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Mediating International Energy Disputes

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Abstract:

The long-term, capital intensive and risky nature of much energy investment means that disputes often arise as does the need to resolve such disputes amicably to preserve the parties' long-term business relationships. Energy disputes can typically have a state to state character, or can arise between investors and states, or companies against other companies. For decades, arbitration has been the preferred option by the parties to international energy disputes. However, there is greater pressure than ever before to ensure that costs – including reputational as well as direct costs – of settling disputes are kept to the minimum. Mediation is increasingly being touted as an important supplement to arbitration because of its many benefits including enabling the parties to find an innovative win-win solution to their dispute based on interests rather than a win-lose outcome, which may end the parties' business relationship. Anecdotal evidence of industry practice lends support to this proposition. The use of mediation in resolving energy disputes is supported by a number of investment treaties including the Energy Charter Treaty and the presence of escalation clauses in energy agreements. However, despite its many advantages, there are also many challenges to the use of mediation in resolving energy disputes. These include a lack of familiarity with it among potential users, the reluctance of government officials and business executives to take personal responsibility for settlements, and a lack of adequate provisions in investment treaties, energy agreements and national investment legislation that provide the legal framework for mediation. The prospects for mediation would be brighter if these and other issues were sufficiently well-addressed.

I. Introduction

The modern internationally operating energy industry is a very different creature from the fossil fuels-based industry associated with the Age of Oil with its geographic focus on the Middle East and parts of the southern hemisphere, dominated by large, internationally operating multinational companies. Several seminal awards in international arbitration – *Aminoil* and the various Libya

cases[1] for example - that emerged from this bygone energy world. Like their counterparts in the regionally focused gas industry, which has also generated many arbitrations but fewer publicly available awards, these energy companies typically concluded long-term contracts with states or state agencies and sought to keep them stable over decades despite changing circumstances. The long-term, capital intensive and risky nature of this energy investment meant that disputes often arose (e.g. caused by change in economic circumstances, change in government policies, gaps in contract, and disagreements among partners on operational matters) as did the need to resolve such disputes amicably to preserve the parties' long-term business relationships. A pattern emerged: energy disputes can typically have a state to state character, or can arise between investors and states, companies against other companies, or individuals against companies.[2]

In the 21st century there have been two major changes to this picture: one concerns the players and the other concerns the contracts. Firstly, internationally operating energy firms may well be concerned with wind or solar power rather than fossil fuels. Their investments may be made in Europe or North America rather than in the southern hemisphere and most importantly, their capital structure will usually be of a more modest nature than that of the successors to Standard Oil. The fossil fuel-based players are – after a period of oil price collapse between 2014 and 2017 – very concerned about the costs of doing business. Secondly, the era of long-term contracts in the international energy industry is not over but has experienced a sharp decline. In the gas industry, changes in end-user markets have undermined the pricing mechanism in long-term contracts, triggering a series of gas pricing arbitrations in recent years. Changes in long-term petroleum contracts are more common as market volatility and other changes of circumstance have become more frequent.

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[1] The Government of the State of Kuwait v The American Independent Oil Company, 21 International Legal Materials (1982) 976; Texaco Overseas Petroleum Co/California Asiatic Oil Co. v. Libyan Arab Republic, 17 International Legal Materials (1978) 1; BP Exploration v. Libyan Arab Republic, 53 International Law Report (1973) 297; Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic, 20 International Legal Materials (1981)1.

[2] Timothy Martin, 'Dispute resolution in the international energy sector: an overview' (2011) 4(4) Journal of World Energy Law and Business 332. They can also involve criminal proceedings of course, which are not considered in this chapter.

The impact of this on mediation[3] is indirect of course. In our view, there are three broad impacts. Firstly, there is a trend for players to be more aware than ever of the benefits of amicably settling the differences that inevitably arise in any relationship over time, fostering a spirit of cooperation that a mediator can tap into. This is facilitated by the role of international organizations like the Energy Charter Conference and its Secretariat which can promote awareness and understanding of this approach in the context of investment disputes.[4] Second, there is greater pressure than ever before to ensure that costs – including reputational as well as direct costs – of settling disputes are kept to the minimum. Finally, there is a willingness to review the traditional approach[5] – primarily, even if not exclusively, arbitration in this key economic sector – and ask if elements of cooperation cannot be incorporated into an adversarial process. Even if arbitration is pending, mediation can still be initiated, and indeed may be initiated at any time once the arbitration has started.[6] This much is assured by the current legal framework for mediation (in

[3] Notwithstanding the conceptual difference between mediation and conciliation, for purposes of this chapter and in line with other the usage of commentators, the two terms are used interchangeably. See Energy Charter Secretariat, *Guide on Investment Mediation* (2016) 2. https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf; Esme Shirlow, 'The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration' Kluwer Arbitration Blog, 29 September 2016 (noting that: "Mediation is frequently likened to conciliation. In fact, both the ECT Guide and PCA Conciliation Rules specifically use "mediation" and "conciliation" interchangeably"), http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/.

[4] In this context, it may be noted that the Energy Charter Secretariat has initiated courses on mediation in connection with investor-state disputes, driven by the growing practice of including provisions on mediation to settle disputes in modern investment treaties. These are jointly organized with the International Centre for Settlement of Investment Disputes (ICSID) and the Centre for Effective Dispute Resolution and the International Mediation Institute. They are mainly designed to deliver benefits to government officials seeking to develop skills in this area.

[5] It is hard to believe that this is unconnected with the current critique of arbitration in investor-state disputes, which among other claims, argues that this mode of dispute settlement in international treaty instruments puts states at a significant disadvantage. For a recent critique of the current or traditional approach to international arbitration, see Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, Cambridge 2015).

[6] Mediation Guidance Notes to the International Chamber of Commerce (ICC), Mediation Rules 2014 (Guidance 28), which states that : « Mediation under the Rules may take place either before arbitration (or litigation) proceedings have been commenced, or in the course of those proceedings, https://cms.iccwbo.org/content/uploads/sites/3/2014/12/icc-mediation-guidance-notes-english.pdf.
A review of the principal rules governing arbitration suggests that mediation or conciliation may be initiated either before or after the arbitration has started and allow for mediated settlements to be recorded as an arbitral award ('consent award' or 'award on agreed terms'): these include, Article 43 of the International Centre for Settlement of Investment Disputes Convention Arbitration Rules 2006 (ICSID Arbitration Rules), Article 36 of the United Nations Commission on International Trade Law Arbitration Rules 2010 ("UNCITRAL Arbitration Rules"); Article 33 Rules of Arbitration of the International Chamber of Commerce 2017 ("ICC Arbitration Rules"); Article 26 London Court of International Arbitration Rules 2014 (LCIA Arbitration Rules); Article 34 Permanent Court of Arbitration

investment treaties,[7] national investment laws, energy/oil and gas contracts,[8] and institutional procedural rules on mediation such as those of the ICC, ICSID, PCA, and the LCIA).[9] ,

