



Bibliography on Investor-State Conciliation and Mediation

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ABOUT THE BIBLIOGRAPHY

This annotated bibliography presents the most extensive literature review to date on investor-State conciliation and mediation, covering more than 75 sources. It is intended to serve as an introduction to investor-State conciliation and mediation, and as a snapshot of the major publications on this topic. The bibliography includes works that (1) provide the historical context for investor-State conciliation and mediation, (2) discuss contemporary practice, and (3) set out future directions. Annotations have been prepared for every work cited, with an emphasis on the work's contribution to scholarship. All works have been classified and placed into sections based on their subject matter. For easier navigation, each section is prefaced with an outline that provides broader context and a very brief survey of the works annotated in that section.

A version of this bibliography will be published by Oxford Bibliographies in late 2020.

ABOUT THE CIL PROJECT ON INVESTOR-STATE CONCILIATION

Since 2016, the CIL Project on Investor-State Conciliation has been focused on the use of conciliation to settle investment disputes. The Project has produced the following major works:

1. 'Background Paper for Working Conference on Conciliation' (2017)
2. 'Report of Conference: CIL Working Conference on Conciliation' (2017)
3. 'Survey on Obstacles to Settlement of Investor-State Disputes' (2018)
by Seraphina Chew, Lucy Reed and J Christopher Thomas QC
4. 'The Dispute Settlement Mechanisms in Major Multilateral Treaties' (2018)
by Anais Kedgley Laidlaw and Shaun Kang

These works can be downloaded without charge at <https://cil.nus.edu.sg/publications>.

This Bibliography commences a new research cycle in the Project. The objectives of the Project's new research are to study how to overcome the obstacles to settlement identified in the 2018 Survey, and to promote the use of conciliation and mediation to resolve investor-State disputes. Future workstreams of the Project include the publication of a handbook and the development of training programmes on conciliation.

This paper may be downloaded without charge at <https://cil.nus.edu.sg/publications>.

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Introduction

Conciliation and mediation have great potential to resolve investor-State disputes. Nonetheless, arbitration has significantly overshadowed these two forms of amicable dispute settlement processes. This disparity is slowly changing, and in recent times there has been a growing interest in conciliation and mediation, particularly given the duration, complexity and cost of investor-State arbitrations, as well as concerns as to the substantive content of investor-State arbitral decisions.

No clear consensus has emerged regarding the precise definition of either conciliation or mediation. Given the substantial overlap between the two processes, they have often been referred to as functionally equivalent and interchangeable. But upon closer examination, these two dispute settlement mechanisms are distinct. At its core, conciliation involves a sole conciliator or conciliation commission evaluating the respective positions of the disputing parties, and making non-binding recommendations for settlement. The goal of the recommendations is to assist the parties achieve an amicable settlement, and conciliation rules typically have flexibility to accommodate other mediation techniques that share the same purpose. In comparison, mediation is a process in which a mediator (i) assists the parties to focus on their real interests rather than legal rights, (ii) generally avoids making any merits-based evaluation of parties' positions and (iii) facilitates a meaningful dialog between the parties to reach an amicable settlement.

Unlike arbitration, in which the disputing parties have no certainty over the arbitrators' binding decisions, the success of both conciliation and mediation depends on the willingness and cooperation of the parties to reach a voluntary and agreed settlement. A settlement resulting from a mediation or conciliation process may potentially be enforced under domestic laws or in States that have ratified the Singapore Convention on Mediation, an innovation in international dispute resolution that may increase interest in investor-State conciliation and mediation.

The UNCITRAL Working Group III is presently considering whether and how to promote conciliation, mediation and other alternative dispute resolution mechanisms in reforms to the present system of investor-State dispute settlement.

Origins and Background

Investor-State conciliation and mediation have common origins in the law of diplomatic protection, under which the home State of an investor may espouse the investor's claim against a State in which that investor's investment was made (host State). This system did not guarantee a remedy to investors since home States had discretion to decide whether to intervene and take up the claims of their nationals with the host State, and even if the intervention ended in success, the home State had full control over any settlement proceeds.

Conciliation has historic roots in the commissions of inquiry provided for in the Hague Conventions on the Pacific Settlement of Disputes of 1899 and 1907, and the mixed claims commissions established under the Jay Treaty of 1794 and subsequent bilateral treaties. Mediation was similarly included as a mode of dispute settlement in the Hague Conventions, although it was then conceptualized as involving the intervention of third party States or political authorities, which might pursue their own interests through the mediation.¹ See also the *Good Offices and Mediation* and *Conciliation* sections of the separate *Oxford Bibliographies* article [*Peaceful Settlement of Disputes*](#).

Modern investor-State conciliation was conceptualized over fifty years ago during the discussions that led to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). Investor-State conciliation was included in that Convention as an alternative to arbitration. At that embryonic stage, Aron Broches, World Bank General Counsel and chief architect of the ICSID Convention, took the view that the role of conciliation in the Convention's framework may prove more important than arbitration.² Broches subsequently noted in 1984 that arbitration was preferred by businesses, but expressed the belief that conciliation may be preferable when parties want to continue their partnership, and noted a growing wish to explore the possibilities of conciliation, possibly by combining it with arbitration.³ Broches's vision has not come into fruition—at least not yet—but there is room for investor-State conciliation to grow, particularly as it is offered as an alternative to arbitration in many modern investment treaties and investment contracts.

Notable conciliation rules that may be applicable in investor-State disputes include the ICSID Conciliation Rules, the Permanent Court of Arbitration (PCA) Optional Conciliation Rules (and the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment), and the UN Commission on International Trade Law (UNCITRAL) Conciliation Rules. UNCITRAL is presently considering an update to its Conciliation Rules, which will modernize them and rename them the UNCITRAL Mediation Rules, reflecting how UNCITRAL regards the terms mediation and conciliation to be interchangeable.

Modern investor-State mediation is a relatively more recent development, with few investment treaties explicitly mentioning it and fewer rules of procedure available, although these factors do not prevent investors and States from agreeing to mediation.

¹ See Cot 1972: Cot differentiated third party intervention into (1) mediation by *le prince* (a third state or political authority), which he criticized for often pursuing their own interests, and held that this was discredited following World War I, and (2) conciliation by *le sage* (wise men who had no political authority but had the respect of the disputing States).

² History of the ICSID Convention Vol. II-1, p. 242.

³ Aron Broches, "Avoidance and Settlement of International Investment Disputes," *American Society of International Law Proceedings* 78 (1984): 53–55.

While mediation was included as an inter-State mode of dispute settlement in the Hague Conventions on the Pacific Settlement of Disputes and Article 33 of the UN Charter, and has a long history of use in various domestic contexts, mediation was not formally made a distinct option for the settlement of investor-State disputes until the development in 2014 of the International Bar Association (IBA) Rules for Investor State Mediation. In its current Rules amendment process, ICSID is presently proposing that in addition to its Conciliation Rules, voluntary Mediation Rules be adopted by its member States.

Primary Works

Investor-State conciliation and mediation are less frequently the subject of considered examination than investor-State arbitration, with fewer books, monographs and edited volumes dedicated to the topic. Nonetheless, numerous journal articles, book chapters and shorter papers in the field have been published, especially in the past decade, reflecting an increased interest by academics and practitioners. The primary works in the field are identified below.

Nurick and Schnably 1986 provide a practice-oriented description of an ICSID conciliation, while Walde 2004 makes a forceful argument in support of mediation. Rovine 2010 curates the papers presented at a session on investor-State conciliation and mediation at the 2009 Fordham Law School Conference on International Arbitration and Mediation. Franck and Joubin-Bret 2011 present the papers delivered at a joint symposium on international investment law and alternative dispute resolution, in which a number of contributions focused on investor-State conciliation and mediation. ICSID 2014 is a special issue of the ICSID Review containing seven articles on investor-State mediation. Energy Charter 2016 provides a practical guide on investor-State conciliation and mediation. Finally, Titi and Fach Gomez 2019 have edited a recent tome that will be a valuable reference work on mediation and conciliation in the years to come.

Titi, Catharine, and Katia Fach Gomez, eds. *Mediation in International Commercial and Investment Disputes*. Oxford: Oxford University Press, 2019.

This edited volume contains a number of chapters relevant to investor-State conciliation and mediation. Of particular note are the chapters by ICSID Legal Counsel Frauke Nitschke on the ICSID Conciliation Rules in practice, Catharine Titi on mediation and the settlement of international disputes, Jack Coe on concurrent co-mediation, and Chester Brown and Phoebe Winch on the confidentiality and transparency debate in commercial and investment mediation.

Energy Charter Secretariat. *Guide on Investment Mediation*. ECT Document CCDEC 2016 12, 2016. <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

This practical guide for potential users of investor-State mediation explains the mediation process under the Energy Charter Treaty and provides general advice on how to engage in investor-State mediation.

“ICSID and Alternate Dispute Resolution.” Special issue, *ICSID Review* 24, no. 1 (Winter 2014): 1–141.

This special issue of ICSID Review is principally focused on investor-State mediation generally, and the IBA Rules on Investor-State Mediation in particular, as the Rules had just been published. It contains seven articles on investor-State mediation, including contributions by Anna Joubin-Bret and Barton Legum, co-chairs of the committee that developed the Rules, Silvia Constain, Roberto Echandi and Priyanka Kher, Susan Franck, Frauke Nitschke, and Wolf von Kumberg.

Franck, Susan, and Anna Joubin-Bret, eds. *Investor-State Disputes: Prevention and Alternative to Arbitration II*. New York: UN Conference on Trade and Development, 2011.

This study compiles and synthesizes the contributions to a 2010 joint symposium on international investment and alternative dispute resolution, organized by the UN Conference on Trade and Development and the Washington and Lee University School of Law, and involving more than thirty scholars and practitioners. It addresses investor-State conciliation and mediation, and the idea of

dispute prevention policies (See section on *Interplay between Dispute Prevention Policies and Conciliation and Mediation*).

Rovine, Arthur W., ed. *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*. Leiden: Martinus Nijhoff Publishers, 2010.

This edited volume contains chapters relevant to investor-State conciliation and mediation, such as chapters by Gabriel Bottini and Veronica Lavista on conciliation and bilateral investment treaties (BITs), Margrete Stevens and Ben Love on the role of institutions in investor-State mediation, Jack Coe on whether mediation of investment disputes should be encouraged, and Edna Sussman on the benefits and obstacles to investor-State dispute mediation.

Walde, Thomas. "Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective." *Transnational Dispute Management* 1 (2004):1. <https://www.transnational-dispute-management.com/article.asp?key=2>.

