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Mediation of Investor–State Disputes: A Treaty Survey

*Kun Fan**

I. INTRODUCTION

The concept of mediation is not new. Long before law was established, courts were organized, or judges formulated law, people resolved their disputes informally through negotiation or mediation. Historically, states also used mediation to resolve their conflicts. In some cultures, such as China’s deeply rooted Confucian philosophy emphasizing harmony and conflict avoidance, mediation was used not an alternative, but an essential—and integral—part of the dispute resolution system.¹

In modern society, mediation and other forms of alternative dispute resolution (“ADR”) regained popularity in reaction to the increasing proceduralization, formalization, and judicialization of arbitration,² or the colonization of arbitration by litigation.³ This is particularly true in the field of investor–state disputes. Investor–state arbitration is becoming more confrontational, more lengthy and costly, and more judicialized. The final result may be unsatisfying, even to a winning party. For instance, in the case of *Metalclad Corp. v. The United Mexican States*,⁴ after winning a seventeen–million–dollar arbitral award against Mexico, the Chief Executive Officer of Metalclad expressed regret at having resorted to this mechanism. He noted that despite “winning” the case, the arbitration had been so dissatisfying that he wished the company had relied on other options to resolve the dispute.⁵ The proceedings had spanned approximately five years, involved a battle in domestic courts, and the claimant’s side alone had an estimated four–million dollars in direct and indirect costs.⁶ No doubt there were considerable costs endured by Mexico as well.⁷ This case shows “how the nominal winner is often a real

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1. See KUN FAN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 194–203 (2013).

2. See RICHARD B. LILLICH & CHARLES N. BROWER, *Introduction, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS ‘JUDICIALIZATION’ AND UNIFORMITY?: TWELFTH SOKOL COLLOQUIUM* ix (Richard B. Lillich & Charles N. Brower eds., 1994).

3. Fali S. Nariman, *The Spirit of Arbitration: The Tenth Annual Goff Lecture*, 16 *ARB. INT’L* 261 (2001).

4. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1.

5. See Jack C. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor–State Disputes—A Preliminary Sketch*, 12 *U.C. DAVIS J. INT’L L. & POL’Y* 7, 8–10 (2015).

6. *Id.*

7. *Id.*

loser—in fees, expenses, and waste of time,” as President Abraham Lincoln famously noted.⁸

In the widely discussed case of *Achmea BV v. Slovakia*, the arbitral tribunal remarked at the close of the hearing that it had a sense that, in this case, settlement “would be a good thing” because “the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case.”⁹

In light of some Governments’ and Non-Governmental Organizations’ (“NGOs”) increasing distrust of investor–state arbitration, mediation regained its momentum as a method of resolving investor–state disputes (“ISD”). Consider, for example, the inclusion of mediation in the dispute settlement provisions of a growing number of international investment treaties (“IIAs”), including Model Bilateral Investment Treaties (“BITs”) and multilateral investment treaties. Mediation’s momentum is also reflected by the Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”), a new multilateral framework for the recognition and enforcement of mediated settlements.¹⁰ The Singapore Convention opened for signature in August 2019 and has been signed by forty–six nations so far, including China and the U.S.¹¹ Although the Singapore Convention only applies to commercial disputes, the spirit and mechanism it embodies would apply with equal force to state–to–state and investor–state disputes.¹²

In this context, what are the challenges and values of using mediation to resolve investor–state disputes? What is the existing framework with respect to the use of mediation in investor–state disputes, including treaties and soft laws? What will the future look like? This Article intends to address these questions surrounding the use of mediation to resolve ISD. Section II will explore the challenges of investor–state disputes. Section III will then discuss why mediation might be particularly beneficial in the ISDS context. Section IV will examine the existing legal framework with respect to investor–state mediation through an extensive treaty survey. Section V looks at the “soft laws” that provide specific guidance on mediation for ISD. Finally, Section VI concludes with prospects to the future.

8. See Roy P. Basler et al., *Abraham Lincoln’s Notes for a Law Lecture*, ABRAHAM LINCOLN ONLINE <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> (last visited Mar. 25, 2020); Thomas Newcomb Hyde, *Lincoln, Legal Ethics and Success in Mediation*, 24(7) HILLSBOROUGH COUNTY B. ASS’N LAW. 54 (2014), https://cdn.ymaws.com/www.hillsbar.com/resource/resmgr/Docs/mag_sum2014.pdf.

9. *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008–13, p. 14–15 (2012) (Vaughan Lowe, Albert Jan van den Berg, & V.V. Veeder, Arbs.).