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Optional Rules for Arbitrating Disputes between two parties of which only one is a State 1993 (PCA Optional Arbitration Rules); Article 34 Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment 2001 (PCA Optional Arbitration Rules Relating to Natural Resources); Article 39 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules); Article 47.5 China International Economic and Trade Arbitration Commission Arbitration Rules 2015 (CIETAC Arbitration Rules), Article 43 China International Economic and Trade Arbitration Commission Investment Arbitration Rules 2017 (CIETAC Investment Arbitration Rules); Article 32.10 Arbitration Rules of the Singapore International Arbitration Centre, 2016 (SIAC Arbitration Rules). However, most of the above arbitration rules 'make no comment as to whether a tribunal may assist the parties in reaching a settlement.' See Clyde Croft, Christopher Kee, Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 408. The exception is Article 47.1 of the CIETAC Arbitration Rules, which states that where both parties consent, the 'arbitral tribunal may conciliate the dispute during the arbitral proceedings' and that the 'parties may also settle their dispute by themselves.' See also Article. 47(10) which states that where the parties have reached a settlement agreement by themselves before the commencement of an arbitration, 'either party may request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement.' Contrast this text with: Article 21(1) ICSID Arbitration Rules, which provides for the possibility of a pre-hearing conference between the tribunal and parties "to consider the issues in dispute with a view to reaching an amicable settlement." The disputing parties may also reach a settlement after the award is rendered to avoid the cost of enforcement and/or maintain their future business relationships. In *Slovak Gas Holding v. Slovak Republic* (ICSID Case No. ARB/12/7), the claimants instituted arbitration proceedings at ICSID in March 2012, alleging that certain measures taken by the Slovak Republic and certain of its organs, including a change in price regulation in the gas sector implemented by means of Decree 4/2008, violated their rights under the Energy Charter Treaty. The proceedings were suspended in December 2012 at the instance of the parties to allow an amicable settlement. In January 2014, the parties filed their settlement and requested the Tribunal to embody the settlement agreement in an award, pursuant to ICSID Arbitration Rule 43(2). Reducing such settlement agreements into consent awards gives them legal force, thereby enabling their enforcement under the New York Convention or other international instrument, as applicable. It can also enhance the legitimacy of the agreement and makes it much easier for political leaders to obtain support from their constituents. See Wolf von Kumberg, Jeremy Lack and Michael Leathes, 'Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come (2014) 29 ICSID Review-Foreign Investment Law Journal 1, 8. On consent awards generally, see Yaraslau Kryvoi; Dmitry Davydenko, Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40 Brooklyn Journal of International Law 827; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 2010) sections 9.33-9.38; Loukas Mistelis, 'The Settlement-Enforcement Dynamic in International Arbitration', (2008) 19 American Review of International Arbitration 377.

[7] Although most investment treaties contain provisions on a 'cooling-off' period (usually 60-90days), which require the parties to attempt an amicable settlement of the dispute before resorting to arbitration, very few explicitly require the parties to attempt to settle the dispute through conciliation or mediation during the cooling-off period. The few exceptions include: article 8.20(1) Chapter Eight of the European Union-Canada Comprehensive Economic and Trade Agreement (provisionally applied from 21 September 2017), Article 9.18 Trans-Pacific Partnership Agreement (TPP) 2016, EU-Singapore Free Trade Agreement 2015, Annex 9-E, Article 4.2, EU-Vietnam Free Trade Agreement 2016 Chapter 8-Chapter II Section 3 Annex 1, Article 4.2, Article 42(1)(b) of the Draft Pan-African Investment Code**,** December 2016. See Gabriel Bottini and Veronica Lavista, 'Conciliation and BITs', in Arthur Rovine (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Fordham University 2009) 354; Chunlei Zhao, 'Investor-State Mediation in a China-EU Bilateral Investment

In the literature on types of international dispute settlement, there is – unsurprisingly – a tendency to separate the main types to examine them analytically.[10] Of course, there is nothing reprehensible about a practice aimed at providing clarity about the various options to assist the reader's understanding, but it can imply that the diverse approaches inhabit different worlds, which they do not (nor would the authors probably intend or sanction this interpretation). The reality is that elements of mediation are already incorporated into some formal dispute settlement clauses in energy contracts, and if interest in them is a guide, the trend is growing. One caveat here is that in largely national settings the picture may differ. In energy terms, the largest consumer and producer of energy, the United States, has long used mediation in its oil and gas disputes.[11] On the international scene however, this is not typical practice, and indeed, where foreign investors are involved, the pattern will tend to be one in which arbitration is the preferred option by the parties to energy contracts.

Treaty: Talking about Being in the Right Place at the Right Time,' (2018) 17 Chinese Journal of International Law 111.

[8] For example, Article 42(1)(b) of the Iraq Kurdistan Region Model Production Sharing Contract (2007) states that where a dispute cannot be resolved through negotiations, 'within sixty (60) days after the date of the receipt by each party to the Dispute of the Notice of Dispute or such further period as the parties to the Dispute may agree in writing, any party to the Dispute may seek settlement of the dispute by mediation in accordance with the London Court of International Arbitration (LCIA) Mediation Procedure, which Procedure shall be deemed to be incorporated by reference into this article, and the parties to such Dispute shall submit to such mediation procedure,' http://www.eisourcebook.org/cms/December%202015/Iraq%20Kurdistan%20Model%20Production%20Sharing%20Contract.pdf.

[9] International Chamber of Commerce Mediation Rules 2014; Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) of the International Centre for the Settlement of Investment Disputes (ICSID Conciliation Rules), Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2014 (SCC Mediation Rules), Conciliation Rules of the United Nations Commission on International Trade Law 1980 (UNCITRAL Conciliation Rules), Permanent Court of Arbitration Optional Conciliation Rules 1996 (PCA Conciliation Rules), Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the environment 2002, London Court of International Arbitration Mediation Rules 2012 (LCIA Mediation Rules), International Bar Association Rules for Investor-State Mediation 2012 (IBA Rules for Investor-State Mediation).

[10] For example, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press 2015); Anthony Connerty, *A Manual of International Dispute Resolution* (Commonwealth Secretariat, London 2006).

[11] For example, see Gary McGowan, 'Mediating International Oil & Gas Disputes' in James M Gaitis (ed.) *The Leading Practitioners' Guide to International Oil & Gas Arbitration*, (Juris, New York 2015) 967-982: 'In the United States, and to an increasing extent throughout the world, many, if not most, of those (oil and gas) disputes are mediated before proceeding to a hearing before an international arbitral tribunal' (at 967). McGowan's emphasis on the sequential nature of mediation and arbitration gives us a clue to how mediation is typically likely to be evident in energy disputes generally.

