrelation between sovereignty over resources and the injunction against expropriation in the context of international investment, see Sangwani Patrick Ng'ambi "Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of *Lucrum Cessans*," *Loyola University Chicago International Law Review* (2015) 153.

4 Indeed, in 1964 the Supreme Court of the United States explained "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens" *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 428 (1964).

5 See Andreas F. Lowenfeld, "The ICSID Convention: Origins and Transformation," *The Georgia Journal of International and Comparative Law* 2009, 47.

6 Paper prepared by the General Counsel Aron Broches and transmitted to the members of the Committee of the Whole, SID/63-2 (18 February 1963) in *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention*, Vol 2 at 72-73.

which are foreseen in the BIT. In those BITs, we generally find the freedom from discrimination, protection against expropriation, and fair and equitable treatment.<sup>7</sup>

Moreover, the arbitrators are chosen freely by the parties but must meet certain standards of independence and impartiality.<sup>8</sup>

Decisions by the arbitration tribunal are called awards. These awards can only consist in financial compensation for losses incurred through unfair treatment by the host State. They can be reviewed for legality by a Committee upon appeal on essentially procedural grounds.<sup>9</sup> The merits of an award cannot, however, be reviewed by the Committee.<sup>10</sup>

Each contracting State to the ICSID Convention has the obligation to recognise the binding force of an award rendered pursuant to the Convention. Moreover, national judges cannot put into question the merit or legality of the award.<sup>11,12,13</sup>

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7 United Nations Commission on International Trade Law, "Settlement of Commercial Disputes: Presentation of a Research Paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a Possible Model for Further Reforms of Investor-State Dispute 'Settlement,'" 24 May 2016, A/CN.9/890, [12]; Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010).

8 Article 37(2)(a) ICSID. Note that in any case the arbitrators must possess the qualities in Article 14, see Article 40(2).

9 Article 52, Article 52(3).

10 Article 52(6).

11 Christoph Schreuer *et al.*, *The ICSID Convention, A Commentary* (2nd Ed., CUP, 2009), 1117.

12 SECTION 6 RECOGNITION AND ENFORCEMENT OF THE AWARD:

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

13 Christoph Schreuer *et al.*, *The ICSID Convention, A Commentary* (2nd Ed., CUP, 2009), 1140 "The Convention's drafting history show that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* of the forum may furnish a ground for refusal."

Those rules applied to investor-State disputes for the last 50 years.

In that regard, Investor State Dispute Settlement, in short ISDS, is essential to the EU, since the EU is the world's biggest recipient and source of foreign direct investments. Therefore, investors need to know they will be treated fairly, not face discrimination, be able to transfer funds freely, be compensated for any expropriation, and be able to enforce their rights. ISDS provisions are included in over 3,000 international investment agreements, and EU Member States are party to some 1,400.

Consequently, it was only a matter of time before the question was raised whether arbitration which involves or may involve EU law is compatible with EU law. In the following section I will discuss two important judgments of the Court of Justice of the European Union (CJEU). In *Eco Swiss*, the CJEU decided that an arbitration award involving a dispute between private parties could, subject to certain conditions, be acceptable under EU law. In *Achmea*, the Court decided that an arbitration award between two EU States under a BIT was not compatible with EU law.

### III. THE CJEU APPROACH TO COMMERCIAL ARBITRATION: ECO SWISS

The CJEU has accepted that the compatibility of a particular award rendered by an arbitral tribunal with EU law can be reviewed for its compatibility with EU law when a party seeks to enforce it before the national courts of a Member State.

*Eco Swiss* illustrates this approach.<sup>14</sup> At issue was a commercial dispute where one party (Eco Swiss) argued that a trademark licensing agreement had been wrongfully terminated by the other party (Benetton). The agreement provided that all disputes were to be settled by arbitration in conformity with the rules of the Netherlands Institute of Arbitrators. The final award granted Eco

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<sup>14</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269.



Swiss damages, which Benetton sought to have set aside in the national courts on the ground (which was not raised in the arbitration) that the underlying agreement was void because it was contrary to Article 101 TFEU.

Dutch law, however, provided that an arbitration award can be annulled only on narrow grounds, including if it is contrary to public policy.<sup>15</sup> The referring court was of the opinion that a breach of Article 101 TFEU did not necessarily entail a breach of public policy, such that it would not always be possible to set aside an award which gives effect to an anticompetitive (and hence void) contract. The CJEU, however, stressed that Article 101 TFEU is a “fundamental provision which is essential [...] for the functioning of the internal market”, the breach of which should therefore be considered a breach of public policy. As a result, a court, faced with an application for annulment of an arbitral award, “must grant that application if it considers that the award in question is in fact contrary to Article [101 TFEU]”.

The reason that lies behind the Court’s ‘indulgence’ is the fact that it is the *national courts* who bear the duty of ensuring any award they enforce is compatible with EU law.<sup>16</sup> As was crisply put by the Advocate General in *Eco Swiss* “the decision not to allow arbitrators to make references for a preliminary ruling under Article [267 TFEU] is in a sense ‘offset’ by the importance the Court attaches to judicial review of arbitration awards.”<sup>17</sup>

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<sup>15</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269, paragraph 7.

<sup>16</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269, paragraph 40.

<sup>17</sup> Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269, paragraph 30. The foundations of this approach can be traced back to the judgment of the Court of 23 March 1982, *Nordsee*, C-102/81, ECLI:EU:C:1982:107, para 14 :

If questions of [EU] law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award — which may be more or less extensive depending on the circumstances — and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

Of course, when the national courts are tasked with reviewing the legality of an award in light of EU law, this also preserves the CJEU's jurisdictional autonomy.<sup>18</sup> Any doubt on the proper application of the substantive law of the EU to the award may require a reference to the CJEU, as on the facts of *Eco Swiss*.<sup>19</sup> The CJEU is thus content with the possibility of the legality of an arbitral award being referred to them.

#### IV. THE CJEU APPROACH TO INTRA EU BITS: ACHMEA

Let us now turn to the second case, *Achmea*.

*Achmea*<sup>20</sup> involved an investment dispute in Slovakia. In 2004, Slovakia opened up the domestic market and allowed operators to offer private sickness insurance services. Following an abrupt change in Slovak legislation which reversed that liberalisation, Achmea sued on the basis of a Bilateral Investment Treaty (BIT) between the Netherlands and what is now Slovakia.

The BIT also provided for a dispute resolution mechanism, in Article 8. According to that provision, if amicable settlement was not possible, the case would be brought before an arbitral tribunal consisting of one member appointed by each party, and a president appointed by both those members. Under Article 8, both the Netherlands and the Slovakia were deemed to have consented to cases being brought against them in that arbitral body. Article 8(6)

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18 See judgment of 1 June 1999, *Eco Swiss*, (C-126/97, ECLI:EU:C:1999:269), paragraph 40: "[EU law] requires that questions concerning the interpretation of the prohibition laid down in [Art 101 TFEU] should be open to examination by national courts when asked to determine the validity of an arbitration award and that *it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling*" (Emphasis ours).

19 See, also, for example, judgment of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675); judgment of 10 February 2009, *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69); judgment of 13 May 2015, *Gazprom* (C-536/13, EU:C:2015:316); and judgment of 7 July 2016, *Genetech* (C-567/14, EU:C:2016:526).

20 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158.

provided that “the arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned ... other relevant agreements between the Contracting Parties ... the general principles of international law.”

The UNCITRAL arbitral tribunal, sitting in Frankfurt, concluded that “the imposition of the ban on profits and the ban on transfer of the portfolio were measures that self-evidently and unequivocally put [Achmea’s] investment into a situation that was incompatible with the most basic notions of what an investment is meant to be” and thus Slovakia was concluded to have breached the undertaking to ensure fair and equitable treatment.<sup>21</sup> Damages were awarded to Achmea.

Slovakia then argued that Article 8 of the BIT was contrary to EU law in the German courts. This question was referred to the CJEU. In particular, the German court asked whether Article 8 of the BIT was compatible with Article 267 TFEU and Article 344 TFEU which, as we have seen, provides that Member States will not submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.<sup>22</sup> The CJEU concluded that Article 8 of the BIT “has an adverse effect on the autonomy of EU law”.<sup>23</sup>

The CJEU began by recalling that an international agreement cannot affect the autonomy of the EU legal order. The EU legal order is autonomous from the law of the Member States and from

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21 *Ibid*, paragraph 281. It is also worth noting that, independently of Achmea’s action, the Slovakian law had been the subject of a successful constitutional challenge.

22 There was another question on whether the BIT was discriminatory and thus contrary to Article 18 TFEU in that it required Slovakia to provide protection to Dutch investors that it was not obliged to provide to other EU investors, but the CJEU did not answer this question.

23 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraph 59.

international law. That principle is enshrined in particular in the prohibition to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties, under Article 344 TFEU. The CJEU then noted that the arbitral tribunal was required to “take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties”. There was therefore a risk that it would be required to judge disputes of EU law, as EU is both “the law in force of the contracting party concerned” and a “relevant agreement between the contracting parties”.<sup>24</sup>

Then, the CJEU observed that the arbitral tribunal was not able to refer questions of EU law to the CJEU. That was because the arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia<sup>25</sup> and lacked the relevant links to those Member States.<sup>26</sup>

Moreover, the award of the arbitral tribunal was subject to limited review, based on the rules contained in the German Civil Code.<sup>27</sup> Article 8 of the BIT amounted to an agreement by the Member States to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.<sup>28</sup>

Consequently, EU law precluded a provision such as Article 8 of the BIT.

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24 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraphs 40 and 41.

25 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraph 45.

26 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraph 48.

27 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraph 53.

28 Judgment of 6 March 2018, *Achmea*, C 284/16, EU:C:2018:158, paragraph 55. The CJEU distinguished commercial arbitration from arbitration under BITs on the basis that the parties have voluntarily consented to such commercial arbitration.

## V. CRITICISM OF ISDS

Dispute resolution via arbitration has been criticised, among others, as undermining basic principles of democratic and public accountability, regulatory capacity, budgetary flexibility and judicial independence.<sup>29</sup>

Particularly controversial is the perceived loss of the right to regulate. The argument goes that arbitration allows big corporations to challenge rules of general application which have been adopted in the public interest, such as the environment, public health or social well-being. Even though the award can only consist in monetary compensation, States would be reluctant to regulate these fields out of fear for arbitration challenges. Therefore, they effectively lose the capacity to regulate to big corporations.<sup>30</sup>

An interest group cited a number of examples, such as the German law to phase out nuclear energy after the Fukushima nuclear disaster, compulsory health warnings on cigarette packets in Uruguay and Australia, or economic privileges granted to black people by the South African government to redress the inequalities created by the apartheid regime.<sup>31</sup>

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29 For a vivid example, see Gus van Harten, "Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP", *Osgoode Legal Studies Research Paper* No. 16/2016; see also, for sources and overview, K. Miles, "Investor State Dispute Resolution: Conflict, Convergence and Future Directions," (2016) *European Yearbook of International Economic Law* at p.287:

Criticism over the last 15 years has also been directed at aspects of ISDS that go beyond the substantive provisions contained within international investment agreements. It has extended to the procedural and institutional structures of investor-state arbitration, focusing on the lack of transparency, restrictions on public participation, arbitral practice, its commercial emphasis, and the lack of an appeals mechanism. The sum of these individual issues has pointed to fundamental systemic problems within ISDS, leading commentators to question the legitimacy of investor-state arbitration altogether.

30 See the interesting discussion in David D. Caron and Esme Shirlow, "Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences," in Geir Ulfstein and Andreas Follesdal (eds), *The Judicialization of International Law - A Mixed Blessing?* (Oxford University Press, Forthcoming), retrievable from <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2834000](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834000)>. See also the blog-format of the full article here: <<http://www.ejiltalk.org/unpacking-the-complexities-of-backlash-and-identifying-its-unintended-consequences/>>:

There is an important and complex question of stating what the backlash is against. Is it against a particular tribunal, against investment arbitration generally, or is it against something else entirely? We suggest that in many cases, "backlash" may be directed at tribunals or arbitration as a convenient focal point, while the force motivating the backlash is prompted by something more diffuse. Tribunals may bear the brunt of backlash because they form a focal point for broader concerns ... there are complexities to backlash, and the investment arbitration mechanism may not in fact be the principal reason for the intensity of the backlash directed against it. The concerns are in part concerns about investment treaty arbitration, but they also reflect and manifest concerns that are deeper and broader.

31 P. Eberhardt, C. Olivet, T. Amos et al *Profiting from Injustice: How Law Firms Arbitrators and Financiers Are Fueling an Investment Arbitration Boom*, Corporate Europe Observatory (2012), 36.

[ICSID] is not fit for purpose in the 21<sup>st</sup> century. I want the rule of law, not the rule of lawyers. I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate.<sup>32</sup>

She equally criticised the absence of possibility to appeal errors of law or fact, the lack of legitimacy, accountability and transparency and that the fragmented system has no coherent multilateral rules on investment protection, nor any permanent structure to resolve investment disputes.<sup>33</sup>

Other commonly made criticisms include that certain arbitrators, chosen by an undertaking or a Member State would, in order to be reappointed in subsequent arbitrations, be biased towards the entity that appointed them. Moreover, the system of ad hoc arbitration is generally conceived to be slow and costly.

This led the Commission to propose a new form of dispute resolution mechanisms in its recent trade agreements, such as CETA.<sup>34</sup>

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32 Cecilia Malmström, "Investments in TTIP and Beyond – Towards an International Investment Court", Blog Post of 5 May 2015. Retrievable here: <[https://ec.europa.eu/commission/2014-2019/Malmström/blog/investments-ttip-and-beyond-towards-international-investment-court\\_en](https://ec.europa.eu/commission/2014-2019/Malmström/blog/investments-ttip-and-beyond-towards-international-investment-court_en)>.

For balance, I add that Judge Stephen Schwebel, in a speech entitled "The Proposals of the European Commission for Investment Protection and an Investment Court System" given in the United States on 17 May 2016, responded as follows, "The extensive Concept paper attached to [Commissioner Malmström's blog] cites no case illustrative of the rule of lawyers, and no case where the State was forced to change legislation.... If there are awards sustaining the investor's "expectations of profits" they are not cited in the EU's papers". Judge Stephen Schwebel has served both as a judge (World Bank Administrative Tribunal, International Monetary Fund Administrative Tribunal and International Court of Justice) as well as an arbitrator (permanent Court of Arbitration and a plethora of private arbitrations).

33 Cecilia Malmström, "The Way Ahead for an International Investment Court", Blog Post of 18 July 2016/ Retrievable here: <[https://ec.europa.eu/commission/2014-2019/Malmström/blog/way-ahead-international-investment-court\\_en](https://ec.europa.eu/commission/2014-2019/Malmström/blog/way-ahead-international-investment-court_en)>.

For balance, I refer to Sophie Nappert, "Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism", delivered on 26 November 2015 in London for the 2015 EFILA Inaugural Lecture; Gloria Maria Alvarez, Blazej Blasikiewicz and others, "A Response to the Criticism Against ISDS by EFILA", (2016) *Journal of International Arbitration*, 1-36.

34 As put in the Commission Concept Paper, *Investment in TTIP and Beyond – The Path for Reform*, retrievable here <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)> "The proposals outlined above are intended as the stepping stones towards the establishment of a multilateral system ... the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system". Thus, this new era of treaty making has mostly been heralded by modifications to the TTIP draft, and the inclusion of more refined dispute settlement provisions in contemporaneous Treaties like CETA, with Canada, and the EU-Vietnam FTA. It is worth pausing at this point and noting that the full ideal of the Commission's reforms has not yet seen light; but the existing and forthcoming Treaties nonetheless take steps forward in that direction.

## VI. THE DRM IN CETA: A BLUEPRINT FOR THE FUTURE

The DRM for investment in CETA is found in section F of Chapter 8. Under Article 8.19 a dispute should be settled amicably if it is possible to do so, and provision is made for a consultation period to work out any differences. Further, mediation may be resorted to at any time in the dispute resolution procedure (Article 8.20). If the dispute has not been resolved within 90 days of the submission of the request for consultations (Article 8.21(1)), the investor may submit a notice to bring his claim.

A claim may be submitted under ICSID rules, or other arbitral rules specified in Article 8.23(2), to the CETA Tribunal on condition that the investor waives the right to bring the dispute before another international or national tribunal, and desists from any existing claims (Article 8.22(1)(f) and (g)). The Tribunal consists of fifteen members, five EU nationals, five Canadians and five third country nationals (Article 8.27(2)) who, like judges at the CJEU under Article 255 TFEU, possess the qualifications required in their respective countries for appointment to judicial office, and, in addition, demonstrate expertise in public international law. They are appointed for a five-year term renewable once. The Tribunal sits three-strong (Article 8.27(6)), with one Member for each of the sub-group of five, although there is the possibility of a Tribunal comprising only one Member being a third country national, particularly where the investor is a small or medium-sized enterprise (Articles 8.23(5) and 8.27(8)). The President is chosen by lot from the third country nationals, and the Members shall be paid a monthly retainer fee to ensure their availability.

There is also an Appellate Tribunal with the power to review awards rendered by the Tribunal. The grounds of review are to be found in Article 8.28(2) which allow for review on all of the bases

of annulment in ICSID, *and* errors in the application or interpretation of applicable law, and manifest errors in the appreciation of the facts, including the appreciation of domestic law.<sup>35</sup> The parties commit, in Article 8.29, to the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes with trading partners, with a view to the hearing of disputes under this section by that body when established.

There is an explicit code of ethics in Article 8.30 which refers to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, and further provides that upon appointment, a Member shall refrain from acting as counsel or witness in any pending or new investment dispute. Challenges to the appointments can be made to the International Court of Justice.

There are also provisions on how the Agreement is to be interpreted. It must be interpreted according to Article 31 of the Vienna Convention on the law of Treaties, “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Furthermore, it is expressly stated that the Tribunal does not have jurisdiction to determine the validity of a domestic measure, and must follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party.<sup>36</sup>

To reduce the risk of what might be perceived as judicial activism, Article 8.31(3) provides that where “serious concerns” arise as in relation to an interpretation that may affect investment, the CETA

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35 CETA also makes provision for administrative and organisational support for the Appellate Tribunal, with the details for the appointment of the Members of the Appellate Tribunal and its functioning left to be fleshed out at a later date.

36 Article 8.31.2; There are also provisions that prevent double-dipping, the practice of bringing simultaneous claims arising out of the same set out of facts in different arbitral or judicial fora (Article 8.22(1)(f) and (g)), and rules that establish the transparency of proceedings by providing open hearings and, in principle, the disclosure of documents (Article 8.36(1) and (5)). CETA also provides that the Tribunal shall order the costs of the proceedings to be borne by the unsuccessful disputing party.



Joint Committee may adopt interpretations of the CETA Treaty and may specify that a given interpretation may have binding effect from a specific date. The exercise of this power does not appear to preclude the giving of an interpretation *after* the Tribunal has made an Award or the Appellate Tribunal has rendered a review – effectively giving a non-judicial body the power to reverse a decision of the Tribunal or Committee – or during the review, giving the State Parties the possibility to interfere with the process.<sup>37</sup>

In terms of remedies, Article 8.34 allows for interim measures to protect the rights of disputing party. Damages awarded by the Tribunal must not be greater than the loss suffered by the investor, and, in any case, prohibits punitive damages (Article 8.39(3) and (4)).

The enforcement of the award depends on the arbitration rules which the parties have selected for the arbitration. If they selected ICSID, then the Tribunal award is enforced as an ICSID award (Article 8.41(6)). In any case the award is binding between the disputing parties and, subject to waiting periods to allow for revision, setting aside or annulment, the parties must swiftly comply with the awards.

Whenever the EU intends to conclude an international agreement, any Member State or EU Institution can request an Opinion from the CJEU on the compatibility of the agreement with the EU Treaties in advance of its coming into force.<sup>38</sup> Although it is termed an Opinion, the Opinion is binding upon the EU Institutions:

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37 Freya Baetens, "Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms", *Journal of International Dispute Settlement* 2016, 8(3)1, 14; Judge Stephen Schwebel, in a speech entitled "The Proposals of the European Commission For Investment Protection and an Investment Court System" given in the United States on 17 May 2016 retrievable here <<https://www.pdfsearch.io/document/New+York+City+Hall/InGuo-show/THE+PROPOSALS+OF+THE+EUROPEAN+COMMISSION+FOR+INVESTMENT+PROTECTION+AND+AN+INVESTMENT+COURT+SYSTEM+Remarks+by+Judge+Stephen+M.+Schwebel+of+May+17,+2016+at+Sidley+Austin,+Washington,+D.C>>.

38 Article 218(11) TFEU.

if the CJEU decides that the agreement is incompatible with the Treaties, the agreement cannot be ratified.

Belgium decided to invoke this procedure in respect of the validity, under EU law, of the chapter of CETA on dispute resolution. The CJEU is currently examining that request.

There are essentially two aspects to the request. First, although the CETA Tribunal would not be called upon directly to resolve a dispute pending before it in the light of EU law or to examine the validity of an act of the European Union, there is a possibility according to Belgium, that the Tribunal may have to decide how EU law is to be interpreted. For example, if an EU Regulation had not been the subject of interpretation by the CJEU, then the Tribunal would necessarily have to interpret that Regulation, even if only as a matter of fact. Belgium argues that this could be contrary to the autonomy of EU law, a point exacerbated by the fact that the CETA Tribunal would not be able to make a reference to the CJEU. The CJEU would not therefore have jurisdiction to give an interpretation of that Regulation. Secondly, Belgium argues that the CETA Tribunal is not a fully-fledged court compatible with the requirements of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Article 47 provides for access to an 'independent' tribunal as one of the requirements linked to the right to an effective remedy enshrined in that Article.

The hearing took place in June 2018. In his non-binding Opinion of 29 January 2019, Advocate General (AG) Bot considers that Section F of Chapter 8 of CETA, containing the ISDS provisions, is compatible with the Treaties and the Charter.<sup>39</sup>

So far as the claim under Article 47 of the Charter is concerned, AG Bot did not accept that the CETA Tribunal should be judged

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39 Opinion of Advocate General Bot in Opinion procedure pursuant to Article 218(11) TFEU, Opinion 1/17, EU:C:2019:72.

by the standards of a traditional domestic court within the EU which has fully to comply with Article 47. On the contrary, AG Bot considered that the Tribunal model adopted in the CETA Tribunal was a hybrid,<sup>40</sup> being a form of compromise between an arbitration tribunal and an investment court. AG Bot points out that the influence of the rules on investment arbitration is quite explicit, in particular on the submission of a claim to the Tribunal (Article 8.23), on the consent to the settlement of the dispute by the Tribunal (Article 8.25), on the enforcement of awards (Article 8.41), the remuneration of Members (Article 8.27.14) and the questions of ethics (Article 8.30.1). In the view of AG Bot, the CETA Model introduces a number of improvements as compared with the resolution of traditional investment arbitration.

The Opinion from the Court is awaited.

## VII. A MULTILATERAL INVESTMENT COURT

The EU does not want to stop at the solution proposed in the CETA agreement though. It would like to set up a permanent body to settle investment disputes, a Multilateral Investment Court.

Practically, it would like to convert the ad hoc system to be set up for CETA into a permanent Investment Court System.

Compared to arbitration, the CETA dispute resolution mechanism and, by extension, the Multilateral Investment Court system is intended to address many of the criticisms made against traditional investment arbitration.

As such, the Multilateral Investment Court system would be permanent and contain safeguards on the legitimacy, transparency and neutrality of the arbitrators. Through the establishment of a single Court, divergences in case-law are intended to be reduced,

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<sup>40</sup> Opinion of Advocate General Bot in Opinion procedure pursuant to Article 218(11) TFEU, Opinion 1/17, EU:C:2019:72, paragraph 242.

which would increase legal certainty. Moreover, the overall cost of arbitration is intended to drop, since the Court would be permanent. The Court's decisions would also constitute binding precedents. Appeals on all terms of the award would be possible, not just in respect of procedural rules as is the case for ICSID. Finally, the Multilateral Investment Court system would also be subject to transparency requirements such as the publication of all decisions and opening up the hearings to the public, which is intended to increase the legitimacy of its decisions.

In July 2017, the UN Commission on International Trade Law, UNCITRAL, agreed to discuss possible multilateral approaches to address ISDS reform. Time will tell whether the multilateral investment court will see the light of day.

## Investment Mediation

David Ng<sup>1</sup>

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## I. INTRODUCTION

1. Over the past two decades and a half, there has been a tremendous growth in international investment arbitration.<sup>2</sup> While there were only a few dozen investor-State dispute settlement (ISDS) cases back in 1992,<sup>3</sup> the total number of known ISDS arbitration cases as of December 2018 has already reached over 900 according to the figures in the Investment Policy Hub of the United Nations Conference on Trade and Development (UNCTAD).<sup>4</sup>

2. In recent years, ISDS mechanism has attracted much criticism (e.g. inconsistent treaty interpretation by ISDS arbitral tribunals, high cost and duration, perceived bias in arbitrator and etc.) and some have even gone so far to criticise ISDS arbitral tribunals as “secret court” and “kangaroo court”. As observed by Professor Jan Paulsson in his seminal article *“Arbitration without Privity”*, “[a]rbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash.”<sup>5</sup>

3. Amid the backlash against ISDS in which the legitimacy of such dispute resolution mechanism is called into question, the United Nations Commission on International Trade Law (UNCITRAL)<sup>6</sup> and various international organisations have embarked on projects to explore the possible reform of ISDS. Much of the focus of the discussion so far has been on investment arbitration and various systemic ISDS reform proposals such as the establishment of standalone appellate body and multilateral investment court have captured much attention in the debate.

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

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

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

5 Jan Paulsson, “Arbitration Without Privity”, *ICSID Review – Foreign Investment Law Journal*, Vol.10, No.2, 1 October 1995, pp.232-257, see p.257.

6 Please refer to the website of UNCITRAL Working Group III on ISDS Reform <[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)>.

4. While it is indisputable that some forms of reform are required for investment arbitration, one should not lose sight that there also exist other alternative dispute resolution (ADR) mechanisms for resolving disputes between host governments and the foreign investors, and a prime example of such ADR mechanisms is investment mediation.

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

## II. CONCEPTS ON INVESTMENT MEDIATION

6. Mediation is a traditional form of dispute resolution that has a very long history and can be traced back to the earliest history of mankind.<sup>7</sup> Such dispute resolution mechanism has existed as early as around 3,000 BCE, in Egypt, Babel, and Assyria.<sup>8</sup>

7. In China, the mediation system has always been an integral part of the ancient tradition of the Chinese legal culture and can be dated back to early ancient times around 4,000 years ago.<sup>9</sup> The non-adversarial nature of mediation is also in line with all the main schools of thoughts in China, namely, Taoism, Legalism, Confucianism and Mohism.<sup>10</sup> Some have even described the practice of mediation as the “Oriental Experience”.<sup>11</sup>

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

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*, see p.222.

11 Marieke Koekoek, *Mediation of Investor-State Disputes in China – Mediation as Complementary Method of Dispute Settlement Arbitration*, September 2012, available at <[http://www.academia.edu/3574985/Mediation\\_of\\_investor-State\\_disputes\\_in\\_China\\_Mediation\\_as\\_complementary\\_method\\_of\\_dispute\\_settlement\\_to\\_arbitration](http://www.academia.edu/3574985/Mediation_of_investor-State_disputes_in_China_Mediation_as_complementary_method_of_dispute_settlement_to_arbitration)>.

8. The core idea of mediation involves the use of a third-party neutral to assist the disputing parties in coming to a mutually agreeable solution.<sup>12</sup> As for the role of mediators, they do not decide cases for the disputing parties as they are neither judges nor arbitrators.<sup>13</sup> Instead, mediators work with the disputing parties, evaluating, facilitating and moving along the discussion about the matters in dispute and how best to resolve the conflicts.<sup>14</sup>

9. There are various styles and forms of mediation. While there have been some discussions as to whether conciliation is a process that is separate and distinct from mediation,<sup>15</sup> it appears that in light of the broad concept of “mediation” as described above, it is clear that conciliation would also be conceptually considered as a form of mediation.<sup>16</sup>

10. Two common forms of mediation are evaluative mediation and facilitative mediation.<sup>17</sup> In evaluative mediation, the mediator operates in an evaluative role, giving his or her opinion as to the relative strengths and weaknesses of the dispute and underlying defences.<sup>18</sup> Conciliation under the International Centre for

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12 Susan D. Franck, “Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide”, *ICSID Review – Foreign Investment Law Journal*, Vol.29, No.1, 1 February 2014, pp.66-89, see p.71.

13 *Ibid.*

14 *Ibid.*

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

16 In fact, the same views were held by Working Group II of UNCITRAL. In the report of Working Group II on the work of its sixty-eighth session (A/CN.9/934, para. 16), it is stated that [t]he Working Group took note of, and approved the replacement of the term ‘conciliation’ by ‘mediation’ throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (see A/CN.9/WG.II/WP.205, para. 5), which would be used when revising existing UNCITRAL texts on conciliation.” In paragraph 5 of Working Paper 205 of Working Group, it was explained that “ ‘Mediation’ is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term ‘conciliation’ with the understanding that the terms ‘conciliation’ and ‘mediation’ were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term ‘mediation’ instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications.”

17 See Franck (n 12), at p.72.

18 *Ibid.*



of Investment Disputes (ICSID) is a process that has elements of evaluative mediation.<sup>19</sup> Facilitative mediation, on the other hand, is interest-based. The mediator's role is to assist the parties in discussing their interests, needs and objectives with an eye to understanding where the parties may have shared objectives, interests and needs or otherwise share some common grounds.<sup>20</sup> The mediator does not give an evaluation of the strengths or weaknesses of the parties' cases or offer her opinion; instead, the mediator focuses on using the process to help the parties re-focus their problem solving, and to focus on future gains that parties can control, rather than the formal allocation of blame for conduct in the past that cannot be altered.<sup>21</sup>

11. That said, evaluative mediation and facilitative mediation are merely tools for mediators to deploy and are by no means the exclusive forms of mediation. If necessary, mediators may even use evaluative mediation and facilitative mediation in combination to assist the disputing parties in reaching settlements.

12. In fact, mediation is commonly found in the dispute resolution mechanisms in a wide variety of areas of international law. For instance, Article 33 of the Charter of the United Nations provides that:

[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration,

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

20 See Franck (n 12), at p.73.

21 *Ibid.*, see pp.74-75.

judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphases added).

The United Nations Convention on the Law of the Sea and its Annex V also allow its Contracting Parties to resolve their disputes through conciliation.<sup>22</sup>

13. On international trade and investment front, Article 5 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides for good offices, conciliation and mediation. It has also been reported that even before the creation of ICSID, investors and governments have requested the World Bank or its then President Eugene R. Black to perform conciliation and mediation functions, and one example is the 1958 dispute between Tokyo and French nationals who held bonds issued by the city.<sup>23</sup> Further, conciliation is also available under the ICSID Convention and there is a set of specific rules for conciliation under the auspices of ICSID.<sup>24</sup>

14. In a debate session of the Hong Kong Forum – 60<sup>th</sup> Anniversary of New York Convention co-organised by UNCITRAL, the Department of Justice of the Hong Kong Special Administrative Region and the Asian Academy of International Law on 20 September 2018, it has been said by a speaker that arbitration is “war” while mediation is “peace”. Such view may have been too binary on the relationship between mediation and arbitration. Moreover, in practice, it would appear to be unrealistic and undesirable

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

23 Gabriel Bottini and Veronica Lavista, “Conciliation and BITS”, in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)*, Brill | Nijhoff, 20 May 2010, see p.358. See also Frauke Nitschke, “The ICSID Conciliation Rules in Practice” (to be published in Forthcoming, “*Mediation in International Commercial and Investment Dispute*”, edited by Catharine Titi and Katia Fach Gómez (Oxford University Press)), available at SSRN: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3257031#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257031#)>, see p.1.

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

to advocate for the replacement of investment arbitration by investment mediation.<sup>25</sup> While investment mediation can function on a stand-alone basis, it is a flexible process in nature and can work with investment arbitration in a complementary manner.

### III. DISCUSSION ON INVESTMENT MEDIATION IN UNCITRAL WORKING GROUP III

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

31. ... there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration ...

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

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25 See Salacuse (n 15), at p.439, and Jack J. Coe, Jr, "Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch", *Journal of Transnational Dispute Management*, Vol.4, No.1, February 2007, see p.32.

26 UNCITRAL Working Group III Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session – Part I* (A/CN.9/930/Rev.1), see paras. 31-33.

16. Moreover, in the round-table session of the first inter-sessional meeting of UNCITRAL Working Group III held on 10-11 September 2018, the importance of the use of investment mediation for reaching amicable settlements was highlighted.<sup>27</sup> During the said round-table session, a number of delegations including China, the United States and the European Union have voiced support to strengthening the use of investment mediation and it has been suggested that further research should be done on two specific issues, namely: (i) the reasons for the under-use of investment mediation; and (ii) how to incentivise the disputing parties of ISDS to utilise investment mediation for dispute resolution.

17. In the annex to Working Paper 149 of UNCITRAL Working Group III for its thirty-sixth session (A/CN.9/WG.III/), investment mediation is listed as a reform option to address the concerns over lengthy and costly ISDS proceedings and to strengthen the existing ISDS mechanism.<sup>28</sup> During the thirty-sixth session of the Working Group III held in Vienna from 29 October to 2 November 2018, it is note-worthy that the Chinese delegation has made an oral intervention in relation to investment mediation<sup>29</sup> and mentioned that it will share further thoughts on investment mediation in the thirty-seventh session of Working Group III to be held in New York on 1-5 April 2019.

#### IV. THE CASE FOR THE GREATER USE OF INVESTMENT MEDIATION

18. As discussed above, investment mediation has the potential to be one of the possible reform options for Working Group III of

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27 UNCITRAL Working Group III Secretariat, *Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Korea* (A/CN.9/WG.III/WP.154), see para. 43.

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

29 UNCITRAL Working Group III Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session* (A/CN.9/964), see para. 118.

UNCITRAL. More importantly, the adoption of investment mediation as a reform option for ISDS is fully compatible to the other reform options that are mentioned in the Annex to Working Paper 149 of UNCITRAL Working Group III (A/CN.9/WG.III/), such as the introduction of appellate review mechanism for ISDS or even the establishment of a multilateral investment court.

19. As to be further discussed below, there is a convincing case to advocate for the greater use of investment mediation and the time is ripe to unlock the full potential of investment mediation to strengthen the legitimacy of the ISDS.

