

Conciliation and Mediation in Investor-State Dispute Settlement
Provisions:
A Quantitative and Qualitative Analysis

Romesh Weeramantry
Brian Chang
Joel Sherard-Chow

October 2021

ABSTRACT

The article sets out the results of an extensive review of conciliation and/or mediation in investor-State dispute settlement (ISDS) provisions contained in international investment agreements (IIAs). Out of 3815 IIAs that were initially screened, 2674 (i.e. 70%) do not refer to such provisions. The research also revealed the number of IIAs signed each year with investor-State *conciliation* provisions have significantly decreased and, in contrast, IIAs signed with investor-State *mediation* provisions are on the increase. The screening found 1125 IIAs that contain investor-State *conciliation* provisions, of which 806 (i.e. 71.6%) provide advance consent to conciliation. In comparison, of the 53 IIAs found with investor-State *mediation* provisions, only 7 (i.e. 13.2%) offer advance consent to mediation. Advance consent to “conciliation or arbitration” was identified in 703 IIAs. The authors outline arguments to show that the disjunctive “or” in these provisions does not give rise to a fork-in-the-road that precludes a right to arbitration if the investor first initiates conciliation proceedings. Only 7 IIAs were found to require conciliation and/or mediation as a mandatory pre-condition to arbitration. The article concludes with recommendations to increase the use of investor-State conciliation and mediation provisions in future IIAs and also to improve the quality of those provisions.

The dataset on which this article is based has been published on the NUS Centre for International Law’s website at: <https://cil.nus.edu.sg/publication/dataset-on-investor-state-conciliation-and-mediation-provisions-15april2021/>

ABOUT THE CIL PROJECT ON CONCILIATION AND MEDIATION

Since 2016, the CIL Project on Investor-State Conciliation & Mediation has been focused on the use of conciliation & mediation to settle investment disputes. To date, 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)
5. ‘Bibliography on Investor-State Conciliation and Mediation’ (2021) (a shorter version of which is published in Oxford Bibliographies in International Law)

These works can be downloaded at <https://cil.nus.edu.sg/publications>.

The current objectives of the Project are to study how to overcome the obstacles to settlement identified in the 2018 Survey, how to promote the use of conciliation and mediation to resolve investor-State disputes, how to assist parties to settle their disputes amicably and thereby to reduce the need to engage in costly and prolonged arbitration procedures.

Table of Contents

Introduction	4
Part I: Methodology	8
Part II: Differences between Conciliation and Mediation	12
Part III: Conciliation and Mediation Provisions Over Time	16
Part IV: Categories of Conciliation and Mediation Provisions	23
Part V: Interpreting “Arbitration or Conciliation” Provisions or Unqualified Submissions to ICSID Jurisdiction	43
Part VI: Conclusions and Recommendations	48

This Working Paper may be downloaded at <https://cil.nus.edu.sg/publications>.

The views expressed in the paper are those of the authors of the paper. They do not necessarily represent or reflect the views of the National University of Singapore or the Centre for International Law.

Citation of this electronic publication should be made in the following manner:

Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, ‘Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis,’ NUS Centre for International Law Project on Investor-State Conciliation and Mediation Working Paper 21/02 (October 2021)
<https://cil.nus.edu.sg/publication/Conciliation_and_Mediation_in_ISDS_Provisions/> accessed DD Month YYYY.

© Copyright is held by the author or authors of each working paper. No part of this paper may be republished, reprinted, or reproduced in any format without the permission of the paper’s author or authors.

“Adjudication may be particularly appropriate to settle disputes arising out of actions putting an end to the investor/host country relationship. But the same is not necessarily true of disputes arising in the context of a long-term relationship which both parties wish to continue. The parties may be at odds concerning the interpretation of their mutual rights and obligations or one of them may ask for adaptation of terms or a more far-reaching renegotiation. In such cases conciliation, at least as a first step, would seem advisable. It has been surprising to me how seldom investment agreements contain provisions for conciliation.”

Aron Broches¹

Introduction

1. In 1958 Eugene R. Black, then the President of the International Bank for Reconstruction and Development (IBRD), acted as a conciliator in a controversy between the City of Tokyo and French bondholders. He formulated a settlement plan that resolved the dispute.² In that same year, William Iliff, a Vice President of the IBRD, mediated a dispute between the Egyptian government and shareholders of the Suez Canal Company. Ultimately, with the intervention of Mr. Black, this second matter also settled.³
2. Aron Broches highlighted the broader significance of these two positive dispute resolution experiences in an interview for the World Bank’s Oral History Program. He recalled that they “rang the bells that started [him] thinking about ICSID.”⁴ Two key inspirations behind the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) were therefore the conciliation by Mr. Black and the mediation by Mr. Iliff.
3. In this context, it is unsurprising that the drafters of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) envisaged that arbitration and conciliation would be available on an equal

¹ Aron Broches, ‘Settlement of Disputes Arising Out of Investment in Developing Countries’ (1983) 11 Intl Business Lawyer 206. Broches’ reference to “investment agreements” was to investor-State contracts rather than investment treaties.

² The IBRD is one of the world’s largest development banks. It forms part of the World Bank Group.

³ Antonio Parra, “Black’s Bank” and the Settlement of Investment Disputes’ in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 153-154. See also ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of International Disputes between States and Nationals of Other States, Vol. 2 Part 1* (ICSID 1968) 7 para 5.

⁴ *ibid* 152, citing World Bank Oral History Program, Interview with Aron Broches (Washington, D.C., 18 April 1984) 29.

footing.⁵ However, the record to date shows that arbitration has proven to be far more popular, with ICSID registering 790 arbitrations since 1966 compared with 13 conciliation proceedings.⁶

4. Nonetheless, arbitration's ascent has drawn attention to the considerable cost and time associated with this adversarial dispute resolution process, which in turn has given rise to interest in investor-State dispute settlement (ISDS) conciliation and mediation as more consensual, economical and faster alternatives. This renewed interest is reflected in the development of conciliation or mediation instruments, including the IBA Rules on Investor-State Mediation,⁷ the International Mediation Institute's Competency Criteria for Investor-State Mediators,⁸ and the Energy Charter Secretariat's Guide on Investment Mediation,⁹ as well as its Model Instrument on the Management of Investment Disputes.¹⁰ Additionally, ICSID is updating its conciliation rules and formulating mediation rules,¹¹ the UN Commission for International Trade Law (UNCITRAL) has adopted a set of Mediation Rules in 2021,¹² and UNCITRAL Working Group III is considering the role of conciliation and mediation in its current examination of ISDS reforms.¹³

⁵ See Frauke Nitschke, 'The ICSID Conciliation Rules in Practice' in Catharine Titi and Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 123.

⁶ ICSID, 'The ICSID Caseload - Statistics (Issue 2021-1)' (ICSID 2021) 9.

⁷ International Bar Association (IBA), 'IBA Rules for Investor-State Mediation' (2014) 29 ICSID Rev-FILJ 1-16. For more information on these rules, see the Special Issue of ICSID Review (Vol. 29 Issue 1) focused on the IBA Rules on Investor-State Mediation.

⁸ International Mediation Institute, 'IMI Introduces Competency Criteria for Investor-State Mediators' (19 September 2016) <<https://imimediation.org/2016/09/19/imi-introduces-competency-criteria-investor-state-mediators/>> accessed 3 February 2021.

⁹ Energy Charter Secretariat, 'Adoption by correspondence of the Guide on Investment Mediation' (19 July 2016) <<https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>> accessed 3 February 2021.

¹⁰ Energy Charter Secretariat, 'Model Instrument on the Management of Investment Disputes' (23 December 2018) <<https://www.energychartertreaty.org/model-instrument/>> accessed 3 February 2021.

¹¹ ICSID Secretariat, 'ICSID Mediation Rules' <https://icsid.worldbank.org/sites/default/files/publications/WP.Mediation_Rules.pdf> accessed 19 July 2021. See also ICSID Secretariat, 'Background Paper on Investment Mediation' (July 2021) <https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf> accessed 19 July 2021.

¹² Mediation Rules of the United Nations Commission on International Trade Law (UNCITRAL Mediation Rules) (2021) <<https://uncitral.un.org/en/texts/mediation>> accessed 9 September 2021. See UNCITRAL Secretariat, 'Settlement of commercial disputes - International commercial mediation: draft UNCITRAL Mediation Rules' (3 January 2020) UN Doc A/CN.9/1026. See also Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL Conciliation Rules) (1980) <<https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation>> accessed 3 February 2021. For further resources on the UNCITRAL Conciliation Rules, see Nassib Ziade, 'References on the UNCITRAL Arbitration and Conciliation Rules' (1990) 5 ICSID Rev-FILJ 363, 366.

¹³ UNCITRAL Working Group III, 'Dispute prevention and mitigation - Means of alternative dispute resolution', Working Paper No 190 of 15 January 2020, UN Doc A/CN.9/WG.III/WP.190.

5. To support this development of investor-State conciliation and mediation, the authors undertook an extensive study of 1141 international investment agreements (IIAs) containing ISDS provisions on conciliation and/or mediation uploaded on the UNCTAD International Investment Agreement Navigator¹⁴ (UNCTAD IIA Navigator) and the World Trade Institute’s Electronic Database on Investment Treaties¹⁵ (WTI EDIT) as at 15 April 2021. The study’s main aim was to understand how frequently these provisions have been included in IIAs and to assess their quality. An aspiration of the authors is for the study to assist and promote the drafting of conciliation and mediation provisions in future IIAs. The authors build on the information and ideas offered in published surveys of investor-State conciliation and mediation provisions and have been mindful not to duplicate the useful work already undertaken.¹⁶
6. The six Parts below set out the methodology and findings of the study. **Part I** explains the research methodology we adopted. **Part II** briefly addresses the difference between mediation and conciliation in the ISDS context. **Part III** presents the principal quantitative findings of the research, for example, the number of IIAs we found that refer to investor-State conciliation, mediation or both. In **Part IV** we group these references into 18 categories (11 for conciliation and 7 for mediation). This is a qualitative categorisation intended to better understand the types of investor-State conciliation and mediation provisions currently found in IIAs. **Part V** focuses on the specific issue of advance consent granted in IIAs to “conciliation or arbitration” and

¹⁴ United Nations Conference on Trade and Development (UNCTAD), ‘International Investment Agreements Navigator’ <<https://investmentpolicy.unctad.org/international-investment-agreements/>> accessed 15 April 2021. The text of all the ISDS provisions referring to conciliation and/or mediation, as well as further details about each treaty such as signature dates and entry into force, are available at Daniel Kang and Joel Sherard-Chow, “Dataset on Investor-State Conciliation and Mediation Provisions” NUS CIL Project on Investor State Conciliation and Mediation Working Paper 21/01 (June 2021), accessible at <https://cil.nus.edu.sg/wp-content/uploads/2021/06/Dataset-on-Investor-State-Conciliation-and-Mediation-Provisions-15April2021.pdf>.