II. Energy Disputes and Mediation Requirements

In many parts of the world, governments and their agencies are heavily involved in the energy business, whether this concerns oil and gas, wind, solar, nuclear energy or coal. The only exception to this is the United States and Canada. Government involvement can occur as owner of resources and grantor of rights to them, provider of regulatory oversight and sometimes as participant in contracts with private parties through a state entity.[12] In many countries, locally-owned companies are encouraged by the host state to take a role in the energy sector, to promote jobs, to grow local skills and to diversify the wider economy from dependence on the energy sector. There are very few areas of energy sector activity where the state is absent.[13]

For the settlement of disputes, this broad role of the state means that a purely commercial approach has limited applicability since one of the parties will have at least some non-commercial goals and interests. A mediator, skilled in commercial mediation practice, may find it challenging to deal with the very different priorities of a state party. Discussion of a settlement will almost always involve parties not present in the room and require consultation with them. The powerful driver to a settlement in the commercial world – time is money and a dispute uses up time – may not figure in the same way or even at all when a state party is involved.[14]

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[12] Ernest Smith, John Dzienkowski, Owen Anderson, John Lowe, Bruce Kramer and Jacqueline Weaver, *International Petroleum Transactions* (Rocky Mountain Mineral Law Foundation, 2010) 30-54, 180-191, 214-215; Peter Cameron and Michael Stanley, *Oil, Gas, and Mining : A Sourcebook for Understanding the Extractive Industries* (World Bank, Washington, DC 2017) 58-60, 63-65, https://openknowledge.worldbank.org/bitstream/handle/10986/26130/9780821396582.pdf?sequence=2&isAllowed=y; Michael Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage* (Kluwer Law International, The Hague, 2002) 40-56.

[13] In most cases, host states try to achieve these objectives by including in the exploration and exploitation contracts they sign with foreign investors relevant provisions on these issues, and sometimes by enacting specific legislation such as local content laws to supplement the contract and the more general legislative framework: See Smith et al, ibid 442-525; Cameron and Stanley, ibid 65-66; Thomas Hickey, 'Production Sharing Contracts, Licenses and Concessions: A Comparative Look at where we are and how they are evolving', in Rocky Mountain Mineral Law Foundation, *Proceedings of the Fifty-Eighth Annual Institute on Oil and Gas Law held by the Centre for American and International Law* (Lexis Nexis, 2007) Chapter 18; Theophilus Acheampong, Marcia Ashong and Victoria Crystal Svanikier, 'An Assessment of Local Content Policies in Oil and Gas Producing Countries', (2016) 7(3) Journal of World Energy Law and Business 220.

[14] Nancy A. Welsh and Andrea K. Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation Law Review 71, 86-87.

Indeed, the *scope* for mediation will be influenced by this factor. At its most constraining, a commercial dispute with a host government or a state-owned enterprise may not be amenable to conciliation or mediation for the simple reason that government officials who agree to settle a significant dispute open themselves to accusations of corruption, loss of their jobs, and criminal proceedings.[15] The word 'significant' is important here. Often, energy disputes involve very large amounts of money and so their sensitivity to this consideration is greater. However, the 'public' aspect of many (but not all) energy disputes does *not* mean that states or state agencies will be averse to some form of conciliation or mediation and indeed, there is some evidence that they are becoming more common.[16]

The advantages of mediation are reasonably well-known, but it is worth summarizing the main ones before examining how they are used in the energy sector.[17] Among the advantages of mediation are that parties can maintain control over the outcome of the dispute and are enabled

[15] Concern over taking personal responsibility tends to be more pronounced in state officials because the actions of such officials are more open to public scrutiny. However, executives in public companies may also be subject to criticism or punishment by shareholders 'for decisions that compromise financial or other ownership expectations.' See Jack J. Jr. Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005) 12 University College Davis Journal of International Law and Policy 7, 29. As Reisman puts it, 'all large and complex organizations in which authority is allocated among many different departments will experience difficulty in making major decisions. This seems especially to be the situation with respect to governments in international investment law disputes. Indeed, in States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having "betrayed" the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal careers. … It is often easier for governments to have the right decision imposed by an outside tribunal rather than "conceded" by the government.' See William Reisman, 'International Investment Arbitration and ADR: Married but Best Living Apart', in UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (Susan D. Franck and Anna Joubin-Bret, eds, UNCTAD, 2011) 22, 26; Thomas Waelde, 'Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation' (2006) 22 Arbitration International 205, 217; Louis Wells and Rafiq Ahmed, *Making Foreign Investment Safe: Property Rights and National Sovereignty* (Oxford University Press, 2007) 220; Jeswald W. Salacuse, 'Is There a Better Way - Alternative Methods of Treaty-Based, Investor-State Dispute Resolution' (2007) 31 Fordham International Law Journal 138, 150-151. An example of the vulnerability of both private and public officials in this area can be found in Nigeria. Nine former executives of international oil companies Shell and Eni together with the companies are currently facing criminal prosecution in Italy over alleged bribery and corruption in connection with a settlement agreement the two companies reached with the Nigerian government in 2011. In Nigeria, three former state officials including two ministers are also being prosecuted for their alleged role in the transaction. See Premium Times (Nigeria), 'Malabu Scandal: Trial of nine Shell, Eni executives starts June 20,' 21 May 2018, https://www.premiumtimesng.com/news/top-news/269124-malabu-scandal-trial-of-nine-shell-eni-executives-starts-june-20.html, and, Sahara Reporters (New York), 'President Buhari Disagrees With Attorney General Malami, Orders EFCC To Ensure Prosecution Of Diezani, Adoke, Others Involved In Malabu Scam,' 20 February 2018, http://saharareporters.com/2018/02/20/president-buhari-disagrees-attorney-general-malami-orders-efcc-ensure-prosecution-diezani.

[16] For example, from 2002-2013, there has been a settlement agreement in at least eight investment cases involving claims of violation of the Energy Charter Treaty by the host state. See Energy Charter Secretariat (n.3) 4 .

[17] See the two introductory chapters of this book which address the pros and cons of mediation.

to maintain their business relationship. It is also generally faster and cheaper relative to arbitration and litigation[18]. Mediation can take into consideration the entirety of the parties' circumstances[19]. It 'provides parties with the opportunity to explore alternative solutions to an adjudicated outcome in a safe and confidential environment'; it enables the parties 'to invent their own solutions including those not available in adjudicated proceedings, thereby avoiding an imposed solution'[20]. It is 'a chance to gather and impart information'.[21] Edna Sussman reinforces this when she says that mediation has an ability to explore underlying interests, and to explore creative solutions[22]. As one arbitrator notes, it offers to resolve a dispute on a 'without prejudice' basis[23].