This article argues that mediation has the potential to create value and help maintain relationships, whereas arbitration and litigation destroy value and relationships, are more costly and time-consuming, and reflect a failure of management. Because of this article, the author was subsequently hired as a mediator in a dispute between the State-owned companies Vattenfall and Polskie Sieci Elektroenergetyczne, and later wrote another valuable article about his experience of conducting the mediation (included in the section on *Conciliation and Mediation in Practice*).

Nurick, Lester, and Stephen Schnably. "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago." *ICSID Review* 1, no. 2 (Fall 1986): 340–53.

This article is the first and only detailed account of an investor-State conciliation proceeding, written by the outside counsel who represented Trinidad and Tobago in the dispute. The authors describe the dispute and the procedure adopted, and conclude that the advantages of conciliation compared to arbitration are the former's relative inexpensiveness and informality. The authors note that their total administrative cost, including the fees of the sole conciliator, was less than USD 11,000 (in 1985).

Early Works on Conciliation

This section covers some of the earlier work on inter-State and investor-State conciliation and interpretative aids on the conciliation provisions of the ICSID Convention. While an examination of inter-State conciliation may assist in understanding investor-State conciliation, differences between the two can be discerned from close reading of the rules. One notable difference is that inter-State conciliations typically require the conciliation commission to set out their proposed settlement at the conclusion of the proceedings, whereas investor-State conciliation rules (ICSID, UNCITRAL, PCA) give the conciliation commission flexibility to propose recommended settlements throughout the proceedings.

ICSID 1968 is an extensive multi-volume record of the ICSID Convention travaux préparatoires compiled by the ICSID Secretariat. Parra 2017 provides a seminal history of the drafting of the ICSID Convention. Broches 1973 and Broches 1984 are influential, as Broches was the principal drafter of the ICSID Convention and founding Secretary-General of ICSID. Ziadé 1996 presents a relatively early look at the operation of the ICSID Conciliation Rules, from the perspective of the Secretary of one of the first ICSID conciliation proceedings. Institute of International Law 1961, Cot 1972, Bowett 1983, Reif 1990, Donner 1999 and Koopman 2008 provide historical perspectives on inter-State conciliation, which facilitate a better understanding of modern investor-State conciliation.

Parra, Antonio. *The History of ICSID*. 2nd ed. Oxford: Oxford University Press, 2017.

This book describes the negotiating history of the ICSID Convention, including its conciliation provisions.

Koopmans, Sven M. G. *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation*. The Hague: TMC Asser Press, 2008.

This book explores the history and practice of inter-State conciliation, discusses the place of conciliation within the diplomatic dispute settlement framework, and examines the relationship between law and conciliation. In the five pages dedicated to commercial conciliation and ICSID conciliation, the author suggests that the resemblance between ICSID's Conciliation Rules and its Arbitration Rules gives the impression that ICSID conciliation is lengthy and complicated, resulting in its limited use.

Donner, Ruth. "The Procedure of International Conciliation: Some Historical Aspects." *Journal of the History of International Law* 1 (1999): 103–24.

This article comprehensively examines the historical origins of conciliation, and early treaties providing for conciliation, up to the year 1978.

**Ziadé, Nassib G., "ICSID Conciliation." *News from ICSID* 13, no. 2 (Summer 1996): 3–8.
<https://icsid.worldbank.org/en/Documents/resources/vol%2013%20summer%201996.pdf>.**

This short article by the Secretary of the Conciliation Commission in the third ICSID conciliation proceeding (*SEDITEX v. Madagascar II*) explains the similarities and differences between ICSID's conciliation and arbitration rules, and discusses the possibility of blending features of conciliation and arbitration, such as transforming a conciliation settlement agreement as an arbitral award by consent, and having arbitrators facilitate amicable settlements.

Reif, Linda C. "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes." *Fordham International Law Journal* 14, no. 3 (1990): 578–638.

This article examines the use of conciliation in the resolution of trade disputes under the General Agreement on Tariffs and Trade and other trade agreements, and the resolution of domestic commercial disputes in the Asia-Pacific region. It only briefly covers investor-State conciliation, because there were few examples of practice when the article was written. The article also provides a historical perspective on the development of conciliation.

Broches, Aron. "Avoidance and Settlement of International Investment Disputes." *American Society of International Law Proceedings* 78 (1984): 53–55.

In these remarks at the 1984 ASIL Annual Meeting, Broches (at p. 54) discusses ICSID arbitration and conciliation, noting that conciliation may be preferable when disputing parties want to continue their relationship, and stating that "the idea of a convention to recognize and enforce agreements arrived at after conciliation has been suggested... but I think that is too tricky an enterprise. I think we have other more pressing worries."

Bowett, D. W. "Contemporary Developments in Legal Techniques in the Settlement of Disputes." *Recueil des Cours de l'Académie de Droit International de la Haye* 180 (1983): 169–235.

Chapter 2 of these lectures at the Hague Academy focuses on conciliation and its relation to the law and legal process. The chapter focuses on historical debates on whether conciliation should be regarded as a quasi-judicial or negotiating process, whether reports should be published, and whether conciliators should take into account only the legal rights and obligations of the parties or include other factors. A case study is presented of the Jan Mayen Conciliation between Iceland and Norway.

Broches, Aron. "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States." *Recueil des cours: Collected Courses of The Hague Academy of International Law* 136 (1973): 331–410.

Broches suggests (at p. 337) in his Hague Academy course on the ICSID Convention that parties to a conciliation proceeding can agree in advance to accept the Commission's recommendation as a binding determination of their dispute. However, Broches notes that such an agreement will not result in an enforceable arbitral award, in the absence of the parties establishing an arbitral tribunal to record the agreement as an award by consent.

ICSID, *History of the ICSID Convention*, 4 vols. Washington, DC: Balmar Printing and Graphics, 1968.

This multi-volume work contains a comprehensive article-by-article historical analysis of the text of the ICSID Convention (Vol. I) and preparatory documents generated during the drafting of the ICSID Convention (Vols. II, III and IV). The English version of the preparatory documents (Vol. II) mentions conciliation 896 times, often as an alternative to arbitration, and includes extensive discussion by the drafters on the articles of the ICSID Convention relating to conciliation proceedings.

Cot, Jean-Pierre, *International Conciliation*. Translated by R. Myers. London: Europa Publications, 1972. Originally published as *La Conciliation Internationale* (Paris: Pedone, 1968).

This work provides a detailed historical background and examination of the definition of conciliation and mediation, and the use of conciliation in the inter-State context and international organisations. The author defines conciliation as "intervention by a third body, having no political authority of its own, but enjoying the confidence of the parties and which, after examining the dispute in all its aspects, proposes a solution which they are not bound to accept." He defines mediation as an appeal to a prince or political authority, which often pursued its own interests and which was discredited with the beginning of World War I, since the intrusion of third party interests is illogical and undermines the principle of sovereignty.

Institute of International Law. *Report on International Conciliation, Session of Salzburg—1961*. Geneva, Switzerland: Institute of International Law, 1961. https://www.idi-il.org/app/uploads/2017/06/1961_salz_02_en.pdf.

This report encourages States to set up permanent bilateral conciliation commissions to resolve their disputes, and sets out a “Regulation on the Procedure of International Conciliation” containing a definition of conciliation and rules on how a conciliation commission should work, including rules governing the secrecy and conclusion of the proceedings.

Definition of Conciliation and Mediation in the Investor-State Context

While many authors as well as UNCITRAL texts regard conciliation and mediation as interchangeable terms (e.g. UNCITRAL 2018), the ICSID system now treats conciliation and mediation as distinct processes, each having its own rules. The ICSID definition of conciliation is based on conciliation's historic roots in public international law, although it is best understood by close examination of the ICSID Convention and the ICSID Conciliation Rules.

Oppenheim 1926 states the classic definition of conciliation in public international law: "the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and (usually after hearing the parties and endeavouring to bring them to an agreement) to make a report containing proposals for a settlement, but not having the binding character of an award or judgment." However, the ICSID definition of conciliation differs from this by allowing the conciliation commission to recommend proposals for settlements throughout the proceedings.

Bottini and Lavista 2010 and Salacuse 2015 describe ICSID conciliation as "non-binding arbitration," reflecting the shared origins and drafting of the ICSID Conciliation and Arbitration Rules (Parra 2017). Salacuse 2015 further suggests that "if one defines mediation as a voluntary process by which a third person assists the disputants to negotiate a settlement of their dispute, then conciliation clearly falls within the category of mediation," albeit in "rather limited form," as conciliation is a rights-based process involving evaluation of the parties' legal rights and obligations.

Franck 2014 and Ng 2019 distinguish between evaluative mediation, in which the mediator gives an opinion on the relative strengths and weaknesses of the parties' positions, and facilitative mediation, in which the mediator assists the parties through interest-based, future-oriented problem solving, to reach a settlement. Ng 2019 further suggests that conciliation is a process with elements of evaluative mediation, while Franck 2006 notes that the ICSID Conciliation Rules do not prohibit a facilitative approach.

While it may be possible to conduct facilitative conciliation, especially for conciliations under UNCITRAL Rules, modern understanding of investor-State conciliation has tended to gravitate towards the definition in the ICSID Convention and under public international law. In contrast, the modern understanding of investor-State mediation tends to be based on the facilitative mediation found in commercial practice, rather than international law's historic understanding of mediation as the facilitation of negotiations by a third State to achieve a peaceful settlement of inter-State disputes (Oppenheim 1926; Brownlie 2009).

Ng, David. "Investment Mediation." Discussion Paper for the ISDS Reform Conference, Hong Kong, February 2019: 30–34. http://isdsreform2019.aail.org/wp-content/uploads/2019/02/ISDS_Discussion_Paper_Investment_Mediation_by_David_Ng-1.pdf.

This discussion paper differentiates between evaluative mediation and facilitative mediation, before making the case for greater use of mediation in ISDS.

UN Commission on International Trade Law. **UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018**, U.N. Doc. A/73/17/Annex II, 2018. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

This Model Law demonstrates how UNCITRAL regards “conciliation” and “mediation” as interchangeable terms. Article 1(3) defines mediation as “a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (‘the mediator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.”

Parra, Antonio. *The History of ICSID*. 2nd ed. Oxford: Oxford University Press, 2017.

In this magisterial book, the author describes the ICSID Convention’s conciliation provisions in various working drafts, and the discussions on these provisions during different drafting stages. Parra demonstrates how the arbitration and conciliation provisions of the ICSID Convention and its Rules were considered and developed concurrently.

Salacuse, Jeswald W., *The Law of Investment Treaties*. 2nd ed. Oxford: Oxford University Press, 2015: 406–11.