¹⁵ World Trade Institute, ‘EDIT – Electronic Database of Investment Treaties’ <<https://edit.wti.org/>> accessed 15 April 2021. See also Wolfgang Alschner, Manfred Elsig and Rodrigo Polanco, ‘Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use’ (2021) *World Trade Review* 73.

¹⁶ See generally ICSID Secretariat, ‘Overview of Investment Treaty Clauses on Mediation’ (July 2021) <https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf> accessed 19 July 2021; Kun Fan, ‘Mediation of Investor-State Disputes: A Treaty Survey’ (2020) *Journal of Dispute Resolution* 327-42; James Claxton, ‘Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation’ (2020) *Asian Journal on Mediation* 34; and Gabriel Bottini and Veronica Lavista, ‘Conciliation and Bilateral Investment Treaties’ in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff, 2010). For a detailed bibliography on investor-State conciliation and mediation, see Romesh Weeramantry and Brian Chang, ‘Investor-State Conciliation and Mediation’ NUS Centre for International Law Project on Investor-State Conciliation and Mediation Working Paper 20/01 (September 2020) <<https://cil.nus.edu.sg/publication/bibliography-on-investor-state-conciliation-and-mediation/>>.

whether this gives rise to a fork in the road that limits an investor's right to invoke only one of these processes. **Part VI** concludes the article by summarising our key findings.

Part I: Methodology

7. Our research methodology comprised three phases: (i) identifying all IIAs referring to conciliation and/or mediation; (ii) filtering this initial dataset by removing IIAs that did not include investor-State conciliation and/or mediation provisions (e.g. IIAs that referred only to State-State conciliation); and (iii) grouping each IIA ISDS provision into specific categories.
8. The universe of IIAs that we worked with were derived from two primary sources: the UNCTAD IIA Navigator and the WTI EDIT database. These databases were chosen because we considered them to be the two most extensive compilations of treaties available.
9. In the first phase, we used these two databases (as at 15 April 2021) to search for all IIAs that contained a reference to conciliation and/or mediation. The total number of IIAs searched in this initial phase was 3815. This number was the aggregate of:
 - a. 3623 IIAs that were common to both the UNCTAD IIA Navigator and the WTI EDIT database;
 - b. 146 IIAs that were exclusive to the UNCTAD IIA Navigator;¹⁷ and
 - c. 46 IIAs that were exclusive to the WTI EDIT database.¹⁸
10. Six primary searches were made during this initial phase:
 - a. In the “Mapping of IIA Content” section of the UNCTAD IIA Navigator, we searched the following pre-set UNCTAD categories: (i) “Investor-State Dispute Settlement – Alternatives to arbitration – Voluntary ADR (conciliation/mediation)”, which returned 626 search results, and (ii) “Investor-State Dispute Settlement – Alternatives to arbitration – Compulsory ADR (conciliation/mediation)”, which returned nil search results.

¹⁷ Model BITs included in the UNCTAD IIA Navigator database were not included in our search. A final search was run on 15 April 2021 to ensure that we had the most up-to-date dataset as of that date.

¹⁸ Treaties on Friendship, Commerce and Navigation (FCN) in the WTI EDIT database were not included in our search. A final search was run on 15 April 2021 to ensure that we had the most up-to-date dataset as of that date.

- b. Utilising the UNCTAD IIA Navigator’s “Advanced Search” function, we searched for IIAs that included at least one reference to: (i) the word “conciliation”, which identified 942 IIAs; and (ii) the word “mediation”, which identified 130 IIAs.
 - c. Using the WTI EDIT database’s search tool, we conducted searches for IIAs that included at least one reference to: (i) the word “conciliation”, which identified 1239 IIAs; and (ii) the word “mediation”, which identified 211 IIAs.
11. Searches that utilized the “Advanced Search” function on the UNCTAD IIA Navigator were conducted only in English, French, Spanish, Portuguese and Italian. As a result, a small number of IIAs concluded exclusively in Arabic, German, Japanese or Russian were not covered in this search. This deficiency was overcome to a significant extent through the use of the WTI EDIT database because, as we understand, it contains English translations of many IIAs concluded only in Arabic, German, Japanese or Russian.¹⁹ We also included in our dataset two relevant IIAs that were not identified by the research methodology described above.²⁰
12. The IIAs identified in the first phase included several that have been either terminated and superseded by newer IIAs, or terminated and not replaced. These terminated treaties were included in our dataset to provide a more complete and accurate understanding of the use and quality of IIA conciliation and mediation ISDS provisions. For the same reason, we included signed IIAs that have not yet entered into force. The year we ascribe to each IIA in our dataset is the year of signature.
13. From the list of IIAs we generated in the initial phase, we removed IIAs that referred to conciliation and mediation only in their State-State dispute resolution provisions. This screening process generated a list of 1141 IIAs, 1088 of which referred to conciliation only, 16 to mediation only and 37 to both.²¹ To extract the most from the data, we double-counted each of the 37 overlapping IIAs. They are treated both as an IIA that refers to investor-State conciliation and also as an IIA that refers to investor-State

¹⁹ Alschner, Elsig and Polanco (n 15) 78-9.

²⁰ These two IIAs are: the Iraq-Jordan BIT (2013) (only available in Arabic on the UNCTAD IIA Navigator database, and not available on the WTI EDIT database); and the China-Macau CEPA IA (2017) (not available on the UNCTAD IIA Navigator or the WTI EDIT database). Given the relevance of these IIAs, they were included in our analysis.

²¹ We found four IIAs that clearly mistranslated “conciliation” as “mediation”, and considered it appropriate to classify them as IIAs referring to conciliation rather than mediation. See nn 53 and 54 below.

mediation. With the double-counting included, our dataset comprised 1125 IIAs that referred to conciliation and 53 IIAs that referred to mediation.

14. In the last phase of our methodology, we conducted a qualitative review of all 1141 IIAs and grouped their investor-State conciliation and/or mediation provisions into specific categories, which are discussed in detail in Part IV below. We excluded from this categorization process those IIAs that did refer to “conciliation” but did not indicate any intention to encourage or consent to investor-State conciliation. For example, we omitted IIAs referring to the “Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings” (emphasis added) where they explicitly provided consent to ISDS arbitration and not conciliation.²²
15. We are conscious that we may not have identified every IIA containing references to ISDS conciliation or mediation. First, not all IIAs have been incorporated into the UNCTAD IIA Navigator or WTI EDIT databases.²³ Second, even if an IIA is contained in these databases, its full text may not be available.²⁴ Third, our word searches may not have found relevant terms either due to translation or typographical errors, or inaccurate conversions of PDF documents into text searchable documents.²⁵ Furthermore, IIAs that do not refer expressly to the terms conciliation or mediation but give the parties the option of using external instruments that encourage or require use of these methods were not detected in our searches.²⁶ Accordingly, we believe our dataset of IIAs that provide for investor-State conciliation and/or mediation is under-inclusive. There are likely to be additional reasons why we have not identified the entire universe of IIAs containing

²² An example of this type of reference to “conciliation” is contained in Article 8(3) of the Argentina-UK BIT (1990).

²³ For example, the China-Macau CEPA Investment Agreement (2017), which contains detailed mediation provisions, was not listed in either of these databases at the time of our final search.

²⁴ The UNCTAD database was reported to have 486 missing texts as of May 2020, while the WTI EDIT database was reported to have 143 missing texts as of August 2020. See Alschner, Elsig and Polanco (n 15) 75, 78.

²⁵ For example, a word search of the version of the BLEU-Egypt BIT (1977, since terminated and replaced) in the UNCTAD database did not return any positive results for “conciliation”, even though Article IX of the BIT mentions conciliation. However, the version in the WTI EDIT database did return a positive search result.

²⁶ See e.g. Bottini and Lavista (n 16) 365-6 (“Consent to conciliation is present in the BITs concluded by France with Ecuador, Egypt, Albania, Bangladesh, China (exclusively concerning the amount of compensation in case of expropriation), Dominican Republic, El Salvador, Haiti, Indonesia, Jordan, Kuwait, Liberia, Paraguay, Sudan, Sri Lanka, and Syria. Most of these BITs do not refer specifically to either conciliation or arbitration, but rather to the ICSID jurisdiction that [...] includes both methods of dispute settlement.”) and Claxton (n 16) 41 (“[Treaties may] refer to ‘third party processes’ in aid of negotiations with a smaller percentage identifying mediation or conciliation by name as tools to support negotiations.”).

conciliation or mediation in ISDS provisions. Our findings must be evaluated with these limitations in mind.

16. The dataset that we generated during our research and utilised for our study are accessible on the website of the National University of Singapore's Centre for International Law at <https://cil.nus.edu.sg/publication/dataset-on-investor-state-conciliation-and-mediation-provisions-15april2021/>.

Part II: Differences between Conciliation and Mediation

17. Many authors and UNCITRAL texts regard conciliation and mediation to be interchangeable terms that refer to non-binding, third-party assistance to settle disputes amicably.²⁷ However, under public international law and in the ISDS context, the functions of conciliation and mediation have often been viewed as separate. Judge James Crawford has observed:

*Conciliation is distinct from mediation and emerged from the commissions of inquiry provided for in the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 and the commissions which figured in the series of arbitration treaties concluded by the US in 1913 and 1914 (the Bryan treaties). Conciliation has a semi-judicial aspect, since the commission of persons empowered has to elucidate the facts, may hear the parties and must make proposals for a settlement, which is normally non-binding.*²⁸

18. Public international law historically associated mediation with the intervention of third States in inter-State disputes,²⁹ and conciliation was developed to facilitate “intervention by a third body, having no political authority of its own, but enjoying the confidence of the parties.”³⁰ However, contemporary understandings of mediation in public international law and international commercial mediation now encompass the intervention of third parties without political authority.
19. In the context of ICSID, the drafters of the Convention³¹ (at least during the preparatory work) did not appear to adhere to a strict distinction between conciliation and mediation. Mediation was at times considered as involving a neutral third-party who could make

²⁷ See for example, Thomas Walde, ‘Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management’ (2004) 2 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=2> accessed 2 February 2021; Fatma Khalifah, ‘Mediation use in ISDS’ (2014) 1 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=2078> accessed 2 February 2021; UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (20 December 2018) art 1(3) and fn 2. UNCITRAL Working Group II, ‘International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation’ Working Paper 205 of 23 November 2017, A/CN.9/WG.II/WP.205; and UNCITRAL Model Law on International Commercial Conciliation, 2002 (19 November 2002) art 1(3).

²⁸ James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) 693. Note that this definition is substantially unchanged from Ian Brownlie, *Principles of Public International Law* (1st edn, Clarendon Press 1966) 543.