However, on the downside, several commentators observe that it does not always provide a decision or an outcome, and invariably entails a compromise. In Salmon's view, mediation adds to the time and costs if there is no settlement.[24] If unsuccessful, it is potentially 'a waste of time'.[25] Other criticisms commonly made are: the outcome is not binding so either party can refuse to reach agreement or reject any recommendation a mediator may make; mediators cannot compel parties to disclose documents or issue interim measures, so they lack teeth; the settlement agreement is not automatically enforceable unless it takes the form of a consent award, and the outcome has no precedent value for future similar disputes between parties or with third parties.[26]

A curiosity of mediation use is that while there is an extensive legal framework for it, there are not many reported cases of successful mediated disputes in energy. Barriers to mediation may

[18] Energy Charter Secretariat (n. 3); Joseph Shade, 'The Oil & Gas and ADR: A Marriage Made in Heaven Waiting to Happen' (1995) 30 Tulsa Law Journal 599.
[19] Simeon H. Baum, 'Hawking Our Wares in the Marketplace of Values - Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum', in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation* (Fordham University: The Fordham Papers (2011) 317.
[20] ibid .
[21] Ken Salmon, 'Mediation – advantages and disadvantages' (2014) 25(2) Construction Lawyer 23.
[22] Edna Sussman 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes', (2014) *TDM*, https://www.transnational-dispute-management.com.
[23] Anthony Connerty, 'Alternative Dispute Resolution', (2007) TDM https://www.transnational-dispute-management.com.
[24] Salmon (n. 21) 23.
[25] Connerty (n. 23).
[26] Coe (n. 15) 25-32; Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum 38, 47-50; Fabio Solimene, 'Dispute resolution in energy-related agreements: how to choose the right means and draft a proper clause' (2015) International Energy Law Review 108, 111-112.

include: a lack of familiarity with mediation among small and medium-sized businesses; cultural and self-interest of the legal profession; confidentiality of such procedures and outcomes; the need for parties to maintain secrecy to avoid the risk of an internal and external backlash; and scepticism over the effectiveness of mediation – seen as a delaying tactic or a 'waste' of time and energy due to the non-binding nature of its outcome.[27] Finally, a factor that plays a role is probably the lack of an international enforcement mechanism, which is likely to remain a shortcoming at least until the recently proposed United Nations Commission on International Trade Law (UNCITRAL) Convention on the enforcement of international commercial settlement agreements is negotiated and enters into force.[28]

A. Mediation Promotion by Treaty and by Contract

Yet there are pointers as to its use in the energy sector. There is evidence of the promotion of mediation by both treaty and contract instruments. For the former we need look no further than Article 26.1 of the Energy Charter Treaty (ECT) which states that investment disputes concerning Part III (Investment Promotion and Protection) 'shall, if possible, be settled amicably'. Although the ECT is silent as to the particular mechanisms that might be used to facilitate an 'amicable settlement' within the three-month cooling off period, the parties are nonetheless free to choose mediation or conciliation using existing mechanisms, as well as 'good offices', whereby a trusted third party facilitates the parties to establish contact and commence an exploration of ways in which an amicable settlement may be reached, a structured negotiation or some bespoke mechanism relevant to their dispute.[29] A *request* for amicable settlement by either party to the dispute and a failure to resolve the dispute within a period of three months following the request are procedural requirements rather than jurisdictional conditions under the ECT before the investor may proceed to submit it to formal settlement under Article 26.2. . This is *not* tantamount to a duty to mediate, since there are other mechanisms available to parties

[27] Waelde (n. 15); Mauro Rubino-Sammartano, 'Visible and Invisible Barriers to Mediation - Speaker Notes', (2012) 9(4) *TDM*, https://www.transnational-dispute-management.com. See generally, Kumberg et al (n. 6) 3(noting: 'lack of familiarity with (and therefore distrust of) mediation; uncertainty about how to find the right competent and suitable mediators for the case in hand; lack of time to mediate within the arbitration process steps; not being convened by the arbitral organizations to consider mediation; not being proactively encouraged to seriously focus on settlement using skilled neutrals; and lack of adequate enforcement procedures'); Martin (n. 1) 337-338.

[28] See Chapter in this book on Enforcement.

seeking to resolve a dispute amicably, but it does imply that mediation is one of several options to meet the direction given in Article 26.1[30]

With respect to contract, a common feature of many energy contracts is the use of escalation clauses. As one authority has pointed out, these have long been common in construction contracts.[31] They can be called variously 'multi-tiered,' or 'stepped' clauses. The Association of International Petroleum Negotiators (AIPN) has used these in several of its Model Form Agreements based on industry practice and designed largely by industry professionals.[32]

In a nutshell, the idea is that the parties are required to submit disputes to an increasingly rigorous and formal series of dispute resolution methods. This allows the parties to encourage and allow opportunities for an agreed settlement, either through mediation or (in the AIPN models) negotiation by senior executives on each side. The parties retain control over their own destinies in the initial stages and the process also ensures that if these relatively informal efforts at a settlement fail, the next step will be one that allows a third party to render a binding decision.

[30] For example, in Stati v. Kazakhstan, the tribunal observed that, 'By the express reference in subparagraphs (1) and (2), it is clear that the intention of Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity." The tribunal then noted that the parties had failed to reach a settlement during the three month period it granted them as such, there was "no reason to deny jurisdiction.' Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. 116/2010, Award of 19 December 2013, paragraphs 829 and 830; cf: Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, paragraphs 154-156; Energy Charter Secretariat (n. 3) paragraph 2.1. (noting that: ""[w]hile available arbitral awards under the ECT have not confirmed the existence of a duty to mediate in Article 26.1 of the ECT, they confirmed that parties need to seriously attempt to reach an amicable settlement"); Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press (2011) 137.

[31] Klaus P. Berger, 'Law and Practice of Escalation Clauses', (2006) 22 Arbitration International 1-17; see also Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses', (2010) 27(6) Journal of International Arbitration 551 – 577.

[32] For example, in the Association of International Petroleum Negotiators (AIPN) International Model Form Dispute Settlement Agreement 2004; and the International Model Form Joint Operating Agreement 2002, www.aipn.org.

Multi-tiered dispute resolution provisions are very common in the petroleum industry. They are frequently included in various types of petroleum contracts across the world, including the Middle East, Africa and Latin America. In the petroleum sector (and in the energy sector more generally), the parties' cooperation and continued performance of their obligations is essential. The multi-tiered dispute resolution provisions are frequently included to maximise the parties' chances to reach an amicable resolution of any disagreements that may arise during the performance of their long-term contracts and avoid the risk that their commercial relationship might suffer if the dispute goes to the formal processes of arbitration or court litigation. The value of a long-term relationship is especially important in the energy , which typically requires close cooperation between the parties and can be highly capital intensive at various stages. Normally, parties to oil and gas contracts view arbitration or court litigation as a last resort solution.