(i) **Many Benefits of Investment Mediation**

20. The benefits of investment mediation have been extensively discussed in academic literatures and various studies by international organisations.<sup>30</sup>

21. Investment mediation, at its core, is a kind of dispute resolution mechanism that emphasises harmony and achieving win-win situations for the disputing parties. It provides the host States and the foreign investors with a high degree of autonomy, flexibility and consensual resolution options in resolving investment disputes. Apart from allowing the disputing parties to control the mediation process,<sup>31</sup> investment mediation can facilitate the disputing parties to reach creative and forward-looking settlement arrangements that are based on the common interests and needs of the parties in dispute, with the assistance of professional mediators.<sup>32</sup>

22. Generally speaking, the remedies available under investment arbitration are limited to monetary damages (with any applicable

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30 See e.g. E. Sussman, "The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes", *Journal of Transnational Dispute Management*, Vol.11, No.1, January 2014.

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

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

interest) and restitution of property.<sup>33</sup> However, it has been observed that, for many ISDS cases, an award of monetary damages or even an injunction is often not the optimal solution. In the words of Professor J. W. Salacuse, whereas an arbitration award is a “*one-dimension solution*” to a problem, a mediated solution to a conflict is often “*multidimensional*”.<sup>34</sup>

23. The range of remedies that can be included in mediated settlement arrangements is essentially limitless. Such settlement arrangements are not limited to legal remedies that can be awarded by arbitral tribunals but may include non-monetary remedies, such as:<sup>35</sup> (i) grant or renewal of a license or permit; (ii) provision of a different location or project for the investment as an alternative compensation for the denial of a permit or license to operate a particular investment; (iii) the swapping of deals for other types of investment contracts or obligations; (iv) re-negotiation of the terms of a concession project; (v) re-evaluation of the return of a project and provisions of additional guarantees or sources of revenue; and (vi) self-assessments and reappraisals by governments of problematic measures they have enacted.

24. More importantly, as compared with investment arbitration, which has been described by some commentators as a “*means to liquidate an economic relationship*”,<sup>36</sup> investment mediation is beneficial to the preservation of relationship and long-term cooperation between the host States and the foreign investors.<sup>37</sup>

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

34 See Salacuse (n 15), at p.420.

35 See UNCTAD (n 32), at p.33.

36 See Salacuse (n 15), at p.418.

37 See Sussman (n 30), at p.8.

25. Furthermore, as compared with investment arbitration which places a great focus on international legal rights, investment mediation leaves greater room to take into account non-legal factors, such as actual stakeholder needs, relationships, economic conditions, politics, social values and even socio-cultural history.<sup>38</sup>

26. According to *The History of the ICSID Convention* published by the ICSID Secretariat, it has been pointed out in a meeting of the executive directors of the World Bank in 1962 that “*conciliation did not in any way infringe or appear to infringe upon a country’s sovereignty*”.<sup>39</sup> In the same year, it has been pointed out by another executive director of the World Bank that “[c]onciliation enabled a government to save face” and “[s]ometimes a government was convinced of the merits of the foreign investor’s claim, but was politically unable to act upon that conviction. The intervention of a neutral, impartial conciliator, whose opinion was unbiased, was tremendously effective in helping to persuade parliaments that the claim must be settled”.<sup>40</sup> As such, investment mediation may avoid arbitral decisions that the host States may find unacceptable or difficult to comply with, which is a result in line with maintaining the autonomy of the host States.

27. While investment mediation will not be able to directly address the concerns over unjustifiable inconsistencies in the treaty interpretation of investment treaties by arbitral tribunals and the call for *jurisprudence constante* in ISDS, mediation, as compared with arbitration, does not have the risk of creating unsatisfactory precedents<sup>41</sup> in ISDS. Moreover, it has been observed by Professor

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38 See Owens (n 31), at p.122.

39 ICSID Secretariat, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Vol. II, Part I, 1968, see pp.14-15.

40 *Ibid.*, see p.68.

41 While there is no formal doctrine of “*stare decisis*” in ISDS, past ISDS arbitral decisions are often treated as “*de facto*” precedents and cited by arbitral tribunals in adjudicating cases. (Source: Directorate-General for External Policies of the European Parliament, *Investor-State Dispute Settlement Provisions in the EU’s International Investment Agreements*, Vol.1 – Workshop, September 2014, pp.16-17).

Jack Coe that the uncertainty of an adjudicated outcome often maintains the parties' interest in engineering with the neutral's assistance, a satisfactory alternative outcome.<sup>42</sup>

28. Potential savings in cost and duration is also a major reason for advocating the greater use of investment mediation.<sup>43</sup> The high cost and duration of ISDS has been identified by UNCITRAL Working Group III in its thirty-sixth working sessions as concerns which require reform. In respect of investment arbitration, while there is a lack of comprehensive and consolidated information on cost and duration of ISDS, some existing studies such as the study by Jeffery Commission in 2016 (JC Study 2016)<sup>44</sup> and the study by Matthew Hodgson in 2017 (MH Study 2017)<sup>45</sup> have provided useful insights into the current situation.

29. The MH Study 2017 indicates that the average party costs (based on 177 cases for claimants and 169 cases for respondents) stand at approximately USD 6 million (median USD 3.4 million) for claimants and approximately USD 4.9 million for respondents (median USD 2.8 million).<sup>46</sup> As for tribunal costs, the MH Study 2017 indicates that the mean ICSID tribunal costs were approximately USD 920,000 (median USD 750,000) and the mean UNCITRAL tribunal costs were approximately USD 1.1 million (median USD 799,000).<sup>47</sup>

30. The JC Study indicates that the average duration of ICSID arbitration proceedings (based on 231 ICSID awards), from

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<sup>42</sup> See Coe (n 25), at p.16.

<sup>43</sup> Seraphina Chew, Lucy Reed and J. Christopher Thomas QC, "Report: Survey on Obstacles to Settlement of Investor-State Disputes" *NUS Centre for International Law Working Paper 18/01* (September 2018), see p.10.

<sup>44</sup> Jeffery Commission, "How Long is Too Long to Wait for an Award", *Global Arbitration Review* (18 February 2016).

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

<sup>46</sup> Matthew Hodgson and Alastair Campbell, "Damages and Costs in Investment Treaty Arbitration Revisited", *Global Arbitration Review* (14 December 2017).

<sup>47</sup> *Ibid.*



registration to award, was 3.78 years, or 1,381 days (median 1,271 days).<sup>48</sup> Its review of 60 UNCITRAL proceedings resulting in an award from 1990 to 2015 reveals that the average duration from notice of arbitration to award was 3.96 years, or 1,446 days (median 1,245 days).<sup>49</sup>

31. As reported by Professor Jack Coe, the former CEO of Metalclad, Mr Grant Kesler, has expressed his dissatisfaction with the arbitration experience under the famous NAFTA case, *Metalclad Corporation v The United Mexican States* (ICSID Case No. ARB (AF)/97/1).<sup>50</sup> Despite that Metalclad was awarded approximately USD 17 million, Mr Kesler described the case as a “*hollow victory*” and considered the arbitration process to be slow, disruptive, expensive, unpredictable, and exceedingly contentious.<sup>51</sup> The proceedings lasted for approximately five years and the cost for Metalclad was an estimated USD 4 million in direct and indirect costs.<sup>52</sup> Mr Kesler commented that if he had to do it over, he would not pursue arbitration, but would have resorted to the so called “political options” to resolve the dispute.<sup>53</sup>

32. Investment mediation may avoid complicated procedures involved in investment arbitration, such as witness cross-examinations and document exchanges, thereby reducing costs and duration of the dispute settlement process.<sup>54</sup> As explained by Judge Stephen M. Schwebel, the former President and Judge of the International Court of Justice, since conciliation need not be

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48 Jeffery Commission, “How Long is Too Long to Wait for an Award”, *Global Arbitration Review* (18 February 2016).

49 *Ibid.*

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

51 *Ibid.*

52 See Coe (n 25), at p.27.

53 See Coe (n 50), at p.339-340.

54 See UNCTAD (n 32), at p.34.

pleadings-intensive or dependent upon production of full proof, such mechanism can produce results more speedily and less expensively than arbitration.<sup>55</sup>

33. In the past, there have been successful cases in which the potential of investment mediation in saving costs and duration has been achieved. A prime example of such successful cases is the first conciliation case conducted under the auspices of ICSID, *Tesoro Petroleum Corporation v Trinidad and Tobago* (ICSID Case No. CONC/83/1). In that case, Lord Wilberforce has, as a sole conciliator, successfully mediated a dispute involving the distribution of USD 143 million in profits between Tesoro Petroleum Corporation and the State of Trinidad and Tobago in less than two years and at a cost of a mere USD 1.1 million.<sup>56</sup>

34. As the disputing parties have greater control over the contents of the mediated settlement agreements, it is also more likely for them to voluntarily comply with such agreements.<sup>57</sup> As such, this can potentially save the cost and resources required for handling the post-award procedures such as annulment, setting-aside and enforcement proceedings.

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

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<sup>55</sup> See Schwebel (n 19), at p.240.

<sup>56</sup> See Salacuse (n 15), at p.436.

<sup>57</sup> See Sussman (n 30), at p.8.

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

36. It has often been said that conciliation is the culturally preferred dispute resolution method in Asia.<sup>58</sup> However, from the practice of the investment treaties across the globe, it appears that conciliation finds cultural resonance in jurisdictions of both the Eastern and Western legal traditions.<sup>59</sup>

37. More and more international investment treaties have included express provisions on mediation and some of such provisions are quite detailed. Some recent examples include: the Investment Agreement for the COMESA Investment Area (2007),<sup>60</sup> the ASEAN Comprehensive Investment Agreement, the model BIT of Thailand (2012),<sup>61</sup> Southern African Development Community Model BIT (2012),<sup>62</sup> the Revised Unified Agreement for the Investment of Arab Capital in the Arab States (2013),<sup>63</sup> the model BIT of India (2016),<sup>64</sup> the EU-Canada Comprehensive Economic and Trade Agreement (2016),<sup>65</sup> the draft model BIT of Netherlands (2018)<sup>66</sup> and the draft text of the Transatlantic Trade and Investment Partnership.<sup>67</sup>

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

59 *Ibid.*

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

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

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

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

64 The text is available at <[https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)>.

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

66 The draft text is available at <[https://globalarbitrationreview.com/digital\\_assets/820bcd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf](https://globalarbitrationreview.com/digital_assets/820bcd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf)>.

67 The draft text is available at <[http://trade.cc.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.cc.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)>.

38. The investment agreement between Mainland China and the Hong Kong Special Administrative Region (CEPA Investment Agreement) under their Closer Economic Partnership Arrangement provides an innovative model. The CEPA Investment Agreement contains provisions that are very similar to those found in international investment treaties, such as fair and equitable treatment, full protection and security and expropriation.

39. However, investment mediation, instead of investment arbitration, is provided for resolving investment disputes between Hong Kong investors and the Central People's Government as well as those between Mainland investors and the Government of the Hong Kong Special Administrative Region.

40. For disputes involving Mainland investors under the CEPA Investment Agreement, Hong Kong International Arbitration Centre – Hong Kong Mediation Council as well as Mainland – Hong Kong Joint Mediation Centre have been designated as the mediation institutions to handle such disputes.<sup>68</sup> Apart from the relevant provisions of the CEPA Investment Agreement and a document (CEPA Mediation Mechanism) setting out certain features of the investment mediation mechanism, a set of modern, high standard, comprehensive yet flexible mediation rules (CEPA Investment Mediation Rules) have been devised for such mediation institutions to administer the mediation under the CEPA Investment Agreement.<sup>69</sup> As for disputes involving Hong Kong investors, China Council for the Promotion of International Trade/China Chambers of International Commercial Mediation Centre as well as China International Economic and Trade Arbitration Commission have been designated as the mediation institutions to handle such disputes.

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

<sup>69</sup> Please refer to the website of the Trade and Industry website <<https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf>> of the full text of the CEPA Investment Mediation Rules. The CEPA Mediation Mechanism is available at <<https://www.tid.gov.hk/english/cepa/investment/files/mediation.pdf>>.

41. Mainland China has also concluded with the Macau Special Administrative Region an arrangement<sup>70</sup> that is similar to the CEPA Investment Agreement with the Hong Kong Special Administrative Region, and that arrangement also provides for mediation in relation to investment disputes.

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

42. In recent years, more and more international organisations and institutions recognise the value of mediation as an effective tool for resolving international investment disputes and support the greater use of such dispute resolution mechanism. For example, the United Nations Conference on Trade and Development (UNCTAD) has organised a symposium in 2010 in Lexington, Virginia to have in-depth discussion on investment mediation.<sup>71</sup> Similarly, under the auspices of the Organization for Economic Co-operation and Development (OECD), a series of symposia on investment mediation has taken place.<sup>72</sup>

43. An important development on investment mediation comes with the introduction of the IBA Rules for Investor-State Mediation (2012)<sup>73</sup> prepared by the State Mediation Subcommittee of the Mediation Committee of the International Bar Association (with Ms Anna Joubin-Bret and Mr Barton Legum as Co-Chairs). It has been reported that the IBA Rules were applied for the first time in an ICSID conciliation case, *Republic of Equatorial Guinea v CMS Energy Corporation and others* (ICSID Case No.

70 The full text of the CEPA Investment Agreement between Mainland China and Macau is available at <[https://www.economia.gov.mo/en\\_US/web/public/pg\\_cepa\\_cepa\\_ai?\\_refresh=true](https://www.economia.gov.mo/en_US/web/public/pg_cepa_cepa_ai?_refresh=true)>.

71 The Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution (as edited by Susan D. Franck and Anna Joubin-Bret) is available at <[https://unctad.org/en/Docs/webdiaicia20108\\_en.pdf](https://unctad.org/en/Docs/webdiaicia20108_en.pdf)>.

72 See Maniruzzaman (n 3), at p.3.

73 The full text of the IBA Rules for Investor-State Mediation is available at the website of the International Bar Association <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/State\\_Mediation/Default.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx)>.

CONC(AF)/12/2).<sup>74</sup> In another case reported by the *Investment Arbitration Reporter*, the Philippines and a French engineering and consulting services company, Systra SA, have agreed to conduct mediation for a dispute arising under the France-Philippines bilateral investment treaty pursuant to the IBA Rules and under the auspices of the ICC-ADR Centre.<sup>75</sup>

44. Moreover, in the proposal on amendments to the ICSID rules as published in August 2018, apart from making substantial revisions to its conciliation rules to enhance the flexibility,<sup>76</sup> the ICSID Secretariat has proposed the introduction of a new set of additional facility mediation rules in response to the suggestions of its stakeholders.<sup>77</sup>

45. In 2016, the Energy Charter Conference endorsed the Guide on Investment Mediation to encourage the Contracting Parties to the Energy Charter Treaty to consider the use of mediation on voluntary basis as one of the options at any stage of the dispute to facilitate amicable solution.<sup>78</sup> It is of interest to note that the said Guide on Investment Mediation prepared with the support of a number of international organisations and institutions including UNCITRAL, ICSID, the Permanent Court of Arbitration (PCA), International Mediation Institute (IMI), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the International Court of Arbitration of the International Chamber of Commerce (ICC).<sup>79</sup>

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74 Paul-Jean Le Canny, "Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System," *ICSID Review – Foreign Investment Law Journal*, Vol.33, No.2, 30 October 2018, pp.456-500, see p.466 and footnote 78.

75 "In an Apparent First, Investor and Host-State Agree to Try Mediation Under IBA Rules to Resolve an Investment Treaty Dispute," *Investment Arbitration Reporter*, (14 April, 2016).

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

77 *Ibid.*, see p.13.

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

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

46. Besides, currently there are the UNCITRAL Conciliation Rules (1980),<sup>80</sup> the ICC Mediation Rules (2014)<sup>81</sup> and the SCC Mediation Rules (2014).<sup>82</sup>

## V. POTENTIAL MAJOR OBSTACLES OVER THE GREATER USE OF INVESTMENT MEDIATION

47. Despite the great potential of investment mediation as an effective dispute resolution mechanism for international investment disputes, it has been observed that, as compared with investment arbitration, investment mediation has been relatively under-used.<sup>83</sup>

48. Although various academic literatures and international conferences have sought to weigh in on the possible reasons for the under-use of investment mediation, empirical researches on that issue have been lacking. Nevertheless, a recent survey report<sup>84</sup> (CIL Survey) prepared by Professor Lucy Reed, Mr J. Christopher Thomas QC and Ms Seraphina Chew on obstacles to settlement of investor-State disputes has provided a good starting point for empirical researches on the issue.

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

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80 The full text is available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1980Conciliation\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html)>.

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

82 The full text is available at <[https://sccinstitute.com/media/40123/mediationrules\\_eng\\_webbversion.pdf](https://sccinstitute.com/media/40123/mediationrules_eng_webbversion.pdf)>.

83 Anna Joubin-Bret, "Recent Trends in Investor-State Disputes: An Update on Mediation and Conciliation", Presentation Slides for Energy Charter Treaty Conference (21 November 2014).

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

(i) **Institutional and Political Factors**

50. Political factors have been observed as the primary reason for the under-use of investment mediation.<sup>85</sup> Some government officials may have a tendency to avoid taking public responsibility for concluding a settlement with foreign investors and to insist on arbitration so that the blame can be pinned on the arbitral tribunal for making adverse decisions against the governments.<sup>86</sup> As commented by some of the participants of the CIL Survey, government officials might find it *“easier to ‘sell’ to parliament and public opinion the need to comply with a binding award”*, and *“prefer to have an international tribunal tell it to pay”*.<sup>87</sup>

51. The behaviours of government officials described above were said to arise out of fear of allegations of or future prosecution for corruption for the individual official or decision maker who signs off the mediated settlement agreement when the decision to settle and/or the mediated settlement agreement are audited internally and/or brought before an investigator or a court.<sup>88</sup> The CIL Survey suggested that the possibility of “personal liability” is a significant institutional disincentive for government officials to recommend settling a dispute.<sup>89</sup>

52. Moreover, as governments value public opinion and support, government officials may be concerned that reaching settlements with foreign investors would be criticised by the public as being *“weak or branded as puppets of foreign interests”*.<sup>90</sup>

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

86 *Ibid.*, at pp.12-13.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*, at p.13.

90 *Ibid.*



53. Technically, all types of international investment disputes can be resolved through investment mediation and the rates of success would vary in light of the actual facts and circumstances of the cases. However, in light of the specific nature of ISDS which generally involve acts of public authorities, disputes involving regulatory measures of general application, or an industry or issue that is highly politicised or sensitive such as public health (e.g. the ISDS case between Philip Morris and Australia on the latter's tobacco plain packaging measures), transboundary resources, extractive industries, or civil aviation would pose greater difficulties to be resolved through investment mediation.<sup>91</sup> Furthermore, the aforesaid cases would likely attract significant media and public attention as well as strong opinions from non-governmental organisations, which may make it more difficult for government officials to settle the cases.<sup>92</sup> Disputing parties may also dismiss investment mediation where the relationship between them is so confrontational that there is not even a relationship to be salvaged<sup>93</sup> and where the purpose of the disputing parties is to obtain an arbitral precedent to be cited in future ISDS cases.

54. Nevertheless, it has been recently reported that Philip Morris and Ukraine have managed to reach settlement over a potential investment treaty dispute over a USD 23 million tax bill.<sup>94</sup> Such case shows that if the disputing parties have the willingness to resolve their disputes in a non-adversarial manner, the assistance of mediators with the right qualifications and skills still hold the potential to help the parties settle their disputes involving substantial claims.

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91 *Ibid.*, see pp.20-21.

92 See Salacuse (n 15), at p.409.

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

94 Tom Jones, “Philip Morris and Ukraine Settle Tax Dispute”, *Global Arbitration Review*, 6 December 2018.

55. Capacity building and training for government officials are beneficial for enhancing their understanding on the investment mediation process and correcting their misconceptions and misunderstanding over such process, which would encourage the greater use of investment mediation. In this regard, the Department of Justice of the Hong Kong Special Administrative Region has co-organised with ICSID and the Asian Academy of International Law a comprehensive and intensive training on investment mediation for government officials and practitioners in October 2018.<sup>95</sup> Public education is equally important in building up the confidence of the public in the use of investment mediation and this can potentially address the concerns of government officials over public criticism on their decisions to mediate and settle with foreign investors.

56. From an institutional standpoint, the fact that ISDS disputes involve a number of government agencies and other public entities<sup>96</sup> might have hindered the use of investment mediation.<sup>97</sup> In the CIL Survey, it is stated that “*the unity of the State is a fiction in international law, for what is treated as a single entity is in reality a complex organisation comprising ministries, administrative and other agencies, legislatures, subnational authorities*”.<sup>98</sup> In this regard, internal conflicts within the host government may arise over issues such as who should participate in the mediation, who should take lead in the strategy, and what an acceptable result would be,<sup>99</sup> and there may also be conflicting perspectives and/or priorities among the government agencies.<sup>100</sup>

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

96 For example, in the United States, decisions in ISDS disputes are made by an interagency group led by the Office of the Legal Adviser of the Department of State and including representatives of the Office of the United States Trade Representative, the Department of the Treasury, the Department of Commerce, the Department of Justice, the Environmental Protection Agency, the Department of the Interior and the Economics and Business Bureau of the Department of State as well as representatives of the State, local or federal agency or agencies the acts of which are at issue (Source: Barton Legum, “The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe’s ‘Toward A Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch’”, *Journal of Transnational Dispute Management*, Vol.4, No.1, February 2007, see Endnote 2).

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

98 *Ibid.*, see p.14.

99 See Sussman (n 30), at p.11.

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

57. Moreover, it has been observed that while statutory authorisation generally exists for paying adverse court judgments or arbitral decisions against the State, such authorisation may not exist for payments in settlement of investment treaty claims.<sup>101</sup> The absence of such authorisation can also entail that specific authorisation from the legislature is required before the proposed settlement can be paid. Such situations may discourage government officials from seriously considering the use of investment mediation. Besides, as more than one government agencies may be involved, there may be friction and lack of accord in practice as to which agency's budget should pay the settlement amount.<sup>102</sup>

58. In the round-table session of the first inter-sessional meeting of UNCITRAL Working Group III held on 10–11 September 2018, Ms Anna Joubin-Bret suggested that governments should establish institutional mechanisms internally for handling and making decisions for investment mediation cases. It appears that there can be a number of variations for such institutional mechanisms. For example, some governments have appointed lead agencies for ISDS disputes and such lead agencies may have an explicit mandate to negotiate a possible settlement with investors.<sup>103</sup> Some governments have formed inter-agency groups for handling ISDS cases, while others have passed legislation that creates a formal institutional framework (including the creation of a legal authority) to prevent and to manage investment disputes.<sup>104</sup> In the latter's arrangement, the relevant legislation explicitly empowers government officials to use ADR and such clear legal mandate to seek alternatives to arbitration may encourage government officials to use mediation.<sup>105</sup> In this regard, to strengthen the use of

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

102 See Sussman (n 30), at p.11.

103 Silvia Constain, "Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape", *ICSID Review – Foreign Investment Law Journal*, Vol.29, No.1, 1 February 2014, pp.25-40, see p.35.

104 *Ibid.*, see p.36.

105 *Ibid.*

investment mediation, international organisations may consider issuing guidelines and sharing best practices to assist governments in thinking how to refine their institutional mechanisms and legal frameworks on investment mediation.

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

59. It has been pointed out by a commentator that disputing parties often prefer processes that are familiar and established.<sup>106</sup> However, due to the confidential nature of investment mediation in general, it is unclear as to the total number of cases in which the disputing parties have made use of investment mediation to resolve their disputes.<sup>107</sup>

60. According to the information collected by Ms Frauke Nitschke, Team Leader/Legal Counsel of ICSID, there were 10 conciliation cases in total which involved States as respondents, with 8 cases involving State parties from Sub-Saharan Africa, one case involving Trinidad & Tobago and another one involving Albania.<sup>108</sup>

61. As observed by Professor J. W. Salacuse, a reason for the under-use of investment mediation is that corporate executives, government officials and lawyers have not been educated about ADR techniques and their potential application to investor-State disputes.<sup>109</sup> Furthermore, given that investment arbitration is a lucrative legal business, lawyers may be driven by professional disposition or self-interest to advise their client to pursue arbitration instead of mediation.<sup>110</sup> As observed by a participant of the CIL

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106 See Owens (n 31), at p.122.

107 See Schwebel (n 19), at p. 239.

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

109 See Salacuse (n 15), at p.443.

110 *Ibid.*, see p.441.

Survey, counsel may be financially motivated to pursue claims through arbitration regardless of the relative benefits of settlement for the client and some law firms may even see ADR as “*Alarming Drop in Revenue*”.<sup>111</sup>

62. From a statistical standpoint, according to the figures of the Investment Policy Hub of UNCTAD as of December 2018, among 580 known treaty-based investment arbitration cases, 22.9% of such cases were settled.<sup>112</sup> Besides, 10.9 % of the cases were discontinued<sup>113</sup> and some of them may have been discontinued as a result of the settlements reached between the disputing parties (although not being officially recorded as “*settled*”).

63. Furthermore, according to the statistics of the ICSID Caseload as of June 2018, approximately 36% of the arbitration proceedings under the ICSID Convention and Additional Facility Rules are settled or otherwise discontinued.<sup>114</sup> While further empirical and statistical research may be conducted to investigate the situation with respect to settlement of ISDS cases, the aforementioned data have at least shown the great potential for the use of investment mediation in resolving ISDS disputes.

64. In fact, Mr Gabriel Bottini, the former National Director of International Affairs and Disputes of the Treasury-Attorney General’s Office of Argentina, has also commented from his experience that while it is hardly possible to determine how many of the dozens of investment arbitration cases arising from the Argentina’s economic and political crisis could have been resolved through conciliation, the high number of cases that were eventually

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

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

113 *Ibid*.

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

settled under negotiations between the disputing parties indicated that at least for some of the investors concerned, conciliation could have been a valuable alternative to pursue the resolution of their claims.<sup>115</sup>

65. Professor Lucy Reed has suggested back in 2010 that international organisations such as UNCTAD, ICSID and other institutions should create a space to publicise and reward success by governments in settlements of international investment disputes without disclosing confidential information.<sup>116</sup> Successful investment mediation cases probably have the “*snowball effect*” of encouraging the greater use of such mechanism in practice. Furthermore, sharing of information on successful investment mediation cases would be useful in promoting mediation as an attractive dispute resolution mechanism for ISDS disputes and enhance the confidence of the disputing parties as well as their legal advisors in relying on such mechanism to resolve disputes.

## VI. POSSIBLE APPROACHES FOR PROMOTING THE GREATER USE OF INVESTMENT MEDIATION

66. Seminars, international conferences and capacity building are useful means to promoting the use of investment mediation. Various experts have also shared their thoughts on the future direction for the research on the subject. For example, Professor J. W. Salacuse considered that a better understanding of the anatomy of ISDS disputes is needed and researches may be conducted on questions such as how ISDS disputes arise and evolve, what actions tend to exacerbate the conflicts, at what point third party neutrals are best suited to intervene, and what kind of experience, skills and resources are best suited to help resolve

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<sup>115</sup> See Bottini and Lavista (n 23), at p.365.

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

particular types of ISDS disputes.<sup>117</sup> Professor Lucy Reed has also recommended that further studies should be conducted to analyse cases that do not result in a final arbitration award on the merits and those awards that memorialise settlement agreements in order to explore the specific patterns that foster settlement and lead to successful non-adjudicative outcomes.<sup>118</sup>

67. As discussed above, the issuance of guidelines and sharing of best practices on investment mediation by international organisations would be useful as well.

68. Nevertheless, an even more extensive solution would involve the creation of a set of model investment mediation rules that may be utilised on a standalone basis or incorporated into international investment treaties.

69. As observed by Ms Anna Joubin-Bret in her article “*Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules*”, many existing international investment treaties provide for a “cooling-off” period, during which the disputing parties are invited to find an amicable settlement to their disputes.<sup>119</sup> However, treaty practice varies as to the options that are available to the parties for settlement of disputes during the cooling-off period and some treaties are silent about the methods and processes available to the parties.<sup>120</sup>

70. It has been further pointed out by Ms Joubin-Bret that even for certain treaties that expressly provide for mediation, the rules are not sufficiently precise and are not clear on how mediation can take place and the sequence between mediation and arbitration, thus not being conducive to the use of investment mediation.<sup>121</sup>

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117 See Salacuse (n 15), at p.443.

118 See Reed (n 116), at p.31.

119 Anna Joubin-Bret, “Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules” in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Brill | Nijhoff, 14 October 2015, see p.154.

120 *Ibid.*

121 *Ibid.*, at p.155.

71. In light of the aforesaid, the creation of a set of model rules on an effective investment mediation mechanism is an option that is worth being further explored in order to fully harness the potential of investment mediation.

## VII. KEY PRINCIPLES OF AN EFFECTIVE INVESTMENT MEDIATION MECHANISM

72. The following paragraphs attempt to set out the key guiding principles for the design of an effective investment mediation mechanism.

### (i) Enshrine the Values of the Rule of Law (Including Fairness, Impartiality and Due Process)

73. Rule of law (including fairness and impartiality) is an essential ingredient for the legitimacy and credibility of a successful investment mediation mechanism.

74. According to Professor Nancy A. Welsh, there is a wealth of research and theory affirming the importance of providing mediation processes that can offer the disputing parties with “*an experience of justice*”.<sup>122</sup> To achieve such an experience of justice, it was said the disputing parties need the opportunity to be fully heard, to know that what they have said has been considered by both the mediator(s) and the other party to the dispute, and to feel treated in an even-handed and respectful manner by both the mediator(s) and the other party to the dispute.<sup>123</sup>

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122 Nancy A. Welsh, “Mandatory Mediation and Its Variations” in UNCTAD (with Susan D. Franck and Anna Joubin-Bret), *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (2010), see p.109.

123 *Ibid.*



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

75. To incentivise the disputing parties to utilise investment mediation to resolve their international investment disputes, the investment mediation mechanism should be designed in such a way that is sensitive to cost<sup>124</sup> and duration and encourages the parties to have early settlement of disputes.

76. For investors, they have an incentive to conserve scarce resources as they are responsible to their shareholders and should use their internal resources for developing commercial innovations instead of expending time and resources in dispute resolution.<sup>125</sup> Similarly, governments have an incentive to conserve taxpayer dollars as they are ultimately responsible to their citizens and are obliged to ensure that public resources are used properly to develop social welfare and promote investment.<sup>126</sup> Early settlement of dispute is thus in line with the mutual interests of host governments and investors.

(iii) **Voluntariness and High Degree of Flexibility**

77. Voluntariness and flexibility are the cornerstones for investment mediation. Voluntariness comes in two senses. Firstly, there should be voluntariness in the mediation process itself.<sup>127</sup> For example, the CEPA Investment Mediation Rules provides that all parties may, in accordance with the principle of voluntary participation, choose whether to withdraw from mediation.<sup>128</sup> Secondly, the disputing parties should be entitled to disregard suggested terms of settlement,

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124 See Coe (n 25), at p.37.

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

126 *Ibid.*

127 See Coe (n 25), at pp.34-35.

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

even if such terms are well-constructed and fair.<sup>129</sup> Under the IBA Rules for Investment Mediation (2012), it is made explicit that the mediator shall not have the authority to impose on the parties any partial or complete settlement of the differences or disputes.<sup>130</sup>

78. It has also been suggested that the investment mediation mechanism should provide for flexible standards for process design, language issues and representations of the disputing parties.<sup>131</sup> An effective investment mediation mechanism should set out a clear basic framework to guide the disputing parties on the process and should provide sufficient room for modifications and customisation of the mediation rules to fit with the circumstances of the individual cases and the preference of the parties.

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

79. The insightful paper by Professor Jack Coe, *“Towards a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch”* has provided a much-needed analysis on the considerations involved in the design of investment mediation mechanism. The following paragraphs seek to provide an overview of the key issues involved in the design of the model rules for an effective investment mediation mechanism.

80. Given the complexities of the issues involved, the present paper does not seek to provide the ultimate answers to all such issues and it is hoped that the questions raised below can be addressed in future researches on the topic. Nevertheless, as a preliminary observation, the CEPA Investment Mediation Rules does provide

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129 See Coe (n 25), at p.35.

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

131 Wolf von Kumburg, Jeremy Lack and Michael Leathes, “Enabling Early Settlement in Investor-State Arbitration – The Time to Introduce Mediation Has Come”, *ICSID Review – Foreign Investment Law Journal*, Vol.29, No.1, 1 February 2014, pp.133-141, see p.138.

a suitable reference model for the design of an effective investment mediation mechanism that is in line with the key principles discussed above.

(i) **Scope of Matters for Mediation**

81. Given the highly flexible nature of investment mediation, the scope of matters that can be subject to mediation may include the whole dispute, certain causes of actions and discrete issues of a dispute.<sup>132</sup>

(ii) **Timing of Mediation**

82. Depending on the choice of the disputing parties, investment mediation should be available at any stage of the disputes.

83. While early settlement of disputes is optimal in terms of saving in costs and duration, some disputes may only be able to be resolved at the later stage. For example, in a case involving an African State and a major foreign investor of that State, while Judge Stephen M. Schwebel was not able to successfully mediate the dispute before the parties pursued arbitration, the dispute was settled by the parties at an advanced stage of the arbitral proceedings but before an award was issued.<sup>133</sup> This example illustrates that parties' view may change in light of the exchange of written pleadings, oral submissions during the hearings, orders made by the arbitral tribunals as the case progresses. As such, it is important for investment mediation to be available at any stage of disputes so that the parties may utilise it when appropriate.

84. It is also of interest to note that there may also be opportunities to foster settlements through mediation even during the post-award phase. Observers have noted that this may involve the creative

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132 See Franck (n 12), at p.74.

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

exploration of whether there are still opportunities to generate value amongst investors and States that foster mutual interests in light of how international law rights have been adjudicated.<sup>134</sup>

### (iii) Mandatory Mediation

85. A consideration in the design of investment mediation mechanism is whether there should be mandatory mediation. Professor Lucy Reed has expressed a degree of skepticism about the value of mandatory ADR for international investment disputes, and indicated that the experience of national court system in mandatory ADR (including court-ordered mediation) may not readily translate to resolution of disputes between governments and foreign investors.<sup>135</sup> Professor Jack Coe has also commented that *“the system ought to be particularly on guard against adding elements of coercion unsupported by data or an articulated policy basis”*.<sup>136</sup>

86. That said, mandatory mediation comes in many forms.<sup>137</sup> In the context of ISDS disputes, a form of mandatory mediation that may be worth considering is to mandate the parties to attempt to resolve their dispute through mediation during the “cooling-off period” before resorting to arbitration. In light of the current insufficient understanding and experience over investment mediation, the aforesaid form of mandatory mediation may be useful in encouraging the wider use of such mechanism.<sup>138</sup> Such mandatory mediation is also compatible with the principle of voluntariness

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

135 See Reed (n 116), at p.30.

136 See Coe (n 25), at p.36.

137 As pointed out by Professor Nancy A. Welsh, the most intrusive form of mandatory mediation is one which requires participation of the disputing parties in the entire mediation process. (Source: Nancy A. Welsh and Andrea Kupfer Schneider, “The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration”, *Harvard Negotiation Law Review*, Vol.18, 2013, see p.129). However, there can be other forms of mandatory mediation, such as: only requiring the disputing parties to consider the use of mediation, requiring the disputing parties to attend a case conference at which mediation will be discussed, requiring the disputing parties to first attend an initial orientation or mediation session and allowing such parties to determine afterwards as to whether they wish to continue the process. (Source: See Welsh (n 122), at pp.110-111.)