²⁹ See for example, Francisco Orrego Vicuña, ‘Mediation’ in Rüdiger Wolfrum and others (eds), *Max Planck Encyclopedia of Public International Law* (2010) para 8 (citing Article 3 of the *Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907*, which refer to “Powers, strangers to the dispute”).

³⁰ Jean-Pierre Cot, *International Conciliation* (R Myers tr, Europa Publications 1972) 329.

³¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (‘ICSID Convention’).

non-binding recommendations. For example, a note by the IBRD General Counsel (Aron Broches) to the IBRD Executive Directors states that “[i]n distinguishing conciliation or mediation from arbitration it has been said that ‘mediation recommends, arbitration decides’.”³² Moreover, the preparatory work of the ICSID Convention records Mr. Broches and Mr. Black explaining to the IBRD Executive Directors: “[a]n undertaking to go to mediation did not however mean an agreement to accept the recommendations of the mediators.”³³

20. As Nitschke has concluded from her survey of the ICSID Convention’s drafting history, its drafters “considered the terms ‘conciliation’ and ‘mediation’ could be used interchangeably” but that “[u]ltimately, the term ‘conciliation’ was chosen.”³⁴ The drafters of the Convention took the view that:

*Conciliation is used in the proposals in the sense of any proceeding or method for the adjustment of a dispute, aimed at bringing the parties to an agreed solution with the assistance of one or more persons (‘conciliators’) empowered to make recommendations.*³⁵

21. Reflecting conciliation’s roots in public international law, many features incorporated into the ICSID conciliation regime do not ordinarily form part of a contemporary international commercial mediation process, including:
- a. empowerment of conciliators (i) to “make—orally or in writing—recommendations to the parties” at any stage of the proceedings, (ii) “to recommend that parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute”, (iii) to “point out to the parties the arguments in favour of its recommendations”;³⁶
 - b. default procedural rules for conciliator appointment and disqualification that are aligned to procedures adopted in arbitration;³⁷

³² ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of International Disputes between States and Nationals of Other States, Vol. 2 Part I* (ICSID 1968) 6 para 2.

³³ ICSID (ibid) 15 para 13.

³⁴ Nitschke (n 5) 123.

³⁵ Nitschke (n 5) 123, citing ICSID (n 32) 6 para 3.

³⁶ Rule 22(2) of the ICSID Rules of Procedure for Conciliation Proceedings (ICSID Conciliation Rules (2006)). See also Article 34 of the ICSID Convention. Other conciliation rules in public international law generally provide for the recommendations to be contained in the concluding report of the conciliation proceedings. See, e.g. Institut de Droit International, *Report on International Conciliation* (Session of Salzburg, 1961) Article 7.

³⁷ Rules 2 to 12 of the ICSID Conciliation Rules (2006). On this point, see Nitschke (n 5) 124-6.

- c. rights of parties to file preliminary objections on jurisdictional or competence grounds;³⁸
 - d. provision for oral hearings and the hearing of witnesses and experts;³⁹ and
 - e. a requirement that the conciliator(s) draw up a report at the closure of the proceedings.⁴⁰
22. Despite the above, the ICSID Convention conciliation regime includes elements of evaluative and facilitative mediation approaches.⁴¹ These can be found in the conciliator’s duty under Article 34 “to clarify the issues in dispute between the parties” and “to endeavour to bring about agreement between them upon mutually acceptable terms”.⁴² The ICSID Secretariat has proposed revisions to the ICSID Conciliation Rules that aim to increase their efficiency and user-friendliness, as well as their flexibility to accommodate facilitative mediation approaches.⁴³
23. From a broader perspective, whether the process adopted in an investor-State dispute is one of conciliation or mediation, both methods have many potential advantages over arbitration. For example, they are faster and less costly procedures than arbitration,⁴⁴

³⁸ Rule 29 of the ICSID Conciliation Rules (2006). The proposed amendments to the ICSID Conciliation Rules remove the automatic suspension of the conciliation upon the raising of an objection, and clarify that failure to raise an objection to jurisdiction in a conciliation is covered by the without-prejudice principle set out in Article 35 of the ICSID Convention. See Nitschke (n 5) 143.

³⁹ Rules 27 and 28 of the ICSID Conciliation Rules (2006). Witnesses and experts are not required to take oaths. This departs significantly from Rule 35 of the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), which requires witnesses and experts to take oaths. The proposed amendments to the ICSID Conciliation Rules renames “hearings” as “meetings” and makes them more flexible in scope and conduct by removing the specific references to witnesses and expert examination. See Nitschke (n 5) 143.

⁴⁰ Rules 30-32 of the ICSID Conciliation Rules (2006).

⁴¹ Nitschke (n 5) 130-5, 140-143; Susan Franck, ‘Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in Investment Agreements’, in Paul Sauvant (ed), *Appeals Mechanisms in International Investment Disputes* (OUP 2008). For more on the distinction between evaluative and facilitative mediation approaches, see Susan Franck, ‘Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide’ (2014) 29 ICSID Rev–FILJ 66, 72-5.

⁴² Article 34(1) of the ICSID Convention.

⁴³ ICSID Secretariat, ‘ICSID Rules and Regulations Amendment - Working Papers’ <<https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>> accessed 3 February 2021; Nitschke (n 5) 141.

⁴⁴ See Aron Broches, ‘Settlement of Disputes Arising Out of Investment in Developing Countries’, (1983) 11 Intl Business Lawyer 206, as quoted at the start of this article. See also Anna Joubin-Bret and Jan Knorich (eds) *Investor-State Disputes: Prevention and Alternative to Arbitration* (UNCTAD 2010) 31–40; Thomas Walde, ‘Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation’ (2006) 22 Arb Intl 205; Franck (n 41) 77-8; Catharine Titi ‘Mediation and the Settlement of International Disputes: Between Utopia and Realism’ in Catharine Titi and Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 121 (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)); Lester Nurick and Stephen Schnably, ‘The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago’ (1986) 1 ICSID Rev–FILJ 340.

and they help preserve commercial relationships, especially in long-term projects or when the investor has multiple projects in the host State.⁴⁵ The Singapore Convention on Mediation may also assist conciliation and meditation to make gains on the popularity of arbitration, as the Convention will facilitate the enforcement of investor-State conciliated or mediated settlement agreements in States that have ratified the Singapore Convention (without making an Article 8(1) reservation).⁴⁶ The importance of the Singapore Convention will also be enhanced by the new UNCITRAL Mediation Rules, the proposed ICSID Mediation Rules, and the current proposed amendments to the ICSID Conciliation Rules, which all include provisions that ensure settlements agreed pursuant to those rules possess the requisite criteria for enforcement under the Singapore Convention (if applicable).⁴⁷

⁴⁵ Titi (ibid); Christine Sim, ‘Conciliation of Investor-State Disputes, Arb-Con-Arb, and the Singapore Convention’ (2019) 31 Singapore Academy of Law Journal 670. An earlier version of this article may be accessed at <www.academia.edu/37052773>.

⁴⁶ Article 8(1) permits a State to declare that the Singapore Convention will not apply “to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party”. See Nadja Alexander and Shouyu Chong ‘The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes’ in Mahdev Mohan and Chester Brown (eds) *The Asian Turn in Foreign Investment* (CUP 2021) (forthcoming); Itai Apter and Coral Henig Muchnik, ‘Reservations in the Singapore Convention—Helping to Make the ‘New York Dream’ Come True’ in Harold Abramson (ed) *Singapore Mediation Convention Reference Book*, (Scholarly Works 2019) 1267 accessible at <<https://digitalcommons.tourolaw.edu/scholarlyworks/653>>.

⁴⁷ Nitschke (n 5) 143; Article 8 of the UNCITRAL Mediation Rules (n 12); UNCITRAL Secretariat (n 12).

Part III: Conciliation and Mediation Provisions Over Time

24. As indicated in Part I, our study commenced with an examination of IIAs with ISDS provisions that referred to conciliation and/or mediation provisions. This initial dataset enabled us to analyse the numbers of IIAs signed annually with these types of provisions. The results of this analysis are set out in this Part.

A. IIAs with Investor-State Conciliation Provisions by Year

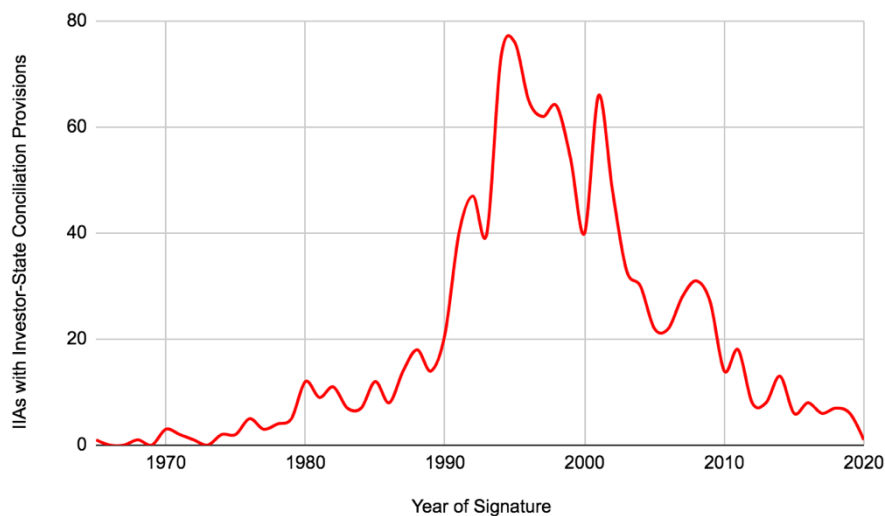


Chart 1: IIAs with Investor-State Conciliation Provisions by Year of Signature

25. As noted above, our searches revealed 1125 IIAs that contained ISDS provisions expressly referring to conciliation.⁴⁸ **Chart 1** shows all of these IIAs, with the y-axis displaying the number of IIAs with an investor-State conciliation provision and the x-axis showing the year these IIAs were signed.
26. The first IIA in the UNCTAD database that contains an investor-State conciliation provision is the now terminated Germany-Iran BIT (1965).⁴⁹ The next 14 years (1965-1979) saw a low annual increase in the number of IIAs with investor-State conciliation provisions, led mainly by a handful of States, such as the Netherlands (9), Romania (7), Belgium and the Belgium-Luxembourg Economic Union (BLEU) (6), the United Kingdom (5), Egypt (4), and the Republic of Korea (4).

⁴⁸ As mentioned in Part I, this total included 37 treaties that referred to both conciliation and mediation.

⁴⁹ Germany-Iran BIT (1965, since terminated and replaced) Protocol art 3. The new Germany-Iran BIT (2002) only provides advance consent to arbitration, and does not mention conciliation or mediation.