The multi-tiered dispute resolution clauses require the parties to define at an early stage what their complaints are with some specificity, and what relief they seek. This serves two important purposes: 1) achieving containment of the scope of the dispute by defining the issues in dispute; and 2) because of this procedure of defining the issues in dispute, and what issues could be amicably agreed, enabling the parties to discuss the practical steps as to how to continue operations and performance of their long-term contract. The parties have an interest in working out constructively how to contain their dispute and ensure continuous performance of their contract and avoid disruption of petroleum operations pending resolution of their differences (even if their dispute escalates).

In sum, the multi-tiered dispute resolution clauses in petroleum contracts are aimed at: minimizing/containing the escalation of disputes that arise between the parties; preserving the parties' long-term relationship; maximizing cost efficiency; ensuring that the parties can agree on mechanisms for maintaining the performance of ongoing obligations under the contract, pending resolution of their dispute; and ensuring that by means of a notification procedure the other party is fully aware of the timing of a distinct stage in the process, without which the multi-tier approach would become hard to implement.

Where a contract requires notification of the dispute, the commercial purpose of this requirement is to clearly define and contain the scope of the parties' dispute, thus allowing it to streamline the

parties' attempts to amicably resolve their dispute. It is of particular significance in a multi-tier process. The principal reason for its importance was identified in the Guidelines to the AIPN Model Form Agreement on Dispute Settlement as follows:

> 'To avoid creating more problems than are solved by this multi-step process, it is imperative that the parties make clear in their agreement when the transition occurs from one dispute resolution method to the next. Otherwise, a party may attack the process in the courts on the grounds that a condition precedent to moving on to the next step has not been fulfilled.'

The key to defining the moment of transition with precision is the Notice of Dispute. Its receipt supplies an objectively verifiable event from which an agreed time to exhaust a specified method of dispute resolution can be measured.[33]. An example of text on this from a recent petroleum agreement is as follows:

> 'A Party who desires to submit a Dispute for resolution shall commence the dispute resolution process by providing the other parties to the Dispute written notice of the Dispute ('*Notice of Dispute*'). The Notice of Dispute shall identify the parties to the Dispute, shall contain a brief statement of the nature of the Dispute and the relief requested and shall request negotiations among Senior Representatives.
>
> If the Dispute cannot be resolved by negotiation within sixty (60) days after the date of receipt by each party to the Dispute of the Notice of Dispute any party to the Dispute may seek settlement of the dispute by mediation in accordance with the London Court of International Arbitration (LCIA) Mediation Procedure, which Procedure shall be deemed to be incorporated by reference into this Article, and the parties to such Dispute shall submit to such mediation procedure:
>
> (a) If the Dispute is not settled by mediation within sixty (60) days of the appointment of the mediator, or such further period as the parties to the Dispute may otherwise agree in writing, any party to the Dispute may refer the Dispute to, and seek final resolution by,

[33] AIPN (2004), ibid, 16.

arbitration under the LCIA Rules, which Rules shall be deemed to be incorporated by reference into this Article.'[34]

This type of clause can be particularly relevant to the commercial setting of an agreement between various energy companies. For example, the 2002 AIPN Model Joint Operating Agreement and the 2004 Model Agreement on International Dispute Settlement[35] provide for a multi-stage approach to the for resolution of disputes arising between the parties, and require a formal, written notice of dispute that sets out the scope of the dispute, followed by an initial period of negotiations among higher management of the parties (typically subject to a defined time-limit). These model contracts then anticipate a transition towards a second stage, involving mediation. If all other means fail, the final step is to resort to arbitration.[36] Such structure is particularly important for joint operating agreements because it provides practical steps for the parties to resolve disputes in a way that achieves the purposes outlined above – i.e. containment of the dispute; cost efficiency; preservation of a long-term relationship; ensuring that the parties have agreed on mechanisms for ongoing obligations to be met.

There is a darker side to such stepped clauses which merits a brief comment. If the pre-action procedures such as mediation are mandatory, they can be used by a dilatory and recalcitrant party to delay the arbitration or even to prevent arbitration by accusing the other party of acting in bad faith during the pre-arbitration phase. For this reason, the drafter of such clauses must make certain that the transitions from one stage to the next are clearly defined as discussed above. It could also be argued that having such procedures is inconsistent with providing for emergency arbitrator procedures or expedited arbitration. Our preference would be to provide for mediation concurrently with the commencement of arbitration rather than as a pre-condition to arbitration.

[34] Unpublished production sharing agreement (authors' copy).

[35] The AIPN International Model Form Dispute Settlement Agreement was developed in the early 2000s for two reasons: firstly, it aimed to reconcile the many different versions of dispute resolution provisions that have been included over the years in AIPN Model Form Agreements; secondly, it was intended as a 'state of the art' dispute resolution agreement that could be incorporated into future AIPN Model Form Agreements. In this case, the drafting committee was expanded to include not only AIPN members but also experts in dispute resolution with experience as advocates and arbitrators in upstream international energy disputes. These model provisions have therefore an authority that allows them to set a standard which at this stage in industry practice – since they are frequently used - should be seen as a minimum standard.

[36] See Article 18.2 AIPN (2002) (n. 32).

III. Energy Mediation in Practice

If we were to seek examples of reported mediated energy disputes, the following awards are among those that are available. We make some comments on the issues and the lessons that may be drawn from them below.

A. Electricity: Vattenvall-PSE

In the mediation of a dispute involving a Power Purchase Agreement (PPA), Vattenfall (a Swedish energy company) and Polskie Sieci Elektroenergetyczne (PSE, a Polish integrated electricity company) had a mediation in 2002/2003 concerning the SwePol submarine interconnector contractual regimes. The PPA was entered into in 1995 under which PSE agreed to purchase electricity from Vattenfall for 20 years at a fixed price aimed at enhancing Polish energy security and reducing the country's reliance on electricity supplies from Russia. However, by the year 2000/2001 changes in economics, political and regulatory circumstances had rendered the PPA uneconomical for PSE, as a result, it 'refused to continue to take any of the power it was obligated to take and pay'.[37] Based on the advice of external counsel to PSE, the parties agreed to submit the dispute to mediation rather than arbitration. A sole mediator was appointed supported by 'three senior specialists in electricity regulatory economics, electricity engineering and financial analysis' (mediation team), who 'provided expertise on technical, modelling and regulatory economics issues'.[38] The parties made clear to the mediator their aim of achieving a reasonable renegotiation of the deal within a specified time duration and agreed to pay the mediator a success fee if these objectives were achieved.