10. United Nations Convention on International Settlement Agreements Resulting from Mediation, 7 August 2019, G.A. Res. A/73/198 (Sept. 12, 2020).

11. *List of Signatory Countries*, SINGAPORE CONVENTION ON MEDIATION, <https://www.singaporeconvention.org/official-signatories.html> (last visited Mar. 26, 2020).

12. Jaemin Lee, Speech at the Singapore Convention on Mediation Panel on the Negotiation of the Convention on Mediation (Aug. 7, 2019) (session report available at <https://www.singaporeconvention.org/assets/pdf/conference-reports/2-Report-Lunch-time-Panel.pdf>).

II. CHALLENGES OF MEDIATING INVESTOR–STATE DISPUTES

In a time of growing criticism of investor–state dispute settlement (“ISDS”), one may wonder why parties are not settling disputes more frequently as suggested by the tribunal in *Achmea BV v. Slovakia*. The resistance to investor–state mediation may be due to the nature of the disputes, the involvement of multiple stakeholders, and the unavoidable political complexities.

In order to better understand the key challenges preventing settlement, the National University of Singapore Centre for International Law, led by Christopher Thomas and Lucy Reed, conducted a survey in November 2016.¹³ The survey asked participants to rank twenty–nine possible obstacles to the settlement of investor–state disputes.¹⁴ The survey revealed that the majority of participants—seventy percent—think the state is the party more reluctant to settle.¹⁵ The survey further identified the following as the key barrier to settlement in ISD: the desire to defer responsibility for decision–making to a third–party.¹⁶ It is no surprise that this particular obstacle was ranked first. In mediation, the parties ultimately assume responsibility for the terms of the settlement. In arbitration, on the other hand, responsibility is shifted to the tribunal who determines the outcome by its award. Therefore, in arbitration, it is easier to shift the responsibility and blame a tribunal for a forced, rather than voluntary, outcome.

The second biggest obstacle identified in the survey was media coverage, which might cause a dispute to become even more politically inflamed, pressuring the state into taking a firmer stance.¹⁷ Yet another significant obstacle to settlement is fear: fear of public criticism (ranked third),¹⁸ fear of allegations of or future prosecution for corruption (ranked seventh),¹⁹ and fear of setting a precedent (ranked sixteenth).²⁰

Obstacles to settlement also arise from the structure of the state, namely the existence of multiple stakeholders in agencies and ministries across all levels of government. It might be more difficult for an official to obtain budgetary approval for a settlement, as opposed to any sum awarded by an arbitral tribunal or court (ranked fourth).²¹ Agreement may prove impossible because of stakeholders’ conflicting and competing perspectives and priorities (ranked sixth).²²

Finally, we should bear in mind that not all disputes are suitable for mediation. In some cases, mediation is not a viable option—for example, when the dispute

13. Seraphina Chew, Lucy Reed, & J. Christopher Thomas, *Report: Survey on Obstacles to Settlement of Investor–State Disputes*, SSRN 1 (Sept. 11, 2018), <https://ssrn.com/abstract=3247492> (NUS Centre for International Law Research Paper No. 18/01). The survey was sent to ninety–seven recipients known to have substantial personal experience in investor–state arbitration in November 2016. The survey received forty–seven responses from private counsel, institutional representatives, and academics. More than half of the participants (sixty–four percent) had experience advising both investor and state parties. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 15–17.

17. *Id.* at 17.

18. Chew, Reed, & Thomas, *supra* note 13, at 18.

19. *Id.* at 28.

20. *Id.* at 29.

21. *Id.* at 19.

22. *Id.* at 28.

involves an issue that is highly sensitive, politicized, or too far reaching and could thus potentially affect too many third-parties (ranked fifth).²³ In the survey, participants offered a number of examples to illustrate this obstacle. One recent, highly-publicized case is instructive: Philip Morris Asia’s claim against Australia.²⁴ One participant observed that the Australian government could “never have settled his dispute, because of the asset class (tobacco), the nature of the measures (plain packaging regulations for tobacco products) and what would have been involved in settlement (monetary compensation to a tobacco company or reversal of the relevant regulations).”²⁵

III. WHY MEDIATION IS BENEFICIAL IN THE ISDS CONTEXT

Despite the potential challenges posed by mediation, it presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. Some of the values of mediation for ISD are discussed below.