27. The peaks in Chart 1 of investor-State conciliation provisions that occur from the mid-1990s to the early 2000s substantially correlate to the high numbers of IIAs that were signed annually during the years 1994 to 2001.⁵⁰ Despite the upward surges of investor-State conciliation provisions in the mid-1990s to 2001 depicted in Chart 1, it bears noting that IIAs containing conciliation provisions signed annually as a percentage of all IIAs signed each year has gradually decreased over time since the 1980s (see Chart 4 below).

B. IIAs with ISDS Mediation Provisions by Year

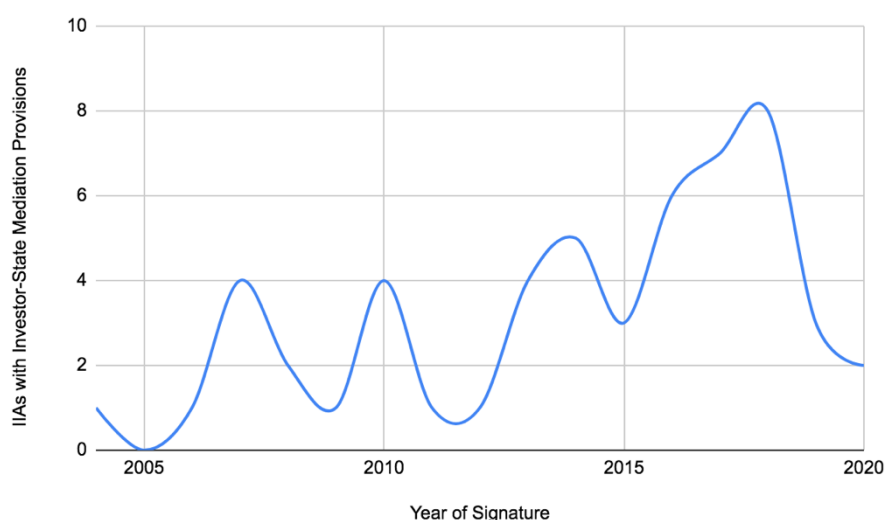


Chart 2: IIAs with Investor-State Mediation Provisions by Year of Signature

28. Our quantitative analysis shows that in contrast to the general decline in the conclusion of investor-State conciliation provisions, there has been a slow but steady increase in the annual number of signed IIAs that refer to mediation. **Chart 2** shows the growth of such provisions over time. Unlike the large sample size for conciliation provisions, there are only 53 investor-State mediation provisions,⁵¹ which help explain the sharp variations depicted in Chart 2.

29. Chart 2 includes all 53 of these provisions, with the y-axis showing the number of IIAs with an investor-State mediation provision and the x-axis indicating the year these IIAs were signed. The chart shows an increase in the number of IIAs from an average of nil to 1 per year in the early 2000s, peaking at 8 in 2018. While the upward trend in Chart

⁵⁰ See UNCTAD, *World Investment Report 2020* (United Nations Publications 2020) 106.

⁵¹ As mentioned in n 48, this included 37 treaties that referred to both conciliation and mediation.

2 is clearly noticeable, the increased numbers still represent only a small fraction of the total number of IIAs concluded each year.

30. ISDS provisions that refer to mediation began to be adopted in IIAs at a much later point in time than IIAs with investor-State conciliation provisions. The first instance of an IIA mentioning mediation in our dataset is the CAFTA-DR (2004).⁵²
31. Three older IIAs,⁵³ and one concluded in 2014,⁵⁴ appear to refer erroneously to mediation. All three have been classified as treaties providing for conciliation in our dataset. These treaties attempt to refer to advance consent to ICSID mediation and/or arbitration, at a time when only ISDS arbitration and conciliation rules were available at ICSID, and ICSID was not contemplating the adoption of mediation rules. Nevertheless, it may be worth considering whether such provisions would in future be interpreted to provide advance consent to ICSID mediation upon ICSID adopting its voluntary mediation rules.⁵⁵

C. ISDS Provisions Referring to Both Conciliation and Mediation by Year

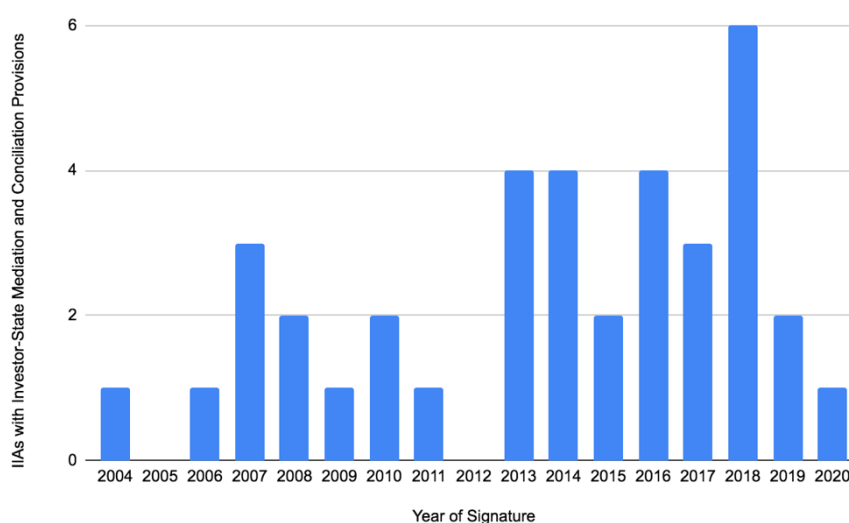


Chart 3: IIAs Referring to Both Conciliation and Mediation by Year of Signature

32. As mentioned, out of the 53 IIAs that referred to mediation in their ISDS provisions, our research found that 37 refer to both conciliation and mediation. **Chart 3** displays

⁵² The Dominican Republic-Central America-United States Free Trade Agreement (2004) ('CAFTA-DR') 43 ILM 514 (2004), art 10.15.

⁵³ China-Germany BIT (1983, since terminated and replaced) Exchange of Letters; Bolivia-Germany BIT (1987, since terminated) art 11(3); Croatia-Slovenia BIT (1997) art 8(2)(e).

⁵⁴ Bahrain-Russia BIT (2014) art 8(2)(d).

⁵⁵ See n 11.

the number of IIAs that refer to both conciliation and mediation by year of signature. It shows a greater incidence of IIAs referring to both forms of dispute resolution after 2015. However, from a broader perspective, the general decline in the adoption of IIA conciliation provisions may generate a downward trend in IIA provisions that include both conciliation and mediation provisions.

D. Analysis by Percentage

33. For comparative purposes, we analysed the number of IIAs with investor-State conciliation or mediation provisions as a percentage of all IIAs signed in that year. To do this, we took the yearly number of IIAs with investor-State conciliation and/or mediation provisions and divided them by the total number of IIAs signed that year based on the data from the UNCTAD and WTI EDIT databases. Charts 4 and 5 show these percentages, and how they have changed over time.

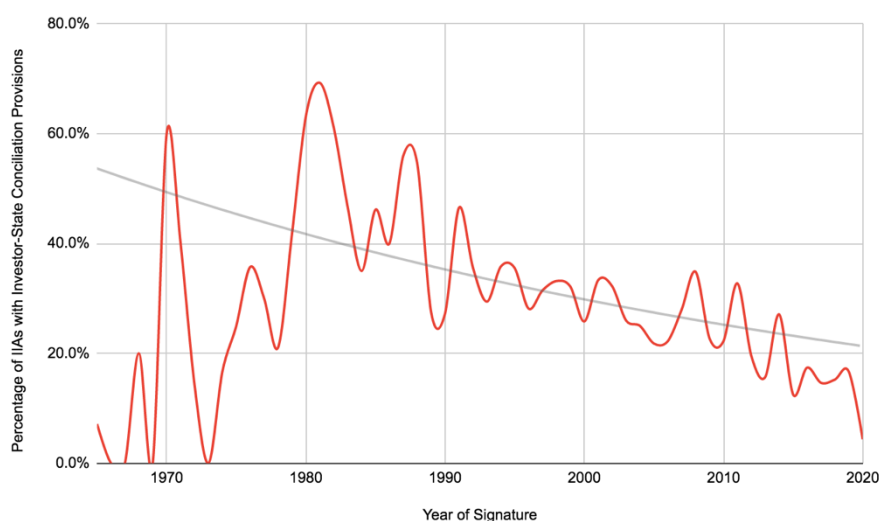


Chart 4: Percentage of IIAs with Investor-State Conciliation Provisions by Year of Signature

34. **Chart 4** shows the percentage of IIAs signed each year with investor-State conciliation provisions. The percentages in the 1970-80s fluctuate significantly as there were very few IIAs concluded in those years. Nevertheless, on average, more than 40% of IIAs concluded in the 1960s and 1970s contained investor-State conciliation provisions. The grey trendline indicates that this percentage has steadily decreased since the early 1980s to less than 20% (19.1%) of IIAs concluded from 2010 to 2020. The overall average from 1965 to 2020 is 29.8%.

35. This analysis shows that investor-State conciliation provisions appear to be less common in IIAs than they originally were in the 1960s and 1970s and they appear to be on a downward movement in future years. From a broader perspective, it may be concluded that 70% of the 3815 IIAs that we searched do not contain a reference to investor-State conciliation.

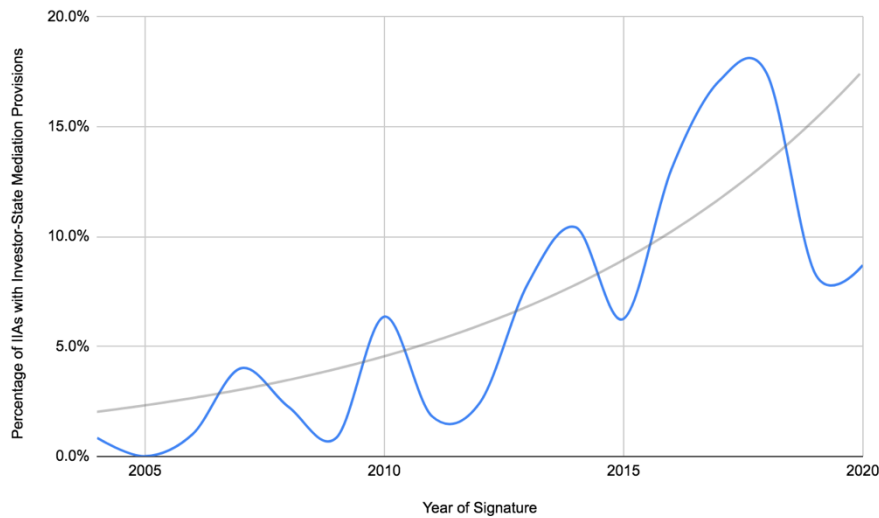


Chart 5: Percentage of IIAs with Investor-State Mediation Provisions by Year of Signature

36. We found a diametrically opposite trend in relation to the growth of investor-State mediation provisions. **Chart 5** shows the percentage of IIAs signed each year with investor-State mediation provisions. The blue line in this Chart shows that the percentage of IIAs signed each year with investor-State mediation provisions increased from 0.83% in 2004 to 17.4% in 2018, while the grey trendline indicates that the average percentage of IIAs concluded with investor-State mediation provisions has increased to over 10% from 2016 to 2020. Nevertheless, the overall average for the period 2004 to 2020 remains considerably low, at 4.7%. But there is a significant chance that the current groundswell of developments in investor-State mediation portend a future increase in the numbers of IIAs including mediation as an ISDS dispute resolution mechanism.