To facilitate the process, the parties provided the mediator relevant negotiating documents rather than selected documents, which enabled the mediator to understand not only how close the parties were to an agreement but also identified the obstacles or 'blockages' to an agreement and thereby tried to solve such blockages. Aside from meeting with the parties separately, the mediator also consulted other relevant external players including the 'Polish energy regulator, the Swedish network operator and the EU Competition Directorate' as part of the 'intelligence gathering' process. The information gathered by the mediator and the technical teams was then synthetized by the mediation team, which produced an outline proposal to be presented to the

[37] Waelde (n. 15) 219.
[38] ibid, 223. The following paragraphs draw upon the account given in this article.

parties, the elements of which consisted of a new contractual regime and a system of risk/investment sharing. This proposal was based on what the mediation team considered a 'fair and practical deal' that the disputing parties would have reached themselves, assuming they had 'jointly developed and funded the interconnector originally'.[39] The outline proposal together with case assessments prepared by the mediator was presented to the senior executives of both parties' companies at series of caucus meetings with the mediator. After about 75 days of 'shuttle-diplomacy' by the mediator and his team, the parties met face-to-face in St Andrews (Scotland) for two and a half days, far away from their respective places of business and distraction, during which a preliminary agreement was reached, and thereafter a detailed agreement was negotiated, agreed and signed by the parties within four months without further involvement of the mediator.

Aside from the time and cost savings (the mediation cost both parties about 1 million euros), other lessons to be drawn from this case study include: the 'advantage [of] conver[ting] […] a lose-lose situation into a win-win situation', the 'significant value that can be generated by professional, interdisciplinary and scientifically oriented transnational mediation', the advisability of not handing over control of commercially significant disputes related to long-term business relationships to external litigation lawyers whose inclination would be to litigate rather than mediate.[40] This case also illustrates the need to involve Chief Executives and/or senior officials (who have the authority to take decisions on behalf of their respective organization) in the mediation process as they were more likely to view the disputes from their companies' broader commercial and long-term interests rather than shaped by the narrow interest of winning the case.

B. Oil and Gas, and maritime boundary: East Timor – Australia Conciliation

Before East Timor regained its independence in 2002, Indonesia and Australia had tried unsuccessfully to negotiate a boundary between the two countries in the Timor Sea, known to contain very large petroleum deposits. Unable to resolve their boundary dispute after a period of several years, the two nations entered into a Joint Development Agreement (JDA) in 1989 that provided a legal framework for the sharing of revenues derived from petroleum development in the area. After gaining its independence, East Timor and Australia signed a new treaty which

[39] ibid, 226-227.
[40] ibid, 231-232.

was substantially the same as the 1989 JDA. However, the parties were not able to reach a unitization agreement that would allow development to proceed in respect of the Greater Sunrise gas field because of the unresolved boundary dispute between the two countries. In 2006, the two nations signed a new treaty known as Certain Maritime Arrangements in the Timor Sea (CMATS), which modified the 2002 treaty in two key respects, one of which was that it "extended the duration of the treaty period for 50 years from the date the CMATS entered into force in 2006 [i.e. until 2057] or until five years after the exploitation of the Greater Sunrise field ceased, whichever occurred first. It also declared that neither country would pursue or assert any claims to sovereign rights and maritime boundaries during this period"[41]

Although the two nations were not able to resolve their boundary dispute, nevertheless the two treaties created sufficient stability in the Timor Gap for "massive LNG development to proceed"[42] at least for some time.

However, in April 2016 East Timor initiated conciliation proceedings at the Permanent Court of Arbitration (PCA) to resolve the maritime boundary dispute with Australia. The conciliation was initiated under annex V of the United Nations Convention on the Law of the Sea (UNCLOS), which allows for a 'compulsory conciliation' to be "initiated where a state has exercised its right to exclude disputes relating to sea boundary delimitation from compulsory arbitration and judicial settlement – as Australia did in 2002, two months before East Timor regained its independence from Indonesia."[43]

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[41] Smith et al (n. 12) 179-180; Centre for International Law (CIL), National University of Singapore, Working Conference on Conciliation: What is it and when to use it, 17-18 January 2017, p. 12, https://cil.nus.edu.sg/wp-content/uploads/2017/10/Conciliation-Background-Paper.pdf.

[42] Smith et al (n. 12) 180.

[43] Tom Jones, "Australia fails to halt conciliation with East Timor", Global Arbitration Review, 26 September 2016, https://globalarbitrationreview.com/article/1068790/australia-fails-to-halt-conciliation-with-east-timor.

Article 298(1)(a)(i) of UNCLOS provides:• in instances where a State declares that it does not accept any one or more of the dispute resolution procedures provided for in Annex V, section 2 of UNCLOS with respect to disputes concerning the interpretation or application of UNCLOS Articles 15, 74 and 83 relating to sea bed boundary delimitations;

- when such a dispute arises subsequent to the entry into force of UNCLOS; and
- no agreement within a reasonable period of time is reached in negotiations;

any party to the dispute can request a State to accept submission of the matter to conciliation under Annex V, section 2.Annex V, section 2 provides that a party notified in accordance with the above provisions "shall be obliged to

A five-member commission was constituted to hear the case,[44] and the opening session held at the Peace Palace in The Hague on 29 August was webcast live, but subsequent sessions were held behind closed doors "in order to provide an 'environment conducive to facilitating the eventual success of the conciliation.'"[45] That was after the Commission had in September 2016 rejected Australia's objection that the commission lacked competence to hear the case.[46]

Prior to initiating the conciliation, East Timor had filed two separate arbitrations against Australia at the PCA. The first claim was filed in April 2013 under the Timor Sea Treaty alleging that CMATS was void because of the allegation that "during the negotiation of CMATS, Australian intelligence operatives covertly listened in on Timor-Leste's negotiating team."[47] In the second arbitration filed in 2015, East Timor sought to "challenge [] Australia's right to tax a subsea pipeline transporting gas from the Bayu-Undan gas field in the Timor Sea to a liquefied natural gas facility in the Australian city of Darwin."[48]

In order to facilitate the conciliation process and as part of 'a confidence building measure', East Timor "withdrew the two arbitrations before the awards had been reached."[49]

East Timor and Australia reached an agreement in August 2017 on the "central elements' of a permanent maritime boundary in the Timor Sea,[50] and the two nations signed a Maritime

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submit to such proceedings" and that "a failure of a party or parties to reply to a notification of institution of proceedings or submit to such proceedings "shall not constitute a bar to the proceedings".

[44] Two members of the Commission were appointed by East Timor and Australia each, while the chairman was appointed by the four party appointed members. See CIL (n. 41) 12 12; Lacey Yong, 'East Timor and Australia reach deal on maritime border', Global Arbitration Review, 4 September 2017, https://globalarbitrationreview.com/article/1147052/east-timor-and-australia-reach-deal-on-maritime-border; Lacey Yong, 'Australia and East Timor sign treaty on maritime border', Global Arbitration Review, 6 March 2018, https://globalarbitrationreview.com/article/1166345/australia-and-east-timor-sign-treaty-on-maritime-border.

[45] Jones (n. 43).