Mediation offers an appealing alternative to arbitration, particularly in light of the dissatisfaction with investor–state arbitration. Professor Coe suggests that it is the uncertainty of an adjudicated result that maintains the parties’ interest in engineering, with the assistance of the conciliator, an acceptable alternative outcome.²⁶ Mediation also address concerns about the legitimacy of private arbitrators rendering a decision against state’s regulatory acts, a frequent criticism of investor–state arbitration. In mediation, it is the disputing parties who are the decision makers; if they cannot come to a settlement agreement, the mediator has no authority to impose a decision on the parties.²⁷

Mediation offers investors and states the opportunity to resolve their disputes themselves, which can prove to be speedier and less costly than arbitration. This is particularly useful in the context of ISD where the median length of arbitration proceedings is four years and four months and median costs are just over four–million dollars for claimants and almost three–and–a–half million for respondents.²⁸

Mediation also allows for broader economic goals, appropriately construing the positive impact investment projects can have for both the investor and the host state and avoiding the escalation of politically sensitive disputes. The collaborative spirit of mediation allows the parties to avoid win–lose outcomes while moving beyond the narrow legal dispute towards a bargain that benefits both sides. It may also permit the investment relationship to continue if the investors and states use the process to share important information and “take advantage of the opportunity to build trust in each other, or at least reduce distrust.”²⁹

23. *Id.* at 2.

24. See Philip Morris Asia Ltd. v. Commonwealth of Australia, UNCITRAL, PCA Case No. 2012–12 (2015) (Karl–Heinz Böckstiegel, Gabrielle Kaufmann–Kohler, & Donald M. McRae, Arbs.).

25. Chew, Reed, & Thomas, *supra* note 13, at 20.

26. Coe, *supra* note 5, at 16.

27. James Claxton, *Compelling Parties to Mediate Investor–State Disputes: No Pressure, No Diamonds?*, 20 PEPP. DISP. RESOL. L.J. 78 (2020).

28. *Id.* at 7 (citing to *Damaged & Costs in Investment Treaty Arbitration Revisited*, GLOBAL ARBITRATION REVIEW (Dec. 14, 2017), <https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited>).

29. Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 77 (2013).

Furthermore, mediation may be better suited to the participation of non–party stakeholders, who may not have standing to participate in the arbitration process. Participation of these non–parties in the mediation process may assist with the implementation of any agreements that are reached.

In the investor–state context, the confidentiality, procedural flexibility, and range of outcome choices make mediation even more attractive, as does the possibility of using mediation in tandem with the existing arbitration structure, notably during treaty–imposed “cooling–off” periods. Additionally, as a less adversarial means of dispute resolution, mediation might alleviate certain concerns of investors, especially foreign ones, who might otherwise be hesitant to sue the government.

The issue of increased use of mediation for resolving investor–state disputes, then, is not a matter of whether and when but, rather, *how*. Even if a complete settlement is not achieved, mediation may open lines of communication for subsequent negotiations and/or narrow issues for future arbitration.

IV. THE EXISTING LEGAL FRAMEWORK

According to Investment Policy Hub’s database, out of 2,572 bilateral investment treaties (“BIT”), 624 provide for mediation or conciliation for investor–state dispute settlement (“ISDS”), which comprises twenty–four percent of all BITs.³⁰ Based on a comprehensive treaty survey examining the mediation clauses contained in the existing IIAs, this Article found that the integration of mediation into ISDS systems is becoming more frequently reflected in IIAs.

A. Availability of Mediation in the “Cooling Off” Period of Investment Arbitration

The vast majority of BITs allow a period for amicable settlement or negotiation, called a “cooling–off” period, during which the parties are invited to find an amicable settlement to their dispute. Some treaties are silent about the methods and processes available to the parties. Several countries, however, have consistently referred to mediation or conciliation in their treaty practice as one of the ways to reach an amicable settlement during this cooling–off period.

B. Mediation as an Alternative to Arbitration

A more recent generation of treaties, particularly those with a broader substantive scope and coverage than earlier treaties, have singled out mediation as available to the disputing parties to reach an amicable settlement at all stages and regardless of whether an investment arbitration is under way. It is also interesting to note that the recent treaties and model BITs range from a simple mention of mediation as one of the non–binding procedures to the more specific and conducive language about investor–state mediation, and some even incorporate comprehensive procedure rules of mediation.

30. INT’L INV. AGREEMENTS NAVIGATOR, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> (last visited Mar. 25, 2020).

1. Reference to Mediation as a Non-Binding Procedure

Mediation has been referred to as a non-binding procedures in a number of model BITs, enacted BITs, and multilateral treaties.

i. Model BITs

A number of recent Model BITs encourage the use of conciliation or mediation as one of the non-binding, third-party procedures. Below are a few examples.