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

as the disputing parties are free to withdraw from the mediation process.

87. Moreover, it has been observed that it is generally easier to effect a negotiated settlement of a dispute if a mediator intervenes earlier rather than later in the conflict because following the submission of the dispute to international arbitration, the difficulties of its settlement may increase due to the hardening of the disputant's positions,<sup>139</sup> further deterioration of the relationship between the parties and the increased attention of the media, political parties, non-governmental organisations and the public on the dispute.<sup>140</sup> As a result, the aforesaid form of mandatory settlement may increase the chance of successful settlement in the early stage of the dispute. Furthermore, such mandatory mediation would, to some extent, render the initiation of the mediation mechanism automatic, which addresses the concern over the perception that the making of an invitation to mediation by a disputing party may be interpreted as a sign of weakness.<sup>141</sup>

88. Besides, even if the mediation at the stage of the cooling-off period is unsuccessful, it may still have the benefits of eliminating areas of the dispute, narrowing the issues, and assisting the parties in gaining a better understanding of the case.<sup>142</sup>

#### (iv) Number of Mediators

89. Investment mediation can be conducted by a single mediator, co-mediators or a mediation commission consisting of multiple mediators.

90. As observed by Professor Jack Coe, parties should be entitled to select their own conciliator or conciliators, subject to the usual

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139 See Salacuse (n 15), at p.444.

140 See Constain (n 103), at p.35.

141 See Coe (n 25), at footnote 129.

142 See Sussman (n 30), at p.8.

default to an appointing authority upon expiry of a designed period of time because such feature would allow the parties to have greater trust in the process.<sup>143</sup>

91. In the CEPA Investment Mediation Rules, unless otherwise agreed by the parties, the default position is a mediation commission consisting three mediators (with each party appointing one and the chairperson to be appointed jointly by the parties).<sup>144</sup> The advantage of such arrangement is that the parties can have a say in appointing its own mediator, which give them a greater sense of control over the process. While such mediation commission model may add complexity to the mediation process management and entail coordination among mediators, such model, with mediators of the right caliber appointed, has the benefit of allowing a greater diversity of mediators in terms of linguistics, cultural and technical backgrounds, and this can potentially create a greater balance in the team and facilitate the “brain-storming” of creative settlement arrangements.

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

92. To ensure the credibility and effectiveness of the dispute settlement mechanism, it is clear that both mediators and arbitrators have to be knowledgeable about public international law and international investment law.

93. However, as compared with arbitrators whose role is to adjudicate the cases in accordance with the relevant investment treaties, the applicable laws and the facts of the cases, mediators need to possess some different skills such as the ability to understand and deal with a wide variety of emotional, psychological, organisational, political, and process issues that obstruct understanding between the parties.<sup>145</sup>

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<sup>143</sup> See Coe (n 25), at p.38.

<sup>144</sup> See Article 5(1) of the CEPA Investment Mediation Rules.

<sup>145</sup> See Salacuse (n 15), at p.441.

In this regard, Professor J. W. Salacuse has commented that “*the resources and experience of a deal-making investment banker are probably much more germane to the mediation of an investor-State dispute than are the talents of a litigator*.”<sup>146</sup>

94. The differences in the role of mediator and that of arbitrator are best illustrated by the successful mediation by Professor Thomas Wälde in the energy dispute between the Swedish, State-owned company Vattenfall and the Polish State integrated energy company PSE. In that case, instead of simply hearing the legal arguments made by each side, Professor Wälde, who was assisted by experts in electricity regulatory economics, electricity engineering and financial analysis, actively worked to identify and eliminate the various barriers that had obstructed negotiations.<sup>147</sup> To achieve this, Professor Wälde shuttled between Stockholm and Warsaw, interviewed key players in depth, held extended formal and informal bilateral consultations, and spent some 40 to 50 days at the “*intelligence gathering*” exercise.<sup>148</sup> Professor Wälde produced a long and detailed analysis of the materials evidencing the parties negotiations and agreements and the evolution of the transaction,<sup>149</sup> and came back to the disputing parties with a proposal and succeeded in persuading the senior executives of both parties that this proposal was rooted in their ideas.<sup>150</sup> The aforesaid tasks that have been undertaken by Professor Wälde in the case are quite different from that of an arbitrator.

95. Under the investment mediation mechanism of the CEPA Investment Agreement, it is provided that the mediators shall have attained the relevant qualifications in mediation, and shall have

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<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, at p.438.

<sup>148</sup> See Schwebel (n 19), at p.238.

<sup>149</sup> See Sims (n 58), at pp.6-7.

<sup>150</sup> See Schwebel (n 19), at p.239.

professional knowledge and experience in the fields of cross-border or international trade and investment and law, and shall remain impartial in resolving the investment disputes.<sup>151</sup>

96. Apart from the issue of qualification of mediators, the code of conduct on mediators is essential for ensuring the legitimacy and credibility of the investment mediation mechanism. Nevertheless, due to the differences in the respective roles between arbitrators and mediators, the considerations over the design of the code of conduct on mediators should presumably be different from those for the code of conduct on arbitrators. In this regard, the CEPA Investment Mediation Rules have set out very comprehensive code of conduct of mediators. It is provided that each mediator shall be independent and impartial and shall mediate the dispute in a manner that is transparent, objective, equitable, fair and reasonable.<sup>152</sup>

97. Under the CEPA Investment Mediation Rules, mediators are required to avoid their performance from being affected by their own financial, business, professional, family or social relationships or responsibilities.<sup>153</sup> Moreover, unless otherwise agreed by the disputing parties, by accepting an appointment as mediator of a dispute under the CEPA Investment Agreement, the mediator is deemed to agree not to act in any other role (including but not limited to counsel, arbitrator, expert or witness) in respect of: (i) any differences or disputes which are the subject of the mediation; or (ii) any other differences or disputes in which a party is involved as a disputant pending the resolution of the dispute in mediation.<sup>154</sup>

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151 See paragraph 1.6 of the CEPA Mediation Mechanism

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

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

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



98. Moreover, if, during the course of the mediation, a mediator becomes aware of any facts or circumstances that may call into question the mediator's independence or impartiality in the eyes of the parties, the mediator is required under the CEPA Investment Mediation Rules to disclose those facts or circumstances to the parties in writing without delay.<sup>155</sup>

99. On the issue of mediators for investment mediation, it is also of interest to note that Professor J. W. Salacuse has suggested the creation of an international investment mediation service by international institutions and other respected organisations. In the view of Professor Salacuse, such service would consist of a crop of experienced international mediators who could be called upon to offer their assistance in cases of disputes between investors and the host governments.<sup>156</sup>

#### (vi) Management of the Mediation Process

100. Both the CEPA Investment Mediation Rules<sup>157</sup> and the IBA Rules for Investor-State Mediation (2012)<sup>158</sup> have included the mechanism of mediation management conference to ensure that the mediation process is well-organised and efficient.

#### (vii) Hybrid Models of Arbitration and Mediation

101. Arbitration and mediation are two dispute settlement mechanisms that can function in a complementary manner with each other. There are a wide variety of hybrid models of arbitration and mediation, and some examples are set out as follows:<sup>159</sup>

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<sup>155</sup> See Article 7(5) of the CEPA Investment Mediation Rules.

<sup>156</sup> See Salacuse (n 15), at p.445.

<sup>157</sup> See Article 9 of the CEPA Investment Mediation Rules.

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

<sup>159</sup> E.Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure", *Journal of Transnational Dispute Management*, August 2018, see pp.3-6.

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

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

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

102. There are also two models called Med-in-Arb<sup>160</sup> and Arb-in-Med.<sup>161</sup> However, strictly speaking, unlike Med-Arb, Arb-Med and Arb-Med-Arb, the two aforesaid models are not actually hybrid processes because the nature of the processes involved remains essentially the same throughout the dispute resolution procedure (i.e. for Med-in-Arb, an arbitration process and, for Arb-in-Med, a mediation process), and there are no formal switching “hats” by the neutrals involved.<sup>162</sup>

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

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

162 See Chua (n 159), at p.6. Klaus Peter Berger, “The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute Offering Preliminary Views, Discussion Settlement Options, Suggesting Solutions, Caucusing”, *Journal of International Arbitration*, Vol.35, No.5, 2018, pp.501-516, see pp.513-514.

103. In respect of Med-Arb, Arb-Med and Arb-Med-Arb, a consideration in the process design is whether the mediation and arbitration will be conducted by the same or different neutrals. An advantage of hybrid models with the same neutrals is the potential savings in cost and duration because where the mediator and arbitrator is the same person, there is familiarity with the dispute, thus avoiding the need for any duplication of work, additional expense or delay when switching from one process to another.<sup>163</sup>

104. It has been suggested that legal culture may influence the parties' use of same neutral hybrid procedure.<sup>164</sup> For example, it was said that China's long-standing emphasis on the stability and harmony of the society and on deference to authority have underpinned the practice of mediation by arbitrators or judges, and Germany also has a long tradition of adjudicators engaging in settlement-oriented activities.<sup>165</sup> That said, it has also been observed that there are same neutral hybrid practice in the United States.<sup>166</sup>

105. However, the same-neutral hybrid procedures do come with their own challenges. A particularly challenging issue is whether the same-neutral's impartiality will be affected by such hybrid procedures. For example, there may be concerns that in the event that the mediation procedure fails and the arbitration continues, the neutral, as an arbitrator, may lose his or her objectivity on account of the information he or she became privy to during the mediation procedure.<sup>167</sup> The neutral may also gain access to information and documents which are confidential and privileged during the

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163 See Chua (n 159), at p.8.

164 Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study", *Journal of International Arbitration*, Vol.33, No.1, 2016, pp.37-82, see pp.62-63.

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

166 *Ibid.*, see pp. 13 -14.

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

mediation process, but such documents and information may not be admissible in the arbitral proceedings. While there may be rules to prevent the admission of information or documents obtained during mediation, it would, in practice, be very difficult for the neutral to block out or erase information obtained during mediation when determining an award as an arbitrator.<sup>168</sup> Such risk is more evident in the scenario of Med-Arb. As for Arb-Med, because the disputing parties will most likely have already disclosed information that would materially affect the result of arbitration during the hearings, the aforesaid risk of the hybrid procedure will presumably be less.

106. Another inter-related risk is the expression of provisional view by the neutral at the early stage of the hybrid process when the disputing parties have not yet had a sufficient opportunity to express their views and, in the scenario that the parties fail to settle, the arbitral award resulted from such process may be at risk of being challenged on the ground of arbitrator's bias.<sup>169</sup> A possible solution for addressing this risk is to first obtain an express waiver from the disputing parties of any possible challenge against the tribunal or the award resulting from the receipt of information by the tribunal during the mediation process and the views on it that the tribunal will have expressed.<sup>170</sup>

107. Private caucus between the mediator and one of the disputing parties is a common tool deployed in mediation process to allow a disputing party to discuss its concerns and interests candidly with the mediator. Nevertheless, apart from subjective opinions and personal comments, private caucuses may also involve the divulging

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168 Alexis Mourre, "The Proper Use of Med-Arb in the Resolution of International Disputes," *Asian Dispute Review*, Vol.18, No.2, 2016, pp.94-99, see p.98. Tai Heng Cheng and Anthony Kohio, "Some Limits to Apply Chinese Med-Arb Internationally", *New York Law School Legal Studies Research Paper Series* 09/10 #33, see p.95.

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

170 *Ibid.*, at p.97.

of confidential information.<sup>171</sup> This gives rise to concerns that the information obtained through private caucuses may lead the mediator consciously forming an opinion that affects the subsequent arbitration<sup>172</sup> and there is also a due process concern as the disputing party cannot rebut the comments made by the other disputing party made in the private caucuses.<sup>173</sup> Three possible solutions have been suggested to address this concern, namely:<sup>174</sup> (i) prohibiting the information obtained through private caucuses from being used by the arbitrator if the arbitration continues; (ii) mandatory disclosure by the arbitrator of the information obtained through private caucuses to the other disputing party if arbitration proceeds; and (iii) do not engage in private caucuses at all.

108. For Med-Arb and Arb-Med, there may also be concerns of coercion exerted by the neutrals on the parties into settlement<sup>175</sup> because the fact that the mediation is conducted by the neutrals who will adjudicate or issue the award on the dispute in the event of failure of mediation may put pressure on the parties.<sup>176</sup> That said, whether the aforesaid risks would materialise in practice depends very much on the skills and styles of the neutrals concerned.

109. The aforesaid concerns may nevertheless be addressed by having different neutrals as the mediator and the arbitrator for the hybrid procedures, but a downside that needs to be taken into account by the disputing parties would be the increase in cost.

110. On the design of hybrid models, Professor Jack Coe has proposed an innovative idea, which he termed as “*Concurrent Med-Arb*” (CMA). The CMA model involves one or more mediators

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171 Srikant Deekshitha and Arka Saha, “Amalgamating the Conciliatory and the Adjudicative: Hybrid Processes and Asian Arbitral Institutions”, *Indian Journal of Arbitration Law*, Vol.III, No.1, 2014, pp.76-100, see p.90.

172 *Ibid.*

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

174 *Ibid.*, see pp.198-199.

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

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

“*shadowing*” the concurrent arbitral process and applying mediation techniques at various junctures of the process with a view to assisting the parties in reaching a settlement that might then be embodied in a consent arbitral award.<sup>177</sup> As pointed out by Professor Coe himself, the challenge in crafting the architecture of CMA is to “*promote unencumbered exploitation of the strengths of [arbitration and mediation] while also containing costs and preventing one process from disrupting or subjugating the other*”.<sup>178</sup>

111. The CMA model envisions a default composition of one arbitrator and one mediator, with each of them to be jointly appointed by the parties subject to the use of institutional appointments in case of deadlock.<sup>179</sup> A variation to the aforesaid model is to have two mediators instead of one, with each disputing party appointing one.<sup>180</sup> Such model would require frequent but efficient communications and cooperation between the arbitrators and mediators.<sup>181</sup> For example, the mediators are to be given copies of the principal arbitral submissions<sup>182</sup> and can be present at arbitral hearings, site inspections, and the like.<sup>183</sup>

112. It remains to be seen as how the innovative CMA model as advocated by Professor Jack Coe will function in practice. As observed by Professor Coe, the replacement of the prevailing three-arbitrator model by a single arbitrator may generate a counter-trend.<sup>184</sup> Furthermore, if the disputing parties insist on

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

178 See Coe (n 25), at p.33.

179 See Coe (n 177), at p.45.

180 *Ibid.*

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

182 See Coe (n 177), at p.47.

183 See Coe (n 25), at p.33.

184 See Coe (n 177), at p.44.

adopting the three-arbitrator model, the additional mediators for shadowing the arbitration process would render the CMA model “*fee-heavy*”.<sup>185</sup>

### (viii) Transparency of Investment Mediation

113. Transparency is a thorny issue in the context of ISDS. It has been observed that in recent years, there has been the appreciable increase in process transparency and public scrutiny on investment arbitration<sup>186</sup> and one notable development is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.<sup>187</sup>

114. Confidentiality is considered to be an essential element in mediation in that it encourages parties to speak freely and openly in the mediation while ensuring the integrity of the process.<sup>188</sup> However, ISDS disputes are different from purely private commercial disputes and confidentiality of mediation may come into tension with the trend towards greater transparency in ISDS.<sup>189</sup>

115. As insightfully observed by Professor Jack Coe, it is important to explore how the policies supporting transparency can be addressed with respect to mediation, while acknowledging that investment mediation and investment arbitration are fundamentally different so as to avoid rigid insistence that the two dispute settlement mechanisms should function with equivalent levels of transparency.<sup>190</sup>

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<sup>185</sup> *Ibid.*, see p.43.

<sup>186</sup> See Coe (n 25), at p.27.

<sup>187</sup> The full text of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration is available at <[http://www.uncitral.org/uncitral/texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/texts/arbitration/2014Transparency_Convention.html)>.

<sup>188</sup> Shahla F. Ali & Odysseas G. Repousis, “Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?”, *Denver Journal of International Law and Policy*, Vol.45, No. 2, see p.246.

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

<sup>190</sup> See Coe (n 25), at p.27.

116. Due to the specific nature of ISDS disputes, while the investment mediation mechanism should be kept private and confidential,<sup>191</sup> it needs to provide for flexibility on the confidentiality obligation to accommodate the needs and policies of host governments on transparency and public disclosure for individual cases.<sup>192</sup>

117. The CEPA Investment Mediation Rules provides that the mediation proceedings shall not be disclosed and shall remain confidential, save as otherwise agreed by the disputing parties and the mediation commission.<sup>193</sup> Furthermore, the disputing parties, the designated mediation institutions, each member of the mediation commission and the persons who participate in the mediation shall not disclose any mediation communication to any other person.<sup>194</sup>

118. Nevertheless, the CEPA Investment Mediation Rules provides that unless otherwise agreed by the disputing parties in writing, the confidentiality obligation shall not extend to the fact that the disputing parties have agreed to mediate or a settlement has been reached from the mediation.<sup>195</sup> Moreover, the confidentiality obligation does not apply where the disclosure of mediation communication is agreed by the disputing parties and the mediation commission, and for such purposes as approved by them.<sup>196</sup>

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191 *Ibid.*, p.40.

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

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

194 See Article 11(3) of the CEPA Investment Mediation Rules. Article 11(3) of the CEPA Investment Agreement further provides that:

[w]ithout prejudice to the foregoing, none of the Parties shall, in any subsequent administrative review (if applicable), arbitration, judicial or any other proceedings, adduce as evidence, or invoke or rely on, any views expressed, statements, admissions or concessions made by the other Party, the Commission or individual member of the Commission; or any report or recommendations made by the Commission or individual member of the Commission.

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

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



119. Similarly, in the IBA Rules for Investor-State Mediation (2012), the confidentiality obligation does not extend to (i) the fact that the disputing parties have agreed to mediate or a settlement resulted from the mediation, unless they otherwise agree in writing and (ii) the terms of a settlement or partial settlement, unless and to extent that the disputing parties otherwise agree in writing.<sup>197</sup> It is also provided that disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.<sup>198</sup>

### (ix) Investment Mediation and Third Party Funding

120. The practice of third party funding in ISDS has been a contentious issue and may be identified as a concern that needs to be addressed in the Working Group III of UNCITRAL.

121. It has been observed that the rise of third party funding in litigation and arbitration will likely be accompanied by the increase in the use of funding in mediation because much mediation happens alongside the two aforesaid dispute resolution mechanisms.<sup>199</sup> In fact, it has been reported by mediators that they have seen third party funders such as Harbour Litigation Funding at the mediation table.<sup>200</sup>

122. In Hong Kong, law reform with respect to third party funding has been undertaken and it has been clarified that third party funding of arbitration, mediation and related proceedings is permitted under Hong Kong law by amending the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620).<sup>201</sup> Given that the practice of third party funding may also give rise to

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

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

199 Geoff Sharp (Brick Court Chambers/Clifton Chambers), "A New Seat at the Mediation Table? The Impact of Third Party Funding on the Mediation Process (Part 1)", *Kluwer Mediation Blog*, 5 December 2016.

200 Geoff Sharp (Brick Court Chambers/Clifton Chambers), "A New Seat at the Mediation Table? The Impact of Third Party Funding on the Mediation Process (Part 2)", *Kluwer Mediation Blog*, 1 April 2017.

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

concerns such as conflict of interests in the context of investment mediation (e.g. conflict of interests between the mediators and the third party funders concerned), considerations need to be given on the approach for regulation of the practice of third party funding in investment mediation.

(x) **Enforcement of Mediated Settlement Agreements**

123. Enforceability of mediated settlement agreements is a key element for the credibility of investment mediation as an effective dispute resolution tool.<sup>202</sup> At the end of the day, it is an enforceable mediated settlement agreement that can give a sense of closure to the disputing parties.

124. Generally speaking, a mediated settlement agreement may be enforced in the domestic courts as a contract in the event of a breach. However, enforcement under contract has been commented as a *“circuitous, slow, complicated and expensive process, leaving the aggrieved party effectively back to square one”*.<sup>203</sup>

125. Some efforts have been made to strengthen the enforcement of mediated settlement agreements in some domestic jurisdictions,<sup>204</sup> including (i) allowing direct enforcement of a mediated settlement agreement in court;<sup>205</sup> (ii) allowing a mediated settlement agreement to be transposed into a notarial deed for enforcement;<sup>206</sup> and (iii) allowing a mediated settlement agreement to be enforced as a consent arbitral award.<sup>207</sup>

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

203 See Chua (n 159), at p.6.

204 *Ibid.*, see pp.6-7.

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

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

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

126. In light of the international nature of ISDS disputes, the international enforceability of settlement agreements reached through investment mediation becomes even more crucial. The many variations in the approaches of domestic jurisdictions with respect to the enforcement of mediated settlement agreement may deter foreign investors from utilising investment mediation and it has also been observed cross-border enforcement of mediated settlement agreement can be difficult.<sup>208</sup> Such concerns on the international enforceability of mediated settlement agreements can, to a certain extent, be addressed by the new United Nations Convention on International Settlement Agreements Resulting from Mediation (UN Mediation Convention) prepared by the Working Group II of UNCITRAL,<sup>209</sup> which has been commented as the equivalent of “*New York Convention*” for mediation.<sup>210</sup>

127. As explained by Ms Anna Joubin-Bret in her presentation during Hong Kong Forum – 60th Anniversary of New York Convention on 20 September 2018, mediated settlement agreements resulting from international investment disputes are within the scope of application of the UN Mediation Convention to the extent of the reservations made by the States.<sup>211</sup>

128. Hybrid models such as Arb-Med and Arb-Med-Arb provide an effective alternative mechanism for international enforcement. If the disputing parties successfully resolve their disputes in mediation

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

209 The text of the draft UN Mediation Convention is available at <<https://undocs.org/en/A/CN.9/942>> and such text is to be read together with Part III (“Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation”) of the report of the fifty-first session (25 June – 13 July 2018) of UNCITRAL (available at <<https://undocs.org/en/A/73/17%20>>). Apart from the draft UN Mediation Convention, Working Group II has prepared a draft model law on international commercial mediation and international settlement agreements resulting from mediation and the draft text of such model law is available at <<https://undocs.org/en/A/CN.9/943>>.

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

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

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

they can go back to the arbitral tribunal to record their settlement agreement in the form of a consent arbitral award.<sup>212</sup> Such procedure is available under Rule 43 of the ICSID arbitration rules<sup>213</sup> and Rule 36(1) of the UNCITRAL arbitration rules (2013).<sup>214</sup> A distinctive advantage of procedure is that the consent arbitral awards can be enforceable under the New York Convention. This is particularly effective in ensuring the international enforceability of mediated settlement agreements in light of the large number of Contracting States to the New York Convention (in total, 159 at present<sup>215</sup>), whereas it would take some time before the UN Mediation Convention is widely ratified and implemented by States<sup>216</sup>.

129. However, it should be pointed out that the mechanism for enforcement of mediated settlement agreements as consent arbitral awards is not available for Med-Arb because where an arbitrator is appointed after the dispute has been resolved in mediation, there is not a dispute existing between the parties to provide a basis for

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212 See Chua (n 159), at p.4.

213 Rule 43 of the ICSID arbitration rules provides that:

**Rule 43 Settlement and Discontinuance**

- (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.
- (2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

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

**Settlement or other grounds for termination**

**Article 36**

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

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

**Article 30. Settlement**

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case."

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

216 See Chua (n 159), at p.7.

arbitration at the time of commencement of the arbitration.<sup>217</sup> With respect to Arb-Med and Arb-Med-Arb, there is no such problem as the arbitration has commenced before the mediation starts.<sup>218</sup>

## IX. CONCLUSION

130. Investment mediation has the potential to be an effective dispute resolution mechanism for ISDS disputes and the greater use of such mechanism should be encouraged. Apart from being able to function on its own, investment mediation can be creatively combined with investment arbitration to strengthen the legitimacy and effectiveness of the system of ISDS.

131. Nevertheless, investment mediation is not a “*panacea*” to all the problems of ISDS,<sup>219</sup> and it has its limitations. For example, when the disputing parties have inflexible demands, the mediators have not been provided with adequate information or sufficient expert support teams, or the relationship between the disputing parties is beyond repair, even top legal minds such as Judge Stephen M. Schwebel may not be able to successfully mediate the disputes.<sup>220</sup> However, this should not deter the efforts to promote the greater use of investment mediation for ISDS.

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

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217 *Ibid.*, see pp.7-8.

218 *Ibid.*, see p.8.

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

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

# Appeal Mechanism for ISDS Awards

Antony Crockett<sup>1</sup>

## Is an Appeals Mechanism for ISDS Awards Desirable and Practicable?

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## I. INTRODUCTION

1. This paper seeks to provide a framework for discussion of the desirability and practicability of the introduction of an appeals mechanism or establishment of a permanent appellate body as reform options to address existing concerns regarding the investor-State dispute settlement (ISDS) system. The paper is divided into four parts as follows: Part 1 includes a brief introduction to the ISDS system and some of the criticisms that form the background to calls for reform; Part 2 briefly describes the particular concerns that have arisen in relation to consistency and correctness of awards rendered by ISDS tribunals and limitations of the existing system in terms of addressing those concerns; Part 3 then considers the desirability and practicability of establishing an appeals mechanism, with particular reference to competing concerns of finality, cost and efficiency versus consistency and correctness of awards; and Part 4 includes brief remarks on a range of additional considerations relating to the design of a permanent appeals mechanism.

2. In this discussion paper, ISDS refers to the system developed to allow private claimants (who may be individuals or legal persons) to bring claims under treaties concluded between two or more States seeking compensation or other remedies based on a breach of treaty obligations by the “host” State, where the person affected has made or proposes to make an investment.<sup>2</sup> This system is based on more than 3,000 international treaties in which States have undertaken to observe certain standards in relation to the admission and treatment of foreign investors and their investments, such as the obligation to accord fair and equitable treatment and the prohibition of unlawful expropriation.<sup>3</sup>

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2 Disputes between States and foreign investors may, of course, also arise under contract and/or provisions of domestic law.

3 For detailed discussion of substantive obligations in international investment treaties, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009).

3. Typically, investment treaties give investors a right to commence arbitration proceedings against the host State under the Convention on the Settlement of Investment Disputes (the ICSID Convention),<sup>4</sup> under the UNCITRAL Arbitration Rules<sup>5</sup> or under the rules of another arbitral institution, such as the Rules of Arbitration of the International Chamber of Commerce.<sup>6</sup> Some bilateral investment treaties also provide investors with other options, including to bring claims before the domestic courts of the host State<sup>7</sup> or to submit the dispute to conciliation or another alternative dispute resolution process.

4. When an investor-State dispute is referred to arbitration, the resulting award (which is equivalent to a judgment) is legally binding and enforceable either pursuant to the ICSID Convention or, in the case of most non-ICSID awards, the New York Convention.<sup>8</sup> According to UNCTAD data, there have been at least 904 ISDS cases submitted to arbitration since 1987.<sup>9</sup> As illustrated in Figure 1 below, the number of cases filed each year has been steadily increasing.

5. In terms of overall outcomes, by the end of 2017, roughly one-third of cases were decided in favour of the State (i.e. claims were dismissed based on the merits or on jurisdictional grounds); about a quarter of cases were decided in favour of the investor with compensation awarded; a further quarter of cases were settled; and the remaining cases were either discontinued, or the investor was

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<sup>4</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for signature on 18 March 1965, entry into force on 14 October 1966) 575 UNTS 159.

<sup>5</sup> United Nations Commission on International Trade Law Arbitration Rules ('UNCITRAL Arbitration Rules') (December 2013).

<sup>7</sup> See e.g. Article 9 of the Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark concerning the Promotion and Protection of Investments (signed on 22 January 2007, entry into force on 15 October 2009).

<sup>8</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature on 10 June 1958, entry into force on 7 June 1959) 330 UNTS 38.

<sup>9</sup> See Investment Dispute Settlement Navigator <<https://investmentpolicyhub.unctad.org/ISDS>> accessed 8 January 2019. The figure of 904 was current as at 31 July 2018.



successful but was not awarded compensation (see Figure 2).<sup>10</sup> Excluding the awards in the three claims against Russia relating to the Yukos oil company,<sup>11</sup> where USD 50 billion was awarded to the claimants, the average amount claimed by investors in ISDS cases is USD 454 million and the average amount awarded is USD 125 million.<sup>12</sup>

6. The ISDS system has been subject to significant public criticism as a result of the large sums which can be awarded in ISDS cases as well as concerns regarding investors seeking to challenge regulations relating to taxation, public health or environmental protection. Concerns such as these have led to some States taking steps to prevent future disputes being referred to arbitration, for example by denouncing the ICSID convention,<sup>13</sup> terminating their investment treaties,<sup>14</sup> narrowing or clarifying substantive standards of protection,<sup>15</sup> or stating that they will not include ISDS provisions in future investment treaties.<sup>16</sup>

10 See UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2017" (IIA Issues Note, Issue 2, June 2018) <[https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf)> accessed 8 January 2018.

11 See the awards in *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 226), *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA 227), and *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 228), each dated 18 July 2014. These awards were subsequently set aside by Hague District Court: see *The Russian Federation v Veteran Petroleum Limited* (C/09/477160/HA ZA 15-1), *The Russian Federation v Yukos Universal Limited* (C/09/477162/HA ZA 15-2), *The Russian Federation v Hulley Enterprises Limited* (C/09/481619/HA ZA 15-112), each dated 20 April 2016.

12 UNCTAD (n 10) 5. It is worth noting that these averages are not adjusted for inflation and as they include sums claimed and awarded over a period of three decades, the averages may give an incorrect impression on the importance of ISDS claims in terms of the potential monetary liabilities for States who are ordered to pay damages to investors.

13 E.g. Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. See "Bolivia Withdraws from ICSID" (*Global Arbitration Review*, 1 July 2007) <<https://globalarbitrationreview.com/article/1028104/bolivia-withdraws-from-icsid>>; "Ecuador to pull out of ICSID" (*Global Arbitration Review*, 15 June 2009) <<https://globalarbitrationreview.com/article/1028325/ecuador-to-pull-out-of-icsid>>; 'Adiós to ICSID' (*Global Arbitration Review*, 25 January 2012) <<https://globalarbitrationreview.com/article/1030923/adi%C3%B3s-to-icsid>> accessed 8 January 2018.

14 The termination of investment treaties does not, of course, automatically imply dissatisfaction with ISDS and may be in pursuit of other objectives, for example to replace older treaties with new agreements. See e.g. Antony Crockett, "The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?" in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill Nijhoff 2018) 159.

15 Catharine Titi, "The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties" (International Centre for Trade and Sustainable Development, November 2018) <[https://www.ictsd.org/sites/default/files/research/ictsd\\_-\\_the\\_evolution\\_of\\_substantive\\_investment\\_protections\\_in\\_recent\\_trade\\_and\\_investment\\_treaties\\_-\\_titi.pdf](https://www.ictsd.org/sites/default/files/research/ictsd_-_the_evolution_of_substantive_investment_protections_in_recent_trade_and_investment_treaties_-_titi.pdf)> accessed 28 January 2019.

16 See Amokura Kawharu and Luke Nottage, 'NZ Renounces ISDS: Déjà Vu?' (Kluwer Arbitration Blog, 6 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/06/booked-luke-nottage/>> accessed 8 January 2019.

7. On the whole, however, ISDS still appears to enjoy significant support from States: since Bolivia's withdrawal from the ICSID Convention in 2007, many more States have acceded to the ICSID Convention<sup>17</sup> than have denounced it. ISDS provisions are also still commonplace in recently concluded BITs<sup>18</sup> and were included in, for example, the 11-country Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that entered into force on 30 December 2018.<sup>19</sup>

8. States and other stakeholders have engaged in discussions in various fora regarding possible reforms to address criticisms of the ISDS system, albeit without necessarily abandoning ISDS entirely. For example, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has been considering the topic of ISDS reform since 2017. In this context, key concerns relating to ISDS identified by UNCITRAL Working Group III and in relation to which potential reforms are being considered include three main topics:<sup>20</sup>

- (a) concerns pertaining to consistency, coherence, predictability and correctness of decisions by ISDS tribunals;
- (b) concerns pertaining to arbitrators and decision-makers; and
- (c) concerns pertaining to the cost and duration of ISDS cases.

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17 Since Bolivia served its notice of withdrawal on 2 May 2007, 14 States have acceded to the ICSID Convention, including e.g. Canada (2013), Haiti (2009), Iraq (2015), Mexico (2018), Moldova (2011), and Qatar (2011). See ICSID, "2018 Annual Report" 16-28 <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 15 January 2019.

18 See e.g. the 2018 Kazakhstan-Singapore BIT; the 2018 Belarus-India BIT; and the 2018 Japan-United Arab Emirates BIT.

19 See the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed on 8 March 2018, entry into force on 30 December 2018), Section B.

20 See UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October - 2 November 2018)" (6 November 2018) <<http://undocs.org/en/A/CN.9/964>> accessed 24 January 2019.

9. In relation to point (a) above, Working Group III has expressed concern in relation to divergent interpretations of investment treaty provisions, procedural inconsistency (i.e. tribunals reaching contradicting conclusions about the same procedural issue), the lack of a mechanism to address issues arising from multiple proceedings, and the limited availability of mechanisms to address inconsistent and incorrect arbitral decisions.<sup>21</sup>

10. The introduction of an appeals mechanism or the establishment of a permanent appellate body have been identified as among the reform options which could address these concerns.<sup>22</sup> Although these are not the only reform options suggested for discussion by UNCITRAL Working Group III,<sup>23</sup> they form the focus of the present paper.

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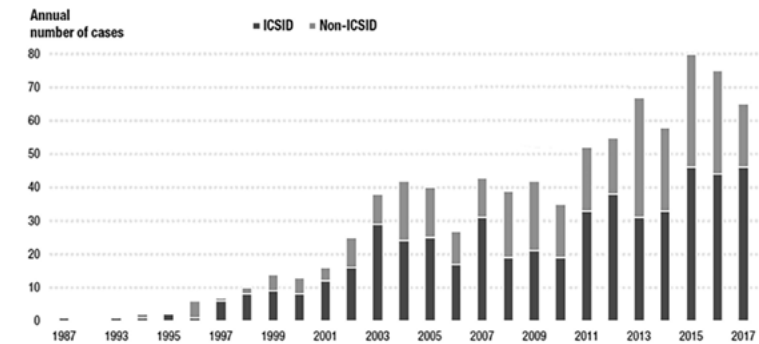
21 See UNCITRAL Working Group III (n 20) 6-11.

22 See UNCITRAL Working Group III Secretariat, "Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters (28 August 2018)" paras 44-45, 47.  
<[http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/WGIII-36th-session/149\\_main\\_paper\\_7\\_September\\_DRAFT.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf)> accessed 18 January 2019.