This book defines conciliation and distinguishes it from mediation, arguing that conciliation is a rights-based, evaluative process, whereas mediation is an interest-based, facilitative process. It emphasizes that conciliation as currently practiced and generally conceived of by many lawyers is a limited form of mediation, contrasting the passive and restricted role played by Lord Wilberforce as conciliator in the *Tesoro* case with the highly engaged approach to mediation by Thomas Walde in the *Vattenfall v. Polskie Sieci Elektroenergetyczne* case.

Franck, Susan. “Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide.” *ICSID Review* 29, no. 1 (Winter 2014): 66–89.

This article provides basic information relating to mediation and its application in the investor-State context, including the distinction between evaluative mediation and facilitative mediation, and emphasizes the importance of choosing the right mediator(s) for a dispute.

Bottini, Gabriel, and Veronica Lavista. “Conciliation and Bilateral Investment Treaties.” In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*. Edited by Arthur Rovine, 358–77. Leiden: Martinus Nijhoff Publishers, 2010.

This work defines conciliation as a process in which a person or commission examines both the legal and factual aspects of a dispute and issues a non-binding report containing proposed terms of settlement. The authors also distinguish mediation as a less formal intervention by a third party who actively participates in the negotiations and may propose terms of settlement throughout the negotiation, but who generally does not issue a formal final report to conclude the process.

Brownlie, Ian. “The Peaceful Settlement of International Disputes.” *Chinese Journal of International Law* 8.2 (2009): 267–83.

This reproduction of a lecture given by Professor Brownlie provides a survey of different methods for the peaceful settlement of inter-State conflicts, including mediation and conciliation. The author defines mediation as the direct conduct of negotiations based on proposals made by the mediator, and cites Oppenheim’s definition of conciliation.

Franck, Susan. "Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in Investment Agreements." In *Appeals Mechanisms in International Investment Disputes*, edited by Paul Sauvant, 143–92. Oxford: Oxford University Press, 2008.

This book chapter discusses the differences between mediation and conciliation, and the author argues that both are facilitative processes, with the key distinction being the formality of the conciliation process. The author analyzes the ICSID Conciliation Rules and notes that they are not incompatible with a facilitative process, although they suggest that the Commission would take an evaluative approach.

Oppenheim, Lassa. *Oppenheim's International Law: A Treatise*. Vol. 2, *Disputes, War and Neutrality*. Edited by Arnold McNair. 4th ed. London: Longmans, Green, 1926: 13–15.

The first and only edition of Oppenheim's International Law edited by Lord McNair (with the assistance of Hersch Lauterpacht), this classic treatise defines conciliation and introduces a new section on conciliation to complement Oppenheim's original sections on arbitration, good offices and mediation. Because this edition can be particularly difficult to find, interested readers may wish to consult subsequent editions of *Oppenheim's International Law*, which contains a similar definition.

Conciliation and Mediation Rules and Procedures

Investor-State conciliation and mediation are less formal than arbitration, and their procedural rules are designed to be flexible and to facilitate a wide range of approaches to the amicable settlement of disputes. Mediation is the more flexible of the two procedures with fewer prescriptive rules. Two examples of procedural rules commonly found in conciliation (but not in mediation) are the requirements that (i) the parties make written submissions to the conciliator/conciliation commission and (ii) the conciliator makes recommendations to the parties, reflecting an almost semi-judicial (albeit, non-binding) role for the conciliators. However, other procedures in conciliation rules often resemble those in mediation, for example, requirements for registration of mediation or conciliation requests, appointment procedures and rules governing the independence and impartiality of mediators or conciliators, the duty of the parties to cooperate in good faith, and the ways to terminate proceedings. While investor-State conciliation and mediation may be conducted under many institutional rules, the most prominent are the ICSID Conciliation Rules and its Additional Facility Rules, the UNCITRAL Conciliation Rules, the PCA Optional Conciliation Rules and its Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment (both of which are based on the UNCITRAL Conciliation Rules), the International Chamber of Commerce (ICC) Mediation Rules, and the IBA Rules for Investor-State Mediation. The flexible nature of these procedural rules to accommodate investor-State disputes is evident from an instance of a mediation that was reportedly undertaken under both the ICC Mediation Rules and the IBA Rules for Investor-State Mediation.

UNCITRAL 2020 proposes a draft update to the UNCITRAL Conciliation Rules, which will be renamed as the UNCITRAL Mediation Rules, reflecting the interchangeable use of the terms conciliation and mediation in the UNCITRAL context. Kinnear 2020 describes the ICSID Secretariat's proposed amendments to its Rules, including an update of the ICSID Conciliation Rules, and the development of new ICSID Mediation Rules. Nitschke 2019 compares the existing ICSID Conciliation Rules with the existing ICSID Arbitration Rules, noting that the ICSID Conciliation Rules tend to have the most detailed procedure (such as provision for jurisdictional challenges to the conciliator) of all conciliation rules, reflecting its common origins with the ICSID Arbitration Rules. Sections of Schreuer, Malintoppi, Reinisch and Sinclair 2009, as well as Legum and Crevon 2019, provide commentary on the ICSID Convention's provisions on conciliation. UNCITRAL 1980, Hermann 1980 and Dore 1987 cover the UNCITRAL Conciliation Rules, while Joubin-Bret and Legum 2014 and Nitschke 2014 address the IBA Investor-State Mediation Rules.

UN Commission on International Trade Law. International commercial mediation: draft UNCITRAL Mediation Rules, U.N. Doc. A/CN.9/1026, 2020. <https://undocs.org/en/A/CN.9/1026>.

This is the proposed draft revision to the UNCITRAL Conciliation Rules, prepared by the UNCITRAL Secretariat. The draft is accompanied by the Secretariat's explanatory Note (U.N. Doc. A/CN.9/1027) and has been updated following a round of consultations with member States. The draft is intended to modernize the Conciliation Rules, and harmonize them with the recently adopted UNCITRAL Model Law on International Commercial Mediation and the Singapore Convention on Mediation.

Kinnear, Meg. "Alternative Dispute Resolution in Investment – The Role of Complementary Mechanisms and Approaches." *5th EFILA Annual Conference*, 30 January 2020. Video, 1:30:07. <https://youtu.be/IzD7m1LrEcY>.

In this video, the ICSID Secretary-General describes the history of investor-State Alternative Dispute Resolution and ICSID, and the differences between ICSID fact-finding, mediation, conciliation and arbitration. She then elaborates on the amendments proposed by the ICSID Secretariat to update the ICSID Conciliation Rules and create standalone Fact-finding Rules and new Mediation Rules.

Legum, Barton and Anna Crevon. "Conciliation." In *The ICSID Convention, Regulations and Rules: A Practical Commentary*, edited by Julien Fouret, Rémy Gerbay and Gloria M. Alvarez, 256–70. Cheltenham and Northampton: Edward Elgar Publishing, 2019.

This book chapter provides an article-by-article commentary on the ICSID Convention's provisions on conciliation, providing details on their drafting and illustrating how the articles work in practice using the limited information known about past ICSID conciliations.

Nitschke, Frauke. "The ICSID Conciliation Rules in Practice." In *Mediation in International Commercial and Investment Disputes*, edited by Catharine Titi and Katia Fach Gomez, 121–42. Oxford: Oxford University Press, 2019.

This chapter, authored by an ICSID Legal Counsel, reviews the drafting history of the ICSID Convention's conciliation provisions, summarizes the similarities and differences between the conciliation and arbitration rules, examines the ICSID conciliation cases to date, and concludes that the ICSID Conciliation Rules are more flexible than is commonly believed, and can be tailored to accommodate the need of the parties and the circumstances of the dispute.

Joubin-Bret, Anna and Barton Legum. "A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules." *ICSID Review* 29, no. 1 (Winter 2014): 17–24.

This article, by the co-chairs of the drafting committee behind the IBA Investor-State Mediation Rules, describes the rationale for the rules and the drafting process, provides a brief overview of the rules, and concludes with forward-looking thoughts. See also other articles in the same issue of ICSID Review.

Nitschke, Frauke. "The IBA's Investor-State Mediation Rules and the ICSID Dispute Settlement Framework." *ICSID Review* 29, no. 1 (Winter 2014): 112–32.

Compares the IBA Investor-State Mediation Rules with the ICSID Conciliation Rules, and explains that the ICSID Rules do not prevent the parties from seeking voluntary mediation under the IBA Mediation Rules before or during ICSID conciliation or arbitration.

Schreuer, Christoph H., Loretta Malintoppi, August Reinisch and Anthony Sinclair. *The ICSID Convention: A Commentary*. 2nd ed. Cambridge: Cambridge University Press, 2009. 431–53.

This book provides an authoritative, article-by-article commentary on the ICSID Convention, including the Convention's provisions on conciliation.

Dore, Isaak. *Arbitration and Conciliation Under the UNCITRAL Rules: A Textual Analysis*. Martinus Nijhoff: The Netherlands, 1987. 3–41.

This book compares the scope of application of the UNCITRAL Conciliation Rules and the UNCITRAL Arbitration Rules, and provides an article-by-article analysis of the Conciliation Rules, with many references to the *travaux préparatoires*.

Herrmann, Gerold. "Commentary on the UNCITRAL Conciliation Rules." *Yearbook Commercial Arbitration* 6 (1980): 170–90.

This article, prepared by a Legal Officer of the UNCITRAL Secretariat tasked with preparing the UNCITRAL Conciliation Rules, explains the concept and characteristics of the rules, and provides an article-by-article commentary on the rules.

UN Commission on International Trade Law. Report of the Secretary-General: Commentary on the Revised Draft UNCITRAL Conciliation Rules, U.N. Doc. A/CN.9/180, 1980.

This official commentary on the UNCITRAL Conciliation Rules is prepared by the UNCITRAL Secretariat.

Conciliation and Mediation in Practice

While there are few known cases of investor-State conciliation and mediation and relatively little information on the known cases, some practitioners, institutions and academics have sought to provide practical guidance on how users and counsel may engage in conciliation and mediation. It is often believed that conciliation and mediation are most fruitfully attempted as early as possible, before the dispute hardens and the relationship between the investor and the State breaks down irreparably. Some investment treaties encourage conciliation or mediation prior to the commencement of arbitration proceedings, as part of the “negotiations stage” or “cooling off period.” However, some authors have argued that conciliation and mediation may also be fruitful if conducted concurrently with the arbitration. Sources focusing on the latter option are discussed in a sub-section below.