Article 14.2 of the Norway draft Model BIT 2015 provides that “[a]ny dispute under this Article shall, if possible, be settled amicably. A Party and an investor of the other Party may agree to non-binding procedures including good offices, conciliation or mediation.”³¹

Article 29.1 of the Southern African Development Community (“SADC”) Model BIT 2012 states that “[i]n the event of an investment dispute between an Investor or its Investment and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party mediation or other mechanisms.”³²

Article 13 of China Model BIT 2010 says, “[a]ny legal dispute between an investor of one Contracting Party and the other Contracting Party in connecting with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, which includes mediation.”³³

Article 20 of the Austria Model BIT 2008 states that “[d]isputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably or through consultations, mediation or conciliation.”³⁴

The above Model BITs only mention mediation as one of the possible means to amicably settle the disputes between investors and states. The models provide no further guidance with respect to mediation procedure. In contrast, the Thailand Model BIT contains more specific language about the start and termination of the procedures for conciliation or mediation and emphasizes the confidential and without prejudice nature of these non-binding procedures.³⁵ Article 10.4 of the Thailand Model BIT 2012 says:

31. Norway Draft Model Bilateral Investment Treaty art. 14.2, 2015.

32. SADC Model Bilateral Investment Treaty Template with Commentary art. 19.1, July 2012.

33. This Model BIT has not been officially published. Reference is made in some academic articles, such as Chunlei Zhao, *Investor-State Mediation in a China-E.U. Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, 17 CHINESE J. OF INT’L L. 111, 124–25 (2018), quoting Xiantao Wen 温先涛, *Discussion on “China Model Bilateral Investment Treaty”* (draft 1) 《中国投资保护协定范本》(草案)论稿(一), 18(4) GUO JI JING JI FA XUE KAN 《国际经济法学刊》169–204 (2011); Xiantao Wen 温先涛, *Discussion on “China Model Bilateral Investment Treaty”* (draft 2) 《中国投资保护协定范本》(草案)论稿(二), 19(1) GUO JI JING JI FA XUE KAN 《国际经济法学刊》132–61 (2011); Xiantao Wen 温先涛, *Discussion on “China Model Bilateral Investment Treaty”* (draft 3) 《中国投资保护协定范本》(草案)论稿(三), 19 GUO JI JING JI FA XUE KAN 《国际经济法学刊》57–90 (2011).

34. Austria Model Bilateral Investment Treaty art. 20, 2008.

35. Thailand Model Bilateral Investment Treaty art. 10.4, May 2012.

The disputing parties may at any time agree to good offices, conciliation or mediation. Procedures for good offices, conciliation or mediation may begin at any time and may be terminated at any time. Such procedures may continue while the matter is being examined by an arbitral tribunal established under this Article, unless the disputing parties agree otherwise. Proceedings involving good offices, conciliation and mediation and positions taken by the disputing parties during these proceedings shall be confidential and without prejudice to the rights of the disputing investor in any further or other proceedings.³⁶

Interestingly, the International Institute for Sustainable Development (“IISD”) Model International Agreement on Investment for Sustainable Development 2006 contains detailed provisions with respect to the prevention of disputes, the use of mediation to seek amicable resolutions, and even the procedures for the appointment of mediators.³⁷ Subparts C through F of Article 42 on Prevention of Disputes and Mediation state, in relevant part, as follows:

Investors and investments shall . . . seek to resolve potential disputes with host states, and host states with their investors and investments, in an amicable manner, prior to and during the cooling–off period. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may be applied. Where no alternative means of dispute settlement are agreed upon, Parties, investors or investments . . . shall seek the assistance of a mediator to resolve disputes during the [required] cooling–off period . . . The potential disputants shall use a mediator from the list established by the Secretariat for this purpose, or another one of their joint choosing. . . . If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling–off period, the Director of the Council shall appoint a mediator from the Secretariat list who is not a national of a State Party or the investor . . . The Parties may also establish regionally–based mediation centres to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional customs and traditions.³⁸

ii. BITs

Mediation is also provided in a number of bilateral treaties, including BITs and FTAs. For instance, Article 12(1) of Switzerland/Egypt BIT 2010 provides that:

Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as “investment dispute”) shall, . . . to the extent

36. *Id.*

37. HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT 58 (2005).

38. *Id.*

possible, be settled through consultation, negotiation or mediation (hereinafter referred to “procedure of amicable settlement”).³⁹