23 Other options included the introduction of a system of precedent, providing guidance to arbitral tribunals, prior scrutiny of arbitral awards, and establishing an international court system. See UNCITRAL Working Group III Secretariat (n 22) paras 37-47.

Figure 1: Trends in known treaty-based ISDS cases, 1987-2017<sup>24</sup>

Figure 1. Trends in known treaty-based ISDS cases, 1987–2017

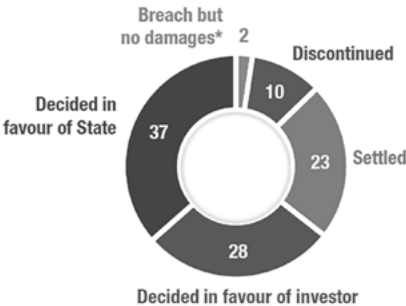


Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.

Figure 2: Results of concluded ISDS cases, 1987-2017  
(Per cent of all cases)<sup>25</sup>

Figure 4. Results of concluded cases,  
1987–2017 (Per cent)



Source: UNCTAD, ISDS Navigator.

\*Decided in favour of neither party (liability found but no damages awarded).

24 UNCTAD (n 10) 2.

25 UNCTAD (n 10) 6.

## II. CONCERNS REGARDING CONSISTENCY AND CORRECTNESS OF DECISIONS BY ISDS TRIBUNALS AND LIMITATIONS OF THE EXISTING SYSTEM TO ADDRESS THESE CONCERNS

11. In 2016, it was reported that more than half of the respondents to a survey conducted by the IBA Arbitration Subcommittee on Investment Treaty Arbitration (the IBA Subcommittee) expressed concern regarding substantive inconsistency in decisions of ISDS tribunals.<sup>26</sup> A majority of respondents also believed that an appellate mechanism could (at least partially) address this concern.<sup>27</sup> Academic opinion has been divided on the impact (and indeed the existence) of inconsistency in ISDS. Some authors refer to inconsistency issues in ISDS as “*considerable and in need of serious attention*”<sup>28</sup> and highlight the damage to the legitimate expectations of parties as a result of uncertainty caused by inconsistency.<sup>29</sup> Others warn against exaggerating the extent of any inconsistencies<sup>30</sup> and comment that “*the need for greater consistency and coherence has not compellingly been established*”.<sup>31</sup> As noted in the introduction, UNCITRAL Working Group III has also discussed concerns pertaining to the consistency, coherence, predictability and correctness of decisions by ISDS tribunals and, at least in the context of those discussions, there would appear to be a consensus that these concerns are sufficiently serious to merit attention from the Working Group.

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26 See IBA Subcommittee on Investment Treaty Arbitration, “Report on the Subcommittee’s Investment Treaty Arbitration Survey” (May 2016) 2, available at <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Default.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx)> accessed 8 January 2019.

27 *Ibid.*

28 Charles N. Brower and Stephan W. Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International investment Law?” *Chicago Journal of International Law*, Vol. 9(2), 473.

29 See Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” *Fordham Law Review* Vol.73(4), 1558..

30 See Stanimir A. Alexandrov, “On the Perceived Inconsistency in Investor-State Jurisprudence” in Jose E. Alvarez, Karl P. Sauvant *et al.* (eds), *The Evolving International Investment Regime: Expectations, Realities, Opinion* (OUP 2011) 69.

31 Barton Legum, “Options to Establish an Appellate Mechanism for Investment Disputes” in Karl P. Sauvant (ed), *Appeal Mechanism in International Investment Disputes* (OUP 2008) 236.

*i. Features of the existing ISDS system that create a risk of inconsistency*

12. In a recent paper, Lise Johnson and Lisa Sachs suggest that concerns regarding inconsistency can be grouped into at least four categories:<sup>32</sup>

- (a) Inconsistency in the interpretation of the same treaty: some investment protection instruments have been invoked multiple times, such as the North American Free Trade Agreement (NAFTA)<sup>33</sup> and the Energy Charter Treaty. This has required ISDS tribunals to construe the same treaty provisions in different cases.
- (b) Inconsistency in the interpretation of identical or similar language across treaties: the investment protection provisions found in investment treaties are often similar, but not always identical. Parties nevertheless refer to past awards dealing with similar language and tribunals are required to make findings on the extent to which differences in language imply a different substantive standard.
- (c) Inconsistency with the intent of State parties to the applicable treaty: in the early experience of arbitration under NAFTA Article 11, for example, several tribunals determined that the fair and equitable treatment standard set out in Article 1105(1) had been breached and ordered the payment of damages by the respondent State. This experience prompted the NAFTA States to adopt, via the NAFTA Free Trade Commission, a binding note of interpretation “*to clarify and reaffirm the meaning of certain of its provisions.*”<sup>34</sup>

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32 Lise Johnson and Lisa Sachs, “Inconsistency’s Many Forms in Investor-State Dispute Settlement and Implications for Reform” (CCSI Briefing Note, November 2018) <[http://ccsi.columbia.edu/files/2018/11/Inconsistencies\\_ISDS\\_Briefing-Note\\_11.28.18.pdf](http://ccsi.columbia.edu/files/2018/11/Inconsistencies_ISDS_Briefing-Note_11.28.18.pdf)> accessed 8 January 2019.

33 North American Free Trade Agreement (adopted on 17 December 1992, entry into force on 1 January 1991) 32 ILM 289.

34 NAFTA Free Trade Commission, “North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions” (31 July 2001).

- (d) Inconsistency with other international or domestic laws and public expectations: this form of inconsistency is an emerging and controversial subject, arising from the increasing complexity of international and domestic legislation and and heightened concern of the public in relation to environmental protection, public health, labour, and human rights.<sup>35</sup>

13. The November 2018 report of the IBA Subcommittee (the 2018 IBA Report) – which discusses concerns and proposed reforms relating to consistency, efficiency and transparency in ISDS arbitration – further contends that there is a greater risk of inconsistency in ISDS cases compared with other areas of law.<sup>36</sup>

14. According to the 2018 IBA Report, the ‘catalysts for inconsistency’ include:

- (a) that ISDS cases “*generally involve legal concepts that are designed to be applied to a broad range of situations, and, therefore, are open to ... different interpretations*”;
- (b) that ISDS is ‘decentralised’ by virtue of the fact that ISDS cases may be referred to different institutions and because the parties have a determining influence over the composition of the tribunal; and
- (c) the relative ‘newness’ of international investment law, in other words, “*the fact that many (if not most) areas of investment law are in the process of being formed*”.<sup>37</sup>

35 For example, Bruno Simma has argued that ISDS tribunals have failed to pay adequate attention to international human rights norms. See “Arbitrators and Human Rights” (Global Arbitration Review, 13 June 2011) <<https://globalarbitrationreview.com/article/1030367/arbitrators-and-human-rights>> accessed 8 January 2019.

36 See IBA Subcommittee on Investment Treaty Arbitration, “Consistency, Efficiency and Transparency in Investment Treaty Arbitration” (November 2018) 6, available at <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Default.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx)> accessed 8 January 2019.

37 See IBA Subcommittee on Investment Treaty Arbitration (n 37) 6.

15. The 2018 IBA Report further suggests that perceptions of inconsistency in ISDS awards may be ‘magnified’ by the fact “*that it is not unusual for different cases to challenge a single state measure or group of measures affecting several investors*” and also as a result of the close scrutiny of awards by scholars and practitioners “focusing on contradictions”.<sup>38</sup>

16. In addition to the factors discussed above, it is worth noting that tribunals are often called upon to interpret treaty provisions which are in similar but not identical language to provisions interpreted in previous awards. The huge number of investment treaties signed by States and the fact that the language used is not uniform creates an obvious risk of ostensibly inconsistent decisions. This risk is likely exacerbated by the fact that States often agree to different language for the same provision in two or more treaties (i.e. it may be difficult reasonably to discern a consistency of practice or intention as to the effect of the relevant provisions from one treaty to the next).<sup>39</sup>

*ii. Tribunals’ views on the precedential value of previous decisions*

17. The existing ISDS system has a number of inherent limitations in terms of addressing the risk of inconsistent or incorrect decisions. A limitation relevant to the present discussion is that there is a tension between the objective of consistency and the duty of arbitrators to decide each case by reference to its particular circumstances. Two cases are cited in the 2018 IBA Report which serve to highlight this tension.

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38 See IBA Subcommittee on Investment Treaty Arbitration (n 37) 7.

39 Compare, for example, Article 11 (*Treatment of Investment*) of the ASEAN Comprehensive Investment Agreement with Article 7 (*Treatment of Investment*) of the ASEAN-China Investment Agreement. See Association of Southeast Asian Nations Comprehensive Investment Agreement (signed on 26 February 2009, entry into force on 24 February 2012); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People’s Republic of China and the Association of Southeast Asian Nations (signed on 15 August 2009, entry into force on 1 January 2010).



18. In *Saipem v Bangladesh* the tribunal addressed the fact that both parties had referred it to numerous prior awards and stated as follows [citations omitted]:<sup>40</sup>

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

19. In *Burlington Resources v Ecuador*, a majority of the tribunal formed the same view, but Professor Brigitte Stern dissented [emphasis added]:<sup>41</sup>

As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyse the arbitrator's role in the same manner, as

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<sup>40</sup> *Saipem S.p.A. v The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), award dated 30 June 2009, at ¶ 67.

<sup>41</sup> *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability dated 14 December 2012, at ¶ 187.

she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

20. It is apparent from these conflicting views on arbitrators' duties that there is no consensus as to whether tribunals are under a duty (or have the authority) to seek consistency in the interpretation of treaty provisions.

*iii. Rights of recourse against ISDS awards*

21. Another limitation of the existing system in addressing inconsistency is that, generally speaking, there are no existing mechanisms permitting appeals on the merits in ISDS cases.

22. The majority of ISDS cases are conducted under the auspices of ICSID and subject to the ICSID Convention.<sup>42</sup> The ICSID Convention provides for only limited rights of review of an award: in Article 50, which allows either party to apply to the Secretary-General for an "*interpretation*" of the award; Article 51, which allows either party to request revision of the award:

On the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

And Article 52, which creates a right to seek annulment of an award on limited specified grounds (discussed in further detail below).

23. The rights created in Article 50 and 51 are obviously limited and not analogous to a right of appeal on the merits. Further, requests under these provisions, if allowed by the Secretary-General, will, where possible, be referred to the same tribunal which rendered the award. Applications under these provisions are also very rare.<sup>43</sup>

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<sup>42</sup> See Figure 1 above.

<sup>43</sup> Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 160-162.

24. Article 52(1) provides that:

Either party may request annulment of the award by an application to the Secretary General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

25. The application for annulment will be referred to a three-member *ad-hoc* committee constituted for the sole purpose of the application. The members of the *ad-hoc* committee are appointed from the ICSID Panel of Arbitrators.<sup>44</sup>

26. The annulment procedure is not analogous to a right of appeal on the merits in two key respects. First, if successful it leads to annulment of the award (in full or in part). The *ad-hoc* committee decision does not substitute for the award and, if the award is annulled, the same dispute can subsequently be referred to a new tribunal. Second, the annulment procedure may not be used to challenge the merits of the tribunal's decision.<sup>45</sup> Instead, the procedure is designed to ensure procedural integrity and due process.<sup>46</sup>

27. For non-ICSID ISDS awards, an award may, in theory, be subject to appeal on the merits in two ways: an 'internal' process whereby the parties design the arbitration agreement to allow for appeal to another tribunal, or an 'external' process where parties opt-in to (or do not opt-out of) a right of appeal under an applicable domestic arbitration statute.

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<sup>44</sup> ICSID Convention (n 4) Article 52(3).

<sup>45</sup> In some cases *ad-hoc* committees have been criticised for straying into the merits of the case in their annulment decisions. See, e.g. Paul Friedland and Paul Brumpton, "Rabid Redux: The Second Wave of Abusive ICSID Annulments" (2012) Vol. 27(4) *American University International Law Review* 727.

<sup>46</sup> Reed, Paulsson and Blackaby (n 43) 162.

28. Consistent with the principle of party autonomy, parties are, generally speaking, free to agree on an internal appeals process to a second tribunal as part of their chosen arbitral procedure. Internal appeals are, for example, common in commodities arbitration<sup>47</sup> and have been included as an option in institutional rules such as those of the Institute of Conflict Prevention and Resolution, JAMS, the European Court of Arbitration, and the Spanish Court of Arbitration.<sup>48</sup> There is no obvious reason why internal appeal decisions would not be enforceable under most domestic arbitration laws; the UNCITRAL Model Law, for example, would uphold the process of “*any such appeal if agreed on by the parties*”.<sup>49</sup>

29. Domestic arbitration laws may also provide for an ‘external’ process of appeal on the merits to the domestic courts at the place of arbitration. In England & Wales, for example, there is a limited right of appeal on a point of law under Section 69 of the Arbitration Act 1996 where an award is rendered in arbitration proceedings where the place of arbitration is England and where the substantive governing law of the dispute is English law. Parties may opt-out of the application of Section 69. If the parties do not opt-out, an appeal under the provision may only be brought with the agreement of all parties or with leave of the court. Hong Kong has an opt-in regime. Specifically, parties may opt-in to Sections 5, 6 and 7 of Schedule 2 to the Arbitration Ordinance (Cap. 609),<sup>50</sup> which provide for appeal on a question of law with the agreement of all parties or with the leave of the court.

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47 Under the Rules of the British Coffee Association (BCA), for example, after proceedings before a first instance tribunal have resulted in an award, either party may appeal to a second tribunal within 30 days of the publication of the award. The case is then heard *de novo* by the appellate tribunal, consisting of either three or five arbitrators. The award issued by the appellate tribunal is final and binding (but can be subject to appeal to the High Court under Section 69 of the Arbitration Act 1996). See the BCA Rules, Article 7.9.6; Michael Swangard, “Chapter 7: Commodity Arbitration” in Julian D.M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England, with Chapters on Scotland and Ireland* (Kluwer Law International 2013) 120-123.

48 See Rowan Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?” (2013) Vol. 30(5) *Journal of International Arbitration* 548-551.

49 Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 924.

50 See Annex 1.

30. The limited rights of appeal to domestic courts found in certain domestic arbitration laws are not likely to be relevant in the context of non-ICSID ISDS awards because it is unlikely that the circumstances of an ISDS case would satisfy the requirements for bringing an appeal. The right of appeal under the English Arbitration Act, for example, is limited to questions of English law,<sup>51</sup> whereas the majority of ISDS cases will be decided under international law.

31. The UNCITRAL Rules and other institutional rules, in particular the ICC Rules, which are sometimes applied in ISDS cases, do not provide for any internal appeals process.<sup>52</sup> As such, in the present ISDS system it will also usually be impossible for a non-ICSID award to be appealed on the merits. Accordingly, subject to a limited right included in most arbitration laws to seek correction of computational, clerical or typographical errors in the award, the only recourse available against an award is to apply for an order setting aside the award. The circumstances in which an award will be set aside are, however, exceptional. For example, in Hong Kong, under Section 81(2)(a) or (b) of the Arbitration Ordinance (Cap. 609), a successful application to annul the award requires the applicant to prove that:

- (a) a party to the arbitration was under some incapacity;
- (b) the arbitration agreement is invalid;
- (c) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration, or was otherwise unable to present its case;
- (d) the award deals with a dispute not contemplated by the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;

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51 Section 2(1) of the Arbitration Act 1996 limits the scope of appeals to arbitrations where the seat is located in England, Wales and Northern Ireland.

52 Of course, in theory, and as the examples of commodities and sports arbitration illustrate, the parties to an ISDS case could agree to an internal appeals process and the resulting decision would be enforceable as an award. Whether such a process could make a significant contribution to improving the consistency and coherence of awards is less clear.

- (e) the composition of the tribunal or the arbitration proceedings was not in accordance with the agreement of the parties, unless such agreement conflicted with a mandatory provision of the ordinance;
- (f) the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
- (g) the award conflicts with public policy in Hong Kong.

32. This provision implements Article 34 of the UNCITRAL Model Law on International Commercial Arbitration which mirrors the limited grounds on which domestic courts are permitted to refuse to recognise or enforce arbitral awards as set out in Article V of the New York Convention.<sup>53</sup>

33. It is well established that Article 34 of the UNCITRAL Model Law is not intended to create rights to appeal the merits of an award. In the leading Hong Kong case, involving an application to set aside an ICC award rendered in Hong Kong, the Court of Appeal stated as follows [citations omitted]:<sup>54</sup>

The court's approach to such application is not controversial. The court is concerned with "the structural integrity of the arbitration proceedings". The remedy of setting aside is not

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<sup>53</sup> Article V of the New York Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
  - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

<sup>54</sup> *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1 (Hong Kong Court of Appeal) [7].

an appeal, and the court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. It will address itself to the process.

### III. DESIRABILITY AND PRACTICABILITY OF AN APPEALS MECHANISM

34. The discussion in this part considers whether an appeals mechanism is desirable and practicable, with particular reference to competing concerns of finality, cost and efficiency versus consistency and correctness of awards.

#### *i. Desirability of an appeals mechanism*

35. Finality – the principle that arbitral awards are not subject to any appeal on the merits – is a cardinal rule of international arbitration. The principle is reflected in the New York Convention, the UNCITRAL Model Law, the ICSID Convention, the rules of the majority of arbitral institutions and the arbitration statutes of many leading centres for international arbitration.

36. Surveys of corporations have confirmed that finality is seen as an important virtue of international arbitration.<sup>55</sup> The fact that the principle is reflected in the key international instruments relating to international arbitration, including investor-State arbitration, would suggest that, for at least the past 60 years, the principle of finality has also been regarded by States as a desirable policy. The principle may be seen as less desirable, however, where the stakes are very high, either in terms of the sums of money involved in a dispute, or because of the nature of the issues.<sup>56</sup>

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55 Loukas Mistelis and Emilia Onyema, "International Arbitration: Corporate Attitudes and Practices" (2006) 15 <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf)> accessed 8 January 2019; Loukas Mistelis and Rutger Metsch, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)> accessed 29 January 2019, 6; Stavros Brekoulakis and Adrian Hodis, "2018 International Arbitration Survey: The Evolution of International Arbitration" <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed 29 January 2019, 7.

56 See Platt (n 48) 534.

37. In terms of public attitudes, it was already noted in the introduction that there has been very strong public opposition to ISDS in numerous countries. In 2014, the European Commission conducted an online public consultation on ISDS in the Transatlantic Trade and Investment Partnership (TTIP). One of the key conclusions drawn from the responses to the consultation (which numbered in the many thousands) was that the establishment of an appeals mechanism to ensure the “legal correctness” of ISDS decisions was of particular importance to respondents.<sup>57</sup>

38. Correctness and consistency of ISDS decisions is, arguably, of greater importance to States (and to the public) than to investors. This is because States may face numerous claims whereas investors are relatively unlikely to ever be involved in more than one ISDS dispute (with the possible exception of the largest multinationals). Having said this, in considering whether an appeals mechanism is desirable, it is worth asking whether appeals are likely to prolong or complicate ISDS disputes, resulting in higher costs to the public purse, at least as far as legal costs are concerned. It is not obvious, of course, that this is the case. An appeals mechanism might lead to lower costs over time, through improving consistency and discouraging the pursuit of frivolous claims, or the practice of legal counsel pursuing every possible argument, however speculative.

39. A further question is whether an appeals mechanism will achieve meaningful improvements in terms of the consistency and correctness of ISDS decisions, or improvements in perceptions of consistency and correctness and therefore the overall legitimacy of the system. Susan Franck has argued that a “*single, unified, permanent body*” charged with “*creating consistent jurisprudence*” will promote the legitimacy of ISDS more than the current system

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57 See European Commission, “Reports Presented Today: Consultation on Investment Protection in EU-US Trade Talks” (13 January 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234>> accessed 8 January 2019.



of stand-alone arbitral tribunals.<sup>58</sup> The 2018 IBA Report, however, argues that “*a permanent or semi-permanent appellate body would not be a guarantee for accurate treaty interpretation*” and that other mechanisms are also needed to achieve consistency and accuracy of decisions, including, for example, the use of binding joint interpretations by States.<sup>59</sup>

40. States will also need to consider the extent to which an appeal mechanism can assist to improve consistency of ISDS decisions given the huge number of bilateral and multilateral investment treaties which increasingly overlap one another and which are often inconsistent in terms of how their substantive provisions are drafted.<sup>60</sup> For this reason, UNCTAD has recommended that States should review their older treaties and consider revising or terminating them as new treaties are signed.<sup>61</sup> UNCITRAL Working Group III has noted the impact of fragmented substantive protection standards on the lack of consistency in ISDS decisions,<sup>62</sup> but has made it clear that its mandate is focused on the procedural rather than the substantive aspects of ISDS.<sup>63</sup>

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58 See Franck (n 29) 1617-1620. See also Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) Vol. 23(3) *Arbitration International* 376, arguing that uniform rule creation would increase the “predictability of investments and the credibility of the dispute resolution system.”

59 See IBA Subcommittee on Investment Treaty Arbitration (n 36) 29-30. In UNCITRAL Working Group III, it has been observed that joint interpretations are rare and that States may find it difficult to agree on a joint interpretation after a treaty has been executed. See UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November-1 December 2017): Part II” (26 February 2018) <<https://undocs.org/en/A/CN.9/930/Add.1/Rev.1>> accessed 8 January 2019.

60 See Anna Joubin-Bret, “Why We Need a Global Appellate Mechanism for International Investment Law” Columbia FDI perspectives No. 146 (27 April 2015), arguing that the likelihood of successfully addressing consistency issues through an appeals mechanism is increased if the design of such a mechanism takes into account the impact it will have on all investment treaties that are in force (rather than a select few) and enjoys widespread support from States.

61 See UNCTAD (n 10) 1.

62 See UNCITRAL Working Group III Secretariat, “Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters” (28 August 2018) para 30 <[http://www.uncitral.org/pdf/english/working\\_groups/wg\\_3/WGIII-36th-session/149\\_main\\_paper\\_7\\_September\\_DRAFT.pdf](http://www.uncitral.org/pdf/english/working_groups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf)> accessed 18 January 2019.

63 UNCITRAL Working Group III, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November – 1 December 2017)” (19 December 2018) para 20, <<https://undocs.org/en/A/CN.9/930/Rev.1>> accessed 24 January 2019.

ii. *Is there a consensus that an appeals mechanism is desirable?*

41. Before turning to questions of practicability of an appeals mechanism from a legal perspective, it is worthwhile to consider briefly the extent to which there may be consensus amongst States that an appeals mechanism is a desirable goal.

42. Starting with the United States, provisions in the Bipartisan Trade Promotion Authority Act of 2002 required the US government to include the establishment of an “*appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements*” as a negotiating objective in future US trade agreements.<sup>64</sup> In trade and investment-related agreements concluded after 2002, this objective was pursued via the inclusion of provisions obliging the contracting parties to consider the establishment of a bilateral appeals mechanism or to reach an agreement that would allow a future permanent appellate body to review awards rendered under the ISDS provisions of the relevant treaty.<sup>65</sup> The 2004 US Model BIT reflected this position in its Annex D, which required the parties to consider establishing an appeals mechanism relating to the ISDS provisions of the BIT within three years of its entry into force.<sup>66</sup> The US approach seems to have influenced other States’ practice as well: the 2015 China-Australia FTA, for example, contains a similar clause requiring the parties to initiate negotiations to establish a (bilateral) appellate mechanism within three years of the treaty entering into force.<sup>67</sup>

64 Bipartisan Trade Promotion Authority Act of 2002, 19 USC § 3801-3813 (West Supp 2003).

65 For example, Articles 10.19(10) and Annex 10-H of the Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile (signed on 6 June 2003, entry into force on 1 January 2004) provide, respectively, as follows:

If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body’s establishment.

Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.

66 See 2004 US Model BIT, Annex D, accessible at <<https://www.state.gov/documents/organization/117601.pdf>>.

67 Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China (signed on 16 June 2015, entry into force on 20 December 2015), Article 9.23.

43. In 2012, the US changed its approach to appeals mechanisms in ISDS through the issue of a new Model BIT.<sup>68</sup> In the 2012 Model BIT, Annex D was removed and, consequently, parties were no longer obliged to consider establishing a bilateral appeals mechanism. However, similar to the 2004 US Model BIT, the 2012 US Model BIT provides that the parties “shall consider” whether any awards issued under the BIT’s dispute settlement provisions should be subject to a multilateral appellate mechanism, in the event such a mechanism is developed in the future.<sup>69</sup>

44. On 30 January 2017, the United States withdrew from the Trans-Pacific Partnership (TPP), which had been negotiated to include text that was consistent with the US negotiating objectives outlined in 2012.<sup>70</sup> In particular, TPP Article 9.23(11) contemplated the possibility of the establishment of a multilateral appellate mechanism, but did not require the Parties to negotiate an appellate mechanism specific to TPP awards.

45. The recently signed United States-Mexico-Canada Agreement (USMCA),<sup>71</sup> which is intended to replace the NAFTA, is not in force. The concluded text represents a departure from both the multilateral and bilateral practice of the United States between 2002 and 2012 as well as from the United States’ approach to the TPP (i.e. between 2012 and 2016). In particular:

- (a) the USMCA is silent regarding the possible establishment of an appellate mechanism to review the awards of tribunals constituted to determine ISDS disputes under the USMCA;

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68 See 2012 US model BIT, accessible at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

69 See 2004 US Model BIT (n 66) Article 28.10; 2012 US Model BIT (n 69), Article 28.10.

70 See Letter from the Office of the United States Trade Representative to the Trans-Pacific Partnership Depository dated 30 January 2018 <<https://ustr.gov/sites/default/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf>> accessed 8 January 2019.

71 See the Agreement between the United States of America, the United Mexican States, and Canada (signed on 30 November 2018).

- (b) there is no requirement or aspiration expressed in the text to negotiate toward the establishment of a review mechanism; and
- (c) in a more significant move away from investment arbitration – and in notable contrast to the recent practice of the European Union (the EU), discussed below – the USMCA eliminated arbitration for US investors in Canada (and vice versa), and significantly curtails the rights of Mexican investors to pursue ISDS claims in arbitration against the US (and vice versa).

46. The EU has also been reconsidering its position on ‘traditional’ ISDS provisions in treaties. Since the EU consultation on the TTIP in 2014 (mentioned above), the European Commission now favours replacement of the existing system of ISDS arbitration with a multilateral investment court system, which would include an appeals mechanism (M-ICS).<sup>72</sup> As a first step towards this goal, the EU has been seeking to establish standing investment courts (ICS)<sup>73</sup> under each of its recent investment agreements with third countries.<sup>74</sup>

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72 See European Commission, “The Multilateral Investment Court Project” <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>> accessed 24 January 2019.

73 Belgium has requested an opinion from the Court of Justice of the European Union regarding the compatibility of the ICS provisions in CETA (which are similar to those in several new treaties signed by the EU) with EU law. Advocate General Bot, in his opinion of 29 January 2019, proposed that the Court should opine that the ICS provisions in CETA are compatible with EU law. The Advocate General’s opinions usually have considerable influence over the Court’s judgments, but are not always followed (notably in the recent *Achmea* judgment where the Court came to a different conclusion than Advocate General Wathelet and concluded that intra-EU BITs were incompatible with EU law). See Opinion 1/17 of Advocate General Bot, Request for an Opinion by the Kingdom of Belgium (delivered on 29 January 2019) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9263214>> accessed 30 January 2019.

74 See the concluded EU’s FTAs with Canada, Mexico, Singapore and Vietnam. The European Commission is negotiating similar agreements with Chile, China, Indonesia, Japan, Malaysia, Myanmar and the Philippines. See Opinion 1/17 of Advocate General Bot (n 73) at footnote 10.

47. While the EU has described these agreements as providing for the establishment of an ICS,<sup>75</sup> the agreements themselves do not refer to an ‘investment court’ but instead provide for arbitration with the possibility of appeal to a second arbitral tribunal. The arbitrators on each tribunal are selected from a list of pre-approved arbitrators who are kept on retainer by the EU and the relevant counterparty. Whether the ICS is a ‘court’ or an ‘arbitral tribunal’ is not just a question of labelling. The characterisation of the process will impact, for example, whether decisions are enforceable as arbitral awards under the New York Convention.

48. Questions of labelling aside, it is clear that the EU favours substantial reform to the ‘traditional’ model of ISDS arbitration. Indeed, in a July 2017 factsheet concerning the negotiation of the EU-Japan Free Trade Agreement, the Commission noted that “[f]or the EU ISDS is dead”, and that the ICS model is now being pursued in all EU agreements.<sup>76</sup>

49. However, in apparent recognition of the difficulty of achieving widespread consensus on the M-ICS model, the EU has proposed the establishment of a multilateral appeals tribunal (MAT) as an alternative to the M-ICS. It is understood that the MAT, as proposed by the EU, would hear appeals from awards rendered under existing treaties providing for *ad-hoc* arbitration tribunals and would also replace the appellate tribunal in the new generation of EU treaties<sup>77</sup>

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75 See e.g. European Commission, “Key Elements of the EU-Singapore Trade and Investment Agreements” (18 April 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1827>> accessed 18 January 2019; European Commission, “The EU-Singapore Agreements Explained” (last update 13 July 2018) <<http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/agreement-explained/>> accessed 18 January 2019.

76 European Commission, “A New EU Trade Agreement with Japan” (July 2017) 6 <[https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155684.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf)> accessed 8 January 2019. Any ICS established pursuant to an EU agreement with a third State will, however, only be empowered to decide on disputes arising under that particular agreement. To date, the EU has concluded agreements containing ICS provisions with Vietnam, Canada and Singapore, none of which have entered into force.

77 See (n 74).

in which ICS provisions are included.<sup>78</sup> The MIC and MAT can,<sup>79</sup> of course, only achieve their goals in terms of improving consistency of ISDS decisions if a significant number of third States agree to join the mechanism.

50. Experience of successive rounds of reform discussions at ICSID suggests that achieving widespread consensus amongst States may be difficult.<sup>80</sup> In 2004, ICSID issued a public discussion paper<sup>81</sup> on possible improvements of the ICSID arbitration framework, including the introduction of an appeals mechanism but ICSID members decided at that time not to pursue this proposal further.<sup>82</sup> ICSID is currently undergoing another reform process to modernise its rules, regulations and procedures.<sup>83</sup> The Secretary-General has indicated, however, that an appeals mechanism is not being considered as part of the current reform process because, again,

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78 The questionnaire of the European Commission's 2016-2017 consultation on reform of investment dispute resolution states in question 44:

Another option that has emerged is the establishment of a permanent Multilateral Appeal Tribunal, i.e. without changing the existing first instance tribunals. Thus a Multilateral Appeal Tribunal would be limited to deal with ISDS awards appealed on the grounds of errors of law and manifest errors of fact, which the current ISDS system does not allow for. This would address the issue of ensuring legal correctness and assist with consistency of case law. The Multilateral Appeal Tribunal would rule on ISDS awards rendered under the ad hoc ISDS tribunals established under existing investment treaties (e.g. EU Member States' BITs) and under investment treaties in force between third countries. Such a Multilateral Appeal Tribunal would also replace the Appeal Tribunals included in the EU's ICSs in EU trade and investment agreements with third countries. (emphasis added)

The original questionnaire is no longer open to view, but filed responses (which include the original questions) are available at <<http://ec.europa.eu/trade/trade-policy-and-you/consultations/multilateral-reform/>>.

79 It is noted that, in the European Union's submission to UNCITRAL Working Group III of 18 January 2019, there are no references to multilateral investment courts or multilateral appeals tribunals. Rather, the proposal is to establish a "*standing mechanism for the settlement of international investment disputes*". See European Commission, "Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a Standing Mechanism for the Settlement of International Investment Dispute" (18 January 2019) <[http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)> accessed 24 January 2019.

80 In 2006, the OECD Investment Committee also explored the feasibility of creating an appeals mechanism for ISDS disputes but it would appear that there was likewise insufficient support from OECD members for the initiative to be pursued further within the OECD. See Katia Yannaca-Small, "Improving the System of Investor-State Dispute Settlement: An Overview" (OECD Working papers on International Investment Number 2006/1) <[https://www.oecd.org/china/WP-2006\\_1.pdf](https://www.oecd.org/china/WP-2006_1.pdf)> accessed 8 January 2019.

81 See ICSID Secretariat Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration" (22 October 2004) <<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> accessed 8 January 2019.

82 See Meg Kinnear, "Appeal, Review, Annulment ... What's it all About?" (ISDS Blog, 23 October 2015) <<http://isdsblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/>> accessed 8 January 2019.

83 See ICSID, "Background on Proposals for Amendment of the ICSID Rules" (3 August 2018) <[https://icsid.worldbank.org/en/Documents/Amendment\\_Background.pdf](https://icsid.worldbank.org/en/Documents/Amendment_Background.pdf)> accessed 8 January 2019.

there is insufficient consensus amongst ICSID members<sup>84</sup> that an appeals mechanism is desirable.<sup>85</sup>

*iii. Legal issues associated with the design of an appeals mechanism*

51. Assuming consensus on the desirability of an appeals mechanism can be established, there are a significant number of legal issues to be considered in terms of how the mechanism would operate, including interaction with the existing ISDS system and instruments, in particular existing investment treaties, the ICSID Convention and the New York Convention.

52. Gabrielle Kaufmann-Kohler and Michele Potestà<sup>86</sup> have proposed that an appeals mechanism be established through the adoption of a multilateral “*opt-in*” convention modelled on the Mauritius Convention,<sup>87</sup> which provides for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>88</sup> to ISDS cases arising under both new and existing investment treaties. The primary advantage of this proposal is that it avoids (arguably) the need to amend the thousands of existing investment treaties, and other relevant international instruments.<sup>89</sup> Under this proposal, ISDS claims would, at first instance, be submitted to arbitration in accordance with the relevant provisions of the applicable investment treaty; the multilateral instrument would then provide for an appeal procedure.

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84 ICSID published the comments it had received on the proposed amendments to its rules in January 2019. It appears that only France addressed appeals mechanisms in its comments, noting that “*the French delegation would more particularly appreciate that more consideration be given to the establishment of an appeal facility, as envisaged during the previous ICSID rules’ update process*”, ICSID Secretariat, “Rule Amendment Project – Member State & Public Comments on Working Paper of August 3, 2018” (15 January 2019) 452 <[https://icsid.worldbank.org/en/Documents/State\\_Public\\_Comments\\_Rule\\_Amendment\\_Project\\_1.17.19.pdf](https://icsid.worldbank.org/en/Documents/State_Public_Comments_Rule_Amendment_Project_1.17.19.pdf)> accessed on 24 January 2019.

85 See Crina Baltag, “Interview with Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes” (Kluwer Arbitration Blog, 15 April 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/04/15/updates-from-the-icsid-interview-with-meg-kinnear-secretary-general-of-the-icsid/>> accessed 8 January 2019.

86 Gabrielle Kaufmann-Kohler and Michele Potestà, “Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?” (3 June 2016) <[http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf)> accessed 8 January 2019.