Walde 2006 recounts his experience as a mediator and discusses potential considerations by the parties in deciding whether to attempt mediation before arbitration. Nurick and Schnably 1984 discuss their experience as outside counsel for the state in an ICSID conciliation, while Khalifa 2014 considers investor-State mediation from a state counsel’s perspective. Franck 2014 and Franck and Joubin-Bret 2014 provide a guide to the use of the IBA Investor-State Mediation Rules. Appel and Daly 2014 introduce the International Mediation Institute’s Competency Criteria for Investor-State Mediations, which is intended to help disputing parties find competent mediators. Leoveanu and Erac 2019 introduce the ICC Mediation Rules and briefly analyze two investor-State mediations the ICC has facilitated. Energy Charter Secretariat 2016 is a highly practical guide to investor-State mediation that can be mostly generalized, although it focuses on the mediation of disputes under the Energy Charter Treaty.

Leoveanu, Alina, and Andrija Erac. “ICC Mediation: Paving the Way Forward.” In *Mediation in International Commercial and Investment Disputes*, edited by Catharine Titi and Katia Fach Gomez, 81–100. Oxford: Oxford University Press, 2019.

While most of this chapter focuses on commercial mediation, it mentions two cases of investor-State mediation, including the ICC’s first mediation under a BIT. The chapter uses the two cases to provide short case studies of the challenges and the benefits of investor-State mediation. It also briefly covers the ICC Mediation Rules and provides advice on how to draft a mediation clause.

Appel, Mark and Conrad Daly. “Investor-State Mediation: Not Whether, Or Even When, But How.” *Global Pound Conference*, 17 November 2016. <https://www.imimmediation.org/2016/11/17/investor-state-mediation-not-whether-or-even-when-but-how/>.

This blog post explains the work of the International Mediation Institution’s Investor-State Taskforce to develop Competency Criteria for Investor-State Mediators, to help disputing parties identify competent mediators.

Energy Charter Secretariat. Guide on Investment Mediation. ECT Document CCDEC 2016 12, 2016. <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

This practical guide explains the mediation process under the Energy Charter Treaty and advises potential users on how to engage in investor-State mediation.

Franck, Susan. "Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide." *ICSID Review* 29, no. 1 (Winter 2014): 66–89.

This article is intended to serve as an introduction to investor-State mediation for disputing parties and their legal counsel, by explaining the evaluative and facilitative models of mediation, the way a mediation might proceed under the IBA Investor-State Mediation Rules, and the role that counsel can play in advising on mediation. It uses a companion simulation to illustrate the initial steps of a hypothetical investor-State mediation.

Franck, Susan, and Anna Joubin-Bret, "Investor-State Mediation: A Simulation." *ICSID Review* 29, no. 1 (Winter 2014): 90–111.

This simulation, which is intended to be a companion to the article above, describes a hypothetical investor-State dispute, the mediator appointment process, and the conduct of an initial mediation management conference (equivalent to the first procedural hearing of an arbitration).

Khalifa, Fatma. "Mediation use in ISDS." *Transnational Dispute Management* 11, no. 1 (January 2014).

This article discusses investor-State mediation from the personal perspective of a state counsel. The author defines and distinguishes mediation from other forms of dispute resolution, and discusses considerations arising at different stages of the mediation.

Walde, Thomas. "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" *Arbitration International* 22, no. 2 (June 2006): 205–32.

This article recounts the author's experience as a mediator in a dispute between the State-owned companies Vattenfall and Polskie Sieci Elektroenergetyczne. The author criticizes arbitration and other forms of alternative dispute resolution (ADR) that focus on legal rights because they destroy value, before explaining that interest-based mediation can create value and sustain relationships. He also discusses potential considerations by disputing parties in deciding whether to attempt mediation before arbitration.

Nurick, Lester, and Stephen Schnably. "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago." *ICSID Review* 1, no. 2 (Fall 1986): 340–53.

This article presents a detailed account of an investor-State conciliation proceeding, written by the outside counsel who represented the State in the dispute. The authors describe the conciliation procedure adopted, and note that it was relatively informal and inexpensive compared with arbitration.

Combined Arbitration and Conciliation or Mediation Procedures

While conciliation and mediation are traditionally considered as processes undertaken before arbitration (“Med-Arb”) or as alternatives to arbitration, they should also be considered as processes to be undertaken in combination with arbitration. Many possible combinations exist, each with its own potential merits and challenges, and not all will be discussed here. Ng 2019 summarizes several possible combinations, and discusses their merits and challenges.

“Arb-Med-Arb” is a process in which the disputing parties begin mediation during arbitration, and in the event of settlement can register their settlement agreement as an arbitration award by consent. Even if the disputing parties fail to reach settlement, they could use the mediation to resolve some of the issues in dispute, leaving the remainder to be resolved by arbitration, thereby narrowing the scope, cost and duration of the arbitration. Onwuamaegbu 2005 discusses how the President of the Tribunal in one ICSID case acted as mediator for a few months at the request of the parties, and achieved this result. Sim 2018 discusses the merits and challenges of combining arbitration with conciliation in an “Arb-Con-Arb” process, which would provide disputing parties with non-binding, independent opinions in advance of an award, providing opportunities for the parties to reach a compromise before the award is rendered.

Coe 2010 discusses a hybrid model of “Concurrent Med-Arb,” in which one or two mediators shadow the arbitration process, applying mediation techniques at various points in the arbitration to facilitate settlement.

“Arb-Med,” a process in which arbitration is followed by mediation, is not uncommonly used after an arbitral award is issued to negotiate the quantum and timing of payment, or negotiate other terms of settlement.

Ng, David. “Investment Mediation.” Discussion Paper for the ISDS Reform Conference, Hong Kong, February 2019: 30–34. http://isdsreform2019.aail.org/wp-content/uploads/2019/02/ISDS_Discussion_Paper_Investment_Mediation_by_David_Ng-1.pdf

This conference paper relies on earlier work by Eunice Chua to define the various models of combining arbitration with mediation, and discusses the challenges associated with such combinations, such as the use of disclosures in subsequent proceedings, and the risk of using the same third party neutral as both arbitrator and mediators.

Sim, Christine, “Conciliation of Investor-State Disputes, Arb-Con-Arb, and the Singapore Convention,” in “International Commercial Mediation,” ed. Joel Lee Tye Beng and Nadja Alexander, special issue, *Singapore Academy of Law Journal* 31 (August 2019): 670–712.

This article discusses how conciliation and arbitration can be structured to form complementary negotiation windows, and recommends that institutions handling investment disputes offer Arb-Con-Arb dispute settlement. The author advocates “Arb-Con-Arb” as a means to provide disputing parties with non-binding yet influential opinions on the merits in advance of an arbitral award, so that the parties can attempt to reach an amicable settlement through bargaining in the shadow of the law. An earlier version of this article may be accessed at <https://www.academia.edu/37052773>.

Coe, Jack. "Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress" In *Investor-State Disputes: Prevention and Alternative to Arbitration II*, edited by, Susan Franck and Anna Joubin-Bret, 43–48. New York: UN Conference on Trade and Development, 2011.

This conference paper discusses the author's proposal for concurrent mediation, a process in which one or two mediators shadow an arbitration, and the most important considerations in deciding whether to adopt this process. A subsequent chapter by the same author in Titi and Fachs Gomez 2019 (under *Primary Works*) fleshes out how concurrent mediation by two co-mediators could operate in practice.

Onwuamaegbu, Ucheora. "The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience." *News from ICSID* 22, no. 2 (Winter 2005): 12–14.

This short article by a then Senior Counsel at ICSID briefly discusses the conciliation and fact-finding mechanisms available at ICSID, as well as the possibility of introducing a mediation mechanism. The article also shares that "In one ICSID case, the President of the Tribunal at the request of the parties acted as mediator for a few months. The parties eventually agreed on some issues and asked the Tribunal to decide on the other issues."

Coe, Jack. "Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch." *UC Davis Journal of International Law & Policy* 12, no. 1 (Fall 2005): 7–46.

This seminal article is one of the key academic works responsible for reviving interest in conciliation and mediation in ISDS. The author discusses the merits and challenges associated with using conciliation and mediation (which he uses interchangeably), before discussing several possible models of combining these processes with arbitration.

Interplay between Dispute Prevention Policies and Conciliation and Mediation

Dispute prevention policies (DPPs) are established by States to manage investor conflicts or grievances, with the ultimate goal of preventing their escalation into formal disputes. DPPs can be important enablers for State participation in conciliation and mediation, by formally delegating authority, including budgetary authority, to a State entity that is authorized or empowered to represent the State in conciliations and mediations. States may also encourage the use of conciliation and mediation before arbitration through their DPPs and investment treaty drafting.

Joubin-Bret and Knorich 2010 is an early work discussing different types of DPPs, which include the following: State agencies designated to lead the response to investor-State disputes from negotiations at the outset of the dispute to arbitration (such as Peru's Special Commission established under its State System of Coordination and Defense in International Investment Disputes, described in Valderrama 2018); high-level inter-ministerial bodies to develop and coordinate measures to prevent and manage investment disputes, including by deciding whether to pursue conciliation and adopt a conciliation settlement agreement (such as the Colombia model, described in Constain 2013); investment ombudspersons that hear and attempt to resolve investors' grievances (such as the South Korean model, described in Shin 2011); and Systemic Investment Response Mechanisms implemented in partnership with the World Bank, which is based on a lead government agency collecting data on investor grievances and identifying patterns, and a high-level government body implementing reforms to address the systemic issues identified (see Echandi 2019).

Investment aftercare services by States' investment promotion agencies are generally not considered to be archetypical DPPs, in the absence of further legislative or policy measures empowering the investment promotion agency to coordinate an effective response to investor grievances, including by changing the conduct of other government actors. However, such investment aftercare services can fulfill important functions in providing early warning of grievances and informally attempting to resolve the grievance by engaging with the responsible State agencies.

Franck and Joubin-Bret 2011 provide examples of DPPs and place them in the broader context of dispute prevention and management, while Turque, Rey and Pallez 2018 survey DPPs in the Southern Mediterranean region. Energy Charter Conference 2018 presents a Model Instrument on Management of Investment Disputes, which is a useful model DPP for States interested in implementing DPPs, while Appel and Tirado 2020 explain the context and choices for this Model Instrument. Calamita 2019 discusses the role of disseminating information on investment treaty obligations within government in order to support dispute prevention strategies.

Appel, Mark, and Joseph Tirado. "Investor-State Mediation—New Tools for Policy Makers." *Transnational Dispute Management* (Advanced Publication, 2020). <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1806>

This article explains the issues addressed by the Energy Charter Conference's Model Instrument on Management of Investment Disputes and the Guide to Investment Mediation (see also Energy Charter 2016 under *Primary Works*).

Calamita, N. Jansen. "Investment Treaties and Governance Project Concept Paper: An Investment Treaty Handbook for APEC Economies." NUS Centre for International Law Working Paper 19/04, National University of Singapore, Singapore, May 2019. <https://cil.nus.edu.sg/publication/investment-treaties-and-governance-project-concept-paper/>.