Article 10(1) of the Egypt/Mauritius BIT 2014 largely mirrors the language of Article 12(1) of Switzerland/Egypt BIT 2010, but adds “conciliation” to the list of settlement procedures available to the parties “after written notification of the alleged breach has been made.”⁴⁰

Article 20.1 of the Chile–Hong Kong, China SAR BIT 2016 says, “[i]n the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultations, which may include, where this is acceptable to the disputing parties, the use of non-binding, third-party procedures, such as good offices, conciliation and mediation.”⁴¹

Article 9.16 of the FTA between the Republic of Korea and the Republics of Central America 2018 provides:

Any dispute arising in accordance with Article 9.17.1 shall be settled, to the extent possible, by consultation and negotiation, which may include the use of non-binding, third party procedures such as conciliation and mediation, and shall be notified by submitting a notice of the dispute in writing, including detailed information of the factual and legal basis, by the investor to the Party receiving the investment.⁴²

Different from the above bilateral treaties with only a reference to mediation, the Investment Agreement signed between Mainland China and Hong Kong on June 28, 2017 under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (“CEPA”) establishes a mediation mechanism to resolve investment disputes and provides detailed guidance for the use of mediation and the appointment of mediators, with reference to specific mediation institutions.⁴³ Hong Kong and Macau investors may, pursuant to Article 19 of the CEPA Investment Agreement, apply to the mediation agency handling disputes between Mainland China investors and the Hong Kong party for mediation of investment disputes between the specific department or agency implementing the specific administrative act in Mainland China.⁴⁴ Mainland investors, on the other hand, are eligible to apply for mediation to mediation institutions that deal with disputes arising between Mainland investors and a Hong Kong department or agency pursuant to Article 20 of the CEPA Investment Agreement.⁴⁵

39. Agreement between The Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments art. 12, June 7, 2010.

40. The Investment Promotion Act art. 10.1, June 25, 2014.

41. Investment Agreement Between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the Republic of Chile art. 20.1, Sept. 7, 2012.

42. Free Trade Agreement Between the Republic of Korea and the Republics of Central America art. 9.16, Feb. 21, 2018.

43. Mainland & Hong Kong Closer Economic Partnership Arrangement Investment Agreement art. 19.1(v), Jan. 1, 2018.

44. *Id.*

45. Mainland & Hong Kong Closer Economic Partnership Arrangement Investment Agreement art. 20(iv), Jan. 1, 2018.

The two Mainland mediation institutions approved to deal with the disputes between Hong Kong investors and the Mainland or Mainland investors and Hong Kong are the Mediation Center of the China Council for the Promotion of International Trade/the China Chamber of International Commerce, and China International Economic and Trade Arbitration Commission (“CIETAC”). The two Hong Kong institutions are the Hong Kong Mediation Commission (“HKMC”) of the Hong Kong International Arbitration Centre and the Mainland–Hong Kong Joint Mediation Center (“MHJMC”).⁴⁶

iii. Multilateral Treaties

A few recently concluded multilateral treaties also provide for the use of mediation of investor–state disputes. For instance, the Comprehensive and Progressive Agreement for Trans–Pacific Partnership (“CPTPP”) mentions conciliation or mediation as a means to resolve investor state disputes.⁴⁷ Specifically, the CPTPP states that “in the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non–binding, third party procedures, such as good offices, conciliation or mediation.”⁴⁸

Article 10.15 of the Dominican Republic–Central America Free Trade Agreement 2004 says, “[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non–binding, third–party procedures such as conciliation and mediation.”⁴⁹

The Association of Southeast Asian Nations (“ASEAN”) Comprehensive Investment Agreement 2009 contains more specific language with respect to conciliation. Article 30 provides as follows:

1. The disputing parties may at any time agree to conciliation, which may begin at any time and be terminated at the request of the disputing investor at any time.
2. If the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress.
3. Proceedings involving conciliation and positions taken by the disputing parties during these proceedings shall be without prejudice to the rights of either disputing parties in any further proceedings.⁵⁰

46. *Mainland & Hong Kong Economic Partnership Arrangement (CEPA)*, TRADE & INDUSTRY DEP’T OF THE GOV’T OF THE HONG KONG SPECIAL ADMIN. REGION, <https://www.tid.gov.hk/english/cepa/investment/mediation.html> (last visited Mar. 25, 2020).

47. See Comprehensive and Progressive Agreement for Trans–Pacific Partnership art. 9.18, Dec. 30, 2018 (the CPTPP was signed in Santiago, Chile, on March 8, 2018. It entered into force for Australia, Canada, Japan, Mexico, New Zealand and Singapore on December 30, 2018, and for Vietnam on January 14, 2019. The CPTPP will enter into force for Brunei Darussalam, Chile, Malaysia, and Peru sixty days after they complete their respective ratification processes).