87 See Kaufmann-Kohler and Potestà (n 84) 27-33, 75-93. It should be noted that, at the time of writing, the Mauritius Convention has been ratified by only five states (Cameroon, Canada, Gambia, Mauritius and Switzerland) out of 23 signatories.

88 See Kaufmann-Kohler and Potestà (n 84) 29.

89 See Kaufmann-Kohler and Potestà (n 84) 31.

53. The Kaufmann-Kohler/Potestà proposal also makes a number of important observations and suggestions regarding the design of the appeals mechanism:

- (a) the authors suggest that the appeal procedure could be characterised as arbitration, meaning that appeal decisions would be regarded as arbitral awards for the purposes of the ICSID Convention (where relevant), New York Convention and other relevant international instruments;<sup>90</sup>
- (b) in non-ICSID arbitrations, the law of the arbitration (*lex arbitri*) would be the same as that applicable in the first-tier proceedings, the parties or appellate tribunal could choose an alternative seat, or the appeals procedure could be completely ‘de-nationalised’ in a similar manner to proceedings under the ICSID Convention. Such a system might prove complex in practice. Issues may arise with respect to, for example, the position of the parties’ rights in relation to the award under the law of the seat at first instance (including annulment rights which parties cannot contract out of in some jurisdictions), or the question of which law would be applicable to the appeals procedure and how that law would interact with the law of the seat at first instance;<sup>91</sup>
- (c) it is suggested that the appellate tribunal would also have jurisdiction to review challenges on grounds mirroring those under Article 52 of the ICSID Convention, in order to avoid creating a three-tier system, where first instance awards might be subject to both annulment and appeal proceedings.<sup>92</sup> It is not

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90 See Kaufmann-Kohler and Potestà (n 84) 70-71.

91 See Kaufmann-Kohler and Potestà (n 84) 71.

92 See Kaufmann-Kohler and Potestà (n 84) 71-72.



entirely clear why the authors of the proposal consider that a three-tier system would result if parties were still able to seek annulment of an award under Article 52 of the ICSID Convention given that the consequence of annulment is, as explained above, that the claim may be referred to a new tribunal. Nevertheless, the suggestion of allowing the appellate tribunal to determine procedural challenges equivalent to annulment reflects a valid concern to avoid the prolongation and complication of proceedings through having two potential avenues of review (i.e. annulment or appeal). For the same reason, the authors suggest that the agreement establishing the appeals mechanism would operate to waive parties' right to seek review of a non-ICSID award pursuant to the law of the place of arbitration.<sup>93</sup>

- (d) in terms of the goals of consistency and coherence of ISDS decisions, the authors propose that the appellate tribunal would be bound to decide in accordance with the specific text of the investment treaty at issue, but would naturally endeavour to pursue consistency and coherence and through doing so would “*develop a body of legally authoritative general principles which would transcend the [treaty] at issue*” in any individual case.<sup>94</sup> Discerning and applying these general principles may prove challenging in practice. States presumably negotiate particular language in treaties to reflect their specific interests in that situation: if different treaties contain different language, this is likely to be intentional.<sup>95</sup>

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93 See Kaufmann-Kohler and Potestà (n 84) 72. In the OECD Investment Committee discussions on an ISDS appeals mechanism it was also suggested that appeal decisions should not be subject to domestic court review. See Yannaca-Small (n 78) 12.

94 See Kaufmann-Kohler and Potestà (n 84) 69. See also, Donald McRae, “The WTO Appellate Body: A Model for an ICSID Appeals Facility?” (2010) Vol. 1(2) Journal of International Dispute Settlement 371–387.

95 See Alexandrov (n 30) 63–64.

There is therefore an inherent tension between States' freedom to negotiate the language of (and standard of protection in) their treaties and the creation of a body of legally authoritative general principles that transcend any one treaty. The authors further suggest that a doctrine of binding precedent would not be critical because first instance tribunals in subsequent cases would take this established body of principles into account when making their decisions.<sup>96</sup> In this regard, it is worth noting that the US has recently criticised<sup>97</sup> the approach of the WTO Appellate Body in adopting a presumption that prior Appellate Body decisions should be followed in subsequent cases absent "*cogent reasons*".<sup>98</sup> When that presumption was adopted, the WTO Appellate Body cited, amongst other authorities, the decision of the *Saipem* tribunal (previously quoted) where the tribunal concluded that "*subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases*".<sup>99</sup> As noted above while the US has, until recently, pursued the establishment of an ISDS appeals mechanism in its treaties in order to achieve coherence in the interpretation of investment treaties,<sup>100</sup> it is no longer clear that this remains an objective and the criticism of the

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96 It is likely that any appellate body would be established through a multilateral treaty. It would be open to the parties to draft into the treaty a standard of consideration of previous decisions. This standard could range from 'taking into account' previous interpretations of identical (or similar) provisions to a formal doctrine of *stare decisis*. Article 3.42 of the Singapore-EU FTA, for example, stipulates, where an obligation under the FTA is identical to an obligation under the WTO agreement, an arbitration panel must "*take into account any relevant interpretation established in rulings of the WTO Dispute Settlement Body*".

97 See "Statements by the United States at the Meeting of the WTO Dispute Settlement Body" (18 December 2018) <[https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB\\_Stmt\\_.as-deliv.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_Stmt_.as-deliv.fin_public.pdf)> accessed 8 January 2019.

98 See WTO, *United States: Final Anti-dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) AB-2008-1 [160].

99 *Saipem v Bangladesh* (n 40).

100 However, even though the 2004 US Model BIT required bilateral discussions between the US and its counterparty "*within three years*" of the parties entering into the treaty, and this provision was included in the US' BITs with e.g. Chile (2004), Morocco (2006) and Uruguay (2006), there is no public record of any such discussions taking place.

WTO Appellate Body may provide further evidence that the US is unlikely to support the creation of an appeals mechanism if decisions are to have binding effect in future cases.

#### IV. ADDITIONAL CONSIDERATIONS IN RELATION TO THE DESIGN OF A PERMANENT ISDS APPEALS MECHANISM

54. Designing an appeals mechanism for ISDS cases is very much an exercise in innovation because there are relatively few models, at an international level, to draw inspiration. Existing international adjudicative bodies which allow appeals include:

- (a) the WTO dispute settlement mechanism;
- (b) the International Criminal Court;
- (c) the European Court of Human Rights (ECHR); and
- (d) various *ad-hoc* international criminal tribunals.<sup>101</sup>

55. It has been suggested elsewhere that the appeals processes of the international criminal tribunals and the ECHR are not apposite to the ISDS context because the existence of rights of appeal before these tribunals are justified by reference to the need to ensure due process and to protect fundamental rights of individuals, rather than the need to ensure consistency and coherence of decisions.<sup>102</sup>

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101 E.g. the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia.

102 See Giorgio Sacerdoti and Matilde Recanatì, "Chapter 11: From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?" in Jorge A. Huerta-Goldman, Antoine Romanetti, *et al.* (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Global Trade Law Series 2013) Vol. 43, 329-330.

*i. Lessons from the WTO Appellate Body*

56. The WTO Appellate Body has frequently been suggested as a model for an ISDS appeals mechanism on the basis that Appellate Body decisions have generally been followed by panels hearing disputes at first instance, thus contributing to a coherence and consistent interpretation of the WTO Agreements. Nevertheless, it is important to appreciate the differences in context between the WTO system and ISDS. In particular, an appeals mechanism for ISDS would be seeking to achieve consistency and coherence in relation to the interpretation of thousands of bilateral and multilateral investment agreements, whereas the Appellate Body of the WTO is only required to adjudicate on a single set of WTO-covered agreements.<sup>103</sup>

57. Another reason that the WTO Appellate Body is proposed as a model is based on the perception that it is reasonably efficient, in particular because appeal proceedings are to be completed at the latest within 90 days.<sup>104</sup> However, in recent years the Appellate Body has failed to conclude proceedings within this timeframe and the process for appointment of Appellate Body members has become increasingly politicised and controversial.<sup>105</sup> The experience of the WTO Appellate Body — where the veto of one member is able to significantly disrupt operations of the appeals mechanism — is to some extent also a cautionary tale to consider when designing an ISDS appeals mechanism.<sup>106</sup>

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103 WTO Dispute Settlement Understanding only applies to just 15 agreements. See WTO, “Legal Provisions in the Multilateral Trade Agreements and the DSU” <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c4s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c4s1p1_e.htm)> accessed 18 January 2019.

104 See Annex 2 of the WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17(5).

105 See International Centre for Trade and Sustainable Development, “WTO Appellate Body Prepares for Reduced Slate of Judges by Month’s End” (2018) Vol. 22 (29) Bridges 1 <<https://www.ictsd.org/bridges-news/bridges/news/wto-appellate-body-prepares-for-reduced-slate-of-judges-by-months-end>> accessed 8 January 2019.

106 Tom Miles, “U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms” (Reuters 27 August 2018) <<https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O>> accessed 24 January 2019.

58. It is nevertheless useful to consider the composition of the WTO Appellate Body, which is composed of seven members appointed by the Dispute Settlement Body, which comprises all members of the WTO. Under Article 17(2) of the Dispute Settlement Understanding (DSU),<sup>107</sup> Appellate Body members are appointed for a four-year term and may be reappointed only once. Further, Article 17(3) of the Dispute Settlement Understanding:<sup>108</sup>

The Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

59. Commentators have argued that the legitimacy of the ISDS system is undermined as a result of the pool of decision makers lacking independence (in particular through being sympathetic to the interests of States or investors who repeatedly appoint them),<sup>109</sup> diversity<sup>110</sup> and, more controversially, expertise in international law and the subject matter of the disputes which they are called

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107 DSU (n 103) Article 17(2).

108 DSU (n 103) Article 17(3).

109 The issue of apparent bias arising from repeat appointments of an arbitrator by the same party has also become a topical issue in international commercial arbitrations in recent years: *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, *Cofely Ltd v Bingham & Knowles Limited* (2016) EWHC 240, *W Limited v M SDN BHD* (2016) EWHC 422 (Comm).

110 It has been argued that the WTO dispute settlement process has been seen as more legitimate by virtue of the pool of decision makers being more diverse. See José Augusto Fontoura Costa, "Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields" (2011) 1(4) *Onati Socio-Legal Series* 1-24.

to adjudicate.<sup>111</sup> The provisions of Article 17(3) of the DSU may therefore be instructive in considering how members of a permanent ISDS appeals mechanism should be chosen, and what qualifications and attributes they should possess.

*ii. Considerations relating to the scope of review*

60. Two further considerations merit brief comment. The first consideration relates to the scope of review of a future ISDS appeals mechanism. Under Article 17(6) of the DSU, appeals to the WTO Appellate Body “*shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel*”. In contrast, the 2004 ICSID Discussion paper on an ICSID Appeals Facility suggested that the grounds for appeals might include (i) a clear error of law; (ii) any of the five grounds for annulment in Article 52 of the ICSID Convention; and (iii) serious errors of fact.<sup>112</sup> A concern with expanding the scope of appeal to include errors of fact is that this is very likely to prolong the resolution of disputes because of the need for the appeals tribunal to review the factual evidence and reasoning of the tribunal.

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111 See e.g. Muthucumaraswamy Sornarajah, “Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness” in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 631-657.

112 Which reflects more of a common law approach: in civil law countries, a case is usually heard *de novo* on appeal.

61. An appeals mechanism confined to review of serious errors of law (and potentially also hearing challenges under Article 52 of the ICSID Convention or on analogous grounds<sup>113</sup>) would seem to be less controversial. Nevertheless, there would remain a concern that the existence of a right of appeal would inevitably prolong proceedings. Various proposals have been made to alleviate this concern, including that parties wishing to bring an appeal should pay security in relation to costs and/or in relation to other sums ordered to be paid under the award.

62. Another option would be to limit the right of appeal to cases where all parties agreed to the appeal, or leave is granted. For example, Section 6(4) of Schedule 2 to Hong Kong's Arbitration Ordinance provides that leave to appeal shall be given only if the court is satisfied —

- (a) that the decision of the question will substantially affect the rights of one or more of the parties;
- (b) that the question is one which the tribunal was asked to decide;
- (c) that, on the basis of the findings of fact in the award —
  - (i) the decision of the tribunal on the question is obviously wrong; or
  - (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.

It is worth considering whether a similar test might be imposed for appeals against ISDS awards.

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113 *Ad-hoc* committees appointed in ICSID annulment proceedings have been criticised for concluding that serious errors of law were equivalent to a manifest excess of power for the purposes of Article 52(1)(b) of the ICSID Convention. See Christoph Schreuer, "From ICSID Annulment to Appeal: Halfway Down the Slippery Slope" *The Law and Practice of International Courts and Tribunals* 10 (2011) 211.

## V. CONCLUSION

63. As stated in the introduction, this discussion paper aims to provide a framework for further discussion of the desirability and practicability of the introduction of an ISDS appeals mechanism. The paper briefly introduced the criticisms of the existing system which have led to calls for reform, in particular concerns relating to the consistency and correctness of ISDS decisions. The paper then outlined the limitations of the existing system in addressing concerns relating to consistency and correctness, and in particular the absence (generally speaking) of any right to appeal the merits of a decision.

64. The desirability and practicability of establishing an appeals mechanism was also discussed, with particular reference to competing concerns of finality, cost and efficiency. In this respect, it was emphasised that States will also need to consider the extent to which an appeals mechanism can assist in improving consistency of ISDS decisions given the huge number of bilateral and multilateral investment treaties which increasingly overlap with one another and which are often inconsistent in terms of how their substantive provisions are drafted.

65. Finally, various considerations relating to the design of a permanent appeals mechanism were briefly introduced. This part of the paper was not comprehensive and further questions meriting attention will surely arise, including:

- (a) how would the appeals mechanism interact with joint interpretation or joint determination provisions contained in some investment treaties?
- (b) is a permanent body needed, or would an ad-hoc arrangement suffice?
- (c) in either case, who would select the appellate decision makers and what criteria should apply to their appointment?



**VI. ANNEX 1 OPT-IN APPEALS PROVISIONS OF  
SCHEDULE 2 OF THE HONG KONG  
ARBITRATION ORDINANCE (CAP. 609)**

**5. Appeal against arbitral award on question of law**

- (1) Subject to section 6 of this Schedule, a party to arbitral proceedings may appeal to the Court on a question of law arising out of an award made in the arbitral proceedings.
- (2) An agreement to dispense with the reasons for an arbitral tribunal's award is to be treated as an agreement to exclude the Court's jurisdiction under this section.
- (3) The Court must decide the question of law which is the subject of the appeal on the basis of the findings of fact in the award.
- (4) The Court must not consider any of the criteria set out in section 6(4)(c)(i) or (ii) of this Schedule when it decides the question of law under subsection (3).
- (5) On hearing an appeal under this section, the Court may by order—
  - (a) confirm the award;
  - (b) vary the award;
  - (c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's decision; or
  - (d) set aside the award, in whole or in part.
- (6) If the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal must make a fresh award in respect of the matters remitted—
  - (a) within 3 months of the date of the order for remission;  
or
  - (b) within a longer or shorter period that the Court may direct.

- (7) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.
- (8) The leave of the Court or the Court of Appeal is required for any further appeal from an order of the Court under subsection (5).
- (9) Leave to further appeal must not be granted unless —
  - (a) the question is one of general importance; or
  - (b) the question is one which, for some other special reason, should be considered by the Court of Appeal.
- (10) Sections 6 and 7 of this Schedule also apply to an appeal or further appeal under this section.

## **6. Application for leave to appeal against arbitral award on question of law**

- (1) An appeal under section 5 of this Schedule on a question of law may not be brought by a party to arbitral proceedings except—
  - (a) with the agreement of all the other parties to the arbitral proceedings; or
  - (b) with the leave of the Court.
- (2) An application for leave to appeal must—
  - (a) identify the question of law to be decided; and
  - (b) state the grounds on which it is said that leave to appeal should be granted.
- (3) The Court must determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.
- (4) Leave to appeal is to be granted only if the Court is satisfied—

- (a) that the decision of the question will substantially affect the rights of one or more of the parties;
- (b) that the question is one which the arbitral tribunal was asked to decide; and
- (c) that, on the basis of the findings of fact in the award—
  - (i) the decision of the arbitral tribunal on the question is obviously wrong; or
  - (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.
- (5) The leave of the Court or the Court of Appeal is required for any appeal from a decision of the Court to grant or refuse leave to appeal.
- (6) Leave to appeal from such a decision of the Court must not be granted unless—
  - (a) the question is one of general importance; or
  - (b) the question is one which, for some other special reason, should be considered by the Court.

## **7. Supplementary provisions on challenge to or appeal against arbitral award**

- (1) An application or appeal under section 4, 5 or 6 of this Schedule may not be brought if the applicant or appellant has not first exhausted—
  - (a) any available recourse under section 69; and
  - (b) any available arbitral process of appeal or review.
- (2) If, on an application or appeal, it appears to the Court that the award—
  - (a) does not contain the arbitral tribunal's reasons for the award; or
  - (b) does not set out the arbitral tribunal's reasons for the award in sufficient detail to enable the Court properly to consider the application or appeal,

the Court may order the tribunal to state the reasons for the award in sufficient detail for that purpose.

- (3) If the Court makes an order under subsection (2), it may make a further order that it thinks fit with respect to any additional costs of the arbitration resulting from its order.
- (4) The Court—
  - (a) may order the applicant or appellant to give security for the costs of the application or appeal; and
  - (b) may, if the order is not complied with, direct that the application or appeal is to be dismissed.
- (5) The power to order security for costs must not be exercised only on the ground that the applicant or appellant is—
  - (a) a natural person who is ordinarily resident outside Hong Kong;
  - (b) a body corporate—
    - (i) incorporated under the law of a place outside Hong Kong; or
    - (ii) the central management and control of which is exercised outside Hong Kong; or
  - (c) an association—
    - (i) formed under the law of a place outside Hong Kong; or
    - (ii) the central management and control of which is exercised outside Hong Kong.
- (6) The Court—
  - (a) may order that any money payable under the award is to be paid into the Court or otherwise secured pending the determination of the application or appeal; and
  - (b) may, if the order is not complied with, direct that the application or appeal is to be dismissed.

- (7) The Court or the Court of Appeal may impose conditions to the same or similar effect as an order under subsection (4) or (6) on granting leave to appeal under section 4, 5 or 6 of this Schedule.
- (8) Subsection (7) does not affect the general discretion of the Court or the Court of Appeal to grant leave subject to conditions.
- (9) An order, direction or decision of the Court or the Court of Appeal under this section is not subject to appeal.

# Third Party Funding in ISDS

Eric Ng<sup>1</sup>

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## I. INTRODUCTION

1. Over the past several years, the discussion over investor-State dispute settlement (ISDS) has been complicated with concerns about Third Party Funding (TPF), where parties to a dispute obtain funding from a third party (Funder) in order to pay the various costs of the dispute, in return for the Funder receiving a portion of any award received by that party.

2. This discussion paper aims to cover the current issues surrounding third party funding in ISDS, including several common issues arising from recent investor-State arbitration jurisprudence. This paper will also go into various pros and cons of including third party funding as a complementary element in the investor-State dispute settlement system. This paper will also address current initiatives taking place to provide structure and regulation around third party funding, including initiatives being implemented at the administrative, State, and international levels. Finally, this paper will briefly address issues that may arise from third party funding of investment mediation.

## II. BACKGROUND

3. Third party funding in common law jurisdictions was historically illegal due to the common law doctrines of champerty and maintenance. These doctrines arose from English common law and are centuries old. Maintenance is defined as a person assisting a party to an action even when that person had no interest in the action.<sup>2</sup> Champerty is a specific form of maintenance where the person assisting the party to the action obtains a share of the judgment award as payment.<sup>3</sup>

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2 Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration Sub-committee Consultation Paper* <[https://www.hkreform.gov.hk/en/docs/tpf\\_c.pdf](https://www.hkreform.gov.hk/en/docs/tpf_c.pdf)> accessed 22 December 2018, para. 1.18, citing *Massai Aviation Services v Attorney General* [2007] UKPC 12.

3 *Ibid* para. 1.19; *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 at para. 11.

4. Accordingly, under common law, third party funding was illegal as it would give rise to maintenance and champerty. However, given the antiquated nature of these offences, common law jurisdictions such as the UK and Australia have relaxed or abolished these offences.<sup>4</sup> The result of this is the creation of a new market for litigation and arbitration financing, where third party investors seek to finance prospective claimants in hope for a certain return.<sup>5</sup> The nature of this return can either be in respect of a fixed sum, or in many cases, in the form of a contingency fee arrangement whereby the Funder will obtain a certain percentage or portion of any award rendered in favour of the claimant.

5. While tortious offences of maintenance and champerty still exist in several common law jurisdictions such as Hong Kong,<sup>6</sup> similar measures to relax the traditional offences in arbitration have taken place over the past several years in both Hong Kong and Singapore.<sup>7</sup>

6. The general liberalisation of third party litigation and arbitration financing has also coincided with the advent of international investment arbitration. The structure of treaty-based arbitration poses several attractive features for potential Funders. Considering the nature of most treaty-based claims such as expropriation of major infrastructure or energy investments, the value of potential claims has the potential to be considerably higher than most commercial disputes. This translates into high potential returns for Funders who are willing to back investor claims, with some published figures stating returns of over 700%.<sup>8</sup>

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<sup>4</sup> *Massai Aviation Services v Attorney General* [2007] UKPC 12.

<sup>5</sup> See Arbitration Ordinance (Cap 609), s.98J.

<sup>6</sup> *Unruh v Seeberger* (2007) 10 HKCFAR 31; *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16; *Raafat Imam v Life (China) Co Ltd* [2018] 4 HKLRD 152.

<sup>7</sup> Arbitration Ordinance (Cap 609), Part 10A; Singapore Civil Law (Amendment) Act 2017.

<sup>8</sup> Burford Capital FY 2017 Report  
<<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>>  
accessed 22 December 2018.



7. The explosive growth of investor-State arbitration has not been without its growing pains. There exists a vocal and growing division of investor-State arbitration critics who see investment arbitration as favouring foreign investors, and as a negative force on efforts to drive sustainable development. The existence of third party funding and its use in investor-State arbitration has fuelled these concerns, as critics rely on the profit-making objectives of third party funding to further decry the transfer of wealth from public purpose objectives to private profits.

### III. CURRENT ISSUES IN RELATION TO THIRD PARTY FUNDING IN ISDS

8. The presence of third party funding in relation to investment arbitration raises certain issues that for the most part are not present or are of lesser concern in commercial contract-based cases. The treaty-based nature of investment arbitration creates an asymmetrical environment that changes how some tools in arbitration will operate. These differences have attracted greater attention due to the nature of third party funding and funding agreements. Several of the major issues that third party funding raises in investor-State arbitration are detailed below.

#### Security for Costs

9. Whereas security for costs is not uncommon in English law or in commercial arbitrations, the use of security in investor-State arbitration is much less clear. The power of the arbitral tribunal to order security is normally discussed in the context of Article 47 of the ICSID Convention which empowers the tribunal to recommend provisional measures to preserve the respective rights of either party as well as ICSID Arbitration Rule 39 which requires parties to establish the circumstances that require such provisional measures. However, particularly in the early days of investor-State arbitration, tribunals questioned whether these rules

would allow for the order of security for costs, particularly in light of ICSID's unique role as a facilitative dispute resolution mechanism for investors in foreign States.<sup>9</sup> Whereas several investor-State arbitration tribunals would determine that they could order security for costs, these tribunals also agreed that exceptional circumstances would be required in order to do so.<sup>10</sup> It was therefore not until 2014 that the first investor-State arbitral tribunal ordered a claimant to pay security in the case of *RSM v Saint Lucia*.<sup>11</sup>

10. The tribunal in *RSM v Saint Lucia* found that exceptional circumstances were present, primarily on the basis that the claimant had previously been involved in two separate ICSID arbitrations against Grenada, where the claimant had failed to comply with several costs orders.<sup>12</sup> The tribunal also took note of the claimant's receipt of third party funding, and took that as further support that the claimant may not be able to comply with a costs award rendered against it, as it was questionable whether the Funder would assume responsibility for honouring any such award.<sup>13</sup> In a separate assenting opinion by Gavan Griffith QC, he noted that the presence of a Funder should in and of itself constitute exceptional circumstances to justify an order for security for costs.<sup>14</sup> He would further propose that where a Funder was involved, that the funded claimant should be able to show that it would have independent capacity to meet any costs orders issued against it, essentially reversing the burden of proof.<sup>15</sup>

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9 Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999.

10 See *Libananco Holdings Co. Limited v Republic of Turkey*, ICSID Case No. ARB/06/08, Decision on Preliminary Issues of 23 June 2008, para. 57; *Commerce Group Corp & San Sebastian Gold Mines, Inc. v Republic of El Salvador*, Decision on El Salvador's Application for Security for Costs of 20 September 2012, at para. 45; *Victor Pey Casado, Fundación Presidente Allende v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures of 25 September 2001, para. 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs of 14 October 2010, at para. 5.16.

11 *RSM Production Corporation v Saint Lucia* ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs.

12 *Ibid.* para. 82.

13 *Ibid.* para. 83.

14 *Ibid.* Assenting Reasons at para. 16.

15 *Ibid.*

11. Gavan Griffith QC's opinion did not find much immediate support however. Securities for costs on the basis of the existence of a Funder were subsequently rejected in the cases of *Guaracachi v Bolivia*<sup>16</sup> and *South American Silver v Bolivia*.<sup>17</sup> In the case of *Guaracachi v Bolivia*, the request for security was denied on the basis that the mere existence of a third party funder did not, in and of itself, demonstrate that a security for costs order would be justified, in particular when the claimant was shown to be a going concern with sufficient assets.<sup>18</sup> In *South American Silver v Bolivia*, the tribunal also rejected an application to order security based solely on the existence of a Funder, stating:

[i]f the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.<sup>19</sup>

12. Although the mere existence of a Funder would not normally constitute exceptional circumstances, one tribunal has determined that the details of the relationship between the Funder and claimant *may* constitute the exceptional circumstances required to ground an order for security. In *Manuel García Armas and others v Venezuela*<sup>20</sup> the Tribunal ordered the claimant to produce the funding agreement that it had entered into. After reviewing the funding agreement, which showed that the Funder would not provide funding for any award of costs, the Tribunal ordered the claimant to prove that it could in fact cover any award.<sup>21</sup> The Tribunal justified reversing the burden of proof on the basis that

16 PCA Case No. 2011-17, Procedural Order No. 14.

17 PCA Case No. 2013-15, Procedural Order No. 10.

18 PCA Case No. 2011-17, Procedural Order No. 14, para. 7.

19 PCA Case No. 2013-15, Procedural Order No. 10, para. 77.

20 PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018. For English summary of the case, see Alexander Levanthal, "Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of *Armas v Venezuela*" <<http://arbitrationblog.kluwerarbitration.com/2018/09/18/assessing-a-potentially-emerging-exception-for-third-party-funding-in-investment-treaty-decisions-on-security-for-costs-in-the-wake-of-arms-v-venezuela/>> accessed 22 December 2018.

21 *Ibid*, para. 246.

the Claimant would be in the best position to produce the evidence. Eventually, the Tribunal decided that the existence of the Funder and in particular, the fact that the funding agreement would not cover an award of costs, constituted exceptional circumstances and subsequently ordered security for costs.<sup>22</sup> The conclusion of this tribunal lines up with the proposition made by Gavan Griffith QC in *RSM v Saint Lucia*.

13. As will be noted below, the assumption that the existence of a Funder means that the claimant will be unable to satisfy any costs awards is a simplistic one at best. In many situations, even a financially stable claimant may opt for third party funding simply on the basis that leveraged financing of its claim will make for a more efficient use of its resources. In those situations, the existence of a Funder should make no difference as to the assessment of whether security for costs should be ordered. Even in the *Armas* case, where the details of the funding agreement were a key factor in establishing exceptional circumstances, there existed concerns regarding the solvency of the claimant, and such decision was not solely based on the existence of a Funder.

14. However, what has been left open to debate is whether the details of a funding arrangement should be disclosed to the Tribunal, and if such details are disclosed, to what extent should the Tribunal rely on those details to make its determination on whether to order security. The Queen Mary Task Force, for example, proposes in its report on third party funding in international arbitration that in the first instance, the decision on whether to order security should be made without regard to the existence of any funding arrangement. However, it then immediately states that the details of a funding arrangement may be relevant to show whether the claimant can satisfy any adverse costs award.<sup>23</sup> The

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<sup>22</sup> *Ibid*, para. 250.

<sup>23</sup> Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.16.

report remains silent as to how evidential issues in these sorts of applications should be balanced, including as to whether the burden of proof should be reversed.

*Conflicts of Interest and Extent of Disclosure*

15. The existence of third party funding may also give rise to issues regarding conflicts of interest. Where Funders have vested interests in certain arbitrators or in certain law firms, potential conflicts of interest may arise between arbitrators and Funders, even when no conflicts exist between the parties and the arbitrators. In an unregulated environment, the existence of third party funding could be confidential and therefore remain undisclosed to the tribunal or to the other party, resulting in conflicts of interest that could persist throughout the course of a dispute.

16. Furthermore, even in regulated environments, questions arise as to what extent third party funding should be disclosed. While most current efforts are unanimous in requiring disclosure of the existence and source of third party funding, the authorities are much less clear as to whether details of a funding agreement should be automatically disclosed or whether such disclosure should be at the discretion of the arbitral tribunal.

17. The Queen Mary Task Force has noted that there has been increased interest in potential conflicts of interest caused by the presence of Funders due to several factors, including the fact that several leading arbitrators have also taken positions either within Funders or as *ad hoc* consultants to Funders, as well as increasing symbiosis between law firms and Funders.<sup>24</sup>

18. Whether Funders should be disclosed in investor-State arbitration, and if so, to what extent, was recently addressed by two

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<sup>24</sup> *Ibid.* p.82.

different tribunals. In *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v Turkmenistan*,<sup>25</sup> the Tribunal was requested to order Claimant to disclose its funding arrangements in order to determine whether there were any conflicts of interest. The Tribunal eventually decided to order disclosure of the funding arrangements on the basis of several factors, such as the need to ensure the integrity of the proceedings and to determine whether any arbitrators were affected by the existence of the Funder.<sup>26</sup> In particular, the Tribunal noted that previous orders for costs in other proceedings had not been paid, and that the Claimant had not denied the existence of a Funder. These two factors led the Tribunal to determine that the Claimant would be unable to meet any costs orders if the Respondent were successful, and that the Funder would be able to disappear, as it was not party to the arbitration.<sup>27</sup>

19. A similar request was submitted by the respondent state in the case of *South American Silver v Bolivia*,<sup>28</sup> However, while the tribunal in *South American Silver* ordered that the claimant disclose the identity of its Funder, it did not go as far as to order disclosure of the details of the actual funding agreement, on the basis that the mere existence of a Funder could not constitute an independent reason to justify disclosure.<sup>29</sup>

20. The need to disclose third party funding so as to prevent conflicts of interest has also found its way into soft law instruments. The 2014 IBA Guidelines on Conflict of Interest General Standard 7 stipulates that a funded party shall:

... inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company

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25 ICSID Case No. ARB/12/6, Procedural Order No. 3.

26 *Ibid.* at paras. 9-10.

27 *Ibid.* at paras. 10-12.

28 PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016.

29 *Ibid.* para. 81.

of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.<sup>30</sup>

The 2014 amendments to the IBA Guidelines on Conflicts of Interest show that the duty of disclosure has thus been extended to the existence and identity of potential Funders, primarily to provide arbitrators with sufficient information to determine whether or not they may have any conflict of interest. However, the IBA Guidelines do not provide any guidance as to whether the details of a funding agreement should be disclosed.

### Transparency

21. Issues regarding security for costs and conflicts of interest also serve as indicators of a greater issue, which is that many facets of ISDS remain confidential and non-transparent. While many investment arbitration awards and procedural decisions are published, in far greater quantities than commercial arbitration awards, such publications do not entirely solve issues of transparency. Many investment arbitration awards are still confidential, and even those that are public do not necessarily disclose whether third parties are in fact funding prospective claimants.

22. In investor-State arbitration, the issue of transparency is of even greater importance considering that the subject matter of many claims are relevant to a State's public interests, and in many cases touch upon issues regarding the exercise of governmental authority which significantly affects the citizens of a host State. One of the strongest criticisms against ISDS is the lack of transparency on issues that are highly relevant to the public interest.

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30 IBA Guidelines on Conflicts of Interest (2014), General Standard 7.

23. The call for transparency in ISDS was strong enough to lead UNCITRAL to develop and publish the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which provides a set of rules that are designed to increase the transparency of both the submission and hearing of investor-State disputes.<sup>31</sup> However, the UNCITRAL Rules on Transparency do not provide any guidance on the disclosure of third party funding or the details of any funding arrangements that may be of interest to the public.

24. The need for transparency in, at the very least, disclosing the identity of any Funder, has been reflected in investor-State arbitration decisions such as *Sehil v Turkmenistan*<sup>32</sup> and *South American Silver v Bolivia*<sup>33</sup> mentioned above. Notably, all efforts in relation to increasing transparency regarding third party funding have revolved around the need to prevent conflicts of interest and to preserve the integrity of proceedings. However, to date, there has been little discussion by arbitral tribunals as to whether the need for transparency around third party funding should be greater on the basis of the inherent nature of investor-State arbitration.

25. Transparency in relation to funding agreements carries both pros and cons. The forced transparency of providing funding agreements and details to the public may serve to better understand what effect, if any, third party funding has on the number of claims being brought in investor-State arbitration. Such concerns were raised during small group discussions within the Queen Mary Task Force.<sup>34</sup> However, many funding agreements may contain confidential information that may not be necessary to disclose. Furthermore, the need to provide exact details of funding agreements may potentially deter potential Funders from taking on certain cases, which would negate the primary benefits of third party funding, such as enhanced access to justice.

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31 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

32 ICSID Case No. ARB/12/6, Procedural Order No. 3.

33 PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016.

34 Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.239.



26. While certain regulatory initiatives have explicitly granted arbitrators discretionary power to order disclosure of funding agreements and other details, such as Rule 24 of the SIAC Investment Arbitration Rules<sup>35</sup> and Article 27 of the CIETAC Investment Arbitration Rules,<sup>36</sup> no current regulatory initiative provides for any mandatory disclosure greater than the existence and source of any third party funding. Without the mandatory disclosure of the various details of funding agreements, it is questionable whether enough information can be made publicly available so as to determine the real effects of third party funding on ISDS, in particular in relation to key issues such as to what extent funding agreements cover adverse costs decisions or the rights of the respective parties to terminate the agreement.

#### IV. PROS AND CONS OF USING THIRD PARTY FUNDING IN ISDS

27. The following section examines both the positive and negative effects of third party funding on the current investor-State arbitration regime. While these factors may not be exhaustive, they tend to be the most common arguments raised by both proponents and critics of third party funding in investor-State arbitration, and provide guidance as to what elements of third party funding are causing the greatest benefit or the most consternation.