[46] Yong (2017) (n. 44); Yong (2018) (n. 44); CIL (n. 41 13.

[47] Ryan Cable, 'In Search of Permanent Maritime Boundaries : Timor-Leste Commences First Ever Compulsory Conciliation under UNCLOS', Kluwer Arbitration Blog, 4 October 2016, http://arbitrationblog.kluwerarbitration.com/2016/10/04/in-search-of-permanent-maritime-boundaries-timor-leste-commences-first-ever-compulsory-conciliation-under-unclos-2/; Yong (2017) (n. 44).

[48] Yong (2017) (n. 44)..

[49] Yong (2018) (n. 44).

Boundaries Treaty on 6 March 2018, which "defines a permanent boundary between the two countries and a pathway for each to the Greater Sunrise gas field in formerly disputes waters. … It also addresses the legal status of the gas field and establishes a 'special regime' for the development of the field and the sharing of revenues."[51]

Notwithstanding the formality of the proceedings and costs in legal fees incurred by the parties, the conciliation provided East Timor and Australia an opportunity to resolve their disputes in a manner they would otherwise not have achieved through arbitration or litigation before the PCA or the International Court of Justice (ICJ) respectively. More importantly, the conciliation afforded the parties the opportunity to reach a comprehensive agreement that resolved not only the legal issues concerning sharing revenues but also the underlying political dispute concerning their maritime boundaries. The conciliation also "demonstrate(s) that States are becoming increasingly creative in seeking to have even the most intractable maritime boundary disputes resolved under the principles of international law and through [less adversarial] third party means."[52]

C. Oil and Gas: Tesoro-Trinidad and Tobago

In another dispute, involving Tesoro Petroleum Corporation and the Government of Trinidad and Tobago, concerning a joint venture entered into in 1968 to develop oil and gas in the host country on a fifty-fifty percent share ownership basis, the agreement provided that in the event Tesoro wished to sell its shares, the government had a right of first refusal. The agreement also provided that no dividends would be declared in the first five years of the joint company. A dispute settlement clause in the agreement provided for conciliation under the auspices of ICSID within a period of six months failing which it was to be submitted to arbitration. Disputes arose between the parties in 1981 over taxation and the refusal by the government to give its approval to a declaration of dividends for 1981 and 1982. Following an unsuccessful negotiation between

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[50] Yong (2017) (n. 44). .

[51] Yong (2018) (n. 44).

[52] Cable (n. 47); Avnita Lakhani, 'The Strategic use of Mediation for Resolving Maritime territorial Disputes', (2013) Journal of International Maritime Law 60-73.

the parties for possible sale of Tesoro's shares to the government, the former invoked the dispute settlement clause by initiating conciliation proceedings with ICSID.

The parties appointed a sole conciliator, and proceedings commenced on 9 March 1984; each party was represented by lawyers. The proceedings were conducted more or less like arbitration, with submissions of memorials and counter-memorials, including an objection to jurisdiction raised by the government, which was joined to the merits by the conciliator. However, with the consent of the parties, the conciliator decided that no oral hearings would be necessary, and that he would decide the matter based on the written submissions of the parties.

On 5 February 1985, the conciliator issued his recommendation, which provided a basis of negotiation between the parties over the next eight months and were able to reach a settlement agreement in November 1985. The conciliation cost the parties about 11,000 US dollars in administrative charges and fees of the conciliator excluding legal costs, at a time when ICSID arbitration cost from 120,000 to 170,000 US dollars.[53]

Just like the Vattenfall-SPE case discussed above, the Tesoro-Trinidad case study demonstrates the time and cost advantages of mediation relative to arbitration or court litigation. Another lesson to be drawn was the strong likelihood that the parties would resolve the dispute in a manner that maintained their commercial relationships than was likely to be achieved through arbitration. Furthermore, on the one hand, the case demonstrates the benefits of expressly providing for mediation or conciliation in an oil and gas and energy investment agreement to encourage the parties to request mediation in the event of a dispute arising without the fear of appearing weak. On the other hand, the case demonstrates the risks of how to resort to institutional conciliation that might take an otherwise informal and flexible process into legalistic proceedings when lawyers are allowed to take control of the process.

[53] Lester Nurick and Stephen Schnably 'The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago', (1986) 1 ICSID Rev.-Foreign Investment Law Journal 340; CIL (n. 41).

D. Oil and Gas: RSM-Cameroon

In another oil and gas conciliation conducted under the auspices of ICSID, RSM Production Corporation filed a request in 2011 based on a conciliation clause in a five-year concession agreement it entered into with the Republic of Cameroon to explore for a natural gas field in Doula. The investor alleged that Cameroon illegally transferred a portion of the concession to a UK company, Victoria Oil and Gas. The claimant also alleged that Cameroon breached a provision in the contract that provided a mechanism for fixing the price of natural gas under the concession. A Commission consisting of three conciliators was appointed by the parties. Both parties were represented by counsel. Following a proceeding that lasted from February 2012 to June 2013 including four days of a hearing in Paris, the Commission issued its report on 11 June 2013 declaring the proceedings closed because in its opinion, there was 'no likelihood of agreement between the parties'.[54] The lesson to be drawn from this case study is that where the disputing parties were not willing to settle, neither the existence of a conciliation clause in the contract nor the appointment and efforts of a distinguished panel of conciliators or mediators can help them reach a settlement. As noted earlier, in such cases the conciliation process could be described as a futile use of time and resources.

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E. Oil and Gas: CMS Energy-Equatorial Guinea

Another unsuccessful conciliation filed pursuant to an ICSID Conciliation clause in an oil, gas and mining contract involved Equatorial Guinea and the CMS Energy Corporation in which the host state filed the request for conciliation in June 2012. A sole conciliator was appointed by the parties and the first session of the proceedings was held in March 2013, following which the parties exchanged written statements of their respective positions. The sole conciliator then visited the place connected with the dispute from 18-19 October 2013. Subsequently, the parties filed a second written statement of their respective positions. In March 2014, a hearing was held for three days in New York and in May 2015 following which the conciliator issued his report

[54] CIL (n. 41); Kyriaki Karadelis, 'RSM files against Cameroon after conciliation fails', Global Arbitration Review, 25 June 2013, https://globalarbitrationreview.com/article/1032440/rsm-files-against-cameroon-after-conciliation-fails.

declaring that in his view, 'there [was] no likelihood of settlement between the parties'.[55] Thus, after three years of effort, the conciliation came to naught.