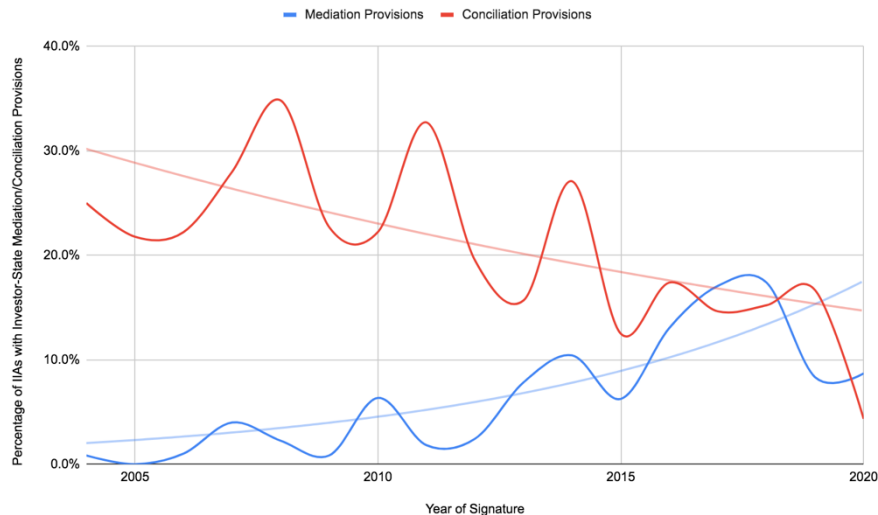


Chart 6: Percentage of IIAs with Investor-State Conciliation Provisions, Compared against Percentage of IIAs with Investor-State Mediation Provisions

37. The contrasting investor-State conciliation and investor-State mediation trends is illustrated in **Chart 6**, which combines Charts 4 and 5. The red trendline indicates a decrease in the adoption of investor-State conciliation provisions while the blue trendline indicates an increasing use of investor-State mediation provisions in IIAs signed each year.
38. There are several potential reasons for the decline in the overall numbers of conciliation provisions. The first is that conciliation, despite its inclusion in IIAs since the 1960s, has not been frequently used.⁵⁶ Another reason may be that conciliation is not well-understood and that disputing parties are not adequately advised on its potential benefits. Many regard it as a form of “non-binding” arbitration that does not lead to a certain outcome (e.g. it depends on the variables of negotiation) and may be difficult to achieve and to enforce.⁵⁷ A third is that many conciliation provisions may give the impression that they potentially create a fork in the road whereby an investor’s choice of

⁵⁶ See Bottini and Lavista (n 16) 359.

⁵⁷ August Reinisch ‘Elements of Conciliation in Dispute Settlement Procedures’ in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thuürer (eds), *Conciliation in International Law* (Brill 2017) 116, 129. For reasons why government officials may be reluctant to settle investment disputes see Seraphina Chew, Lucy Reed and Christopher Thomas, ‘Report: Survey on Obstacles to Settlement of Investor-State Disputes’ NUS Centre for International Law Working Paper 18/01 (September 2018).

conciliation precludes subsequent recourse to arbitration.⁵⁸ If there is a perception that arbitration rights might be extinguished if IIA conciliation is commenced, it is not unreasonable that this would render conciliation under IIAs an unacceptable option for most investors. We discuss this issue in **Part V**. Other reasons may include a greater preference for arbitration given that it is by far the most frequent mode of ISDS, the desire to defer decision-making responsibility to an arbitral tribunal, the well-established mechanisms in place to assist arbitral award enforcement (e.g. Articles 53-55 of the ICSID Convention and the New York Convention) or a view by States that express reference to conciliation is unnecessary as conciliation is already provided for in IIA language submitting disputes generally to ICSID jurisdiction (on this issue, see **Conciliation Category 3** below).

39. By contrast, the inclusion of investor-State mediation in IIAs is growing. Despite this upward trend, the overall numbers of IIAs with investor-State mediation provisions (53) still remain very low, representing 4.7% of the total number of IIAs concluded between 2004 (when mediation was first referenced in an IIA) and 2020 (1125), and 1.4% of the total number of IIAs we searched in the UNCTAD and WTI EDIT databases (3815) on 15 April 2021. As noted above, there are nonetheless good prospects for a continued future increase in the numbers of IIAs providing for investor-State mediation.

⁵⁸ Reinisch (ibid) 131.

Part IV: Categories of Conciliation and Mediation Provisions

40. This Part describes the phase of our study in which we categorised the IIA conciliation and mediation provisions in our dataset.⁵⁹ The objective of this categorisation was to better understand the variations in the drafting of IIA investor-State conciliation and mediation provisions and their quality. We formulated 11 categories of conciliation provisions and 7 categories of mediation provisions. Each category is addressed separately below. The main conclusions to be drawn from the findings in this Part are set out in Part VI.
41. Categories involving the descriptor “advance consent” to conciliation or mediation signify that the relevant host State has agreed in an IIA to future investor-State conciliation or mediation processes instituted under that IIA. In other words, the IIA of itself contains the requisite consent and a covered investor is not required to obtain any further agreement or approval by the host State to commence a conciliation or mediation (subject, where applicable, to admissibility or jurisdictional requirements).

A. CONCILIATION PROVISIONS

Conciliation Category 1: Advance consent to “conciliation or arbitration”

42. Conciliation Category 1 provisions provide a State’s advance consent to investor-State conciliation *or* arbitration. An example is found in Article 7 of the Indonesia-United Kingdom (UK) BIT (1978):

The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the [ICSID Convention] any disputes that may arise in connection with the investment. [emphasis added]

43. These types of provisions are by far the most prevalent in our investor-State conciliation provision dataset. They were found in 703 IIAs, or 62.5% of all IIAs referencing

⁵⁹ We categorised IIAs based on our review of the relevant treaty provisions, and not on preparatory work or any other external materials, except where otherwise noted. Where IIAs provide different options depending on whether one or more Contracting Parties were also party to the ICSID Convention, we classified them based on all the different options where conciliation may be available.

investor-State conciliation.⁶⁰ Of these 703 IIAs, 678 provided for conciliation under ICSID, eight referred to conciliation under the UNCITRAL Rules only, 15 did not specify a particular set of rules or administering institution and two allowed for conciliation exclusively under the International Chamber of Commerce Rules.⁶¹

44. The words “conciliation or arbitration” may give rise to an argument that it creates a fork in the road, i.e. if an investor chooses one dispute resolution method, it precludes the other method. There are strong reasons why this restrictive interpretation of Conciliation Category 1 provisions should not prevail. The issue is dealt with in Part V below.
45. Within the 703 IIAs in this Category, 51 contain provisions that express advance consent to arbitration only, but thereafter specify that the investor has the right to choose between conciliation or arbitration. Because these provisions may arguably provide advance consent to conciliation or arbitration, we included them in Conciliation Category 1.⁶²

Conciliation Category 2: Advance consent to conciliation and arbitration

46. Conciliation Category 2 comprises a variety of provisions that effectively provide advance consent to investor-State conciliation *and* arbitration. The simplest type of a Conciliation Category 2 provision is found in Article 10 of the Belgium-Indonesia BIT (1970):

Each Contracting Party hereby irrevocably and anticipatory [sic] gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the [ICSID Convention], at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure. [emphasis added]

⁶⁰ Within the 678 IIAs, 20 provided for conciliation under both the ICSID Convention and the UNCITRAL Conciliation Rules, and six referred to conciliation under the Kuala Lumpur Regional Centre for Arbitration (now the Asian International Arbitration Centre) as an alternative to ICSID conciliation. The Netherlands has led the way in including Conciliation Category 1 provisions, having signed 78 IIAs that provide for ISDS “conciliation or arbitration”.

⁶¹ See France-Haiti BIT (1984) art 8 and Haiti-United States of America BIT (1983) art VII(3).

⁶² An example of this type of provision is contained in Article 9 of the Georgia-Greece BIT (1994).

47. We found thirteen other IIAs that deployed the exact phrase “conciliation and arbitration” or a close variation of it.⁶³ In total, Conciliation Category 2 provisions were found in 44 IIAs, or 3.9% of all IIAs referencing investor-State conciliation.
48. Included within these 44 IIAs were 25 that have a multi-tiered structure, expressly providing advance consent first to conciliation, and then at a later stage to arbitration. This subset of Conciliation Category 2 includes five BITs concluded by India⁶⁴ and four BITs concluded by Israel⁶⁵ and two other BITs⁶⁶ that first provide advance consent to conciliation, and thereafter consent to arbitration if the conciliation is unsuccessful or not attempted. Conciliation Category 2 also includes 14 BITs, mainly in IIAs concluded by Finland,⁶⁷ with provisions worded in the following terms:

Notwithstanding the provisions [...] relating to the submission of the dispute to arbitration the investor shall have the right, to choose the conciliation procedure before the dispute is submitted for arbitration.

49. Three IIAs that arguably provide the option of submitting disputes for conciliation and arbitration to domestic institutions were also included in this Category.⁶⁸

Conciliation Category 3: Advance consent to conciliation and arbitration through unqualified submission to ICSID jurisdiction

⁶³ 11 BITs used the term “conciliation and arbitration: Belgium-Indonesia BIT (1970) art 10; BLEU-Republic of Korea BIT (1974) art 8; Egypt-Romania BIT (1976) art 3; BLEU-Egypt BIT (1977, since terminated and replaced) art IX; Romania-Sudan BIT (1978) art 4; Equatorial Guinea-France BIT (1982) Exchange of letters; Norway-Romania BIT (1991) art VIII(2); Comoros-Egypt BIT (1994) art 10(4); Egypt-Jordan BIT (1996) art 6(1); Italy-Venezuela BIT (2001) art VIII(2)(b); and Kyrgyzstan-Lithuania BIT (2008) art 8(2). 2 BITs used the wording “arbitration and conciliation”: Italy-Romania BIT (1990, since terminated) art 8(2)(c) and Albania-Italy BIT (1991) art 8. The Bolivia-Germany BIT (1987) uses the term “mediation and arbitration”, but we believe that this was a mistranslation. See n 53.