##### Pros

##### *TPF provides greater access to justice for aggrieved investors*

28. One of the primary justifications for allowing third party funding is that it greatly increases the ability for aggrieved claimants to proceed with their claims, providing greater access to justice and allowing legitimately injured investors to have their grievances heard.

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35 2017 Singapore International Arbitration Centre Investment Arbitration Rules, Rule 24(1).

36 CIETAC International Investment Arbitration Rules, 1 October 2017, Article 27.

29. One of the greatest advantages of the current investment dispute settlement system is that, for the most part, it operates outside of the ambit and jurisdiction of the host State's domestic legal systems. Investment arbitration provides a rule-based form of dispute resolution that is, for the most part, neutral, and which gives aggrieved investors an avenue to have their claims heard without potentially unlawful interference of a foreign government. ISDS therefore provides unprecedented access to justice for private investors, opening up avenues of recourse that would traditionally have to be dealt with on an inter-State level.

30. The need for such a system is particularly evident in cases where the aggrieved investor has been affected by a denial of justice, whereby the cause of action itself stems from the host State's domestic legal and judicial framework. In cases such as *Saipem v Bangladesh*<sup>37</sup> or *Loewen v United States*<sup>38</sup> for example, domestic judicial systems have not only failed to provide adequate recourse to aggrieved investors, but have outright refused access to justice. These situations form the primary cause of action for the breach of the host State's treaty obligations. It is therefore insufficient to maintain that such claims can be handled solely in a domestic context.

31. However, the ability of the investor to access investment arbitration does not come cheap. The costs of ISDS are ever increasing. The average cost of bringing a claim in investment arbitration today is approximately USD 8 million.<sup>39</sup> For many smaller investors, the costs of attempting to recover the value of their investments are simply too high to bear. This is further exacerbated when considering that where investors are claiming for expropriation,

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37 ICSID Case No. ARB/05/7.

38 ICSID Case No. ARB(AF)/98/3. Notably, the Tribunal in this case did not allow the investor to present its case due to a failure to exhaust domestic remedies. The factual situation however, shows how a domestic legal system can fail to provide effective recourse.

39 UNCITRAL Working Group III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session*, A/CN.9/930, 19 December 2017, para. 29.

the acts of the host State may have severely depleted the investor's economic resources.<sup>40</sup> In other words, the very breaches that the investors are seeking compensation for may also make it impossible for these investors to bring their claims.

32. Funders are therefore a key contributor to ensuring that investors who have legitimate grievances against host States, and who have contributed capital and labour to contribute to a host State's economy, are not left without recourse in the event that their investments are either expropriated or otherwise diminished. Where the host State has entered into obligations under a bilateral or multilateral agreement to respect foreign investment, Funders help to lubricate the machinery required for the investor to obtain recourse.

33. Some of the delegations to the UNCITRAL Working Group as well as the Queen Mary Task Force have recognised the need for Funders in the current investment arbitration framework. It has been observed by some of the delegations to the UNCITRAL Working Group that many small to medium enterprises are currently unable to access the investment arbitration system due to the high costs of conducting a modern-day investment arbitration.<sup>41</sup> These delegations further expressed that these investors are now turning to third party funding in order to finance the costs of having their dispute heard.<sup>42</sup> The Queen Mary Task Force also supports this contention, stating that investment arbitration is seen as an essential means of recourse for foreign investors in order to protect against expropriation and discrimination; and that to support this,

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<sup>40</sup> Assuming as well that the investor is not a special purpose vehicle with limited capital.

<sup>41</sup> UNCITRAL Working Group III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session*, A/CN.9/930, 19 December 2017, para. 34.

<sup>42</sup> *Ibid.* para. 57. The issue of third party funding is to be further considered in the 37th session of Working Group III in New York, to be held in April 2019. For the views that have been expressed by different delegations in the previous working sessions of Working Group III on third party funding, see summary by Professor Anthea Roberts <<https://www.ejiltalk.org/uncitral-and-ids-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/>> accessed 27 January 2019.

*“third-party funding is regarded as a critical tool for facilitating access to investment arbitration in order to seek justice on such claims.”*<sup>43</sup>

*TPF helps mitigate the financial risks of investors that are faced with arbitration*

34. For investors who have had their investments expropriated or who have otherwise faced severe repercussions due to breaches of a host State’s treaty obligations, the prospect of a lengthy and costly arbitration against the host State may not be appealing, particularly when their own finances may have already been severely affected due to the host State’s actions. Even when an investor may potentially have the resources to fund its own claim against a respondent State, the high costs of investment arbitration may prove to be an ineffective and inefficient use of the investor’s resources, limiting economic growth, which in turn may have severe economic effects on the investor beyond the initial breach of treaty.

35. The presence of Funders in these situations allow for investors to leverage their claims, to use outside funding to help support the costs of arbitration so that their existing economic resources can best be allocated to their business proficiencies. Indeed, an increasing number of solvent companies are turning to Funders to help cover their legal costs so as to better utilise their resources.<sup>44</sup> In the Queen Mary Task Force report, most funders in the Task Force suggested that larger solvent companies are increasingly using third party funding to share risk and maintain liquidity.<sup>45</sup>

36. While there may be some criticism levied on the basis that third party funding may prop up unmeritorious claims, where the

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<sup>43</sup> Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.202; citing D G Henriques, “Third Party Funding: A Protected Investment?”, *Spain Arbitration Review*, No. 30, 2017, pp. 122-127.

<sup>44</sup> Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.158.

<sup>45</sup> *Ibid.* p.180.

claim brought by an aggrieved investor is meritorious, the question of whether the investor is in fact impecunious and therefore qualified for third party funding should be of less importance. Where the claim is valid, the obligation of the respondent State to pay compensation should take place regardless of whether the investor is currently solvent. As such, when third party funding would allow an investor to better utilise its existing resources, the presence of such funding should not be objectionable to respondent States.

*Review of potential claims by Funders may filter out hopeless or unmeritorious claims*

37. The very nature of third party funding means that Funders will usually only support claims that have a high probability of returns, i.e. success on the merits of the claims. Just as with any other professional investor, the success of any individual funder will be dependent on their ability to determine which investments will succeed and which will fail. This subsequently gives rise to the assumption that in order to obtain third party funding, any prospective funded party must first convince the Funder that their claim is strong enough to provide a high probability of returns.

38. Based on those assumptions, it is arguable that the existence of third party funding in investment arbitration provides a *de facto* screening mechanism for claims. Only those claims that provide a high chance of success will proceed on to the arbitration stage, and unmeritorious claims will filter out due to lack of financing.<sup>46</sup> This will subsequently reduce the costs that may be incurred by host States as claims that are hopeless will not take up the limited time and resources that many host States are faced with.

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<sup>46</sup> *Ibid.* p.208.

39. Published figures from major Funders indicate that such a filtering process is taking place. Burford Capital, for example, closed only 4% of all inquiries in 2017, funding 59 investments out of 1,561 inquiries.<sup>47</sup> IMF Bentham, another major Funder represents a 90% success rate in jurisdictions outside of the USA between 2011-2018.<sup>48</sup> These figures show that the due diligence process of Funders does filter out claims, although they do not demonstrate whether those claims would have proceeded without their support.

40. While there may still be questions as to how effective Funders may actually be at filtering out unmeritorious claims, as well as to what criteria Funders may attach in investment arbitration cases where the relative novelty of the field means that there is not a strong body of precedent to lend predictability to the outcome of a dispute, what can be shown is that given the attractiveness of third party funding to aggrieved investors, the due diligence process undertaken by Funders at least provides some form of pre-arbitration screening mechanism that may either drive away unmeritorious claims, or persuade borderline investors to pursue settlement.

*Presence of third party funding may result in more efficient case management*

41. The level of control that a Funder may exercise over the management of the case appears to differ from case to case and to date there do not appear to be any published studies that examine the effects of third party funding on the overall management and control of a case.<sup>49</sup> Control over a case by a Funder may have both good and bad characteristics.

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<sup>47</sup> "Burford Annual Report 2017" <<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>> accessed 22 December 2018, p.20.

<sup>48</sup> IMF Bentham, "FY2018 Full Year Results Investor Presentation" <<https://www.imf.com.au/docs/default-source/site-documents/investor-presentation-fy2018-full-year-results>>, Slide 12.

<sup>49</sup> Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 2 December 2018, p.74.

42. In certain cases, there are advantages to having oversight by a Funder that has done rigorous due diligence on the merits of a certain claim. The English Court of Appeal has stated that “*rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals*” was expected from responsible Funders.<sup>50</sup> Active monitoring by a Funder in these situations may provide for more effective case management.

43. Furthermore, the presence of third party funding may act as a deterrent against strategic attempts to “bleed out” prospective claimants by delaying or otherwise imposing high burdens on claimants in attempts to deplete their cash reserves and force the investor to eventually abandon their claim. Knowledge that a claimant will have external financing to cover such costs may prevent forensic defensive posturing by a respondent State.<sup>51</sup>

### Cons

#### *TPF prevents true access to justice by excluding non-investors*

44. Access to justice, as described above, is one of the greater strengths and arguments for allowing third party funding in ISDS. However, critics of the investment arbitration system argue that the access that third party funding provides to investors is not true access to justice, as such access is limited to only the foreign investor, and excludes other potential interested parties.

45. Just as with commercial arbitration, investment arbitration is based on consent, which in the ISDS context is offered by the respondent State in the form of a dispute settlement article in a bilateral or multilateral agreement, and subsequently crystallised by the investor when it submits its request for arbitration. This consent-based jurisdiction necessarily means that, just as with

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50 *Excalibur Ventures v Texas Keystone and others* [2016] EWCA Civ 1144.

51 Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration Sub-committee Consultation Paper* <[https://www.hkreform.gov.hk/en/docs/tpf\\_e.pdf](https://www.hkreform.gov.hk/en/docs/tpf_e.pdf)> accessed 22 December 2018, para. 5.15.

commercial arbitration, only the parties to the dispute settlement clause may participate in that arbitration.

46. Normally this may not be objectionable in commercial arbitration as the subject matter of a commercial dispute rarely has public policy or public interest ramifications. However, in the ISDS context, where measures taken by a respondent State may have significant public interest or policy concerns, only the investor has the right to make claims against the respondent State. Furthermore, if the measures taken by the respondent State are in fact due to public interest, the public, in most cases, are powerless to prevent an investor from challenging those measures or being able to present their case before the arbitral tribunal.

47. Participation in investment arbitration is therefore difficult for those non-investors that may have been affected either by the investment or by the governmental measures that have affected the investment. Unlike in most domestic systems where these individuals may have been able to act as interpleaders, the closest substitute is the preparation and filing of *amicus curiae* submissions. Those who have attempted to file *amicus curiae* submissions, however, have complained that this system does not “*provide an effective or practical means of accessing justice for either State violations or company abuses exacerbated or caused by international investments.*”<sup>52</sup>

48. Third party funding advocates argue that the presence of third party funding enhances access to justice. However, third party funding may also be seen as enabling or prolonging a focus on economic returns rather than “justice” by fuelling a system that only allows those with direct economic interests to access the investment arbitration system and excluding those who may have been directly or indirectly affected by the related investment or governmental measure.

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52 Columbia Center on Sustainable Investment, *Impacts of the International Investment Regime on Access to Justice*, September 2018 <<http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Documents-Final.pdf>> accessed 26 December 2018, p.10.



*TPF exacerbates what is a largely asymmetric dispute resolution method*

49. Critics of the current investor-State arbitration system argue that the system is structurally biased towards prospective claimants.<sup>53</sup> Recent numbers from UNCTAD show that respondent States have been successful in over a third of all published investment disputes, mostly at the jurisdictional phase, slightly higher than the 28% of claimants that have succeeded overall. However, of those cases that have proceeded to the merits, 60% were decided in favour of claimants.<sup>54</sup> These numbers indicate that while States may enjoy some advantage at the jurisdictional phase, these advantages are subsequently negated if a dispute manages to reach discussion of the merits. These statistics also may indicate a structural bias due to the asymmetrical nature of investor-State arbitration, primarily due to the fact that under the current system, it is practically impossible for respondents to successfully lodge counterclaims that would help set off or neutralise prospective claims. These structural imbalances may be further distorted by the introduction of third party funding.

50. In commercial arbitration, third party funding will usually fund both claimants and respondents. The benefits for the Funder in respect of prospective claimants are straightforward. For respondents, third party funding may also increase the availability of funds to respond to claims, in particular where the respondent may have a strong prospective counterclaim from which the Funder can obtain returns on its investment.

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53 See Frank Garcia and Kirrin Hough, "Third Party Funding in International Investor-State Arbitration", *American Society of International Law*, Vol. 22, No. 16, 1 November 2018, <<https://www.asil.org/insights/volume/22/issue/16/third-party-funding-international-investor-state-arbitration>> accessed 22 December 2018; See also *Teinver v Argentina* (ICSID Case ARB/09/1); Burford Capital FY 2017 Report <<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>> accessed 22 December 2018.

54 UNCTAD, *World Investment Report 2018* <[https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf)> accessed 27 January 2019 pp.94-95.

51. In most cases, however, investment arbitrations tend to be asymmetric. Whereas the Claimant will usually obtain monetary damages in respect of its claims, the host States, when successful, are in almost all cases limited to only costs awards. In particular, the specific nature of treaty arbitration in many cases serves to bar host States from being able to bring counterclaims that could potentially provide returns to any Funder.

52. Whether a respondent State may bring counterclaims in investment arbitration remains a topic of heated debate. These debates arise primarily from the unique elements that separate investment arbitration from normal commercial disputes. Whereas the majority of commercial arbitration disputes arise from contractual agreements that are, for the most part, symmetrical as to the respective rights and powers of the parties to bring claims against each other, there is no such guarantee of symmetry for investment disputes.

53. In particular, while it is a given that the bilateral or multilateral agreement that constitutes the standing offer to arbitrate on behalf of the host State is subsequently crystallised by the submission of a request for arbitration by the investor, the method of this crystallisation raises questions as to whether the host State can subsequently bring counterclaims under that agreement. In various cases where the State has attempted to bring a counterclaim, the tribunal has had to determine whether the wording of the arbitration agreement in the relevant treaty was broad enough to encompass potential counterclaims, or whether the wording had been restricted so that only the investor had the power to bring substantive claims.<sup>55</sup>

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<sup>55</sup> *Saluka Investments BV v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004; *Sergei Pausbok v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.

54. Even with more recent arbitral decisions deciding that the scope of modern treaty dispute resolution clauses will allow for States to bring counterclaims for issues such as environmental damages or human rights abuses, such decisions subsequently run into other issues in relation to whether the counterclaims of respective respondent States share factual or legal connections to the investor's claims, i.e. whether the counterclaims arise out of the same legal instrument as the investor.<sup>56</sup> These tests almost invariably result in the failure of the application for a counterclaim given that the claimant will rely primarily on breaches of treaty, and that exceedingly few of those treaties provide for any substantive rights that the respondent State could use as the legal basis for its counterclaims.

55. The result of this is that while the door may be slowly opening, the probability of a respondent State to successfully have their counterclaim admitted, much less succeed on the merits is vanishingly small. In fact, of all published investment arbitration decisions, only two cases considered a counterclaim from the respondent State to be admissible. Those two decisions were both related, in the cases of *Burlington Resources v Ecuador*<sup>57</sup> and *Perenco v Ecuador*.<sup>58</sup> Even then, the only reason the counterclaims in these cases were found admissible was the claimants in both cases declined to contest the jurisdiction or admissibility of the counterclaims.

56. In the context of TPF, the consequences of the asymmetric dispute resolution methods most commonly found in investment arbitration through bilateral and multilateral agreements are that host States will almost never be able to access the avenues for funding that the investors will be able to access. Without the ability to have any potential counterclaims heard, respondent States simply cannot provide a workable business model that will allow a Funder to obtain a comparable rate of return.

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56 *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *David Aven v Costa Rica*, UNCITRAL, Final Award, 18 September 2018.

57 ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017.

58 ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015.

57. There have been disparate cases where respondents have been able to obtain funding from third parties, but these sources of funding tended to be from non-profit entities rather than from professional financial investors. For example, in the *Philip Morris v Uruguay*<sup>59</sup> arbitration, the Uruguayan government received financial support from the Bloomberg Foundation and its “Campaign for Tobacco-Free Kids.”<sup>60</sup> Such sources of non-profit funding will likely help to support respondent States in other cases that deal with significant issues of public interest, but it is arguable that the limited nature of such funding is far outweighed by the availability of funding for claimants, and therefore does not significantly alleviate what is an inherent structural imbalance.

*TPF risks overburdening governmental resources*

58. The rapid increase in investor-State claims over the past 20 years has proven that ISDS is an effective and popular option for aggrieved investors, despite the high costs of handling a claim. However, whereas a prospective claimant will only have to deal with one set of legal costs, respondent States face an ever-increasing burden of legal costs as more and more investors utilise the investor-State dispute resolution system.

59. One of the greatest criticisms against the investor-State dispute resolution system stems from physical or economic crises that have arisen in host States. In situations where States are forced to take certain measures, either to regulate or to safeguard its interests, the general measures taken can give rise to multiple claims, which then puts even more pressure on already strained governmental resources. One such example of this was Argentina, whose economic crisis between 1999-2001 gave rise to as many as 45 claims from

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59 ICSID Case No. ARB/10/7.

60 Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.48.

2001-2009.<sup>61</sup> These claims included cases such as *Abaclat v Argentina*,<sup>62</sup> the world's first ISDS class-arbitration, whereby over 180,000 individual Italian bond holders brought claims against Argentina in respect of its debt-restructuring efforts during the 2001 economic crisis.<sup>63</sup>

60. Even when cases are discontinued or settled, handling of these cases may require the devotion of significant resources by respondent States. Costs in investment arbitration continue to rise, and as stated above, the estimated average cost for an investment dispute is now approximately USD 8 million.<sup>64</sup> Furthermore, many investment arbitrations are being brought against developing nations, who may have limited resources to spend for defending against potential claims. For these nations, even at the best of times, the existing caseloads may already stretch governmental budgets and public resources to the breaking point. Considering that many cases may also be brought in times when the host State is still dealing with the after-effects of national crisis, the costs of defending such proceedings may eventually prove unbearable.

61. This burden may be further exacerbated by the presence of a Funder. The funding of claims potentially extends the survivability of a claim, meritorious or otherwise. Whereas certain claims may have fizzled out due to passage of time or exhaustion of resources, funding will prolong these disputes and thereby continue to drive up costs for respondent States.

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61 "Argentina – As Respondent State", *Investment Policy Hub* <<https://investmentpolicyhub.unctad.org/ISDS/CountryCases/8?partyRole=2>> accessed 22 December 2018.

62 ICSID Case No. ARB/07/5.

63 *Ibid.*

64 UNCITRAL Working Group III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session*, A/CN.9/930, 19 December 2017, para. 29.

*TPF may amplify regulatory chilling effects*

62. Regulatory chill is the theory that outside forces may force a government to refrain from implementing regulations. Critics of the investment arbitration system have argued that the explosion of investment treaty arbitration cases may lead to governments hesitating or refraining from instituting regulatory measures out of fear of opening themselves up to liability and risk of facing claims brought by affected foreign investors.<sup>65</sup> The possibility of regulatory chill may be more significant when considering that many cases are against developing countries that may not necessarily have robust health, environmental, or human rights regulations.

63. Further, many of these developing nations may not have the governmental resources to negotiate or modernise their original treaties, leaving these nations with older generation treaties that possess limited safeguards to protect a State's inherent regulatory powers.

64. Such concerns are only amplified with third party funding, the presence of which can not only increase the quantity of claims that can be levied against a respondent State, but also prolong the life of such claims, even when they may not be meritorious.

*TPF supports the transfer of wealth from the public sector to private actors*

65. Where an investor has been successful in claiming against a respondent State for breaches of treaty, any award that will be rendered will necessarily have to be paid out of public funds. The issuance of an investment award, and its subsequent enforcement, therefore constitutes a *de facto* transfer of public resources to private entities.

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<sup>65</sup> K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, Cambridge 2009) 25, citing Mann, H. *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (IISD and World Wildlife Fund, Winnipeg 2001) 34; E. Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Earthscan, London 2001) 87; K. Gray, "Foreign Direct Investment and Environmental Impacts: Is the Debate Over?", *RECIEL* 11(3) 311; A. Cosbey, H. Mann, L. Peterson, K. von Moltke, *Investment and Sustainable Development* (IISD, Winnipeg 2004).

66. In a non-funded investment dispute, the payment out of any award to the claimant constitutes compensation for breaches of the respondent State's treaty obligations. In cases of expropriation or denial of justice this may be justified, but in situations where the State has exercised its inherent right to regulate for its health, environment, or other needs, the transfer of funds from the public sector to private actors may be seen as contradictory to the State's need to promote sustainable development.<sup>66</sup>

67. The presence of a Funder only lends further support to this specific criticism of the investment disputes system, as the Funder will subsequently make a profit off of what was, up until the date of any award, public funds at the disposal of the respondent State. This may also lead to criticism that the presence of Funders will artificially prop up those investors whose purposes run counter to the principles of sustainable development,<sup>67</sup> particularly when many claims of indirect expropriation due to environmental or safety regulations have arisen from mining and energy investments.

68. Furthermore, such transfers of wealth from public sectors to Funders can be seen as actively working against the original purposes of the funds. Whereas public funding would have normally been earmarked to help support environmental or health regulations, when such funds have been diverted to a Funder, there is no guarantee as to how those funds will subsequently be used. It is not impossible that the Funder, having received returns from a State's legitimate exercise of its regulatory rights, subsequently uses those funds to invest into other claimants who do not actively support sustainable development objectives. The public purpose of the funds is thus destroyed, and the transfer of wealth to private actors potentially causes measurable harm to health, environmental, and human rights objectives.

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<sup>66</sup> Queen Mary Task Force Report <[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.201.

<sup>67</sup> *Ibid.*

*TPF increases the risk of creating more marginal, speculative, and frivolous claims*

69. Just like any other professional investor, success is based on the diversification of a portfolio of investment. The assumption underlying third party funding is that the chance of success of a claim is the primary consideration of a Funder, as returns will generally be based on success of the claim. However, the probability of success may not always be the only consideration. It is not impossible to consider that a Funder, faced with a claim that may have only a very small chance of success, but which could net a very high return, may take the chance of including that investment in its portfolio.

70. Current efforts to regulate third party funding revolve around requirements of disclosure and effective standards to protect funded parties entering into funding agreements. However, there is currently no regulatory initiative that attempts to control how Funders should manage their portfolios or provide criteria that must be established in order to accept an investment. Indeed, there does not appear to be any way to practically implement such regulation even if it was proposed. Each Funder exercises its own discretion and judgment when accepting an investment into its portfolio.

71. Furthermore, it is undeniable that the current state of ISDS, and one of its largest criticisms, is that an investor could possibly bring two identical cases before two different tribunals, and obtain two different results. There is no binding precedent in investment arbitration and what may be a weak case for one tribunal may convince a different one. Funders may therefore take a greater risk supporting a case that may be unmeritorious on its face in the hope of a different outcome before a different tribunal. Such risks are subsequently balanced through a portfolio of other safer



investments. The Queen Mary Task Force has also pointed out that several critics have raised specific concerns regarding portfolio investment and its ability to hedge higher risk investments.<sup>68</sup>

*Cost allocation in funding agreements may give rise to “arbitral hit and runs”*

72. The ability for a Funder to withdraw from a funding agreement may cause situations where, once it appears that a claimant may lose its case against a respondent State, the Funder will be able to withdraw from the case, leaving the claimant impecunious and unable to satisfy any subsequent costs award rendered in favour of the respondent State. The Funder, as a non-party to the disputes settlement clause, is able to walk away as it cannot be subject to any orders issued by the respective arbitral tribunal.<sup>69</sup> This creates an “arbitral hit and run” scenario whereby success will result in a windfall for the claimant and Funder but failure will still leave the respondent State out of pocket.

73. Such concerns were the driving reasons why respondent States have been pushing for issuance of security for costs orders, such as those issued in *RSM v Saint Lucia*<sup>70</sup> and *Armas v Venezuela*.<sup>71</sup> Without security for costs, respondent States find themselves in situations of unnecessary risks, where even success will still cause undue burden on governmental resources.

74. Hong Kong regulation in respect of the recently published Code of Practice has also recognised that the sudden withdrawal by a Funder may cause severe prejudice to a case. The Code attempts to mitigate this risk by restricting the ability of the Funder to

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68 Queen Mary Task Force Report  
<[https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf)> accessed 22 December 2018, p.203.

69 *Ibid.* pp.161, 177.

70 *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs.

71 *Manuel García Armas and others v Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018.

withdraw or terminate a funding agreement except under certain prescribed situations.<sup>72</sup>

## V. CURRENT INITIATIVES TO REGULATE THIRD PARTY FUNDING IN ISDS

75. Considering the great level of interest from both private investors and public bodies in how third party funding can affect the ISDS landscape, it is not surprising that there are multiple current initiatives to provide a structured framework around third party funding that will help preserve the advantages of funding while mitigating any potential pitfalls. These initiatives are taking place now and on multiple levels, including at the procedural or administrative level, domestic law level, and treaty level. Some of these initiatives are detailed below.

### *Procedural and Administrative Level – Rules Regarding Third Party Funding*

76. Arbitral institutions are at the forefront of third party funding regulation, with several institutions now including rules and regulations regarding the need to disclose third party funding relationships. Several of these modifications are also specific to investor-State arbitration.

77. The ICSID Rules have been amended with the aim of modernising the ICSID arbitration rules and to take into account developments in the investment treaty arbitration field over the past 20 years. Among the various amendments are rules relating specifically to the need for parties to disclose the existence of any third party funding and the sources of this funding, as well as separate codified powers for arbitrators to make orders for security for costs. New ICSID Arbitration Rule 21 imposes a new obligation

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72 Code of Practice for Third Party Funding of Arbitration <[http://gia.info.gov.hk/general/201812/07/P2018120700601\\_299064\\_1\\_1544169372716.pdf](http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf)> accessed 22 December 2018, paras. 2.13-2.16.

on the parties to disclose whether they are being supported by third party funding and if so to disclose the source of the funding. The parties must also keep such details current throughout the proceedings. However, the new Rule 21 does not impose any obligations to disclose the funding agreement or its contents.<sup>73</sup>

78. ICSID is not the only administrative body to contemplate specific regulations in relation to TPF. While not specific to investment arbitration, the 2018 HKIAC Administered Arbitration Rules include specific rules in respect of TPF that imposes disclosure obligations when funding arrangements have been entered into. Specifically, Article 44 of the 2018 HKIAC Rules specifies that when a funding agreement has been made, the funded party must communicate the fact that a funding agreement has been concluded as well as the source of funding.<sup>74</sup> The funded party must also notify the tribunal and other party when their situation has changed.

79. The Singapore International Arbitration Centre has also considered issues in relation to third party funding in its 2017 SIAC Investment Arbitration Rules. Rule 24 of the SIAC Investment Arbitration Rules provides for additional powers of the tribunal. Rule 24(1) explicitly empowers the tribunal to order disclosure of any funding arrangement, identity of any Funder, and where appropriate, details of the Funder's interests and whether the Funder has agreed to take on any adverse costs liability.<sup>75</sup> Notably, unlike the ICSID amendments and the 2018 HKIAC Rules, the SIAC Investment Arbitration Rules do not provide for automatic disclosure of the existence of any funding arrangements. This is likely due to Singapore's decision to impose its disclosure obligations on counsel rather than the funded party via Singapore's professional conduct rules.<sup>76</sup>

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73 "Proposals for Amendment of the ICSID Rules – Synopsis" <[https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis\\_English.pdf](https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis_English.pdf)> accessed 22 December 2018, para. 21.

74 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules, Article 44.

75 2017 Singapore International Arbitration Centre Investment Arbitration Rules, Rule 24(1).

76 Legal Profession (Professional Conduct) Rules 2015, s.49A.

80. The China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules adopted in 2017 also provide for disclosure requirements when third party funding is present. Article 27 of the Investment Arbitration Rules provides for mandatory disclosure of the existence, nature, and identity of any funding, as well as empowering the arbitral tribunal to order disclosure of any relevant information in the respective funding agreement.<sup>77</sup>

*Regulation at the Jurisdictional Level*

81. Whereas individual institutions such as ICSID and HKIAC are moving towards imposing regulations for Funders, such efforts are also being replicated at the domestic law level, with individual jurisdictions now implementing provisions to regulate potential Funders. Hong Kong and Singapore have both recently implemented amendments to their domestic laws to both accommodate for and regulate third party funding.

82. Following the Hong Kong decision in *Unruh v Seeberger & Anor*<sup>78</sup> where it was left open whether maintenance and champerty would apply to arbitrations in Hong Kong, and subsequent to the Law Reform Commission's report in 2016, Hong Kong's amendments to the Arbitration Ordinance (Cap 609) in June 2017 now make express allowances for third party funding in arbitration.<sup>79</sup> Adopting an approach similar to that taken by Australia, Hong Kong takes a "light-touch" approach to the regulation of third party funding, requiring all third party funders to adhere to a Code of Practice developed by the Hong Kong Department of Justice, but not requiring any further interventionist measures.<sup>80</sup>

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77 CIETAC International Investment Arbitration Rules, 1 October 2017, Article 27.

78 [2007] 2 HKC 609.

79 <<https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf>> accessed 27 January 2019.

80 "Report on Third Party Funding for Arbitration" <[https://www.hkreform.gov.hk/en/docs/rtpf\\_e.pdf](https://www.hkreform.gov.hk/en/docs/rtpf_e.pdf)> p.64.

83. Hong Kong issued its Code of Practice for Third Party Funding of Arbitration (Code) on 7 December 2018, fulfilling its obligations under Part 10A of the amended Arbitration Ordinance (Cap 609).<sup>81</sup> The Code imposes several obligations upon Funders, including obligations in relation to maintaining suitable standards and practices such as:

- Promotional material standards and requirements;<sup>82</sup>
- Requirements as to the content of the funding agreement and the need to ensure that funded parties have obtained independent legal advice in relation to the funding agreement;<sup>83</sup>
- Maintenance and disclosure of capital adequacy requirements;<sup>84</sup>
- Required procedures to manage conflicts of interest;<sup>85</sup>
- Standards and requirements for confidentiality;<sup>86</sup>
- Requirements for the Funder to refrain from influencing the funded party or its legal representative to give control or conduct of the arbitration to the Funder, nor to cause the funded party's legal representative to act in breach of its professional duties, nor to influence the arbitral body or institution;<sup>87</sup>
- Requirements for the Funder to remind the funded party of its obligation to disclose information under Sections 98U and 98V of the Arbitration Ordinance (Cap 609);<sup>88</sup>
- Requirements to explicitly state in the funding agreement whether the Funder will meet any liability for adverse costs, insurance premiums, security for costs, or any other financial liability;<sup>89</sup>
- Requirements for establishing grounds of termination, in particular that the Funder will not withdraw except under specific circumstances;<sup>90</sup>

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81 Code of Practice for Third Party Funding of Arbitration <[http://gia.info.gov.hk/general/201812/07/P2018120700601\\_299064\\_1\\_1544169372716.pdf](http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf)> accessed 22 December 2018.

82 *Ibid.* para. 2.2.

83 *Ibid.* paras. 2.3-2.4.

84 *Ibid.* para. 2.5.

85 *Ibid.* paras. 2.6-2.7.

86 *Ibid.* para. 2.8.

87 *Ibid.* para. 2.9.

88 *Ibid.* paras. 2.10-2.11.

89 *Ibid.* para. 2.12.

90 *Ibid.* paras. 2.13-2.16.

- Requirement to have an effective dispute resolution mechanism between Funders and funded parties;<sup>91</sup>
- Requirements to have an effective procedure for addressing complaints against it.<sup>92</sup>

84. Singapore has also implemented amendments to its Civil Law Act (Chapter 43 of the 1999 Revised Edition) as well as its Legal Profession Act (Chapter 161 of the 2009 Revised Edition) to allow for third party funding in specific circumstances. Section 5A of the amended Act abolishes the torts of maintenance and champerty, while maintaining that contracts not allowed by Section 5B will still be considered to be contrary to Singaporean public policy or otherwise illegal.<sup>93</sup> Section 5B of the amended Act then provides for the legalisation of third party funding for certain classes of dispute resolution, such as arbitration. Section 5B is structured so that the Minister can later broaden the scope of the qualification to other classes of dispute resolution.<sup>94</sup>

85. In respect of disclosure obligations, Singapore has taken the approach of imposing these obligations upon the legal representatives of funded parties rather than upon the parties themselves. Section 49A of the Singaporean Legal Profession (Professional Conduct) Rules 2015 stipulates that any Singaporean legal practitioner must disclose the existence and identity of any Funder.<sup>95</sup> Moreover, Section 49B of the same rules prohibits legal practitioners from having any ownership interest in a Funder that it has referred to a client or which has a contract with the law firm.<sup>96</sup>

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91 *Ibid.* para. 2.17.

92 *Ibid.* para. 2.18.

93 Civil Law (Amendment) Act 2017, s.2.

94 *Ibid.*

95 Legal Profession (Professional Conduct) Rules 2015, s.49A.

96 *Ibid.* s.49B.

### *Treaty Level Regulation of TPF*

86. In addition to regulation at the administrative and jurisdictional levels, third party funding in investment arbitration must also consider potential regulation at the treaty level, as more recent bilateral and multilateral agreements are considering the issue of third party funding.

87. For example, the Comprehensive Economic Trade Agreement (CETA) signed between Canada and the EU now includes specific disclosure requirements when there is the presence of third party funding. Specifically, Article 8.26 CETA establishes that “[w]here there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.”<sup>97</sup> Similar provisions are also present in the EU-Vietnam Investment Protection Agreement<sup>98</sup> and the EU-Singapore Investment Protection Agreement.<sup>99</sup>

88. As third party funding in investment arbitration continues to grow and calls for regulation increase, it is likely that third party funding clauses will become more and more prevalent in bilateral and multilateral investment agreements, so as to provide safeguards for host States that may not wish to rely on institutional rules.

### *Is Regulation of Funding at Multiple Levels Advisable?*

89. As established above, there are multiple initiatives that have either taken place or which are underway in relation to ensuring that third party funding of arbitration or mediation issues is sufficiently regulated. Such initiatives are taking place at each level of the dispute resolution environment, including at the institutional, jurisdictional, and international level.

97 Comprehensive Economic and Trade Agreement, Article 8.26 <[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)> accessed 22 December 2018.

98 EU-Vietnam Investment Protection Agreement, Chapter 3, Article 3.37 <[http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157394.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf)> accessed 22 December 2018.

99 EU-Singapore Investment Protection Agreement, Chapter 3, Article 3.8 <[http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156731.pdf](http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf)> accessed 22 December 2018.

90. While regulation of Funders is generally recognised as a necessary element to ensure that funded parties are adequately protected and advised of their rights and obligations, as well as to ensure that the integrity of the arbitration process is maintained and that there are effective methods of disclosure and conflicts management, the various initiatives to attempt to regulate this process may lead to issues of conflict between the various regulatory requirements.