On the one hand, the last two case studies demonstrate that aside from the willingness of the parties to submit the dispute to conciliation, the success of the process depends very much on the parties' willingness to compromise in order to reach a settlement. Otherwise the whole process might turn out to be a futile exercise. Thus, '[i]f the political and/or economic incentives are insufficiently attractive, it is unlikely that parties will agree to settle'.[56] On the other, the Vattenfall-PSE and Tesoro case studies (and to a limited extent the East Timor-Australia) illustrate the benefits of mediation/conciliation in resolving energy disputes quickly and cheaply relative to arbitration or court litigation, as well as providing the parties with an opportunity to recalibrate their commercial relationships in a manner they may not achieve through arbitration or litigation. The case studies also indicate that when the disputing parties hand over control of the mediation/conciliation to their legal counsel, they may end up having a process akin to arbitration, with all its legal technicalities, as well as time consuming activity and perhaps high financial costs, especially if the panel consists of more than one mediator/conciliator.

IV. Issues in Mediation and the Future of Energy Mediation

This final section reflects on how the effectiveness of mediation in energy disputes might be enhanced. As the case studies illustrate, and contrary to some popular assumptions that question its relevance to the various energy industries, mediation is already in use, albeit in diverse ways, with varying degrees of success and with respect to various kinds of energy. Data about other investor-state mediations is not readily available in the public domain; as such any conclusions on the basis of what we have presented here must be tentative. To the extent that mediation offers potential savings to the parties in a dispute in terms of costs in time and funds, it seems entirely appropriate to seek ways in which its use can be enhanced and indeed even promoted.

[55] Equatorial Guinea v. CMS Energy Corporation and Others, ICSID Case No. CONC(AF)/12/2; CIL (n. 41)16.
[56] CIL (n. 41)17; Stephen Schwebel 'Is Mediation of Foreign Investment Disputes Plausible?' (2007) 12 ICSID Rev. Foreign Investment Law Journal 237.

At the ground level, the parties should ensure that there is a legal basis for mediation by expressly providing in investment treaties, national investment legislation and in the relevant energy agreements that there is a requirement to attempt mediation either as a pre-condition for submitting the dispute to arbitration or preferably, concurrently with the commencement of arbitration. The existence of such a clause in the applicable law would encourage the parties to resort to the mechanism without the requesting party appearing weak.[57] That said, we have noted firstly that in the energy sector one of the parties is often a state body, subject to quite different and often non-commercial constraints and pressures than a commercial party, complicating the tasks of a mediator, and secondly, that there are advantages in considering the option of mediation even while an arbitration process has begun.

At the next level, mediation could be enhanced by making its benefits and availability better known. As noted above, one of the reasons for the lower frequency of mediation use is the lack of familiarity among small and medium-sized businesses with the benefits and where to access mediation services. This problem might be overcome by more awareness campaigns by dispute service providers such as ICSID, PCA, the International Mediation Institute and other institutions. A wider publicity for the success stories of mediation might also help.[58]

Further, at present, there is no international legal framework that provides for *enforcement* of mediation agreements and mediated settlement agreements akin to the New York Convention. Obviously, this applies to all kinds of mediation and not only those with an energy or energy-related subject-matter. Consequently, a party to a mediation agreement may refuse to take part in a mediation or prevaricate or take other measures to delay proceedings (and anecdotal evidence

[57] Salacuse (n. 15)182 (noting that 'investment contracts between multinational corporations and host governments might provide for specific alternative dispute settlement in the event that conflict arises. Such contracts might stipulate, for example, that no arbitration may be launched until corporate executives and government officials have attempted and failed to negotiate or mediate disputes'.); Kumberg et al (n. 6) 5.

[58] Markus Petsche, 'Mediation as the Preferred Method to Solve International Business Disputes: A Look into the Future', (2013) International Business Law Journal 251, 258; Thomas Stipanowich, 'The International Evolution of Mediation: A Call for Dialogue and Deliberation', (2015) 46 Victoria University of Wellington Law Review 1191, 1241, http://ssrn.com/abstract=2712457. On recent initiatives by ICSID to promote investor-State mediation through education, outreach, and case administration, see 'ICSID Secretariat, Considering the Future of Investor-State Mediation,' https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue3/Considering-the-Future-of-Investor-State-Mediation.aspx; and 'ICSID hosts half-day event, "Investor-State Mediation: Perspectives from States, Mediators & Practitioners on 15 June 2017', https://icsid.worldbank.org/en/Pages/News.aspx?CID=243.

suggests this is not an uncommon abuse of conciliation requirements). Instead, it may resort to arbitration or court litigation in another jurisdiction. Similarly, unlike an arbitration award which may be enforced under the New York Convention in all member states, a mediated settlement agreement can only be enforced as a contract or by taking steps to have it ratified as a consent award by the arbitral tribunal hearing the case.[59] Currently, the UNCITRAL Working Group on Arbitration and Conciliation is working to develop a convention on the international enforcement of commercial settlements, which will when it comes into force ease the difficulties of enforcing a settlement agreement.[60] Such a convention will enhance the prospects of mediation in general.[61]

Finally, as noted above, one of the reasons that dissuade business executives and state officials from resorting to mediation is a concern about being accused of giving in to the opponent or at worst of being a party to corruption. This is more so in the case of investor-state disputes in highly politicized sectors such as oil and gas, and indeed in most other forms of energy. In such cases, public officials would rather shift responsibility for a decision to an arbitral tribunal or a court of law rather than take personal responsibility. Such concerns may be assuaged by creating an inter-ministerial or inter-departmental agency vested with the authority to endorse settlement agreements, thereby enhancing the legitimacy of such agreements in the eyes of the public, in a way that is analogous to an arbitral award or a court decision. Alternatively, the mediator can endorse formally the settlement agreement, thereby lending his/her authority to the final agreement.[62]

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[59] Edna Sussman, 'A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements', (2015) TDM, www.transnational-dispute-management.com; Bobette Wolski, 'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research', (2014) 7 Contemporary Asia Arbitration Journal 87; Chang-Fa Lo, Desirability of a New International Legal Framework for Cross-border Enforcement of Certain Mediated Settlement Agreements, (2014) 7 Contemporary Asia Arbitration Journal 119.

[60] See Chapter in this book on Enforcement.

[61] Sussman (n. 59); Gaultier (n. 26) 48 (noting that 'in the context of international disputes, being able to use mediation and have its resulting agreement be able to be applied almost worldwide definitely is an attraction, and underlines the concrete effectiveness of cross-border mediation, even though the process is still at an early stage'.); S.I. Strong, 'Realizing Rationality: An Empirical Assessment of International Commercial Mediation', (2016) 73 Washington & Lee Law Review 1973, 2014-2016.

[62] Waelde (n. 15) 217 (noting that 'the mediator, if vested with sufficient authority, can endorse more formally the negotiated outcome').

By way of a concluding remark to this chapter, we believe that the practice of mediation in energy disputes is far greater than textbooks on dispute settlement and energy law would have us believe, and moreover, that its future can be – and indeed ought to be – greater, as a way of enhancing the parties' options for amicable and speedy settlement. These prospects would surely be brighter if the above issues were sufficiently well-addressed.