This concept paper discusses the legal and governance challenges posed by investment treaties, the policy implications of those challenges, and the potential efficacy of educating government officials on investment treaty obligations in order to prevent investor-state disputes. It then elaborates on the considerations involved in designing a training handbook that governments and DPPs can develop as part of those educational efforts, based on the author's review of existing training material shared by APEC governments.

Echandi, Roberto, Ivan Anton Nimac and Dongwook Chun. "Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses: Summary of Research Findings and Policy Implications." World Bank Working Paper 144312, World Bank Group, Washington, D.C., January 2019. <https://documents.worldbank.org/en/publication/documents-reports/documentlist?repnb=144312>.

This executive summary of a 104-page working paper presents the concept, rationale and policy implications of the Systemic Investment Response Mechanism (SIRM) piloted by the World Bank in eight countries around the world. The SIRM comprises a lead agency that detects investor grievances and a higher-level governmental body that systematically addresses these grievances before they escalate.

Valderrama, Carlos Jose. "Peru—Best Practices for Confronting International Lawsuits Brought by Private Investors." *ICSID Review* 33, no. 1 (Winter 2018): 103–24. <https://doi.org/10.1093/icsidreview/six024>.

This article, which is available in Spanish and English, elaborates on Peru's experience with ISDS, including its State System of Coordination and Defense in International Investment Disputes, and shares best practices based on the author's personal experience as the head of Peru's Special Commission responsible for managing investor-State conflicts.

Energy Charter Conference. *Model Instrument on Management of Investment Disputes*, CCDEC2018 26, 2018. <https://www.energychartertreaty.org/model-instrument/>.

This model instrument was developed by the Energy Charter Secretariat in consultation with the fifty-five member governments of the Energy Charter Conference, and was ultimately adopted by the Energy Charter Conference. The model instrument is intended to help States implement a DPP that enables government officials to settle investment disputes through mediation.

Turque, Diana Ruiz, Marie-Estelle Rey, and Diane Pallez. *Stocktaking of Investment Dispute Management and Prevention in the Mediterranean Region*. Paris: OECD, 2018. <http://www.oecd.org/mena/competitiveness/BN-Stocktaking-of-Investment-Dispute-Cairo-062018.pdf>.

This background paper provides an overview of ISDS in the Southern Mediterranean region, an analysis of dispute prevention and management mechanisms in the region, and a précis of good practices and case studies of dispute prevention and management.

Constain, Silvia. *Investor-State Dispute Prevention Strategies: Selected Case Studies*. Washington, D.C.: USAID, 2013. https://www.apec.org/Groups/Committee-on-Trade-andInvestment/~/_media/Files/Groups/IEG/20130625_IEG-DisputePrevention.pdf.

The case studies in this handbook provide an overview of different dispute prevention policies and programs implemented by the governments of Chile, Colombia, Costa Rica, Mexico and Peru. These include formal laws and regulations, and more ad hoc measures, including early detection systems, training for government officials, design of institutional frameworks for optimal dispute prevention and management, and monitoring systems.

Franck, Susan, and Anna Joubin-Bret, eds. *Investor-State Disputes: Prevention and Alternative to Arbitration II*. New York: UN Conference on Trade and Development, 2011.

This conference report discusses the potential of dispute prevention policies, conciliation and mediation throughout the report, from definitions to examples of practice in Peru, Chile and South Korea, to avenues for further exploration.

Shin, Hi-Taek. "An Ombudsman as One Avenue Facilitating ADR and Socio-Cultural Factors Affecting ADR in Investment Treaty Dispute Resolution." In *Investor-State Disputes: Prevention and Alternative to Arbitration II*, edited by Susan Franck and Anna Joubin-Bret, 97–101. New York: UN Conference on Trade and Development, 2011.

This short commentary discusses South Korea's Office of the Foreign Investment Ombudsman (OIO), and explains why the OIO and mediation/conciliation and good offices tend to be preferred in South Korea due to socio-cultural factors, unless litigation has been filed and the dispute made public, in which case the respondent's need to save face or avoid public criticism results in protracted litigation.

Joubin-Bret, Anna, and Jan Knorich, eds. *Investor-State Disputes: Prevention and Alternative to Arbitration*. New York: UN Conference on Trade and Development, 2010: 65–99. <https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=422>.

This background paper discusses several different types of dispute prevention policies, which are well-illustrated with examples from Peru, Colombia and South Korea, and concludes with recommendations on dispute prevention and promotion of conciliation and mediation to States, investors, legal practitioners, arbitration institutions, and international organizations.

Enforcement of Settlement Agreements Arising from Investor-State Conciliation and Mediation

While there is a strong expectation that parties will voluntarily comply with settlement agreements arising from investor-State conciliation and mediation given the consensual nature of such agreements, this confidence is reinforced by the existence of a system of enforcement. Enforcement historically could be achieved by embodying the settlement agreement as an arbitral award by consent, or by pursuing the domestic law remedies of the State in which enforcement was sought. Article 14 of the 2002 UNCITRAL Model Law on International Commercial Conciliation merely provides for settlement agreements to be “binding and enforceable,” leaving it up to States to decide on the domestic rules for enforcement. This reflects the diversity of domestic approaches, with some States enforcing conciliated or mediated settlement agreements as contracts, while others providing for expedited enforcement procedures. The 2018 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) bridges that diversity, by providing an expedited enforcement regime for conciliated or mediated settlement agreements that resolve international “commercial” disputes, a term that is understood in the UNCITRAL context to include international investor-State disputes (Schnabel 2019). Nevertheless, the Singapore Convention on Mediation allows States to file an Article 8.1(a) reservation excluding settlement agreements to which the State or its agencies are a party, and/or an Article 8.1(b) reservation requiring the settlement agreement to have terms “opting in” to the applicability of the Singapore Convention on Mediation. Counsel wishing to rely on the Singapore Convention on Mediation would therefore be well-advised to ensure that the country against which enforcement is sought has ratified the Singapore Convention on Mediation, and to check whether it has filed applicable reservations (UN Office of Legal Affairs 2020).

Apter and Muchnik 2019 discuss the reservations in detail, while Appel 2018 suggests how States can use the reservations to strengthen investor-State mediation. Alexander and Chong 2019 provide a comprehensive commentary on the Singapore Convention on Mediation, while UNCITRAL 2020 presents the travaux préparatoires of the Convention. UNCITRAL 2018 presents the updated 2018 UNCITRAL Model Law on International Commercial Mediation, which amends Article 14 of the 2002 Model Law with a section providing for domestic implementation of the expedited enforcement regime found in the Singapore Convention.

United Nations Office of Legal Affairs. “Status of the United Nations Convention on International Settlement Agreements Resulting from Mediation.” United Nations Treaty Collection. Accessed July 17, 2020. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

This website is the most authoritative source on the status of ratifications of and reservations to the Singapore Convention on Mediation.

United Nations Commission on International Trade Law. “Travaux Préparatoires on the Convention.” Accessed July 17, 2020.

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/travaux.

This website provides a list of preparatory documents and a set of article-by-article references to relevant paragraphs of the UNCITRAL Reports of Working Group II covering the negotiation of the Singapore Convention.

Alexander, Nadja, and Shouyu Chong. *The Singapore Convention on Mediation: A Commentary. The Netherlands: Kluwer Law International, 2019.*

This is the first article-by-article commentary on the Singapore Convention on Mediation to be published. The authors explain that the default rule is that the Convention will apply to international mediation settlement agreements to which States or their governmental agencies are party, so long as the settlement agreement satisfies the requirements as to scope prescribed in Articles 1 and 2, and the State has not made a reservation under Article 8(1).

Schnabel, Timothy. "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements." *Pepperdine Dispute Resolution Law Journal* 19, no. 1 (2019): 1–60.

This article explains the key provisions of the Singapore Convention on Mediation based on the negotiating records and the author's experience as the U.S. delegate to the negotiations. It explains that the Convention applies to international mediation settlement agreements resolving "commercial" disputes, and the scope of the term "commercial" was intended to be read broadly, and could include at least some investor-State agreements, as long as they do not fall within the exclusions of settlement agreements enforceable as judgments or awards.

Apter, Itai, and Coral Henig Muchnik. "Reservations in the Singapore Convention—Helping to Make the 'New York Dream' Come True." In *Singapore Mediation Convention Reference Book*, edited by Harold Abramson, 1267–81. New York: Touro Law Center, 2019.

<https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1739&context=scholarlyworks>.

One of the authors of this chapter was a member of the Israeli delegation to the negotiations on the Singapore Convention on Mediation. The chapter discusses the rationale for the two reservations permissible under the Convention, explaining that they may help persuade States to ratify the Convention by providing flexibility to exclude government-related mediated settlements, especially because States may make reservations at any time according to Article 8(3) of the Convention.

Appel, Mark. "A Done Deal for States and Investors: The New UNCITRAL Convention on International Settlement Agreements Resulting from Mediation." *Journal of Enforcement of Arbitral Awards* 1, no. 2 (2018): 1–12.

This article examines the potential application of the Singapore Convention on Mediation to investor-State disputes, focusing on the two reservations allowed under the Convention. The author suggests that an Article 8(1)(a) reservation should not be used to exclude investor-State mediation settlement agreements, but to limit which agency or individual can speak for the State, and that an Article 8(1)(b) reservation can be used by State negotiators to offer finality and enforceability as a bargaining device.

UN Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*, 2018, U.N. Doc. A/73/17/Annex II, 2018. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

This Model Law amends the 2002 UNCITRAL Model Law on International Commercial Conciliation by replacing the word "conciliation" with "mediation" throughout the Model Law, and by including a section on enforcement of international settlement agreements that is consistent with the Singapore Convention on Mediation.

Empirical Studies

The following two sub-sections discuss the empirical studies that have been produced on investor-State conciliation and mediation to date.

Amicable Settlement of Disputes

Robust empirical studies on the amicable settlement of investor-State disputes are very difficult to undertake due to the confidential nature of many negotiations, conciliations, mediations and their outcomes. However, some scholars have attempted to study the known cases of investor-State disputes in the ICSID, Italaw and UNCTAD Investment Disputes Settlement Navigator databases that were settled or discontinued before an award was issued, using these cases to test the theoretical claims and beliefs of academics and practitioners.