⁶⁴ See Cyprus-India BIT (2002, since terminated) art 9; Finland-India BIT (2002, since terminated) art 9; India-Serbia BIT (2003, since terminated) art 9; Bosnia and Herzegovina-India BIT (2006, since terminated) art 9; and India-Slovenia BIT (2011, since terminated) art 11.

⁶⁵ See Ethiopia-Israel BIT (2003) art 8; Israel-Mongolia BIT (2003) art 8; Israel-Montenegro BIT (2004) art 8; and Israel-Serbia BIT (2004) art 8.

⁶⁶ See Morocco-Syrian Arab Republic BIT (2001) art VII and Brunei Darussalam-Ukraine BIT (2004) art 9.

⁶⁷ See Finland-Poland BIT (1990, since terminated and replaced) art 10(2); Denmark-Poland BIT (1990, since terminated) art 9(4); Czech Republic-Finland BIT (1990) art 8; Finland-Slovakia BIT (1990) art 8(2); China-Czech Republic BIT (1991, since terminated and replaced) art 9(3); Belarus-Finland BIT (1992, since terminated and replaced) art 9(3); Belarus-Vietnam BIT (1992) art 6(3); Estonia-Finland (1992) art 8(2); Finland-Latvia BIT (1992) art 8(2); Finland-Lithuania BIT (1992) art 8(2); Finland-Romania BIT (1992, since terminated) art 8(2); and Finland-Uzbekistan BIT (1992) art 8(2); Kyrgyzstan-Ukraine BIT (1993) art 7(3); and Ukraine-Vietnam BIT (1994) art 6(3).

⁶⁸ See Article 12 of the Gabon-Turkey BIT (2012) and Article 7 of the Afghanistan-Turkey BIT (2004) (both referring to the Istanbul Chamber of Commerce); and Article 10 of the Burkina Faso-Turkey BIT (2019) (referring to the Ouagadougou Arbitration, Mediation and Conciliation Center).

50. Conciliation Category 3 provisions do not refer explicitly to conciliation and arbitration but contain a State’s advance consent to submit to ICSID jurisdiction without qualification as to the type of ICSID dispute settlement to be adopted. Absent an indication that ICSID dispute resolution is limited exclusively to either conciliation or arbitration, these provisions provide consent to ICSID jurisdiction generally. Accordingly, they engage the entire jurisdiction of ICSID, including conciliation under Chapter III (ICSID Convention Articles 28-35) and arbitration under Chapter IV (ICSID Convention Articles 36-55) of the ICSID Convention. An example of a Conciliation Category 3 provision is contained in Article 8 of the France-Jordan BIT (1978):

*Each of the Contracting Parties agrees to submit to the International Center for the Settlement of Investment Disputes (I.C.S.I.D.) any disputes it may have with a national or a company of the other Contracting Party.*⁶⁹

51. *SPP v Egypt* illustrates the reason why a generic reference to ICSID jurisdiction implies advance consent to conciliation and arbitration. That case concerned an ISDS provision (although in a domestic law of Egypt) providing advance consent to settle disputes “within the framework of the [ICSID] Convention” without an express reference either to arbitration or conciliation. Based on the general nature of the ISDS provision, Egypt argued that it had not provided advance consent to arbitration since it did not specify whether it was consenting to arbitration or conciliation. The tribunal dismissed the argument, holding that that the ICSID Convention does not require that:

*consent to the Centre’s jurisdiction [must] specify whether the consent is for purposes of arbitration or conciliation. Once consent has been given “to the jurisdiction of the Centre”, the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings.*⁷⁰

52. Conciliation Category 3 provisions are common in a number of France’s BITs.⁷¹ Within our dataset, we found these types of provisions in 58 IIAs, or 5.2% of all IIAs

⁶⁹ Authors' unofficial English translation of the original French text. France-Jordan BIT (1978) art 8.

⁷⁰ *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (*SPP v Egypt*) para 102.

⁷¹ Bottini and Lavista (n 16) 365-6 (“Consent to conciliation is present in the BITs concluded by France with Ecuador, Egypt, Albania, Bangladesh, China (exclusively concerning the amount of compensation in case of expropriation), Dominican Republic, El Salvador, Haiti, Indonesia, Jordan, Kuwait, Liberia, Paraguay, Sudan, Sri

referencing investor-State conciliation. However, our dataset is under-inclusive because our research methodology is likely not to have identified all relevant IIAs in this category, especially those that do not contain the words “conciliation” or “mediation” but only contain an unqualified submission to ICSID jurisdiction, such as the French BITs. These French BITs were not picked up by our methodology. They came to our notice because they were identified in the research conducted by Bottini and Lavista.

Conciliation Category 4: Advance consent to conciliation and arbitration through unqualified submission to ICSID’s Additional Facility

53. Conciliation Category 4 provisions, much like Category 3 above, do not refer explicitly to conciliation and arbitration. They do, however, make this reference indirectly. The reason for this conclusion is set out below.
54. IIAs that include Conciliation Category 4 provisions grant unqualified advance consent to the submission of an investment dispute to ICSID’s Additional Facility (if either the home or host State is not a party to the ICSID Convention). Article 11(2) of the Ethiopia-Spain BIT (2009) is illustrative:

If the disputes referred to in paragraph (1) of this Article cannot be thus settled amicably within six months from the date of the written notification, the investor shall be entitled to submit, at his choice, for resolution to [ICSID] in case both Contracting Parties become members of this Convention. If a Contracting Party which is party in the dispute has not become a contracting State of the [ICSID Convention], the dispute shall be dealt with pursuant to the Rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceeding of the ICSID.⁷²

55. An indirect reference to conciliation and arbitration occurs in this provision because a reference to the Additional Facility engages the Additional Facility Rules, Article 2 of which states that the ICSID Secretariat is:

Lanka, and Syria. Most of these BITs do not refer specifically to either conciliation or arbitration, but rather to the ICSID jurisdiction that, as explained above, includes both methods of dispute settlement.”)

⁷² Ethiopia-Spain BIT (2009) art 11(2).

authorized to administer [...] in accordance with these Rules, proceedings between a State [...] and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings [...]” [emphasis added].⁷³

56. When this Rule is read with the unqualified submission of an investment dispute to the Additional Facility in Article 11(2) of the Ethiopia-Spain BIT (2009), and absent words to the effect that initiation of Additional Facility conciliation precludes recourse to arbitration or vice versa, we take the view that there is a good argument that Article 11(2) is a provision that grants advance consent to both conciliation and arbitration.
57. Conciliation Category 4 provisions were found in 51 IIAs, or 4.5% of all IIAs referencing investor-State conciliation.

Conciliation Category 5: Advance consent to conciliation with a fork in the road

58. Conciliation Category 5 provisions, while granting advance consent to conciliation, may be interpreted as containing a fork in the road clause. Such a clause may preclude conciliation if the investor first engages in arbitration or vice versa. An example of this type of provision is Article 20(7) of the ASEAN-India Investment Agreement (2014):

Where the dispute cannot be resolved as provided for under paragraph 5 of this Article within one hundred eighty (180) days from the date of written request for consultations and negotiations, unless the disputing parties agree otherwise, it may be submitted at the choice of the disputing investor to:

- (a) the courts or administrative tribunals of the disputing Party;*
- (b) conciliation or arbitration in accordance with the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention;*
- (c) conciliation or arbitration under the ICSID Additional Facility Rules, provided that either of the disputing Party or the non-disputing Party is a party, but not both, to the ICSID Convention;*
- (d) an international ad hoc arbitral tribunal established under the UNCITRAL Arbitration Rules; or*

⁷³ ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (‘Additional Facility Rules’) (April 2006) art 2.

(e) any other arbitral institution or in accordance with any other arbitral rules, if the disputing parties agree.

Provided that submission of the dispute by the disputing investor to any courts or administrative tribunals or to any fora or any arbitration rules under subparagraphs 7(a) to (e) shall exclude resort to the other. [emphasis added]⁷⁴

59. Fork in the road clauses have been interpreted by a number of arbitral tribunals. Generally their approach is to interpret these clauses restrictively, for example, by requiring the two dispute resolution procedures in question to involve the same parties, causes of action and objectives (the so-called “triple identity test”) before they will decide that the invocation of one precludes the other.⁷⁵
60. Conciliation Category 5 provisions were found in 37 IIAs, or 3.3% of all IIAs referencing investor-State conciliation.

Conciliation Category 6: Advance consent limited to conciliation only

61. Two treaties fell within Conciliation Category 6. One provided unqualified advance consent to investor-State conciliation, but not to arbitration. This is the Republic of Korea-Tunisia BIT (1975), which provides:

*In applying the [ICSID Convention] and the request of a national or a legal person of one of the two Contracting Parties who considers having suffered damage resulting from non-compliance with the provisions of this Agreement, the other Contracting Party irrevocably undertakes to submit to the conciliation procedure.*⁷⁶

62. The other IIA, the Lebanon-Spain BIT (1996), provides (under Article XI) consent to ICSID jurisdiction (i.e. to both conciliation and arbitration) if both contracting parties have become members of the ICSID Convention. However, it goes on to provide advance consent to conciliation only under the ICSID Additional Facility if one of the

⁷⁴ ASEAN-India Investment Agreement (2014) art 20(7).

⁷⁵ See *Khan Resources v Mongolia*, Decision on Jurisdiction, 25 July 2012, UNCITRAL, PCA Case No. 2011-09 paras 386-400. See also Ana Ubilava, ‘Underutilisation of ADR in ISDS: Resolving Treaty Interpretation Issues’ (SSRN 2020) <<https://ssrn.com/sol3/abstract=3762843>> accessed 3 February 2021, 26-27.

⁷⁶ Authors' unofficial English translation of the original French text, which reads: “*En application de la Convention pour le Règlement des Litiges Relatifs aux Investissements signée le 18 mars 1965 et la requête d'un ressortissant ou d'une personne morale d'une des deux Parties Contractantes qui considère avoir subi un dommage résultant de la non-observance des dispositions du présent Accord, l'autre Partie Contractante s'engage d'ores et déjà et irrévocablement à se soumettre à la procédure de conciliation.*” Republic of Korea-Tunisia BIT (1975) art 8.

contracting parties is not a member of the ICSID Convention.⁷⁷ Accordingly, we have categorised this treaty under both Conciliation Category 3 and Conciliation Category 6.

63. This Conciliation Category is similar to Mediation Category 2.

Conciliation Category 7: Conciliation if parties agree

64. Conciliation Category 7 covers IIAs that specifically provide for investor-State conciliation but do not grant advance consent. This means that host State consent must be sought and obtained if an investor is to validly institute any investor-State conciliation procedure.⁷⁸ An example of this Category of provision is Article 30 of the ASEAN Comprehensive Investment Agreement (2009):

Article 30: Conciliation

1. The disputing parties may at any time agree to conciliation, which may begin at any time and be terminated at the request of the disputing investor at any time.