48. *Id.*

49. Dominican Republic–Central American Free Trade Agreement art. 10.15, Aug. 5, 2004.

50. ASEAN Comprehensive Investment Agreement art. 30, 2009.

The Investment Agreement for the Common Market for Eastern and Southern Africa (“COMESA”)_Common Investment Area 2007 contains language similar to the International Institute for Sustainable Development (“IISD”) Model International Agreement on Investment for Sustainable Development 2006 with respect to the use of mediation. In Particular, Article 26 deals with negotiation and mediation, and states:

4. Where no alternative means of dispute settlement are agreed upon, a party shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between the notice of intention and the initiation of dispute settlement proceedings under Articles 27 or 28. The potential disputants shall use a mediator from the list established by the COMESA Secretariat for this purpose, or another one of their joint choosing. Recourse to mediation does not alter the minimum cooling-off period.
5. If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, the President of the COMESA Court of Justice or his designate shall appoint a mediator from the COMESA Secretariat’s list who is not a national of the Member State of the COMESA investor or the Member State(s) party to the dispute. The appointment shall be binding on the disputing parties.⁵¹

The above examples show a general trend to include mediation as an option to resolve investor–state disputes in model BITs, recently concluded BITs, and multilateral treaties. Some provide only a simple mention of mediation as one of the non-binding procedures, while others provide more detailed guidelines as to the nature of mediation or the procedures for the appointment of mediators.

2. Incorporation of Comprehensive Procedural Rules of Mediation

Another trend appears in the E.U.’s recently concluded agreement, which incorporates a set of comprehensive rules of investor–state mediation. For instance, the Canada–European Union Comprehensive Economic and Trade Agreement (“CETA”) of 2016 contains specific language on mediation of investor–state disputes, including temporal availability of mediation and mediator appointment, and incorporates a Code of Conduct for Mediators, as well as procedural rules of mediation.⁵² Article 8.20 of the CETA provides as follows:

1. The disputing parties may at any time agree to have recourse to mediation.

51. Investment Agreement for the COMESA Common Investment Area art. 26.4–5, 2007.

52. The Canada–European Union Comprehensive Economic and Trade Agreement (CETA), Oct. 30, 2016.

2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party. . .
3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator.
4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days the appointment of the mediator.
5. If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.⁵³

Annex 29–B provides for a Code of Conduct for arbitrators, including disclosure obligations, duties of arbitrators, independence and impartiality of arbitrators, confidentiality, and more.⁵⁴ The Code of Conduct applies, *mutatis mutandis*, to mediators.

Annex 29–C sets out detailed rules of procedure for mediation, including initiation of the proceeding (Article 2), selection of the mediator (Article 3), rules of procedure for mediation (Article 4), implementation (Article 5), confidentiality (Article 6), time limits (Article 7), costs (Article 8), and review (Article 9).⁵⁵

Similarly, the EU–Singapore Investment Protection Agreement of 2018 also sets out detailed procedural rules of mediation.⁵⁶ Chapter 15 is dedicated to the mediation mechanism, covering specific issues regarding the objective and scope of mediation, initiation of the procedure, selection of the mediator, procedural rules of the mediation, implementation of a mutually agreed upon solution, time limits, costs, and review.⁵⁷ A Mediation Mechanism for Disputes between Investors and Parties is also included in Annex 6, which incorporates detailed procedural rules of mediation.⁵⁸

EU–Vietnam trade and investment agreements from 2018 contain almost identical language to the 2018 EU–Singapore Investment Agreement with respect to dispute resolution⁵⁹ and the mediation mechanism.⁶⁰

53. *Id.* at art. 8.20.

54. *Id.* at Annex 29–B.

55. *Id.* at Annex 29–C.

56. EU–Singapore Trade and Investment Protection Agreements, Oct. 19, 2018.

57. *Id.* at chapter 15.

58. *Id.* at Annex 6.

59. Compare EU–Singapore Trade and Investment Protection Agreements, Oct. 19, 2018 with EU–Vietnam Trade and Investment Agreements, Sept. 24, 2018.