Echandi 2013 uses dispute system design to provide a useful conceptual framework for thinking about investor-State conflicts, distinguishing between conflicts, which arise when parties express dissatisfaction or concern about measures or inaction by the other party, and disputes, which crystallize when the party submits a notice of intent to arbitrate. This conceptual framework makes clear the difficulty in studying the innumerable investor-State conflicts that were resolved amicably, some undoubtedly with third-party intervention, before they crystallized into disputes. Echandi and Kher 2014 use all the known cases registered with ICSID at the time to demonstrate that there is substantial settlement negotiation up to the period where a final award on the merits is rendered, and argue that the growing number of settlements at early stages of arbitral proceedings demonstrates the potential for mechanisms that help investors and States manage their conflicts before they escalate into arbitration. Hafner-Burton 2017 uses the ICSID cases filed and concluded before April 30, 2012, to raise transparency and legitimacy concerns about the secrecy of settlements. Ubilava 2020 uses a larger dataset of 541 cases, of which 133 were settled, to examine the validity of common criticisms of amicable settlement. Kessedjian et al. 2020 use several research methods to identify twenty-three cases in which conciliation/mediation was attempted, though the authors include caveats acknowledging that their findings are not conclusive due to the confidentiality of documents relating to conciliation and mediation.

Chew, Reed, and Thomas 2018 take a different approach, by surveying forty-seven experienced practitioners on what they consider to be the key challenges to settlement, in order to identify the key obstacles and create the foundation for future work on how to overcome them. A future study might expand on the survey by Chew, Reed, and Thomas 2018, with a more extensive survey of disputing parties (e.g. surveys conducted by the ICSID and PCA Secretariat of counsel representing both investors and governments focusing on the amicable settlement of disputes).

Kessedjian, Catherine, Anne van Aaken, Runar Lie, and Loukas Mistelis. "Mediation in Future Investor-State Dispute Settlement." Academic Forum on ISDS Concept Paper 2020/16, PluriCourts, Oslo, Norway, March 2020.

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>

This paper uses several research methods to find eleven cases in which conciliation or mediation was

attempted, on top of the twelve known ICSID Conciliation cases. The authors also preview the findings of the Queen Mary University of London survey of investors on ISDS reform, which finds that 30% of respondents “strongly favor” and 34% of respondents “somewhat favor” the introduction of a mandatory requirement to go through mediation before commencing arbitration proceedings.

Ubilava, Ana. “Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems.” *Journal of World Investment & Trade* 21, no. 4 (August 2020): 528–57. <https://doi-org.libproxy1.nus.edu.sg/10.1163/22119000-12340183>.

This article analyzes a data set of 541 ISDS cases that settled after arbitration was commenced, to respond to four common criticisms of amicable settlements in ISDS: whether disputes concerning certain industries are less likely to settle; whether settlements impede transparency; whether amicable settlements pay less compared to awards; and whether the non-enforceability of settlement agreements is a problem in practice.

Chew, Seraphina, Lucy Reed, and Christopher Thomas. “Report: Survey on Obstacles to Settlement of Investor-State Disputes.” NUS Centre for International Law Working Paper 18/01, National University of Singapore, Singapore, September 2018. <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-State-disputes/>.

This paper presents the results of a survey of ninety-seven experts working in the field of investment arbitration, forty-seven of whom responded. 62% of respondents had experience representing both investors and States. The respondents indicated that the most significant obstacles to amicable settlement of disputes, in order of importance, were the desire to defer responsibility for decision-making to a third-party, fear of public criticism or allegations of corruption, and difficulty coordinating multiple governmental stakeholders.

Hafner-Burton, Emilie Marie, Sergio Puig and David G Victor. “Against International Settlement? The Social Cost of Secrecy in International Adjudication.” *Yale Journal of International Law* 42, no. 2 (2017) 279–343. <https://digitalcommons.law.yale.edu/yjil/vol42/iss2/2>.

This article uses a data set of cases filed with ICSID and concluded before May 2012, to argue that transparency reforms until then were not leading to a decline in the secrecy of settlements. The article applies to ISDS previous scholarship debating transparency of settlements in national legal systems, presents three case studies of how some investors use secrecy and settlement, and proposes several reforms to achieve greater transparency.

Echandi, Roberto, and Priyanka Kher. “Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration.” *ICSID Review* 29, no. 1 (Winter 2014): 41–65.

This study finds that ninety-two cases, or 22% of the total arbitration proceedings registered with ICSID between 1970 and 2012, were settled as a result of an agreement between the parties, before an award on the merits was issued. The study finds that a significant (34%) and growing number of disputes are settling at the early stages of arbitral proceedings, and argues that this demonstrates the need for more conflict management processes.

Echandi, Roberto. “Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management.” In *Prospects in International Investment Law and Policy*, edited by Roberto Echandi and Pierre Sauve, 270–305. Cambridge: Cambridge University Press, 2013.

This book chapter sets out a conceptual framework for understanding investor-State conflicts, drawing a distinction between conflicts, which is a process of expressing disagreement or dissatisfaction, and disputes, which crystallize when the party submits a notice of intent to arbitrate. An earlier version of this chapter is available at

<https://pdfs.semanticscholar.org/012c/df959a91c6bb4a76be20a786937f7fa90f22.pdf>.

Treaty Provisions Referring to Conciliation and/or Mediation

There are relatively few conclusive empirical studies of investment treaties referring to conciliation and/or mediation, although some scholars have used UNCTAD's IIA Mapping Project to find that there are 627 out of 2577 mapped treaties, which is approximately 24%, that mention the possibility of voluntary ADR (e.g. "conciliation," "mediation" or "non-binding, third-party procedures"). Fan 2020 goes beyond this to provide a treaty survey of various types of mediation provisions, categorized by the type of treaty. Bottini and Lavista 2010 survey the treaty practice of the G-8 countries and Argentina and India on conciliation in IIAs. Kessedjian et al. 2020 take a data science approach by using machine learning to identify cooling off clauses in IIAs.

Fan, Kun. "Mediation of Investor-State Disputes: A Treaty Survey." *Journal of Dispute Resolution*, forthcoming. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549661.

This paper surveys various types of mediation and conciliation clauses in IIAs, ranging from cooling off clauses in Model BITs and older BITs to more recent IIAs that include detailed procedural rules on mediation.

Kessedjian, Catherine, Anne van Aaken, Runar Lie, and Loukas Mistelis. "Mediation in Future Investor-State Dispute Settlement." Academic Forum on ISDS Concept Paper 2020/16, PluriCourts, Oslo, Norway, March 2020.

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>.

The authors use machine learning on the World Trade Institute's EDIT database of IIAs to find that 2052 out of 2885 treaties surveyed, or 71%, contain cooling-off provisions, although only 3% expressly mention conciliation, and 1% mention mediation. It is unclear whether the 3% figure includes treaty provisions providing advance consent to conciliation.

Bottini, Gabriel, and Veronica Lavista. "Conciliation and Bilateral Investment Treaties." In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*. Edited by Arthur Rovine, 358–77. Leiden: Martinus Nijhoff Publishers, 2010.

This paper surveys the BITs of ten countries (the G-8 plus Argentina and India), finding numerous BITs providing advance consent to conciliation in the treaty practice of France, India (although it has since terminated many of these BITs), Italy, Japan, the United States and the United Kingdom.

Reforms to Promote the Use of Investor-State Conciliation and Mediation

Many reform proposals have been made to promote the use of investor-State conciliation and mediation, within the context of the UNCITRAL Working Group III discussions on ISDS reform, ICSID Rule Amendments, and elsewhere. While this section is unable to capture all the reform proposals that have been made, it attempts to include some of the most current reform proposals, which may be read with the subsequent sections highlighting academic work that could inform reform discussions.

UNCITRAL 2020 summarizes the reform proposals and submissions made by States, while Kessedjian et al 2020 and Cheng 2020 present suggestions in the context of the UNCITRAL Working Group III discussions. Cheng 2020 suggests that States consider adopting a Model Protocol on Investor-State Mediation. Kinnear 2020 addresses the proposed amendments to the ICSID Rules, which would create new voluntary ICSID Mediation Rules and Fact-Finding Rules, while updating the ICSID Conciliation Rules to make them more user-friendly. Because two of the principal obstacles to States practicing investor-State conciliation and mediation are the lack of practical guidance and the lack of legislation authorizing officials to negotiate on behalf of the State and coordinate the State's response to an investor-State claim, Dahlan and von Kumberg 2017 and Appel and Tirado 2020 explain the Energy Charter Secretariat's work to address these obstacles, including the development of a Practical Guide on Mediation and a Model Instrument on Management of Investment Disputes, ideas that merit further consideration and development. Salacuse 2007 and Coe 2009 discuss ways to amend treaty language to promote mediation, while von Kumberg, Lack, and Leathes 2014 present ten reform suggestions including the need for more practical guidance. The need to train and develop a pool of appropriate expert investor-State mediators is another common issue raised by many authors (Coe 2009, von Kumberg, Lack, and Leathes 2014, Welsh and Schneider 2014). Claxton 2020 and Welsh and Schneider 2013 consider different degrees of compulsoriness of mediation, and the arguments for and against this.

Cheng, Teresa. "The Search for Order within Chaos in the Evolution of ISDS." *ICSID Review* (May 2020): SIAA3. <https://doi-org.libproxy1.nus.edu.sg/10.1093/icsidreview/siaa003>.

This article is a republished version of a speech by the Secretary for Justice of Hong Kong to the Chartered Institute of Arbitrators, expressing her support for a standalone ISDS appellate mechanism, and the strengthening of investor-State mediation. The article introduces the comprehensive provisions for investor-State mediation in the Investment Agreement under the Closer Economic Partnership Arrangement concluded between China and Hong Kong, and suggests that this could be a model for other States to follow.

Claxton, James. "Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?" *Pepperdine Dispute Resolution Law Journal* 20, no. 1 (April 2020): 78–100. <https://digitalcommons.pepperdine.edu/drlj/vol20/iss1/4/>.

This paper discusses the merits and problems of compelling mediation in the investor-State context, and three different options for compelling mediation: financial incentives, mandatory instruction of disputing parties on mediation, and mandatory mediation (as a prerequisite to arbitration). The paper provides detailed mediation options that can be compelled by States, institutions and arbitrators, and concludes by suggesting measures that stakeholders may take to promote investor-State mediation.

Kessedjian, Catherine, Anne van Aaken, Runar Lie, and Loukas Mistelis. "Mediation in Future Investor-State Dispute Settlement." Academic Forum on ISDS Concept Paper 2020/16, PluriCourts, Oslo, Norway, March 2020.

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>.

This paper presents several ideas for future work by UNCITRAL's Working Group III: guidelines on framing the mediation to fit the specific needs of States; guidelines on framing the mediation to meet civil society's concerns; guidelines as to what happens with the documents and arguments used during the mediation; enforcement; links between mediation and third-party funding; a code of conduct for mediators; and costs allocation.

UN Commission on International Trade Law. *Dispute prevention and mitigation—Means of alternative dispute resolution*, U.N. Doc. A/CN.9/WG.III/WP.190, 2020.