91. This potential conflict can be seen when comparing, for example, the method of regulation in Hong Kong and Singapore. Hong Kong's amended Arbitration Ordinance (Cap 609) regulates Funders operating in Hong Kong, including the imposition of disclosure obligations upon funded parties pursuant to Sections 98U and 98V Arbitration Ordinance (Cap 609).<sup>100</sup> Singapore's disclosure requirements, however, are imposed on counsel by virtue of its Professional Conduct Rules.<sup>101</sup> The 2018 HKIAC Arbitration Rules also impose disclosure obligations under Article 44.<sup>102</sup> Therefore, an arbitration that would be seated in Hong Kong under the 2018 HKIAC Rules that involves Singaporean counsel could potentially have three different rules governing disclosure of third party funding. In the investment arbitration context, one also needs to consider regulation currently being included into bilateral and multilateral agreements, potentially adding a fourth source of regulation into the dispute.

92. At the moment, most regulations are unanimous in requiring the disclosure of the existence and identity of any Funder. However, as the field matures and regulations are amended or refined, there exists the possibility of eventual conflict between the disparate methods of funding regulation. Even where general concepts may be common between these sets of rules, different applications of those concepts may cause greater confusion and debate in the future.

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100 Arbitration Ordinance (Cap 609), ss.98U, 98V.

101 Legal Profession (Professional Conduct) Rules 2015, s.49A.

102 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules, Article 44.



## VI. THIRD PARTY FUNDING IN INVESTMENT MEDIATION

93. Much of the focus on third party funding and the structural imbalances inherent in ISDS have focused on one aspect of ISDS, investor-State arbitration. In reality, there exists a range of dispute settlement methods along the spectrum, including party-to-party negotiation as well as investment mediation.

94. That the investor may have multiple methods of resolving its dispute is readily reflected in most bilateral and multilateral agreements. Most treaties include as part of their dispute settlement provisions the requirement for consultations and negotiations, or a cooling off period.<sup>103</sup>

95. Several international bodies have considered the use of mediation to help reduce and alleviate the high costs of investor-State arbitration. The UNCITRAL Working Group, for example, has considered that the “*use of methods other than arbitration to resolve disputes, including mediation, were also considered as potential measures that could reduce time and cost in ISDS*”.<sup>104</sup> ICSID also maintains an investment mediation programme whereby ICSID will provide facilities and administrative services to assist parties in identifying mediators, organising mediation sessions and managing the finances of the process.<sup>105</sup> ICSID also provides a set of mediation rules under its Additional Facility (which no longer requires one party to be a Contracting State or a national of a Contracting State).<sup>106</sup> The IBA has also issued Rules for Investor-State Mediation, which provide rules for, *inter alia*, appointment of mediators and the conduct of mediation.<sup>107</sup>

103 “Investor-State Mediation” <<https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>> accessed 28 December 2018.

104 UNCITRAL Working Group III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session*, A/CN.9/930, 19 December 2017, para. 67.

105 “Investor-State Mediation” <<https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>> accessed 28 December 2018.

106 ICSID Additional Facility Rules of Procedure for Mediation Proceedings ((Additional Facility) Mediation Rules) <[https://icsid.worldbank.org/en/Documents/X.%20Amendments\\_Vol\\_Two-English\\_AF%20MR.pdf](https://icsid.worldbank.org/en/Documents/X.%20Amendments_Vol_Two-English_AF%20MR.pdf)> accessed 28 December 2018.

107 *IBA Rules for Investor-State Mediation*, 4 October 2012 <[https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Appealed%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Appealed%20by%20IBA%20Council%204%20Oct%202012).pdf)> accessed 28 December 2018.

96. While third party funding in arbitration has been relaxed, it is questionable whether third party funding of mediation may fall within the traditional doctrines of maintenance and champerty. As noted in *Neville v London Express Newspaper*<sup>108</sup> and adopted in *HKSAR v Winnie Lo*,<sup>109</sup> maintenance and champerty are concerned with *litigation*, and therefore may not extend to non-contentious proceedings such as mediation. When considering third party funding in mediation generally, the Law Reform Commission of Hong Kong Third Party Funding in Arbitration Sub-committee considered that mediation and other forms of alternative dispute resolution, being non-contentious, would not attract liability under maintenance and champerty.<sup>110</sup>

97. Notably, nothing in the ICSID (AF) Mediation Rules nor the IBA Rules for Investor-State Mediation contain any explicit references or rules governing third party funding. Considering that both ICSID and the IBA have explicitly included regulations on disclosure of third party funding in their amended ICSID Rules and IBA Guidelines on Conflicts of Interest respectively, the omission of such regulations in their Mediation Rules may serve to indicate that the use of third party funding in mediation is seen to be less of an issue.<sup>111</sup>

98. Despite this, when considering amendments to the Arbitration Ordinance (Cap 609) to accommodate third party funding, Hong Kong took the further step to clarify the applicability of third party funding to mediation as well, thereby reducing potential confusion as to whether maintenance and champerty may apply to mediation.<sup>112</sup> The subsequent Arbitration and Mediation Legislation

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108 [1919] AC 368.

109 (2012) 15 HKCFAR 16.

110 Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration Sub-committee Consultation Paper* <[https://www.hkreform.gov.hk/en/docs/tpf\\_e.pdf](https://www.hkreform.gov.hk/en/docs/tpf_e.pdf)> accessed 22 December 2018, para. 1.30.

111 The amended ICSID Conciliation Rules even include an explicit rule providing for disclosure of third party funding.

112 Law Reform Commission of Hong Kong, *Report: Third Party Funding for Arbitration* <[https://www.hkreform.gov.hk/en/docs/rtpf\\_e.pdf](https://www.hkreform.gov.hk/en/docs/rtpf_e.pdf)> accessed 28 December 2018, paras. 3.38-3.39.

(Third Party Funding) (Amendment) Bill 2016 made changes to the Mediation Ordinance (Cap 620), adding a new Section 7A that replicates the application of Part 10A to mediations as well as arbitration.<sup>113</sup>

99. While some of the structural elements of investment arbitration that may be amplified or exacerbated by third party funding may not be present in investment mediation systems, such as the asymmetrical nature of compensation and the issues regarding regulatory chill or portfolio investment, there are still several issues that will not be dissipated by moving from an investment arbitration to an investment mediation system.

100. Primarily, issues regarding conflicts of interest may still arise between Funders and potential mediators. In particular, the ICSID (AF) Mediation Rules and the IBA Rules for Investor-State Mediation both impose obligations of impartiality and independence upon a mediator,<sup>114</sup> and yet without mandatory disclosure of the existence of a Funder, mediators may have inherent conflicts of interest that they will not be aware of. Further, issues of transparency may be further muddled due to the express obligations of confidentiality included in current mediation rules.<sup>115</sup> Such provisions have the potential to provide a step backwards in relation to efforts to improve and expand transparency in the investment disputes system.

## VII. CONCLUSION

101. The advent of the investment dispute settlement system was a sea change for how private actors could obtain relief for foreign governmental measures, allowing for the first time, a method by

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113 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016  
<<https://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf>> accessed 28 December 2018.

114 ICSID (AF) Mediation Rules, Rule 6; IBA Rules for Investor-State Mediation, Article 3.

115 ICSID (AF) Mediation Rules, Rule 16; IBA Rules for Investor-State Mediation, Article 10.

which private investors could obtain direct relief from host States. The meteoric rise of investor-State arbitration cases over the past 20 years shows both a need and demand for this sort of direct relief.

102. The creation of ISDS has also opened up a new lucrative market for Funders that many Funders have taken advantage of, allowing for greater gains and subsequently, greater access for smaller investors that may have sufficient resources on their own to be able to access the dispute settlement system.

103. However, just as with any other burgeoning industry, there remain issues that need to be resolved in order to provide a balanced system that both allows access to justice for legitimately aggrieved investors while preventing undue burden on respondent States that could cause an eventual withdrawal from the dispute settlement system altogether.

104. The advantages of including third party funding into the current investment disputes system are clear, providing unprecedented access to investors to have their grievances heard, in a manner that promotes meritorious claims and possibly filters out unmeritorious ones.

105. Meanwhile, whereas there are certainly disadvantages to including third party funding, such as exacerbating or amplifying existing structural imbalances that tend to favour the investor over respondent States, it is questionable whether third party funding independently causes these issues; or rather that these weaknesses are inherent in the investment arbitration system itself.

106. Current efforts to regulate third party funding are unanimous on the need to disclose both the existence and sources of third party funding. Beyond that, however, regulations begin to diverge as to whether any further disclosure is required, on whom these obligations lie, and whether the presence of third party funding

justifies any other measures such as security for costs. Considering regulation at the administrative, jurisdictional, and treaty levels, further work may be required to establish a common set of rules and regulations so that obligations and duties are clear to all parties.

107. Further, it is unclear at the moment what role third party funding may play in investment mediation, if any. Current rules governing investment mediation do not account for nor attempt to regulate for third party funding, which may cause issues with conflicts of interest and transparency.

108. In the end, the genie cannot be put back into the bottle. What is agreed by a vast majority is that the answer is not to eliminate ISDS altogether, but to reform it in a manner that provides effective safeguards against abuse while preserving and further enhancing the ability for individuals to obtain recourse and relief from legitimate grievances.

# Appointment of Arbitrators and Related Issues

Adrian Lai<sup>1</sup>

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<sup>1</sup> Adrian Lai, Barrister; Deputy Secretary General of Asian Academy of International Law.

## I. PURPOSE

1. This paper is to facilitate the discussion in the session on “Appointment of Arbitrators and Related Issues” at the ISDS Reform Conference, which will cover the topics of (a) examining the pros and cons of various methodologies in the appointment of arbitrators; (b) exploring how the ISDS reform should tackle the issues of “double hatting”, issue conflicts and improving the arbitrator challenge procedures; and (c) examining the desirability (or undesirability) of replacing *ad hoc* arbitrators with full-time judges.

## II. BACKGROUND

2. In July 2017, the United Nations Commission on International Trade Law (UNCITRAL) entrusted the Working Group III (the Working Group) with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS Reform). The mandate given to the Working Group include:

The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.<sup>2</sup>

3. At the 34<sup>th</sup> and 35<sup>th</sup> sessions of the Working Group, various topics of the current ISDS system were identified for further discussion at the following session. In the “Note by the Secretariat” on “Possible reform of investor-State dispute settlement (ISDS)”, it was stated:

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2 Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17) §§263-265.

Concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties (“party-appointment”), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns ... have been said to undermine the legitimacy of the ISDS regime and its democratic accountability .... These concerns fall within two broad categories: those concerning the arbitral process and outcomes ... and those relating to arbitrators/decision-makers ....<sup>3</sup>

4. The deliberations at the aforesaid two sessions were followed up at the 36<sup>th</sup> session of the Working Group. As to the concerns pertaining to arbitrators and decision-makers, the following specific concerns were identified at the 36<sup>th</sup> session: (a) the standards of independence and impartiality required of individual arbitrators, and the observation that those standards might be insufficiently clear in scope and homogeneous in practical application; (b) the existence of issue conflicts and double hatting; (c) the challenge mechanism and its limitations; (d) the limitations of the party-appointment mechanism as regards ensuring competence and qualifications of arbitrators; (e) impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators on the perception of bias; (f) limited number of individuals repeatedly appointed as arbitrators; and (g) lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators.<sup>4</sup>

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<sup>3</sup> A/CN.9/WG.III/WP.142, §20. See also *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session*, A/CN.9/935, Chapter IV; and *Possible Reform of Investor-State Dispute Settlement (ISDS) (Draft) – Note by the Secretariat* (A/CN.9/WG.III/WP.149), §8.

<sup>4</sup> *Possible Reform of Investor-State Dispute Settlement (ISDS) (Draft) – Note by the Secretariat* (A/CN.9/WG.III/WP.149), §§11-13.



5. This discussion paper is not intended to cover all concerns identified above. Instead, it selects some of them and organises the discussion under the following topics: (a) “The Arbitrator Appointment System”, (b) “Concerns about *ad hoc* Arbitrators”, and (c) “Replacing *ad hoc* arbitrators with full-time judges?”

### III. CONCERN 1: The Arbitrator Appointment System

#### *A. Party-appointment system*

6. In ISDS cases, parties play a major role in appointing the arbitrators. Typically, for a 3-member arbitral tribunal, each party appoints one arbitrator initially. Then the presiding arbitrator will be agreed by the disputing parties directly, or selected by the party-appointed arbitrators.

7. From the parties’ own perspective, the party-appointment system allows parties to select their own preferred arbitrators according to their own criteria. Whilst the parties may have by agreement identified the qualities that an arbitrator should meet; parties, however, may attach different weight to different criteria, and come up with their own preferred choices. The parties’ right to appoint their own preferred arbitrators is regarded as a fundamental right in the ISDS arbitral process enshrining the party’s autonomy principle.

8. It is argued that parties generally have a high level of trust and confidence in the arbitrators they appoint and hence tend to be more willing to accept the arbitral awards delivered by the tribunals.<sup>5</sup>

9. The use of the party-appointment system in the context of ISDS, however, is not free from attack.

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<sup>5</sup> Alison Ross, *Paulsson and van den Berg presume wrong, says Brower*, GLOBAL ARB. REV., 6 February 2012.

10. Firstly, it is said that ISDS cases require expertise in matters of both public and private international law and hence an arbitrator in ISDS cases should include the ability to take into account relevant issues of public interest or public policy, which are usually at stake in ISDS cases. However, it cannot be ensured that parties, in appointing the arbitrators of their own choices, will take that into account. This is exacerbated by the lack of transparency in the appointment process as parties are not obliged to disclose their appointment strategies to the other party. This reinforces the concern (or perception) that a party may appoint its preferred arbitrator without paying due regard to his/her ability to take into account public interest concerns.

11. Secondly, it is argued that there is an inherent flaw in the party-appointment system which cast doubts (whether as a matter of perception or otherwise) on the independence or impartiality of the appointed arbitrators. For example, *ex parte* interviews<sup>6</sup> are likely to be conducted prior to appointment and a party-appointed arbitrator may be perceived to be more readily to side with the party appointing him.

12. The perceived bias on the part of the party-appointed arbitrators is reinforced by the situations of (a) dissenting opinions in ISDS cases and (b) repeated appointments.

*a. Dissenting Opinions*

13. With respect to dissenting opinions, an empirical study has been done on 150 publicly reported ISDS decisions. Amongst the decisions studied, there were 34 cases (22%) in which party-appointed arbitrators issued dissenting opinions. It is also worth noting that nearly all of those 34 dissenting opinions were issued by the arbitrators appointed by the parties that lost the case in

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<sup>6</sup> Pre-appointment interviews, under the current system, are limited to availability and conflict and cannot address the merits of the case. E.g. see *Practice Notes for Respondents in ICSID Arbitration 2015*, p.18.

whole or in part.<sup>7</sup> The statistical information, some argue, gives rise to the concern about the independence and impartiality of party-appointed arbitrators.

14. Another front of attack against the party-appointment system is that arbitrators in ISDS cases are often characterised as favouring States or investors (“pro-State/pro-investor” arbitrators) based on their previous appointments. Statistical information suggests that some arbitrators are consistently appointed by claimant-investors (as frequent as 50 times) and some by respondent-States (as frequent as 82 times).<sup>8</sup>

15. On the one hand, the perception of bias on the part of the party-appointed arbitrators undermines the public confidence in the ISDS regime. It is also said that party-appointment system leads to polarisation in tribunals, where the ultimate responsibility for deciding the case rested with the presiding arbitrator.

16. On the other hand, it is argued that the alleged bias of party-appointed arbitrators is merely a perception rather than reality. Firstly, arbitrators are not randomly-selected and one must not assume that parties would select unsuitable candidates to take on appointments. Secondly, the fact that dissenting opinions are given is not itself indicative of bias. On this, there does not appear to be consensus on what the “correct” level of dissenting opinion should be, and whether the existence or level of dissenting opinions can indicate bias. In fact, some argues that dissenting opinions are a significant feature of international dispute settlement and play a critical role in fostering the legitimacy of international arbitration.<sup>9</sup>

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7 Albert Jan van den Berg, “Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration”, in Mah noush Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, 821-843.

8 Source: Langford, Behn & Lie, “The Revolving Door in International Investment Arbitration,” *Journal of International Economic Law*, Vol.20, No.2, 2017, 301 (Table 1).

9 Charles Brower and Charles Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded” (2013) 29 *Arb Int'l* 7, 7-44. For those who are interested in reading Professor van den Berg’s response, see “Charles Brower’s Problem with 100% - Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration” in D. Caron, S. Schill, *et al.*, *Practising Virtue: Inside International Arbitration* (OUP 2015), Chapter 30.

Thirdly, statistics indicate that issuing a dissenting opinion reduces the chances of reappointment as a presiding arbitrator.<sup>10</sup> Fourthly, the majority of ISDS cases are decided unanimously, indicating that in majority of cases, either the investor-appointed arbitrator is agreeing to reject the investor's claims or the State-appointed arbitrator is agreeing to find against the State.<sup>11</sup> On this, it is noted that the more recent studies suggested that the dissent rate is only in the range of 14.4%-17% for ISDS cases.<sup>12</sup>

### *b. Repeated appointments*

17. The issue of repeated appointments are in two aspects: (1) repeated appointments generally which give rise to problems like lack of diversity in appointments; and (2) repeated appointments by the same law firm or party.

#### *i. Repeated appointments generally*

18. There has been a concern that in the ISDS context there is a lack of diversity in arbitrators appointments and as a result majority of arbitrator appointment goes to a small group of individuals.

19. Statistics speak for themselves: of the 372 individuals appointed to ICSID tribunals from 1972 until 2011, 37 were appointed to around 50% of the cases, and approximately one third had background education from only 5 universities,<sup>13</sup> and the top five arbitrators took up more than 11% of all arbitral appointments.<sup>14</sup>

20. Repeated appointments of a small group of arbitrators has contributed to the concern of the lack of diversity in the pool of

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10 Anton Strezhev, *You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration*.

11 *Possible reform of investor-State dispute settlement (ISDS) - Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (advance copy)*, (A/CN.9/WG.III/WP.151) §42.

12 Charles Brower, *Trajectory of the Investor-State Dispute Settlement*, (2017) 49 Loy. U Chi. L.J. 271, 309-310.

13 *Possible Reform of Investor-State Dispute Settlement (ISDS) – Arbitrators and Decisions Makers: Appointment Mechanisms and Related Issues*, (A/CN.9/WG.III/WP.152) §26.

14 Information extracted from Langford, Behn & Lic, *The Revolving Door in International Investment Arbitration* (Table 1) (Footnote 8 (*supra*)).

arbitrators and indirectly creates an invisible barrier deterring young practitioners transitioning themselves from advocates to arbitrators. Repeated appointments also reinforce the perception that arbitrators in ISDS context are either “pro-investor” or “pro-State”, which undermines the integrity and legitimacy of the ISDS system. See §13 above.

21. Despite foregoing, it has to be stressed that there is no empirical evidence on how repeated appointments, if at all, affect the arbitrators’ independence and impartiality.

22. Repeated appointments of a small group of arbitrators have also raised problems of availability and increased costs by lengthening proceedings, which is beyond the scope of this discussion paper.

*ii. Repeated appointments by the same law firm or party*

23. Repeated appointments by the same law firm or party as arbitrators are an “Orange List” matter that ought to be disclosed by the arbitrator(s) concerned under the IBA Guidelines on Conflict of Interest in International Arbitration (the IBA Guidelines):

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

24. Repeated appointments by the same law firm or party *per se*, however, do not without more lead to the conclusion of existence of justifiable doubts on the arbitrator's impartiality or independence. The IBA Guidelines provide:

Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act.<sup>15</sup>

25. The above proposition is illustrated in the following cases. In *Tidewater Inc. & Ors v The Bolivarian Republic of Venezuela*, the two unchallenged arbitrators considered that “[t]he starting-point is that multiple appointments as arbitrators by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function” and that “[r]epeated appointments may be as much the result of the arbitrator's independence and impartiality as an indication of justifiable doubts about it”.<sup>16</sup>

26. Similar conclusion was reached in *Universal Compression International Holdings SLU v The Bolivarian Republic of Venezuela*,<sup>17</sup> in which a party-nominated arbitrator was challenged on grounds of multiple appointments by the same law firm/party. The chairman dismissed the challenge and held:

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<sup>15</sup> IBA Guidelines on Conflict of Interest in International Arbitration, Part II, §4.

<sup>16</sup> *Tidewater Inc. & Ors v The Bolivarian Republic of Venezuela (Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator)*, ICSID Case No. ARB/10/5, 23 December 2010, §§60-61.

<sup>17</sup> *Universal Compression International Holdings SLU v The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators)*, ICSID Case No. ARB/10/9, 20 May 2011.

In this case, no objective fact has been presented that would suggest that [the challenged arbitrator's] independence or impartiality would be manifestly impacted by the multiple appointments by Respondent. [The challenged arbitrator] has been appointed in more than twenty ICSID cases, evidencing that she is not dependent – economically or otherwise – upon Respondent for her appointments in these cases.

Claimant also claims that [the challenged arbitrator] 'will not be learning of Venezuela's actions and its defences afresh in the present case – because she has already been exposed to them' in the other three cases. Claimant's assertions, however, are speculative and do not identify what evidence or arguments, if any, may be presented in those other arbitrations that would in Claimant's view 'unjustifiably influence [the challenged arbitrator], negating her ability to judge the present case independently and impartially'.

In conclusion, the Chairman finds that the appointment of [the challenged arbitrator] on three prior occasions by Venezuela does not indicate a manifest lack of the required qualities.<sup>18</sup>

27. Supporters of the aforesaid proposition argue that given the relatively narrow pool of arbitrators available in the ISDS system, any restrictions against repeated appointments by the same law firm or party would render the existing ISDS system unworkable. On this, the following observation is made in the IBA Guidelines:

It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals.

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18 *Ibid*, §§77-79. Also see §§86-88.

If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.<sup>19</sup>

28. However, the arbitral tribunal in *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela*<sup>20</sup> took a different view:

It is suggested by the arbitrators in [*Tidewater*] that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. We do not agree. In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. The suggestion by the arbitrators in *Tidewater* that multiple appointments are likely to be explicable on the basis of a party's perception of the independence and competence of the oft appointed arbitrator is in our view unpersuasive. In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its

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<sup>19</sup> The IBA Guidelines, footnote 5.

<sup>20</sup> *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands)*, ICSID Case No ARB/10/14, 5 May 2011.



prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.<sup>21</sup>

29. Another concern that may arise from repeated appointments by the same law firm or party is that where the arbitrator concerned is appointed on multiple arbitrations having related issues, whether such repeated appointments would give rise to justifiable doubt on his/her impartiality or independence.

30. The chairman in the *Universal Compression International Holdings SLU* case did not consider repeated appointments in such context would give rise to any concern. He held:

The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in *Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic*, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic* ... the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case. It is evident that neither [the challenged arbitrator] nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases.

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<sup>21</sup> *Ibid*, §47.

31. Similar observation was made in *Electrabel SA v Republic of Hungary*,<sup>22</sup> in which the unchallenged arbitrators observed:

... Investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations. For example, every ICSID arbitration relates to the same ICSID Convention, just as many treaty arbitrations relate to the same Vienna Convention. As for governmental decrees and contractual wording, it is commonplace for arbitrators to review the same legislation or standard form of contract, such as FIDIC, the NYPE form of time charterparty or the Bermuda excess insurance form. We do not consider that Article 57 can now be interpreted, after more than forty years, effectively to outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by users.<sup>23</sup>

32. On the other hand, in the case of *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan*,<sup>24</sup> the challenge on grounds of repeated appointments was successfully made. The unchallenged arbitrators therein, whilst considered that repeated appointments alone did not indicate a manifest lack of independence or impartiality on the part of the challenged arbitrator, considered that the facts of the multiple arbitrations were basically identical and concluded that a reasonable and informed third party would find it highly likely that the challenged arbitrator could not be completely objective and open-minded, but would be prejudiced.

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<sup>22</sup> *Electrabel S.A. v Republic of Hungary (Decision on The Claimant's Proposal to Disqualify a Member of the Tribunal)*, ICSID Case No ARB/07/19, 25 February 2008.

<sup>23</sup> *Ibid.*, §41.

<sup>24</sup> *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan (Decision on the Proposal for Disqualification of Mr Bruno Boesch)*, ICSID Case No ARB/13/13, 20 March 2014.

33. It is also argued that the concern about arbitrators' independence and impartiality is linked to the economic significance of such repeated appointments to the arbitrators concerned: it has been reported that on average an arbitrator's compensation per ISDS case can be conservatively estimated as in excess of USD 400,000<sup>25</sup> (less expenses). It, to some extent, reinforces the concern about an arbitrator's impartiality and independence arising from repeated appointments.

34. On the whole, there is concern, whether as a matter of fact or perception, about the quality, independence and impartiality of party-appointed arbitrators. It is generally agreed that the concern, even only as a perception, ought to be addressed to maintain the public confidence in the arbitral process and the whole ISDS regime.

### *B. Authority-appointment system*

35. Most institutional rules foresee the intervention of an appointing authority to assist the parties in the appointment process.<sup>26</sup> It has been suggested that the direct appointing authority role in selecting arbitrators has increased in recent years in the increasingly polarised ISDS field.<sup>27</sup>

36. The main concern relates to appointments by appointing authorities is the lack of transparency in the appointment process. Transparency is required in two stages: (1) the shortlisting and selection process; and (2) disclosure of appointments. Some authorities, like ICSID, has regularly disclosed information like the names of arbitrators, their nationality, the method of their appointments, who made the appointments and the date of appointment.<sup>28</sup>

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25 *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, Consultation Paper, March 2018, David Gaukrodger, Investment Division, Directorate for Financial and Enterprise Affairs, Organization for Economic Cooperation and Development, Paris, France, §31.

26 E.g. Article 38 of the ICSID Convention, Articles 8-9 of the UNCITRAL Arbitration Rules.

27 Footnote 25 (*supra*), §17.

28 The Permanent Court of Arbitration do not publish information related to the arbitrator's identity or qualification except with parties' consent.

*C. Abolition of the party-appointment system?*

37. Given the lack of transparency on the parties' appointment of arbitrators and the inherent risk (or perception) of bias of party-appointed arbitrators, it has been suggested that the party-appointment system should be abolished and replaced by (a) joint appointment of all arbitrators by the disputing parties; (b) appointment of arbitrators by a neutral body, e.g. the administering institution; or (c) permanent judges (which is discussed separately below).

38. Putting aside cases in which the parties are able to come to mutual agreement on the choices of arbitrators without intervention of the appointing authority, currently there are two commonly used methods through which arbitrators are selected in the case of parties' failure to reach agreement on the appointment of the sole or presiding arbitrator: namely the "ballot" procedure and the "list" procedure.

39. Under the "ballot" procedure, the appointing authority proposes potential appointees to the parties, each of them then indicates (without sharing its selection to the other party) which, if any, of the candidates they would accept. The appointing authority will then appoint one of the mutually agreed candidate(s) (subject to clearance of conflict and disclosure requirements) as the arbitrator(s).

40. Under the "list" procedure, the appointing authority similarly proposes potential appointees to the parties, each of them can strike a certain number of proposed appointees and rank the remaining appointees. The appointee who gets the best ranking will be appointed.

41. Under both procedures, if appointment cannot be made under the said procedures, the appointing authority will appoint the arbitrator(s) to fill the place(s).

42. It can readily be seen under the “ballot” and “list” procedures, the appointing authorities play the leading and significant role in (1) shortlisting the candidates for consideration by the parties; and (2) appointing the arbitrators as the last resort in cases where the parties have failed to appoint the arbitrators under the said procedures.

43. The significant role that the appointing authorities are to play highlights the importance of transparency in the appointing process by the appointing authorities. Appointing authorities are expected to be transparent in the shortlisting process (which limits the choices of parties to the candidates put forward by the appointing authorities) and the last-resort appointing process (which imposes the arbitrator(s) on the parties in absence of agreement).

44. In addition to the “list” and “ballot” procedures, views have been expressed that a pre-established “roster” should be agreed by the contracting States to the investment treaties (not by the parties to the dispute) in advance, and that arbitrators, if they cannot be agreed by the parties *to the dispute*, are to be appointed by the appointing authority from the roster.

45. The China-Australia Free Trade Agreement 2015 is one of very few BITs which provides for the roster system in detail. It provides that a list of arbitrators of not less than 20 individuals shall be established by the Committee on Investment (established by the Contracting States), from which the Secretary-General (being the appointing authority) is to appoint to fill any vacancies if such vacancies cannot be filled by agreement of the parties to the dispute.<sup>29</sup>

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29 Article 9.15 of the China-Australia Free Trade Agreement (2015).

46. Supporters of this option argues that the roster system enhances transparency, expedites appointments and promotes greater quality and consistency of decisions. It is also argued that it is a halfway house between a fully-fledged investment court and the *ad hoc* arbitration system.

47. The party-appointment system is a facet enshrining the principle of party autonomy, which is the fundamental tenet of arbitration. The abolition of the party-appointment system, some argue, is a draconian and disproportionate response to the concerns raised about party-appointed arbitrators, in particular when there is a lack of empirical evidence to substantiate the perception that the public may have held against party-appointed arbitrators. For instance, the roster system goes as far as excluding the investors from the participation in appointing the presiding (or sole) arbitrator for they have no role to play in setting up the “roster” in the first place.

48. It is argued that on balance the party-appointment system works well in that the alleged polarisation has been exaggerated (evidenced by the fact that majority of the ISDS cases are decided unanimously) and that the disputing parties (and their appointed arbitrators) tend to act sensibly in selecting the presiding arbitrator (evidenced by the relatively moderate level of intervention by the appointing authorities).

49. It is also doubtful whether parties are prepared to give up their right to appoint their own preferred arbitrators. In the 36th session of the Working Group, strong views have been expressed by States’ representatives against the removal of the States’ right to appoint their own preferred arbitrators on grounds that it is a fundamental feature of party’s autonomy in arbitral process and that it is against the national interest to give up such a right. On this, developing States have in different degrees expressed their concerns about the lack of diversity in arbitrators and the lack of sufficient control over ISDS proceedings, caution must be exercised before further taking

away the States' (limited) control over the arbitral process.

50. Further, it is not the case that there is complete lack of standards governing the conducts of arbitrators in the ISDS context. For example, the IBA Guidelines, though not legally binding, have been taken into account in various challenge proceedings.<sup>30</sup> It has been argued that the concern about arbitrators' independence or impartiality can be addressed by strengthening the existing controls over arbitrators, developing a new code of conducts at multilateral level with effective enforcement mechanism, giving clearer guidelines on the interpretation and application of the code; and imposing sanctions on non-complying arbitrators. It is noted that ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators. Also, suggestions have been made to increase the transparency of the challenge decisions in order to shed light on how arbitral tribunals could apply the code of conducts.

#### IV. CONCERN 2: Concern about *ad hoc* arbitrators

51. Under the current ISDS system, arbitrator appointments are necessarily *ad hoc* in nature and appointments are made only when disputes are submitted to arbitration.

52. The *ad hoc* nature of the appointments gives rise to certain issues that arguably affect the independence and impartiality of arbitrators: e.g. double hatting, issue conflicts, lack of diversity in arbitrators and the challenge procedures.

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30 E.g. *ICS Inspection and Control Services Ltd. v The Republic of Argentina*, PCA Case No.2010-9, 17 December 2009 (in which it was held the IBA Guidelines, although not binding, "reflect international best practices and offers examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence"); *Perenco Ecuador Ltd. v The Republic of Ecuador*, PCA Case No.IR-2009/1, 8 December 2009 (challenge against a co-arbitrator; IBA Guidelines applied by parties' agreement); *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia*, ICSID Case No. ARB/05/24 (challenge against Counsel's participation in the proceedings on grounds that the Counsel concerned and the presiding arbitrator were members of the same set of chambers; IBA Guidelines referred to).

### A. *Double hatting*

53. It has been suggested that international investment arbitration is marked by a “revolving door”, in that single individual actors play multiple roles as arbitrators, counsel, expert witnesses, and tribunal secretaries within the *ad hoc* arbitration system. The movement between roles may be sequential or even simultaneous. Double hatting refers to the practice when a single individual plays different roles in different arbitration proceedings simultaneously.

54. According to the recent empirical study,<sup>31</sup> the practice of double hatting continues to exist. The practice, however, is not a common or widespread practice but within a small group of highly influential and well-known actors in the ISDS system.

55. It is generally noted that the practice has posed a number of issues including potential and actual conflict of interest. It is argued that even the appearance of impropriety (e.g. suspicion that an arbitrator would decide in a manner so as to benefit a party he represents in another dispute) has a negative impact on the perception of the legitimacy of the ISDS regime.

56. The problems arising from double hatting has been vividly put by Philippe Sands:

It is possible to recognize the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously.<sup>32</sup>

<sup>31</sup> Footnote 8 (*supra*), 326-327.

<sup>32</sup> See Philippe Sands, “Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel”, in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012), 31-32.



57. Likewise, Judge Thomas Buergenthal has expressed similar view:

I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments (the bilateral investment treaties, for example) are regularly at issue in different cases before it.<sup>33</sup>

58. *Telekom Malaysia v Ghana*<sup>34</sup> is apparently the first decision that a respondent host State challenged one of the tribunal's arbitrators for double hatting. There, Ghana applied to the Dutch courts (exercising supervisory jurisdiction) to challenge the arbitrator's appointment after it had learned that the arbitrator was concurrently acting as counsel on behalf of the investor in an application for an annulment of the award in *Consortium RFCC v Morocco* for Ghana intended to rely on the award in *RFCC v Morocco* to advance its defence. The Hague District Court held that the arbitrator's duty to advance his client's position in the *RFCC* annulment proceedings was incompatible with his duty as arbitrator in the *Telekom Malaysia* case:

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33 Thomas Buergenthal, "The Proliferation of Disputes, Dispute Settlement and Dispute Settlement Procedures and Respect for the Rule of Law," *Arbitration International*, Vol.22, No.4, 2006, 498.

34 *Republic of Ghana v Telekom Malaysia Berhad*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004.

[A]ccount should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the *RFCC/Morocco* award. This attitude is incompatible with the stance Professor Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the *RFCC/Morocco* award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the *RFCC/Morocco* award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated.<sup>35</sup>

59. The Dutch court ordered the arbitrator concerned to resign as counsel in the *RFCC* case if he still wanted to remain as arbitrator in the *Telekom Malaysia* case, which he duly did. Ghada was not satisfied with the Dutch court giving the arbitrator a choice and filed a second challenge to the Dutch court seeking to remove the arbitrator from the panel of the *Telekom Malaysia* case. The challenge was, however, dismissed. The court held:

... After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended

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35 District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/ RK 2004.667, Decision of 18 October 2004, reprinted at (2005) 23 ASA Bulletin 186, 192.

such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration ...<sup>36</sup>

60. Whilst there are concerns about arbitrators wearing double, or even multiple, hats, the case against double hatting is not one sided. The following arguments have been raised against total ban of double hatting:<sup>37</sup>

(1) There is only a small pool of investment arbitrators and double hatting is an inevitable phenomenon. Limiting qualified legal counsel from sitting as arbitrators would undermine the quality of the arbitral process.