60. *Id.*

V. SOFT LAWS: SPECIFIC GUIDELINES FOR THE MEDIATION PROCESS

Apart from the treaties, international institutions have also taken various efforts to promote the use of mediation for ISDS by including specific guidelines for the mediation process through its soft laws, such as the ICC, Stockholm Chamber of Commerce (“SCC”), the International Bar Association (“IBA”), Energy Chartered Treaty (“ECT”), the International Center for the Settlement of Investment Disputes (“ICSID”), and the International Mediation Institute (“IMI”).⁶¹

A. *The IBA Rules for Investor–State Mediation*

A clear indication of the change in attitude by governments, multi–nationals, and institutions came in the form of the IBA Rules for Investor–State Mediation adopted by the IBA Council on October 4, 2012.⁶² Such adoption was a clear attempt by a variety of stakeholders to set out a framework by which mediation could be utilized in ISD, thereby avoiding the need for arbitration. The IBA Rules for Investor–State Mediation provide for co–mediation and early management conferences to assure the viability of the process.⁶³ The Rules also provide for concurrent mediation and arbitration proceedings.⁶⁴

None of the treaties I have examined so far expressly adopt the 2012 IBA Rules. There has been one reported mediation case conducted pursuant to the IBA Rules under the auspices of the ICC International Centre for ADR: *Systra SA v. Republic of the Philippines*.⁶⁵ The dispute brought by Systra SA and its local subsidiary, Systra Philippines, Inc., arises out of allegedly long overdue invoices for services and work performed on infrastructure projects (including metro and rail projects) for various government agencies of the Philippines.⁶⁶ In an effort to avoid arbitration, the parties agreed to conduct a mediation pursuant to the 2012 IBA Rules at the ICC–ADR Centre.⁶⁷

There may also be room for mediation proceedings conducted under the IBA Rules within the ICSID conciliation and arbitration framework. As the IBA Mediation Rules are not mutually exclusive with the ICSID Conciliation Rules, nor with the ICSID Arbitration Rules, ICSID Senior Legal Counsel Frauke Nitschke argues that the IBA Rules can be applied (a) at a preliminary stage; (b) alongside ICSID arbitration or conciliation; (c) following an ICSID arbitration or conciliation; or (d) as a standalone process.⁶⁸

61. INT’L MEDIATION INST., <https://www.imimediation.org> (last visited Mar. 25, 2020).

62. Int’l Bar Ass’n, *Rules for Investor–State Mediation*, art. 1, 1 (Oct. 4, 2012), http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx.

63. *Id.* at 4.

64. *Id.* at 6.

65. For details of the case, see Luke E. Peterson, *In an Apparent First, Investor & Host–State Agree to Try Mediation Under IBA Rules to Resolve an Investor Treaty Dispute*, IA INV. ARBITRATION REPORTER (Apr. 14, 2016), <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/>.

66. *Id.*

67. *Id.*

68. Frauke Nitschke, *The IBA’s Investor–State Mediation Rules and the ICSID Dispute Settlement Framework*, 29 ICSID REV. 112 (Winter 2014).

*B. ECT Guideline on Investment
Mediation (2016)*

In July of 2016, the Energy Charter Conference adopted the Guide on Investment Mediation.⁶⁹ This Guide is an “explanatory document” designed to encourage States and investors to actively consider mediation for investor–state disputes.⁷⁰ The Guide covers a range of matters, including the rules which may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement.⁷¹ The Guide also canvasses the key differences between existing mediation or conciliation rules.⁷² The Energy Charter Conference also encouraged its Contracting Parties to consider mediation as a possible option at any stage of the dispute to facilitate an amicable resolution.⁷³

1. ICSID Draft Mediation Rules

ICSID has been supportive of the resolution of investment disputes through conciliation and mediation. Indeed, the creation of the International Centre for Settlement of Investment Disputes (“ICSID”) was based on World Bank’s experience in conciliation through a few high–profile investment disputes in the 1950s and 1960s, and conciliation was viewed as a focal point when the ICSID was established.⁷⁴ Much to the surprise of founders of the ICSID, however, states showed little interest in ICSID’s conciliation services and instead preferred arbitration and began concluding investment contracts and treaties with ICSID arbitration clauses, resulting in the rapid escalation of arbitrations in the 1990s until the present day.⁷⁵

Despite the relatively slow increase in the number of conciliations compared to arbitrations registered at the ICSD, the Center kept actively promoting the use of conciliation and mediation to resolve ISD by organizing various events, seminars, and trainings on ISM. In 2018, ICSID began work on a new set of mediation rules.⁷⁶ As part of a broader effort to update and further modernize the ICSID’s procedural rules for resolving investment disputes, these will be the first institutional mediation rules designed specifically for investment disputes.