<https://undocs.org/en/A/CN.9/WG.III/WP.190>.

This working paper summarizes the proposals and submissions by member States relating to mediation, conciliation and other means of dispute prevention, discusses existing frameworks and current initiatives, and presents possible reform options for consideration by UNCITRAL Working Group III.

Appel, Mark, and Joseph Tirado. "Investor-State Mediation—New Tools for Policy Makers." *Transnational Dispute Management (Advanced Publication, 2020)*.

<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1806>.

This article elaborates on the Energy Charter Conference's Model Instrument on Management of Investment Disputes and its Guide to Investment Mediation.

Kinnear, Meg. "Alternative Dispute Resolution in Investment—The Role of Complementary Mechanisms and Approaches." *5th EFILA Annual Conference*, January 30, 2020. Video, 1:30:07.

<https://youtu.be/IZD7m1LrEcY>.

In this video of a keynote address, the Secretary-General of ICSID describes the amendments proposed by the ICSID Secretariat to update the ICSID Conciliation Rules and create standalone Fact-finding Rules and new Mediation Rules.

Dahlan, M. R., and Wolf von Kumberg. "Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation." *Pepperdine Dispute Resolution Law Journal* 17, no. 2 (October 2017): 233–66. <https://digitalcommons.pepperdine.edu/drlj/vol17/iss2/3/>.

This article argues that ISDS reform should be achieved by strengthening the use of mediation to regulate the process of ISDS, discusses the need for establishing standards for investor-State mediators, and explains the work of the Energy Charter Treaty Secretariat on facilitating investor-State mediation.

von Kumberg, Wolf., Jeremy Lack, and Michal Leathes. "Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come." *ICSID Review* 29, no. 1 (Winter 2014): 133–41.

This article presents ten suggestions for reform that can increase the use of mediation in ISDS, such as: offering practical guidelines like a Mediation Manual; providing model checklists, documents and tools to assist the parties' participation in mediation; and providing flexible standards for process design, language issues and representation.

Welsh, Nancy, and Andrea Kupfer Schneider. "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration." *Harvard Negotiation Law Review* 18 (Spring 2013): 71–144. <https://www.hnlr.org/wp-content/uploads/sites/22/2013/12/18HarvNegotLRev71-Welsh-Schneider.pdf>.

This article applies dispute system design principles and procedural justice research and theories to recommend a "default" model of mediation that begins in a facilitative manner but also permits evaluations of legal positions. It also recommends a less intrusive form of "compulsory" mediation, in which dispute resolution clauses require the parties to participate in an initial meeting or mediation session, but give parties the choice of proceeding with mediation.

Coe, Jack J. "Should Mediation of Investment Disputes be Encouraged, and if so, by Whom and How?" In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*, edited by Arthur W. Rovine, 339–57. Leiden: Martinus Nijhoff Publishers, 2010.

This article discusses the merits of investor-State mediation and the obstacles to its use, before recommending the following reform measures to promote mediation: amending treaty language; adopting policies and measures encouraging mediation; and having institutions promote mediation and train appropriate mediators.

Salacuse, Jeswald W. "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution." *Fordham International Law Journal* 31, no. 1 (2007): 138–85.

This article proposes several ways of strengthening ADR in ISDS, notably model treaty language that would encourage the use of ADR, and an exchange of letters that the phrase "negotiations and consultations" in cooling-off clauses be interpreted to include the use of ADR techniques.

Potential Advantages of Conciliation and Mediation over Arbitration

Most authors agree on the following potential advantages that parties can enjoy through conciliation and mediation rather than through arbitration. Saving the time and expense of engaging in arbitration proceedings are two interrelated practical considerations (Joubin-Bret and Knorich 2010, Sussman 2010, Reinisch 2017, Walde 2006). Nurick and Schnably 1985 and Titi 2019 provide cost figures for ICSID conciliation that are less than 20% of the cost of ICSID arbitration, without factoring in legal fees. Another key reason for parties engaging in conciliation or mediation is to preserve their relationship, which is especially important in long-term projects or when the investor has multiple projects in the State (Titi 2019, Reinisch 2017, Walde 2006, and Sim 2018). Conciliation and mediation also give the parties more control and flexibility to tailor the right procedure and decide on the outcome (Joubin-Bret and Knorich 2010 and Sussman 2010). In particular, conciliation and mediation allow the parties to reach creative settlements that take into account the interests of the parties (Joubin-Bret and Knorich 2010, Sussman 2010) and reflect an optimal economic and political bargain (Sim 2018). Conciliation and mediation enable the parties to keep the proceedings and/or the outcome confidential to the extent that they desire (Reinisch 2017), and such confidentiality may be critical during the proceedings to ensure a successful outcome, although the parties could later agree to publish details (see Nurick and Schnably 1985, in which the parties agreed on a joint press statement at the conclusion of proceedings). Conciliation and mediation could also help the parties prevent the establishment of an undesirable precedent (Joubin-Bret and Knorich 2010) or enable an investors to seek redress in situations in which they might not want to bring an arbitration claim (Walde 2006). Sussman 2010 discusses the advantages of having a facilitative mediator over direct negotiations, while Sim 2018 discusses the advantages of engaging in conciliation or evaluative mediation, such as the provision of a neutral expert opinion that could legitimize a settlement or help parties reach agreement on the quantum of damages.

Titi, Catharine. "Mediation and the Settlement of International Disputes: Between Utopia and Realism." In *Mediation in International Commercial and Investment Disputes*, edited by Catharine Titi and Katia Fach Gomez, 121–42. Oxford: Oxford University Press, 2019.

This book chapter lists the advantages of mediation as follows: it ensures that parties have control over the outcome; it can preserve their business relationship; and it is cheaper and faster than arbitration. The chapter provides a useful comparison of costs, noting that the average institutional costs of ICSID conciliation proceedings is USD 182,000 (including conciliator fees, but excluding the legal fees of the parties), less than 20% of estimated tribunal costs in arbitration.

Sim, Christine, "Conciliation of Investor-State Disputes, Arb-Con-Arb, and the Singapore Convention," in "International Commercial Mediation," ed. Joel Lee Tye Beng and Nadja Alexander, special issue, *Singapore Academy of Law Journal* 31 (August 2019): 670–712.

This article states that conciliation has the following advantages: preserving relationships; accommodating diverse players and interests; providing a well-respected and neutral expert opinion that gives parties a basis to legitimize a settlement agreement and to agree on the quantum of damages; and enabling the parties to reach a creative settlement that better reflects an optimal economic and political bargain. An earlier version of this article may be accessed at <https://www.academia.edu/37052773>.

Reinisch, August. "Elements of Conciliation in Dispute Settlement Procedures." In *Conciliation in International Law*, edited by Christian Tomuschat, Riccardo Pisillo Mazzeschi, Daniel Thuürer, 116–32. Brill: Leiden, 2017.

In this chapter, the author identifies conciliation-like features in WTO dispute resolution and investor-State dispute resolution. The chapter also discusses the advantages and disadvantages of conciliation (at pp. 127–31), with the advantages including the maintenance of future relations, avoiding the time and cost of arbitration, achieving a more efficient outcome due to greater degrees of voluntary compliance, and enabling the parties to keep the proceedings and/or outcomes confidential.

Joubin-Bret, Anna, and Jan Knorich, eds. *Investor-State Disputes: Prevention and Alternative to Arbitration*. New York: UN Conference on Trade and Development, 2010: 31–40.

<https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=422>.

This paper includes a section discussing the advantages and challenges in applying alternative approaches to ISDS. Advantages include flexibility to tailor procedures and craft creative outcomes, the possibility of saving time and expense, the "without prejudice" nature of conciliation and mediation, and avoidance of arbitral awards setting undesired precedents.

Sussman, Edna. "Investor State Dispute Mediation: The Benefits and Obstacles, Contemporary Issues in International Arbitration and Mediation." In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*, edited by Arthur W. Rovine, 323–38. Leiden: Martinus Nijhoff Publishers, 2010.

This book chapter discusses the benefits of mediation over arbitration, such as saving time and costs, streamlining issues, and allowing the parties to control the results, ensure confidentiality during the proceedings, explore creative solutions and maintain relationships. The chapter also explores mediation's benefits over direct negotiations, such as the mediator's ability to design a customized, effective process, listen to the parties' grievances, help the parties explore underlying interests, and identify and overcome impediments to settlement.

Walde, Thomas. "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation" *Arbitration International* 22, no. 2 (June 2006): 205–32.

This article presents an extensive critique of arbitration and other forms of ADR that focuses on legal rights as value-destroying, before explaining that interest-based mediation may create value and sustain relationships. He also discusses potential considerations by disputing parties in deciding whether to attempt mediation before arbitration.

Nurick, Lester, and Stephen Schnably. "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago." *ICSID Review* 1, no. 2 (Fall 1986): 340–53.

Based on their experience as external counsel for a State in an early conciliation, the authors conclude that the advantages of conciliation compared to arbitration are the former's relative inexpensiveness and informality. Their total administrative cost, including the fees of the sole conciliator, was less than USD 11,000 (in 1985).

Potential Obstacles to Conciliation and Mediation and How to Overcome Them

Scholars and practitioners agree that there are significant obstacles to the successful use of conciliation and mediation to help disputing parties reach settlement. However, there is less consensus in identifying the most significant obstacles. Sussman 2010 is a good introductory article that lists a number of possible obstacles.

Legum 2006 argues that the most significant obstacles arise from the structure of the State, when multiple agencies are involved in a dispute and lack budgetary and legislative authorisation to settle a dispute. The difficulty in coordinating multiple governmental stakeholders with different interests to reach a settlement is underscored by Ng 2019 and Leoveanu and Erac 2019, who describe an ICC ISDS mediation in which it was difficult to identify and engage relevant government officials. States could address these issues by setting up or designating a lead agency and providing it with legislative and budgetary authority to settle disputes. See also the *Interplay between Dispute Prevention Policies and Conciliation and Mediation* section. However, Clodfelter 2010 argues that the public nature of the State and measures at issue are obstacles that can go beyond issues concerning lines of authority and budget limitations, underscoring that there will be cases involving regulations that States will not settle.

Schwebel 2007 argues that disputing parties will prefer arbitration over mediation and conciliation, because arbitration allows the parties to avoid responsibility for a settlement and shift the blame of unfavorable outcomes to the tribunal, a point that is reinforced by Allee and Huth 2006 based on their study of negotiations over territorial disputes and Salacuse 2007. Salacuse 2007 recounts the Egyptian Pyramids case (*SPP v. Egypt*), in which the Egyptian Prime Minister was offered a settlement, but refused the offer because he did not want to open himself to attack from the press or political opponents.