(2) The arbitrators' community in ISDS should be allowed to grow in diversity to move away from the existing pool being "*pale, male and stale*". Some tolerance has to be afforded to younger counsel transitioning into arbitrators.

61. The first argument might have been true years ago when the pool of qualified arbitrators available for ISDS cases remained very small. The argument is weakening when the pool has kept growing since 1990s. Yet, despite the growing pool of arbitrators, the practice of double hatting continues to exist. This explains that States and investors, who have been the major players in appointments, have to some extent contributed to the practice.

62. In respect of the second argument, the general consensus seems to be that tolerance is to be afforded to young practitioners to move from counsel to arbitrators. However, the transitioning period should be brief and a practitioner should cease taking up cases as counsel after taking up his first few appointments.

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<sup>36</sup> Footnote 34 (*supra*).

<sup>37</sup> Footnote 11 (*supra*) §27.

63. The issue of double hatting, however, should not be overstated. After all, in a three-member tribunal, an arbitrator needs to persuade at least one of the remaining two arbitrators to accept his argument in order to benefit his client in another case. Besides, the fact that majority of the ISDS cases are decided unanimously suggests that the concern of double hatting may be more apparent than real.

64. The statistics suggests that the situation of double hatting, though continues to exist, is improving. The findings suggest that (1) the practice of double hatting is prevalent among a small but highly-influential group of arbitrators (25 individuals and particularly so for a sub-group of 5 individuals within that group); (2) double hatting for the “top 25” individuals has been relatively stable in the recent years; (3) there has been a declining trend of double hatting due to many reasons such as retirement of those prominent arbitrators or those having sufficient caseload as arbitrators (and thereby precluding them from acting as counsel); and (4) last but not least some arbitrators have declared that they will not engage in practice as counsel.<sup>38</sup>

65. It is expected that the practice of double hatting should become less and less prevalent, though the removal of it is unrealistic (and may deter young counsel from transitioning to arbitrators).

### *B. Issue conflicts*

66. Issue conflict arises where an arbitrator is said to have “pre-judged” issues based on their prior awards or decisions, publications and statements indicating their views on particular issues in dispute.

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38 Footnote 8 (*supra*), 326; Footnote 11 (*supra*) §34.

67. Judge Peter Tomka (the then-President of the International Court of Justice) in *CC/Devas (Mauritius) Ltd. v The Republic of India*<sup>39</sup> made the following observation:

... The basis for the alleged conflict of interest in a challenge invoking an ‘issue conflict’ is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect ... some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.<sup>40</sup>

*a. Challenges based on previous scholarly and professional writings*

68. Past scholarly and professional writings and speeches expressing *general* views on substantive legal issues are not sufficient to sustain a challenge on grounds of issue conflict.

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<sup>39</sup> *CC/Devas (Mauritius) Ltd. v The Republic of India (Decision on the Respondent’s Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego as Co-Arbitrator)*, PCA Case No.2013-09, 30 September 2013.

<sup>40</sup> *Ibid.*, §58.

69. In *Urbaser S.A. v The Argentine Republic*,<sup>41</sup> the arbitrator was challenged on the basis of his previous academic writings. The unchallenged arbitrators rejected the challenge and held:

What matters is whether the opinions expressed by [the challenged arbitrator] on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceedings. Claimant's view is, as stated, broader. They do not include in their position the latter qualification and they contend that the opinions expressed by [the challenged arbitrator] are to be taken as such and that it appears 'unquestionable' that he shares the same opinion today, absent any evidence that he has changed his opinion in the meantime (such change not being noticed in [the challenged arbitrator's] statement ...

The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.<sup>42</sup>

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<sup>41</sup> *Urbaser S.A. v The Argentine Republic (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator)* ICSID Case No. ARB/07/26, 12 August 2010. See also *Repsol v The Argentine Republic (Decision on the Request for Disqualification of the Majority of the Tribunal)*, ICSID Case No. ARB/12/38, 13 December 2013.

<sup>42</sup> *Ibid.*, §§44-45.

70. On the other hand, an arbitrator may be seen to have crossed the line if his academic writing suggests that he is unlikely to keep an open mind. In the *CC/Devas (Mauritius) Ltd.* case,<sup>43</sup> the respondent challenged the co-arbitrator appointed by the investor on the ground that the challenged arbitrator had sat together with the presiding arbitrator in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). In addition, the challenged arbitrator in an academic writing defended his position in those two other cases despite the annulment. The challenge was upheld:

The standard to be applied here evaluates the objective reasonableness of the challenging party's concern. In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the co-arbitrator's] ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? [The co-arbitrator] is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that [the co-arbitrator] should withdraw from this arbitration.<sup>44</sup>

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<sup>43</sup> Footnote 39 (*supra*).

<sup>44</sup> Footnote 39 (*supra*) §64.

71. It is considered that unless the opinions expressed are “*specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceedings,*” there is no lack of independence and impartiality.<sup>45</sup>

72. The aforesaid conclusion is echoed by the ASIL-ICCA Task Force:

... Members of the Task Force from all perspectives urged that international arbitration benefits significantly from vigorous and open discussion of contemporary legal issues by knowledgeable persons. In the Task Force’s view, scholarly or professional publications addressing issues at a general level (but not discussing details of a particular dispute in which they have been named) should not be seen as impairing impartiality. It would be a significant loss for such informed commentary to be chilled by fear of a possible future challenge to the author on account of the views expressed. Opinion in the Task Force thus mirrored the approach of the 2014 IBA Guidelines on Conflicts of Interest, which consider that no disclosure is required where the arbitrator ‘has previously published a legal opinion (such as a law review article or public lecture) concerning an issue that also arises in the arbitration...’ In this sense, the challenge in the *CC/Devas* case could be understood as illustrating – and not departing from – the general recognition that doctrinal views are not problematic based on the assumption that the arbitrator can be convinced to take a different view.<sup>46</sup>

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45 Footnote 11 (*supra*) §§36-39.

46 *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration*, The ICCA Reports No.3, 17 March 2016, §173.



*b. Challenges based on past service as counsel/advocate or arbitrator*

73. The general view is that prior professional advocacy *per se* is not an indication of bias. In *St Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela*,<sup>47</sup> the Claimant challenged the Respondent-appointed arbitrator on the ground that “*there is a danger that [the challenged arbitrator] will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future*”. The challenge was vigorously rejected:

The Arbitral Tribunal does not find that Claimant’s arguments support a case of a ‘manifest’ danger in this regard. Claimant has presented no facts which cast ‘reasonable doubt’ on [the challenged arbitrator’s] impartiality and independence, let alone facts which ‘make it obvious and highly probable’ that [the challenged arbitrator] lacks these qualities.

...

Even if one assumes *arguendo* that [the challenged arbitrator] did in fact vigorously advocate Argentina’s positions in other investment treaty arbitrations, the Arbitral Tribunal cannot see why [he] would be locked in to the views he presented at the time. It is at the core of the job description of legal counsel – whether acting in private practice, in-house for a company, or in government – that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor’s case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case.<sup>48</sup>

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<sup>47</sup> *St Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela (Decision on Claimant’s Proposal to Disqualify Mr Gabriel Bottini from the Tribunal)*, ICSID Case No. ARB/12/13, 27 February 2013.

<sup>48</sup> *Ibid.*, §§78, 80.

See also the *Telekom Malaysia* case (the 2nd challenge) at §59 above.

74. Similarly, the arbitrator's previous decisions do not *per se* suggest that his independence or impartiality has been affected. In the *CC/Devas* case<sup>49</sup> the respondent also challenged the presiding arbitrator on the ground that he and the other co-arbitrator (also under challenge) had in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). The fact that the presiding arbitrator had twice decided the issue *per se* was held to be not sufficient to sustain the challenge:

The circumstances presented by the Respondent as giving rise to justifiable doubts about the Presiding Arbitrator's impartiality are more limited. The Respondent argues that [the presiding arbitrator's] participation on the two panels with [the co-arbitrator], both of which discussed the 'essential security interests' provision in their decisions, is sufficient to disqualify him from participating on this Tribunal. I, however, find that [the presiding arbitrator's] more limited pronouncements on the relevant text are not sufficient to give rise to justifiable doubts regarding his impartiality. [The presiding arbitrator] has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees and thus I can accept his statement that '[his] intention is to approach the matter with an open mind and to give it full consideration' and that '[he] would certainly not feel bound by the *CMS* or the *Sempra* awards'. In my view, there is no appearance of his prejudgment on the issue of 'essential security interests' which will have to be considered by the Tribunal in the ongoing arbitration.<sup>50</sup>

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49 Footnote 39 (*supra*).

50 Footnote 39 (*supra*) §66.

*c. Challenges based on the arbitrator's prior exposure to similar facts*

75. The fact that an arbitrator's knowledge of significant facts from involvement in previous cases *may* give rise to a ground of challenge.

76. In the *Caratube* case<sup>51</sup> the claimant investor challenged the respondent-appointed arbitrator on the ground that he had also sat as an arbitrator in the *Ruby Roz* case. The claimant contended, amongst others, that there were "*obvious similarities between the Ruby Roz case and the present arbitration*" and such involvement manifestly affected the challenged arbitrator's ability to exercise independent and impartial judgment. The unchallenged arbitrators found that there was "*significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration*". Accordingly, they held:

... In the light of the significant overlap in the underlying facts between the *Ruby Roz* case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of [the challenged arbitrator's] intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the *Ruby Roz* case and his exposure to the facts and legal arguments in that case, [the challenged arbitrator's] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that [the challenged arbitrator] would pre-judge legal issues in the present arbitration based on the facts underlying the *Ruby Roz* case.<sup>52</sup>

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51 Footnote 24 (*supra*).

52 Footnote 24 (*supra*), §90.

77. In *EnCana Corporation v Republic of Ecuador*,<sup>53</sup> the respondent appointed the same arbitrator in two parallel arbitrations involving similar claims under the same bilateral investment treaty. Accordingly, that arbitrator would receive all materials of the two arbitrations whilst his two fellow arbitrators would not. The tribunal expressed the following concern:

... Pleadings or information provided by Ecuador to [the respondent-appointed arbitrator] in his capacity as a member of the other Tribunal are not thereby provided to this Tribunal. Moreover this Tribunal has no authority over the documents and information tendered to another Tribunal; it can only decide the present case in the light of the information tendered to it.

On the other hand, as soon as [the respondent-appointed arbitrator] uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore [the respondent-appointed arbitrator] cannot reasonably be asked to maintain a ‘Chinese wall’ in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal.<sup>54</sup>

78. The ASIL-ICCA Task Force in their Report drew the following conclusions from the practices of international courts and tribunals:

... The cases thus suggest that prior opinions about similar *legal* issues, without more, are generally not disqualifying.

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53 *EnCana Corporation v Republic of Ecuador*, LCIA/UNCITRAL, Partial Award on Jurisdiction, 27 February 2004.

54 *Ibid.*, §§44-45.

On the other hand, views about *factual* matters specific to the case at hand have been found to be of concern. Decision makers have upheld challenges where an arbitrator has had previous exposure to facts relevant to a particular dispute, but outside the case record, that may affect his or her ability to address the case on the basis of the parties' arguments alone. The degree of engagement with the specific facts at issue in the case may explain the difference between the disqualifications in *Caratube* and *EnCana* and the rejections in *Suez*, *PIP* and *Içkale* ....<sup>55</sup>

### *C. Lack of diversity of arbitrators*

79. Lack of diversity of arbitrators in terms of gender, age, ethnicity and geographical distribution has been a concern in the ISDS regime for a long period of time. "Pale, male and stale" is a term (not politically correct but succinct) that describes the proclivity for choice of arbitrators.

80. There is not only over-concentration of appointments to a small pool of arbitrators, but also uneven distribution of appointments. Amongst the top 25 arbitrators who collectively have taken up one third of all arbitral appointments, with four exceptions, all are listed as nationals of Western States. For the four exceptions, one is from Eastern Europe but has been residing in the US for decades and the other three coming from Latin American States but maintaining their professional practices in the US or Western Europe. None of them are from Asian or African countries or jurisdictions.<sup>56</sup>

81. The uneven distribution of appointments (in terms of nationality) remains to be the case in recent years. According to the statistics, arbitrators from France, US and UK have consistently been the

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<sup>55</sup> Footnote 45 (*supra*) §174.

<sup>56</sup> Footnote 8 (*supra*).

three largest groups of appointees and they have taken up almost 30% of the appointments. If one is to expand the analysis to “top 10 nationalities”, the “top 10s” have taken up over 50% of the appointments, and none of them are of Asian or African nationalities.<sup>57</sup>

82. Parties to ISDS cases have certainly contributed to the aforesaid disparity. In terms of appointments made directly by parties in ICSID cases in 2016, 67% originated from Western Europe or North America. Comparing the national origins of disputing parties with that of the appointment arbitrators, the disparity grows even wider. While 22% of parties came from Eastern Europe and Central Asia, only around 2.5% of ICSID arbitrators originated from there. Similarly, 13% of ICSID parties came from the Middle East and North Africa, but only 4% of ICSID arbitrators came from those regions. 11% of ICSID parties came from Sub-Saharan Africa, but only 1.5% of ICSID arbitrators came from that region.<sup>58</sup>

83. The over-concentration and uneven distribution of arbitrator appointments also make the ISDS arbitrator community effectively a “closed shop”, to which young practitioners find themselves difficult, if not impossible, to enter the market.

84. Another concern is the lack of gender diversity. According to the published surveys, in broad terms, women’s participation in ISDS cases as arbitrators has been disturbingly minimal (around 5%-6%).<sup>59</sup>

85. Diversity in age is also a concern warranting consideration for it is essential for the sustainability of the ISDS system. This view,

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57 The “Top 10s” are France, USA, UK, Canada, Switzerland, Spain, Australia, Germany, Italy and Mexico.

58 Lucy Greenwood, “Tipping the Balance – Diversity and Inclusion in International Arbitration,” *Arbitration International*, Vol.33, No.1, 1 March 2017, 99-108.

59 Footnote 13 (*supra*) §24. This figure takes into account of all ICSID appointments in the past.

however, is not necessarily unanimous. The following observation was made in the recent survey:

Another example of the nuanced and disparate perspectives adopted by respondents was highlighted by a number of interviewees through the lens of age diversity. While most interviewees agreed that gender diversity, for example, is invariably desirable and therefore of less relevance to this enquiry, some advanced the idea that age diversity does not always improve the quality of a tribunal's decision-making. Some interviewees, both counsel and arbitrators, stressed the fact that the nature of some disputes, particularly in investment treaty arbitration, calls for arbitrators with a sufficient breadth of relevant experience that cannot easily be found among the younger generations of arbitrators. The issue, they argue, is therefore not age itself but rather the relevant previous experience that can only be acquired through continued practice over a long period of time.

By contrast, others observed that, in general, they felt younger arbitrators display a particular drive to perform well in arbitrations, hoping that their proficient conduct will be noticed and that they will therefore attract more appointments in the future. Moreover, interviews revealed no general consensus as to who would qualify as a 'young' arbitrator in this context. While most interviewees think that an arbitrator under 40 years of age is commonly considered as 'young', a small number of interviewed respondents expressed that they would also consider 'young' an arbitrator under 50 years of age, particularly in light of their perception that the average arbitrator is likely to be well in his or her sixties.<sup>60</sup>

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<sup>60</sup> Queen Marry and White & Case, *The 2018 International Arbitration Survey: The Evolution of International Arbitration*, pp.16-17.

*D. Adequacy of the challenge mechanism*

86. An effective challenge mechanism is seen to be a critical safeguard to ensure arbitrators' independence and impartiality. It is said that an effective challenge mechanism must fulfil two functions: (1) to provide teeth of the requirements for independence and impartiality (i.e. partisan arbitrators must be disqualified) and (2) it must be sufficiently robust to allow for cases to proceed.<sup>61</sup>

87. Almost all arbitration laws and rules contain provisions on procedures for challenging arbitrators for non-compliance with ethical requirements.

88. Generally speaking, the burden rests on the challenging party to make out the case that there are matters that give rise to sufficient doubts as to the challenged arbitrator's independence or impartiality. Whilst it is generally agreed that proof of actual bias is not required, the practice varies from one case to another as to what precise standard of proof the challenging party has to meet. For example, some arbitral tribunals have adopted the "reasonable doubts" test when applying Article 57 of the ICSID Convention (which requires the challenging party to demonstrate a "manifest lack" of "reliability to exercise judgment"); whilst other indicated that "manifest" involved a higher standard, so that the conflict has to be evident or apparent.

89. In terms of the decision-makers of challenge applications are concerned, the current ICSID Arbitration Rules provides where there is a challenge to a single arbitrator on a three-member panel, the challenge is to be decided by the unchallenged arbitrators, unless they are equally divided, in which case the Chairman will decide. Challenges to sole arbitrators and to two or three members of a three-member panel are decided by the Chairman.<sup>62</sup> The

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<sup>61</sup> Footnote 11 (*supra*), §49.

<sup>62</sup> Rule 9 of the ICSID Arbitration Rules.



UNCITRAL Arbitration Rules, on the other hand, vests the decision-making power in the appointing authority.<sup>63</sup>

90. One of the concerns raised about the current challenge mechanism is that there is lack of transparency in how challenge applications are decided, largely attributed to the facts (1) that challenge decisions are not routinely published in all fora, and (2) that the published decisions themselves indicate that the application of the standards of independence and impartiality is difficult to predict. The unpredictability of the challenge outcome, coupled with the fear of negative consequences that the challenging party may face if the challenge is unsuccessful, may have contributed to the system not being effectively utilised. On the other hand, it is observed that there is a general increase in the number of tactical, vexatious or frivolous challenges. In one ISDS case, there were five separate challenges to one arbitrator stretching from October 2011 to February 2016, all of which were dismissed.<sup>64</sup> Either of these undermines the integrity and legitimacy of the ISDS system.

91. Another concern is whether it is suitable for the unchallenged arbitrators to decide a challenge application against their fellow arbitrator. It is said that having an external party decide on the delicate matter of removal of an arbitrator is preferable to a decision by the remaining members of the arbitral tribunal, because this ensures that an independent entity, not vested in the specific case, decides this fundamental matter. After all, the practice of double hatting and over-concentration of arbitrator appointments arguably gives rise to an impression that arbitrators tend to be more generous to their fellow arbitrator subject to challenge.

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<sup>63</sup> Article 13(4) of the UNCITRAL Arbitration Rules.

<sup>64</sup> *ConocoPhillips Company & Ors v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30.

### *E. Possible reforms?*

92. It is noted that efforts have been made to diversify the pool of arbitrators. For instance, in the case of ICSID, the Secretariat has made effort in promoting a diverse and highly qualified pool of arbitrators. The effort has borne fruit: in 2018, 22 ICSID member States,<sup>65</sup> most of them are non-Western States, designated 102 individuals to the ICSID Panels. Improvement has been made to actual appointments as well. In the case of ICSID, there has been constant improvement on gender diversity: from 12.3% of total female appointments in 2015 to 24% in 2018. Similar commitment has been expressed by PCA.<sup>66</sup>

93. While the numbers with respect to gender and geographic diversity have gradually improved, the extent of disparity in representation is still vast. In particular, when one considers diversity in nationality, even the recent figures remain to show that the appointments are still Western Europe- and North America-dominated and developing countries remain significantly under-represented.

94. Some suggest that the cause of lack of diversity in appointments is that disputing parties are not familiar with the potential arbitrator candidates, rather than any real basis or prejudice against appointing diverse candidates. The lack of familiarity gives rise to sense of insecurity and fear of making the wrong choice etc.<sup>67</sup>

95. It is said that tight controls can be imposed on candidates to reduce double hatting or repeated appointments in order to promote diversity in appointments. For instance, an arbitrator may be required

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<sup>65</sup> ICSID 2018 Annual Report, 22-23.

<sup>66</sup> See "PCA Responds to Queries on Arbitral Legitimacy" (20 May 2014).

<sup>67</sup> Lucy Greenwood "Tipping the Balance – Diversity and Inclusion in International Arbitration", (2017) *Arbitration International*, Vol.33, No.1, 99, 105-106.

to confirm under the declarations the days or weeks that he has already committed to other undertakings over the next couple of years and/or require arbitral tribunal to provide the parties and the administering institutions with regular progress reports. These measures, to some extent, may (indirectly) force the disputing parties to expand their search for suitable candidates for appointment.

96. Although there is a growing representation in arbitrators from non-Western States, continued effort should be made to expand their representation. Many developing States have not nominated sufficient number of arbitrators that they are entitled to nominate under the ICSID or PCA systems. In doing so, there is a pressing need for States, in particular developing States, to build up capacity for counsel and potential arbitrators.

97. Insofar as the challenge procedure is concerned, as submitted above, the transparency in the challenge decisions should be increased. On this, administering institution should compile summaries of the challenge decisions or best practices to promote a uniform and consistent application of principles in dealing with challenge applications.

98. On the other hand, firm measures should be taken against tactical, vexatious and frivolous challenges, which serve no purposes other than delaying the arbitral process. It is noted that in the proposed reform of the ICSID Rules, measures such as a tighter challenge procedure timeframe and removal of “automatic suspension” upon filing a challenge etc. are proposed to address the issue. Also, the proposed reform also allows the unchallenged arbitrators to refer the challenge to the Chairman for decision if they see fit not to decide the challenge application themselves.

## V. CONCERN 3: Replacing *ad hoc* arbitrators with full-time judges?

99. There is a resurgence of debate over the dichotomy between the advantages of courts system over *ad hoc* arbitral tribunals. The debate is in two-fold: (1) whether there should be an appellate body (this is to be covered by another discussion paper); and (2) whether there should be an investment court (consisting of the first instance level and the appellate level) replacing the *ad hoc* arbitral tribunal system.

100. Creating a standing international investment court system (ICS) implies the replacement of the current system of *ad hoc* arbitral tribunals with a new institutional structure, namely a standing international court. The latter would consist of judges appointed or elected by States on a permanent basis, for example, for a fixed term. It could also have an appeals chamber.

101. The intensity of the debate is neatly summarised by Lucy Reed:

Speaking with more perspective, but still with drama, Philippe Pinsolle has taken the view that defending investment arbitration is a 'lost battle' because no 'rational discussion is possible' where the criticisms are 'largely ideological, if not emotional' and '[t]he perception is that private arbitration no longer passes the legitimacy threshold.' The only answer, says Maitre Pinsolle, is an investment court system.

Others disagree, with equally dramatic language. Judge Stephen Schwebel has written that the investment court proposals 'smack of appeasement of uninformed criticism of ISDS rather than sound judgment.' His fundamental objection is that the EU investment court regime would replace 'a system [i.e. arbitration] that on any objective analysis works reasonably well' with 'a system that would face substantial problems of coherence, rationalization,

negotiation, ratification, establishment, functioning and financing.<sup>68</sup>

102. Scholars and practitioners have advanced different arguments in favour of, or against, the ICS for various reasons, such as costs, enforceability of judgments, and jurisdictional limitation etc. Those arguments, no doubt, warrant consideration and debate in the ISDS reform discussion. However, for the purpose of this paper, the discussion is confined to “appointment of arbitrators and related issues”.

103. An important argument in favour of ICS is that judges, as opposed to arbitraors, will be free from (perceived) inherent flaws in the party-appointed system and problems like double hatting or actual or apparent bias arising from repeated appointments by the same law firm or party. Judges, as the argumnt goes, will be truly independent and impartial in handling ISDS cases. The argument has been succinctly captured by UNCTAD:<sup>69</sup>

This approach rests on the theory that investment treaty arbitration is analogous to domestic judicial review in public law because ‘it involves an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful State conduct.’ Under this view, a private model of adjudication (arbitration) is inappropriate for matters that deal with public law. The latter requires objective guarantees of independence and impartiality of judges which can be provided only by a security of tenure – to insulate the judge from outside interests such as an interest in repeat appointments and in maintaining the arbitration industry. Only a court with

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68 Lucy Reed, *International Dispute Resolution Courts: Retreat or Advance*, (2017-2018) 4 McGill J. Disp. Resol. 129, 135.

69 UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, No.2, June 2013, 9 ([www.unctad.org/diae](http://www.unctad.org/diae)).

tenured judges, the argument goes, would establish a fair system widely regarded to be free of perceived bias.

A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court ... would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and curacy of decisions and ensure independence and impartiality of adjudicators.

104. Another argument in favour of ICS is that through ICS, by rules, it can better achieve a fairer distribution of judicial appointments. For instance, Article 9 of the Statute of the International Court of Justice provides that States in electing judges shall bear in mind “*not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.*” Taking Canada-EU Trade Agreement (CETA) as an example, it is provided that the 15-member tribunal is to be comprised of (a) 5 nationals of EU member States; (b) 5 nationals of Canada; and (c) 5 nationals of third-countries.

105. There are, however, counter-arguments against the proposal of replacing arbitrators with judges.

106. Firstly, the argument against party-appointment system is that the arbitrators so appointed are likely to be biased in favour of the appointing party. It is unclear why this “inherent flaw” does not apply to ICS, under which judges are appointed by States.

107. Judge Schwebel made the following observation when he discussed CETA:

The inference to be drawn from the foregoing EU statements is that the system of arbitrators chosen by the parties to the dispute found in bilateral investment treaties and the ICSID Convention is not insulated from any real or perceived risk of bias. Yet the parties to cases before the Investment Tribunal will be investors and States. The question arises, if there is a risk, real or perceived, of bias of ad hoc arbitral tribunals, as the EU appears to insinuate, is there not a risk, real or perceived, of bias – in favor of States and against investors – in the EU Commission's proposals?

If the fact of appointment by a party of an arbitrator is taken to import bias, is not the appointment of judges solely by States a formula for the establishment of courts biased against investors?

I do not believe that it is the intention of the EU to entrench such bias in the courts proposed by the EU Commission. But if it is to be presumed that an arbitrator appointed by an investor is biased in favor of the investor – a presumption that the record of investor/State arbitration does not sustain – is there reason to presume that judges appointed only by States will not be biased in favor of States?<sup>70</sup>

108. The existence of perceived bias on international judges is reinforced by statistics. In the empirical study conducted in 2004 over the cases decided by the International Court of Justice, it is suggested (1) that judges usually voted in favour of their home States; and (2) that judges are more likely to vote in favour of States that belong to a geopolitical bloc shared by their own State(s).<sup>71</sup>

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70 Remarks by Judge Stephen M. Schwebel on "The Proposals of the European Commission for Investment Protection and an Investment Court System" (17 May 2016) <<http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf>>.

71 Eric Posner & Miguel de Figueiredo, "Is the International Court of Justice Biased?" (John M. Olin Programme in Law and Economics Working Paper No.234, 2004).

109. Secondly, investors are excluded from the judges' election process. Under the current system, an investor appoints its own preferred arbitrator, and has some involvement in the appointment of the presiding arbitrator (by the "ballot" or "list" procedures or through the agreement of the parties' respective trusted co-arbitrators). However, under ICS, investors are unlikely to have any, or any substantive role, to play in the election of judges who are to hear their cases.

110. The impact of depriving investors of participation in the selection process of judges cannot be under-estimated: the whole purpose of the ISDS system is to allow investors to seek reliefs directly against the host States for any non-compliance of substantive protection afforded by the relevant investment treaties. It is counter-intuitive to say that investors should have faith in the judges' election process dominated by States. It is important to maintain the system to be inclusive to allow investors' participation in the selection process.

111. Thirdly, host States do not necessarily find favour of ICS even investors are to be excluded from the judges' election process. Under ICS, host States, if sued, will also be deprived of the right to appoint its own preferred judge. As submitted above, resistance has been strong against any attempt to deprive the parties of their right to appoint their own preferred arbitrators in accordance with their own weighted criteria.

112. Fourthly, the election process of judges in permanent international tribunals is often highly politicalised, and there is no reason why ICS would be immune from this problem. Judge Buergenthal recalled what happened to him when he went through the re-election process to the ICJ:



... Having just gone through a re-election process, I am particularly conscious of the variety of problems the current system poses for judges seeking election or re-election to certain courts and tribunals, particularly within the United Nations system. What struck me in my re-election campaign is how highly politicised the election process is for the various judicial positions that the UN membership has to vote for and how little judicial qualifications of the individual candidates or their judicial record seem to matter. In my case, for example, one state very formally proposed to vote for me, provided the USA agreed to support that state's candidacy for a seat on the Security Council. ...

Another problem that will have to be addressed at some point, I believe, has to do with the pressure that judicial candidates wishing to be renominated are likely to experience when they have to vote in a case in which their state of nationality is a party. That is another reason why, as I indicated a minute ago, I would prefer for national judges not to participate in cases involving their own country. The problem might also be dealt with by limiting judges to one term only, possibly one longer single term.<sup>72</sup>

113. Fifthly, the ICS does not address the lack of diversity in arbitrators. Whilst the rules may provide for geographical/nationality distribution of judicial appointments (like CETA), it is unclear how the age, gender, or even language diversity is to be addressed. In fact, it is suggested that depriving the investors of their right to appoint arbitrators, there is a risk that the individuals appointed to the ICS are likely to come from similar background (e.g. government counsel or career judges instead of

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72 Footnote 33 (*supra*), 498-499. Judge Kenneth Keith has expressed similar experience: "Challenges to the Independence of the International Judiciary" (26 November 2014) (Chatham House, International Law Programme Speech Transcript), 7-8.

practitioners) and it may result in tribunals of monochromatic experience and uniform views. Besides, the over-emphasis of the expertise in public international law (as a mandatory requirement for appointments as judges under the ICS) unnecessarily excludes arbitrators with expertise in different legal areas and risks marginalising valuable ideas from other areas of law.<sup>73</sup>

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<sup>73</sup> James Crawford, "The Ideal Arbitrator: Does One Size Fit All?" (2018) 32(5) *Am U Int'l L Rev*, 32(5), 2018, 1003-1022, 1020-1021.



# PROGRAMME

Opening	
Welcome Speech	<b>Ms Teresa Cheng GBS SC JP</b> <i>Secretary for Justice,  Hong Kong SAR, China</i>
Opening Remarks	<b>Dr Jiang Chenghua</b> <i>Deputy Director General,  Department of Treaty and Law of the Ministry of  Commerce, China</i>
	<b>Dr Sun Jin</b> <i>Counselor,  Department of Treaty and Law of the Ministry of  Foreign Affairs, China</i>
	<b>Dr Anthony Neoh QC SC JP</b> <i>Chairman,  Asian Academy of International Law</i>
Session I: Investment Mediation	
Moderator	<b>Dr Anthony Neoh QC SC JP</b> <i>Chairman,  Asian Academy of International Law</i>
Speakers	<b>Professor Jack J. Coe Jr.</b> <i>Professor of Law,  Pepperdine Law School</i>
	<b>Professor Lucy Reed</b> <i>Director,  Centre for International Law, Faculty of Law, National  University of Singapore</i>
Commentator	<b>Mr Paul Starr</b> <i>Partner,  King &amp; Wood Mallesons</i>

Session II: Appeal Mechanism for ISDS Awards	
Moderator	<b>Mr Paul Tsang</b> <i>Law Officer (International Law),  Department of Justice, Hong Kong SAR, China</i>
Speakers	<b>Professor Albert Jan van den Berg</b> <i>Partner,  Hanotiau &amp; Van Den Berg (Brussels, Belgium)</i>
	<b>Mr Matthew Gearing QC</b> <i>Partner,  Allen &amp; Overy</i>
	<b>Professor Zhang Yuejiao</b> <i>Professor of Law,  Tsinghua University, China</i>
Commentator	<b>Ms May Tai</b> <i>Managing Partner, Greater China,  Herbert Smith Freehills</i>
Session III: Third-Party Funding in ISDS	
Moderator	<b>Mr Matthew Hodgson</b> <i>Partner,  Allen &amp; Overy</i>
Speakers	<b>Dr James Ding</b> <i>Commissioner,  Inclusive Dispute Avoidance and Resolution Office,  Department of Justice, Hong Kong SAR, China</i>
	<b>Professor Julian D. M. Lew QC</b> <i>International Arbitrator,  Head of School of International Arbitration, Queen Mary  University of London</i>

Session IV (Davos-Style): Appointment of Arbitrators and Related Issues	
Moderators	<b>Ms Caroline Nicholas</b> <i>Head of Technical Assistance and Senior Legal Officer,  International Trade Law Division, United Nations Office  of Legal Affairs</i>
	<b>Ms Sun Huawei</b> <i>Partner,  Zhong Lun Law Firm</i>
Speakers	<b>Ms Meg Kinnear</b> <i>Secretary-General,  ICSID, World Bank</i>
	<b>Professor Brigitte Stern</b> <i>Professor Emeritus,  The University of Paris I – Panthéon-Sorbonne</i>
	<b>Mr Stanimir A. Alexandrov</b> <i>Principal,  Stanimir A. Alexandrov PLLC</i>

Oxford-Style Debate: The Permanent Investment Court System Is the Solution to the Concerns over ISDS	
Moderator	<b>Professor Chin Leng Lim</b> <i>Choh-Ming Li Professor of Law, The Chinese University of Hong Kong</i>
Speakers	For the Motion
	<b>Professor Shan Wenhua</b> <i>Dean, School of Law and School of International Education, Xi'an Jiaotong University</i>
	<b>Mr Emmanuel Jacomy</b> <i>Partner, Shearman &amp; Sterling</i>
	Against the Motion
	<b>Professor Stephan W. Schill</b> <i>Professor of International and Economic Law and Governance, University of Amsterdam</i>
	<b>Professor Brigitte Stern</b> <i>Professor Emeritus, The University of Paris I – Panthéon-Sorbonne</i>
Closing	
Closing Remarks	<b>Ms Teresa Cheng GBS SC JP</b> <i>Secretary for Justice, Hong Kong SAR, China</i>





Reform of investor-State dispute settlement (ISDS) has been attracting much discussion in the international community in recent years. Even the United Nations Commission on International Trade Law (UNCITRAL) has entrusted its Working Group III to work on this seminal subject.

**ISDS Reform Conference 2019** was co-organised by the Asian Academy of International Law and the Department of Justice of the Hong Kong SAR. With the theme “Mapping the Way Forward”, the Conference drew diverse audiences to benefit from the wisdom of an international team of highly esteemed speakers, comprising international investment law experts, senior officers of UNCITRAL and International Centre for Settlement of Investment Disputes of the World Bank Group, senior government officials of Asian countries, representatives of prestigious arbitration institutions as well as leading practitioners and academics.

This publication is a collection of presentations given at the Conference and papers contributed by a number of practitioners, covering a wide range of topics of ISDS reform.