*2. If the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress [...]*⁷⁹

65. These types of provisions were found in 123 IIAs, or 10.9% of all IIAs referencing investor-State conciliation.

Conciliation Category 8: Conciliation during pre-arbitration consultation phase if parties agree

66. Conciliation Category 8 provisions provide for conciliation during the pre-arbitration consultation phase if the parties agree to this procedure. For example, Article 23 of the Australia-Hong Kong Investment Agreement (2019) provides that:

In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the investment dispute through consultations, which

⁷⁷ Lebanon-Spain BIT (1996) art XI(2).

⁷⁸ See generally Christine Sim (n 45).

⁷⁹ ASEAN Comprehensive Investment Agreement (2009) art 30.

*may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.*⁸⁰

67. These provisions serve to encourage conciliation as a means of dispute settlement prior to the commencement of arbitration, but fall short of providing advance consent to conciliation. Such provisions have been found in 83 IIAs, which represents 7.4% of all IIAs referencing investor-State conciliation.⁸¹ We note that because conciliation in Category 8 is voluntary, it is a subset of (and also counted in) Conciliation Category 7. We created Category 8 to understand the level of reference to conciliation in the pre-arbitration phases of the ISDS process.

Conciliation Category 9: Conciliation that may be compelled by the State (but not the investor)

68. Conciliation Category 8 provisions empower States (but not the investor) to initiate conciliation unilaterally. An example is Article 14.23(1) of the Australia-Indonesia CEPA (2019), which reads:

*If the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor [...]*⁸²

69. In this Category of provision, if an investor wishes to initiate conciliation proceedings, it must obtain a separate agreement with the disputing State. In other words, from the investor's perspective, there is no advance consent to conciliation. But from the State's point of view, a failure to settle the dispute within 180 days of the request for consultations enables it to compel conciliation without the consent of the investor.
70. These provisions are rare and have been found only in a handful of treaties. In addition to the Australia-Indonesia CEPA, Conciliation Category 9 provisions are contained in the Hong Kong SAR-United Arab Emirates BIT (2019),⁸³ the Armenia-UAE BIT

⁸⁰ Australia-Hong Kong Investment Agreement (2019) art 23.

⁸¹ Our results for Conciliation Category 7 and Mediation Category 4 track the findings of a study based on supervised machine learning of cooling off provisions in 2885 IIAs that found references to conciliation in 3% of the IIAs studied and references to mediation in 1% of the IIAs studied. See Catherine Kessedjian and others, 'Mediation in Future Investor-State Dispute Settlement' (2020) Academic Forum on ISDS Concept Paper 2020/16, 7.

⁸² Article 14.19 of the Australia-Indonesia Comprehensive Economic Partnership Agreement (CEPA) (2019) defines "disputing Party" as "a Party against which a claim is made under [the section on ISDS]".

⁸³ Hong Kong, China Special Administrative Region (SAR)-United Arab Emirates BIT (2019) art 8(3). See Ana Ubilava, '[Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation](https://www.kluwermediation.com/blog/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation)' (Kluwer Mediation Blog, 5 September 2020) <[https://](https://www.kluwermediation.com/blog/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation)

(2016),⁸⁴ the Mauritius-UAE BIT (2015),⁸⁵ the Serbia-UAE BIT (2013),⁸⁶ and the Estonia-UAE BIT (2011).⁸⁷

Conciliation Category 10: Conciliation as a mandatory pre-condition to arbitration

71. Conciliation Category 10 covers IIA provisions that require conciliation be attempted as a mandatory pre-condition to arbitration. We found six: the Costa Rica-UAE BIT (2017),⁸⁸ the Armenia-UAE BIT (2016), the Mauritius-UAE BIT (2015), the India-Uruguay BIT (2008),⁸⁹ the India-Sweden BIT (2000)⁹⁰ and the Iraq-Jordan BIT (2013).⁹¹ Article 9 of the last-mentioned treaty provides, in relevant part:

[...] Settlement of any dispute arising from an investment between a Contracting Party and an investor of the other Contracting Party shall be resolved by way of the amicable means of mediation and conciliation.

[...] If such a dispute cannot thus be settled in accordance with item (First) above, and means of internal review have been exhausted within (180) one hundred and eighty days after the submission of a written application for resolution, either of the parties to the dispute may submit the dispute to:

a) to the competent courts of the Contracting Party in whose territory the investment was made;

b) the International Centre for Settlement of Investment Disputes [...]
[emphasis added]

72. The practical effect of this provision was examined by the tribunal in the *Itisaluna v Iraq* case. Although that tribunal was interpreting the OIC Investment Agreement (to which Iraq is a party, and which, in our opinion, does not contain a Conciliation

<http://mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation/>> accessed 3 February 2021.

⁸⁴ Armenia-United Arab Emirates BIT (2016) art 10(3).

⁸⁵ Mauritius-United Arab Emirates BIT (2015) art 10(3).

⁸⁶ Serbia-United Arab Emirates BIT (February 2013) art 9(3).

⁸⁷ Estonia-United Arab Emirates BIT (2011) art 9(4).

⁸⁸ Costa Rica-United Arab Emirates BIT (2017) art 14(3).

⁸⁹ India-Uruguay BIT (2008) art 9(2) and (3).

⁹⁰ Noah Rubins has described this treaty as involving a “three-step dispute resolution procedure, beginning with negotiation, followed by mandatory conciliation under the UNCITRAL rules, and finally leading to arbitration if this process does not lead to settlement”. Noah Rubins, ‘Comments to Jack C. Coe Jr’s Article on Conciliation’ (2006) 21 Mealey’s Intl Arb Rep 63, 65. India-Sweden BIT (2000) art 9.

⁹¹ This BIT was not identified through our research methodology as the UNCTAD website only contained an Arabic translation and it was not contained in the WTI EDIT database at the time of writing. A translation of Article 9 of the Iraq-Jordan BIT (2013) is contained in *Itisaluna Iraq LLC and others v Republic of Iraq*, ICSID Case No. ARB/17/10, Award (3 April 2020) (*‘Itisaluna v Iraq’*) para. 60. We have included it in our dataset given its high relevance. Although the UNCTAD IIA database at the date of writing does not record the Iraq-Jordan BIT’s entry into force, the *Itisaluna v Iraq* tribunal received evidence that that BIT entered into force in November or December 2016 (para 58).

Category 10 provision),⁹² the tribunal – in an *obiter* statement – examined the Iraq-Jordan BIT (2013) as part of its review of Iraq’s treaty practice. The tribunal took the view that pursuant to Article 9 of that BIT:

*disputing parties must first have resort to mediation and conciliation and, only if this fails, may a party submit the dispute to the adjudicatory mechanisms available under the treaty [... the BIT] supports an approach that conditions resort to arbitration on the prior resort to and exhaustion of a non-adjudicatory settlement process.*⁹³

73. A view has been expressed that Article 17 of the OIC Investment Agreement requires conciliation as a pre-condition to arbitration.⁹⁴ However, there is more compelling authority indicating that it is not.⁹⁵ Accordingly, we have not classified the OIC Investment Agreement as a treaty that belongs to Conciliation Category 10. We discuss the relevant authorities in Part V below.

Conciliation Category 11: State-State conciliation (in relation to investor claims)

74. Category 11 concerns conciliation processes that may be initiated and conducted by the investor’s home State on behalf of the investor. This Category involves direct engagement between the home-State and host-State, and represents a form of diplomatic protection.⁹⁶ Despite the inter-State nature of these provisions, we found many that were located in the ISDS sections of IIAs, which provide an additional and optional level for settling investment treaty disputes. An example of a Category 11 conciliation clause is Article 9 of the Armenia-BLEU BIT (2001):

1. [...] As far as possible, the Parties shall endeavour to settle the dispute through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.

⁹² Agreement on Promotion and Protection and Guarantee of Investments among Member State of the Organization of the Islamic Conference (opened for signature 5 June 1981, entered into force 23 September 1986) (‘OIC Agreement’) art 8.

⁹³ *Itisaluna v Iraq*, para 181.

⁹⁴ *ibid*, para 190. Note also the Dissenting Opinion of Arbitrator Peter, para 231-234.

⁹⁵ *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, Award on Respondent’s Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) (‘*al-Warraq v Indonesia*’) para 79. Damien Charlotin, ‘Uncovered: Kaufmann-Kohler chaired tribunal confirms that OIC Agreement contains consent to arbitration, but ultimately dismisses mining claims on the merits’ (*Investment Arbitration Reporter*, 17 February 2021).

⁹⁶ See generally, Sven MG Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (TMC Asser Press, 2008).

*2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months ... the dispute shall be submitted, at the option of the investor, either to the competent jurisdiction of the State where the investment was made, or to international arbitration.*⁹⁷

75. Typically, State-State conciliation provisions do not refer to any particular institution or set of rules and are mainly found in the treaties concluded by Belgium/BLEU.
76. Our study identified 65 IIAs containing Conciliation Category 11 provisions in their ISDS provisions.⁹⁸ This comprises 5.8% of the total number of all IIAs referring to conciliation in their ISDS provisions.

⁹⁷ Armenia-BLEU BIT (2001) art 9.

⁹⁸ This number does not include State-State dispute resolution clauses that are located outside ISDS provisions, which provide for conciliation as one of the means for resolving State-State disputes over the IIAs.