On August 16, 2019, the ICSID Secretariat published its third working paper on proposals for rule amendments, which builds on the proposals that were originally published in August 2018 and March 2019 and follows extensive consultations with ICSID Member States and the public.⁷⁷ The third working paper includes the Rules of Mediation Proceedings (“ICSID Mediation Rules”) and the

69. INT’L ENERGY CHARTER, GUIDE ON INVESTMENT MEDIATION (2016).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. ANTONIO R. PARRA, THE HISTORY OF ICSID 8 (2017).

75. Claxton, *supra* note 27, at 5.

76. *Investor–State Mediation*, ICSID, <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms-mediation.aspx> (last visited Mar. 25, 2020).

77. *ICSID Rules & Regulations Amendment Process*, ICSID <https://icsid.worldbank.org/en/amendments> (last visited Mar. 25, 2020).

Additional Facility Rules of Procedure for Mediation Proceedings (“Additional Facility Mediation Rules”).⁷⁸

The mediation rules complement ICSID’s existing rules for arbitration, conciliation, and fact-finding and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings.⁷⁹ Overall, the goal is for ICSID to provide parties with a range of effective dispute settlement options which may be used on their own or in combination with each other.⁸⁰

If the parties reach an amicable settlement through mediation during an arbitration under the ICSID Convention, the Tribunal may record the settlement in the form of an award pursuant to Rule 54 (2) of the Arbitration Rules for the ICSID Convention (in the proposed amendment). The settlement agreement would then benefit from the delocalized enforcement mechanism that is unique to the ICSID Convention.⁸¹ The mediation rules also align with Singapore Convention, meaning a settlement agreement reached through the mediation process meets the Singapore Convention’s requirements for enforceability.⁸² Once finalized and approved by ICSID Member States, the mediation rules will add a valuable dispute settlement option for states and investors.⁸³

2. *The IMI’s Competency Criteria for Investor–State Mediators*

Finally, in light of the lack of accredited or identifiable investor–state mediators from which parties can choose their mediator or co–mediators, the IMI’s Investor–State Mediation Taskforce has created a Competency Criteria for Investor–State Mediators (“Competency Criteria”).⁸⁴

The Competency Criteria lays out a series of areas in which the ideal investor–state mediator would be competent, including both a familiarity with various tools and technologies and knowledge of the particular industry.⁸⁵ Specific areas are as follows: (1) understanding of investor–state issues; (2) experience in mediation and other dispute resolution processes; (3) experience with different forms of negotiation, mediation, and conciliation; (4) understanding of arbitration and adjudication processes; (5) intercultural competency; and (6) other competencies.⁸⁶ These Criteria could assist parties, institutions, designating authorities, and other appointing bodies in selecting competent and suitable mediators or co–mediators.

78. *Proposals for Amendment of the ICSID Rules*, 1 INT’L CTR. FOR SETTLEMENT OF INV. DISP. 2 (Working Paper No. 3, Aug. 2019), https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf.

79. *ICSID’s Role in Advancing Investor–State Mediation*, ICSID <https://icsid.worldbank.org/en/Page/resources/ICSID’s-Role-in-Advancing-Investor-State-Mediation> (last visited Mar. 25, 2020).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *What Has the Investor–State Taskforce Achieved so Far?*, INT’L MEDIATION INST. (July 31, 2019), <https://www.imimmediation.org/about/who-are-imi/ism-tf/>.

85. *Id.*

86. *Id.*

VI. LOOKING TO THE FUTURE

Looking into the future, mediation may offer a “soft” opening of the otherwise increasingly formalized and proceduralized arbitration proceedings, particularly in the context of investor–state disputes. Various initiatives have been taken in the past decade to promote the use of mediation to resolve international investment disputes, including the inclusion of the dispute settlement provisions in a growing number of IIAs and the increasing number of soft laws providing guidance on the use of mediation for ISD. The ratification of the Singapore Convention will also incentivize the use of mediation by enabling disputing parties to easily enforce and invoke settlement agreements across borders.

Below is an excerpt from a speech by Sir Anthony Clarke. He pushed for civil justice reform, but I think his words are also appropriate in the context of promoting mediation for ISD:

It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough (trôf). The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not.⁸⁷

Perhaps it is now time to take the horse to the trough. We should be doing more to encourage litigants to use mediation to settle their ISD. The more *we* do, the more likely *they* are to settle their disputes that way.

87. Anthony Clarke, *The Future of Civil Mediation*, Speech to the Civil Mediation Council’s Nat’l Conference (May 8, 2008).