Welsh and Schneider 2013 suggest that one obstacle might be lawyers' unwillingness to give up control over the conduct of the dispute, but note that lawyers are playing a central role in court-connected mediation within States.

Salacuse 2007 describes different barriers to negotiated settlements and explains how mediators could help parties address these.

Chew, Reed, and Thomas 2018 describe the results of a survey of experts, who find that the most significant obstacles to settlement are the desire to defer responsibility for decision-making to a third party, fear of public criticism or allegations of corruption, and difficulty in coordinating multiple governmental stakeholders.

Sussman, Edna. "Investor State Dispute Mediation: The Benefits and Obstacles, Contemporary Issues in International Arbitration and Mediation." In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*, edited by Arthur W. Rovine, 323–38. Leiden: Martinus Nijhoff Publishers, 2010.

This book chapter lists the following obstacles that are unique to the mediated settlement of investment disputes: infringement on sovereignty; uncertainty as to the merits; the involvement of multiple agencies in the dispute; difficulty identifying all of the necessary participants in the mediation; budgetary constraints; need for legislation to resolve the dispute; preference for shifting responsibility to a tribunal; time and expense; failure of previous negotiations; reconciling calls for transparency with the need for confidentiality; enforcement difficulties; fear of bad publicity or precedent; and State representatives' lacking personal stakes in the outcome.

Chew, Seraphina, Lucy Reed, and Christopher Thomas. "Report: Survey on Obstacles to Settlement of Investor-State Disputes." NUS Centre for International Law Working Paper 18/01, National University of Singapore, Singapore, September 2018. <https://cil.nus.edu.sg/publication/survey-on-obstacles-to-settlement-of-investor-State-disputes/>.

This paper presents the result of a survey of experts working in the field of investment arbitration, the majority of whom had experience representing both investors and States. The respondents indicated that the most significant obstacles to amicable settlement of disputes, in order of importance, were the desire to defer responsibility for decision-making to a third-party, fear of public criticism or allegations of corruption, and difficulty in coordinating multiple governmental stakeholders.

Leoveanu, Alina, and Andrija Erac. "ICC Mediation: Paving the Way Forward." In *Mediation in International Commercial and Investment Disputes*, edited by Catharine Titi and Katia Fach Gomez, 81–100. Oxford: Oxford University Press, 2019.

This book chapter describes two cases of investor-State mediation administered by the ICC, and the obstacles faced in the first ICC Mediation under a BIT. These obstacles included ensuring the government's participation, and a change of administration after a general election, which ultimately prevented the parties from reaching an agreement. Nevertheless, the parties only spent USD 40,000 on administrative costs and the mediator's fees and expenses, for an amount in dispute of around USD 2.5 million.

Ng, David. "Investment Mediation." Discussion Paper for the ISDS Reform Conference, Hong Kong, February 2019: 15–21. http://isdsreform2019.aail.org/wp-content/uploads/2019/02/ISDS_Discussion_Paper_Investment_Mediation_by_David_Ng-1.pdf

This discussion paper includes a section summarizing two sets of obstacles to the greater use of mediation in ISDS, grouping them under the two headers of institutional and political factors, and insufficient understanding and experience of investment mediation.

Welsh, Nancy, and Andrea Kupfer Schneider. "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration." *Harvard Negotiation Law Review* 18 (Spring 2013): 71–144. <https://www.hnlr.org/wp-content/uploads/sites/22/2013/12/18HarvNegotLRev71-Welsh-Schneider.pdf>.

This article sets out four critiques of mediation in ISDS, together with countervailing factors and possible solutions. First, some perceive mediation as unnecessary or a threat to arbitration. Second, some argue that the entire ISDS regime would have to be restructured to add mediation, including the renegotiation of hundreds of BITs and revision of rules and procedures. Third, the public nature of ISDS disputes makes settlements more difficult to conclude and sell to constituents. Fourth, lawyers may be afraid of losing some professional autonomy to their instructing parties.

Clodfelter, Mark A. "Why Aren't More Investor-State Treaty Disputes Settled Amicably?" In *Investor-State Disputes: Prevention and Alternative to Arbitration II*, edited by Susan Franck and Anna Joubin-Bret, 38–42. New York: UN Conference on Trade and Development, 2011.

This contribution to an edited volume argues that two of the most fundamental barriers to settlement are: the public nature of the respondent and the measures at issue, which goes beyond cautious employees, lines of authority and budget limitations; and the inability of the parties to assess the merits of their respective cases due to uncertainties in the governing principles applicable to ISDS.

Schwebel, Stephen M. "Is Mediation of Foreign Investment Disputes Plausible?" *ICSID Review* 22, no. 2 (Fall 2007): 237–41.

In this article, the author discusses his experience with mediation and contrasts it with Thomas Walde's. The article elaborates on the disadvantages of mediation and conciliation, and concludes that both investors and States prefer arbitration because it allows blame shifting to the tribunal.

Salacuse, Jeswald W. "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution." *Fordham International Law Journal* 31, no. 1 (2007): 138–85.

This article identifies different barriers to negotiated settlements, and explains how mediators can help parties overcome these process through providing productive processes, improving communications between the parties, and suggesting substantive settlement proposals. The barriers include: strategic barriers, such as the drive to achieve short-term gains, and not disclose interests or information that could be exploited by the other side; psychological barriers; and structural barriers, such as the political limitations constraining negotiators and governments, and bureaucratic obstacles to agreement within an organization.

Allee, Todd L., and Paul K. Huth. "Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover." *American Political Science Review* 100, no. 2 (May 2006): 219–34.

This article analyzes nearly 1,500 rounds of talks concerning territorial disputes between States, and argues that political leaders who anticipate significant domestic political costs if they make voluntary, negotiated concessions are likely to seek the "political cover" of an international legal ruling. In such cases, it will be easier for leaders to justify concessions if they are required by an international court or arbitration body.

Legum, Barton. "The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Towards a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch'." *Mealey's International Arbitration Reports* 21, no. 4 (April 2006): 72–4.

This short comment discusses the challenges associated with mediation and conciliation in the ISDS context, and argues that conciliation is most promising when the dispute involves a single government ministry, as the State would face less information and coordination challenges.

Dispute System Design and Conciliation and Mediation

Franck and Joubin-Bret 2011 define dispute system design (DSD) as the systematic process of creating a dispute resolution system that harnesses the positive aspects of conflict or at least minimizes the negative aspect. It is not a dispute resolution methodology, but involves the intentional and systematic creation of an effective, efficient and fair dispute resolution process based on the unique needs of a particular system. The objective of DSD is to design better dispute resolution systems by (1) analyzing the parties' patterns of dispute to diagnose the current system, (2) designing methods to manage conflict more effectively with practical principles, (3) approving and implementing the design architecture, and (4) testing and evaluating the new design to make appropriate revisions prior to disseminating the process to the rest of the system. Franck 2008 is based on the first academic application of DSD to ISDS, exploring why arbitration has emerged as the preferred method for resolving investment disputes, and notes that policymakers wanting to provide for mediation will have to address structural questions on whether mediation should be mandatory, and whether it can occur independently or concurrently with arbitration, as well as procedural questions such as the process of selecting mediators and the rules regarding confidentiality and transparency. Echandi 2013 uses DSD to draw a conceptual distinction between conflicts, which arise when parties disagree, and disputes, which crystallize when a party submits a notice of intent to arbitration, and argues that more should be done to resolve conflicts before they escalate. Franck and Joubin-Bret 2011 contains two contributions that apply DSD to explore how mediation can be used to resolve investor-State disputes. Bingham 2011 suggests DSD needs to balance six fundamental, and sometimes competing values: transparency, accountability, participation, collaboration, efficiency and effectiveness. Bingham 2011 further argues that facilitated ADR such as mediation and conciliation should be attempted as early as possible to resolve conflicts and disputes, since research suggests that the sooner ADR is implemented, the sooner the dispute is resolved. Schneider 2011 suggests that there are six key elements to measure in assessing how facilitative ADR can be brought into investment treaties: participation, suitability, accountability, fluidity, sustainability, and permeability. Following the creation of the new system, additional criteria can be used to evaluate success: transaction costs, party satisfaction, effect on relationships, and the recurrence of disputes. Welsh and Schneider 2013 rely on DSD and procedural justice research to argue that parties should be required to attend an informational meeting on mediation, so that they can make an informed decision on whether to engage in mediation.

Echandi, Roberto. "Complementing Investor–State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management." In *Prospects in International Investment Law and Policy*, edited by Roberto Echandi and Pierre Sauve, 270–305. Cambridge: Cambridge University Press, 2013.

This book chapter sets out a conceptual framework for understanding investor-State conflicts, relying on dispute system design and conflict theory to make a distinction between conflicts, which is a process of expressing disagreement or dissatisfaction, and disputes, which crystallize when the party submits a notice of intent to arbitrate. The author then makes a further distinction between conflict management and dispute resolution, and explores the concept of investor-State conflict management systems. An earlier version of this chapter is available at

<https://pdfs.semanticscholar.org/012c/df959a91c6bb4a76be20a786937f7fa90f22.pdf>.

Welsh, Nancy, and Andrea Kupfer Schneider. "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration." *Harvard Negotiation Law Review* 18 (Spring 2013): 71–144.

This article describes DSD and procedural justice research, and the US experience with court-connected mediation, and recommends mandating parties' participation in an initial meeting to learn about mediation and other ADR options, so that the parties can decide whether to use them.

Franck, Susan, and Anna Joubin-Bret, eds. *Investor-State Disputes: Prevention and Alternative to Arbitration II*. New York: UN Conference on Trade and Development, 2011.

https://unctad.org/en/Docs/webdiaeia20108_en.pdf.

This conference proceedings includes a summary of DSD contributions (pp. 3–4), including two contributions applying DSD to the inclusion of mediation in ISDS (Bingham, pp. 27–33; Schneider, pp. 93–96), before concluding with a contribution (Franck and Ratigan, pp. 125–34) analyzing how prevention and ADR processes could be used at each stage of an investor-State disagreement to resolve the disagreement.

Franck, Susan. "Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in Investment Agreements." In *Appeals Mechanisms in International Investment Disputes*, edited by Paul Sauvant, 143–92. Oxford: Oxford University Press, 2008.

This book chapter explores why arbitration has emerged as the preferred method for resolving investment disputes, and then discusses six broad categories of ADR alternatives and their challenges: preventative options such as ombudspersons and negotiated rulemaking processes; negotiated ADR including direct and indirect negotiations such as inter-governmental diplomacy; facilitated ADR such as mediation and conciliation; fact-finding; advisory ADR such as early neutral evaluations and mini-trials; and imposed ADR such as arbitration, courts and mixed claims commissions.