Chart of all IIA Conciliation Categories

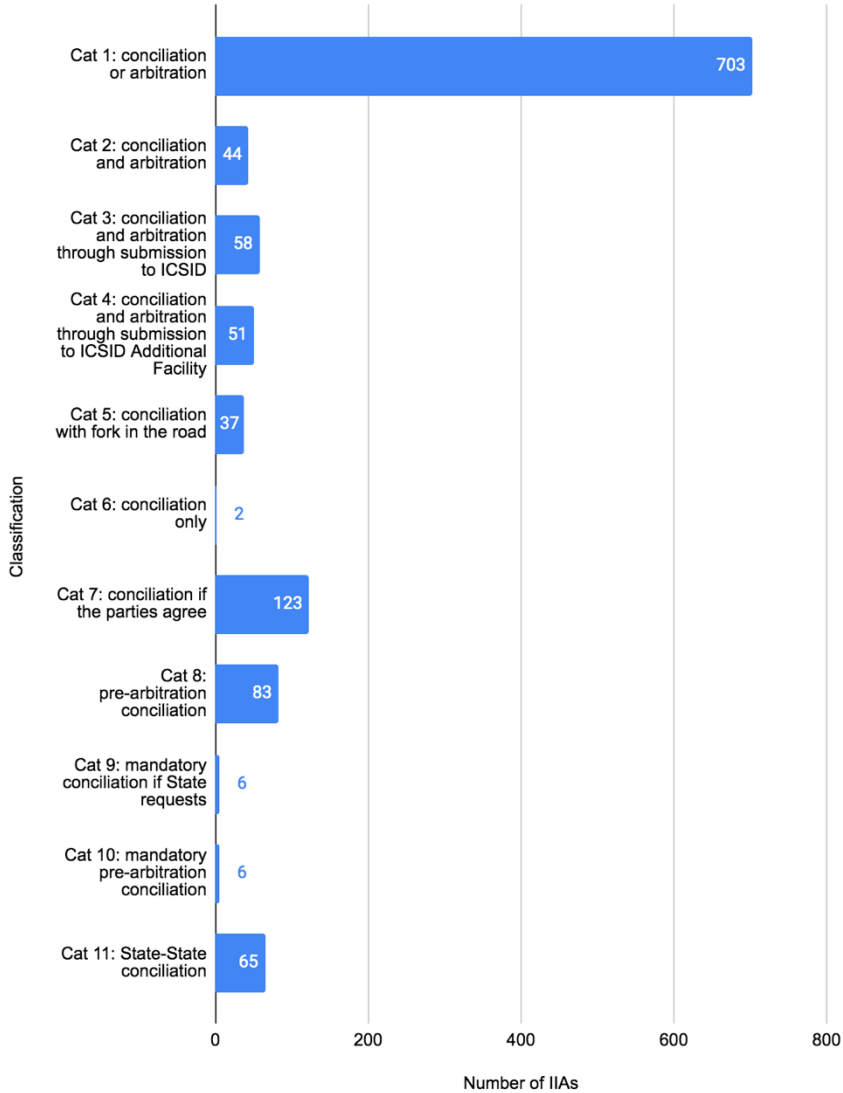


Chart 7: Bar Graph Summarising Conciliation Categories

77. To summarise our findings, **Chart 7** sets out the total number of IIAs that fall into each of the 11 Conciliation Categories described above. The Chart includes more IIAs than the total number of IIAs in our dataset that refer to conciliation in their ISDS provisions (1125) because some treaties fall into more than one category.

B. MEDIATION PROVISIONS

Mediation Category 1: Advance consent to mediation

78. Mediation Category 1 provisions involve a State granting advance consent to investor-State mediation to resolve future investment disputes that may arise between an investor and the host State. An example of this type of provision is found in Article 19(1) of the Mainland China-Hong Kong Closer Economic Partnership Arrangement Investment Agreement (China-HK CEPA IA):

A dispute arising from a claim by a Hong Kong investor that it or its covered investment has suffered losses or damages resulting from a breach by the Mainland authorities or institutions of the obligations provided in this Agreement in relation to the Hong Kong investors or their covered investments [...] may be settled by the following means: [...]

*(v) resolution through mediation whereby a Hong Kong investor may submit an investment dispute arising from this Agreement between that investor and the Mainland to a mediation institution of the Mainland side [...]*⁹⁹

79. Article 20 of the China-HK CEPA IA provides similar mediation rights in relation to a Mainland investor that has invested in Hong Kong.
80. We found six other ISDS provisions providing advance consent to mediation: in the Burkina Faso-Turkey BIT (2019); Costa Rica-UAE BIT (2017); Mainland China-Macau CEPA IA;¹⁰⁰ China-Taiwan Province of China Cross-Straits Bilateral Investment Protection and Promotion Agreement (2012),¹⁰¹ Iraq-Jordan BIT (2013),¹⁰² and COMESA Investment Agreement (2007).¹⁰³

⁹⁹ Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement (signed 28 June 2017, entered into force 28 June 2017) ('China-HK CEPA IA') art 19(1).

¹⁰⁰ Mainland and Macao Closer Economic Partnership Arrangement Investment Agreement (signed 18 December 2017, entered into force 1 January 2018) ('China-Macau CEPA IA') arts. 19(1)(v) and 20(1)(iv). Although the China-Macau CEPA IA is not included in the UNCTAD IIA Navigator or WTI EDIT databases, it was included in our dataset as it is a highly relevant instrument.

¹⁰¹ China-Taiwan Province of China Cross-Strait Bilateral Investment Protection and Promotion Agreement (signed 9 August 2012, entered into force 1 February 2013) art 13(4).

¹⁰² Discussed above in Conciliation Category 10.

¹⁰³ Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (signed 23 May 2007) art 26(4). Discussed below in Mediation Category 6.

81. These seven instruments in this Category are exceptional because in the vast majority of IIAs referring to mediation, States and investors need to enter into a separate agreement before mediation procedures may commence.¹⁰⁴

Mediation Category 2: Advance consent limited to mediation only

82. Mediation Category 2 ISDS provisions provide advance consent to mediation but not to arbitration. Only three instruments were found in this Category, and all were signed by the People's Republic of China. These were the China-HK CEPA IA (discussed in Mediation Category 1), the China-Macau CEPA IA, and the China-Taiwan Province of China Cross-Straits Bilateral Investment Protection and Promotion Agreement.
83. We included these three instruments also in Mediation Category 1 (concerning advance consent). They are also similar to Conciliation Category 6.

Mediation Category 3: Mediation if parties agree

84. Mediation Category 3 (much like Conciliation Category 7) relates to IIA provisions that provide for investor-State mediation but require agreement between the investor and host State if a mediation is to take place. Our research found that 43 out of 53 ISDS provisions referring to mediation, or the vast majority of all the investor-State mediation provisions in our dataset (81.1%), fall within Mediation Category 3. This finding contrasts with Conciliation Category 7 provisions, which were contained in only 10.9% of all IIAs referencing investor-State conciliation.
85. Within the 43 IIAs included in Mediation Category 3, we identified 16 (30.1%) that explicitly state that parties may agree to mediate at any time, including during the pre-arbitration consultation phase or the arbitral proceedings. An example is found in Article 23(1) of the Burkina Faso-Canada BIT (2015):

*The disputing parties may at any time, be it after notice of intent to submit a claim to arbitration has been given or after a claim has been submitted to arbitration, agree to mediation.*¹⁰⁵

¹⁰⁴ We note for completeness that we identified three IIA provisions pursuant to which States could compel an investor to engage in mediation. We classified these separately as Mediation Category 5 provisions.

¹⁰⁵ Burkina Faso-Canada BIT (2015) art 23(1).

86. While this provision does not provide advance consent to mediation, express treaty terms such as these are likely to encourage and promote investor-State mediation either prior to or during ISDS arbitration.

Mediation Category 4: Mediation during pre-arbitration consultation phase if parties agree

87. Mediation Category 4 provisions relate to mediation during the pre-arbitration amicable settlement phase. In this Category, investor-State mediation is explicitly mentioned as a non-mandatory option for disputing parties during the pre-arbitration consultation period. One such example is Article 9.18 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018):

*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.*¹⁰⁶

88. These types of provisions are found in 27 of the 53 IIAs (50.9%) that contain investor-State mediation provisions. All of these 27 provisions have also been included in Mediation Category 3 given that they require a separate agreement to mediate between the investor and host State. Further, it is noteworthy that 22 of these Mediation Category 4 provisions also make reference to conciliation, as seen in the example extracted above.

Mediation Category 5: Mediation that may be compelled by the State (but not the investor)

89. Mediation Category 5 is similar to Conciliation Category 9, and concerns IIA provisions under which States (but not the investor) may unilaterally institute compulsory mediation. We found 3 IIAs that fall into this category, namely the Armenia-UAE BIT (2016),¹⁰⁷ the Mauritius-UAE BIT (2015), and the Indonesia-Republic of Korea CEPA (2020).¹⁰⁸ Article 10(3) and (4) of the Armenia-UAE BIT (2016) reads:

¹⁰⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) ('CPTPP') art 9.18.

¹⁰⁷ Although the UNCTAD IIA database listed the Armenia-UAE BIT as "Armenia-United Arab Emirates BIT (2002)" at the time of writing, the date of signature according to both the UNCTAD IIA database and the text of the treaty itself is 22 July 2016, and the year 2002 reflects the year of signature of the previous BIT which was terminated upon the entry into force of the present BIT. The UAE-Armenia BIT (2016) – as well as the Mauritius-UAE BIT (2015) – refers to both "conciliation and mediation" and has been counted as both a conciliation IIA and a mediation IIA in the dataset.

¹⁰⁸ Indonesia-Republic of Korea Comprehensive Economic Partnership Agreement (2020) ('Indonesia-Republic of Korea CEPA') art 7.19(7).

3. When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice [for consultations and negotiations], it shall be submitted to the competent authority of that Contracting Party or arbitration centers thereof, for conciliation and mediation.

4. If the dispute cannot be settled amicably within six months from the date of the start of the conciliation and mediation process referred to in paragraph 3 of this Article, the dispute may upon the request of the investor be settled as follows [...] by a competent Court of the [host State ...] by arbitration centres of the [host State, and by ICSID or UNCITRAL Rules arbitration]

90. In this provision, although the investor may be compelled to engage in mediation, the mandatory requirement ceases after six months of mediation (if no settlement is reached). In this event, the investor may institute proceedings before the host State's domestic courts or before the specified arbitration fora. Given that three months of consultations and thereafter six months of mediation are pre-conditions to arbitration, the Armenia-UAE BIT and the similarly worded Mauritius-UAE BIT are also included in Mediation Category 6 below.
91. The Indonesia-Republic of Korea CEPA contains a mediation provision that is virtually identical to the Australia-Indonesia CEPA discussed in Conciliation Category 9 above, but substitutes the word "conciliation" with "mediation".

Mediation Category 6: Mediation as a mandatory pre-condition to arbitration

92. We found five IIAs that may be interpreted as requiring mediation as a mandatory pre-condition to arbitration (representing 9.4% ISDS of all mediation provisions). This category comprises the Costa Rica-UAE BIT (2017), the Armenia-UAE BIT (2016), the Mauritius-UAE BIT (2015), the Iraq-Jordan BIT (2013),¹⁰⁹ and the COMESA Investment Agreement (2007). Article 14 of the Costa Rica-UAE BIT provides:

3. In the event that an investment dispute cannot be resolved through consultations and negotiations in accordance with paragraph 1, within three months after the respondent receives notification of the dispute, it must submit to a third - party procedure such as conciliation or mediation before an authorized center of the Party complained against in the dispute.

4. For greater certainty, compliance with the requirements pursuant to paragraphs 1, 2 and 3 regarding consultation and negotiation and third-party procedures is mandatory and a condition precedent to the submission of the dispute to arbitration.

¹⁰⁹ Discussed above in Conciliation Category 10.

5. *If the controversy referred to in paragraph 1 cannot be resolved amicably within six months from the beginning of the third party procedure referred to in paragraph 3 of this Article, which can be extended if the disputing parties If so agreed, the investor may submit a claim to arbitration.*

93. The Costa Rica-UAE BIT, Iraq-Jordan BIT and the COMESA Investment Agreement have also been included in Mediation Category 1, while the Armenia-UAE BIT and the Mauritius-UAE BIT have also been classified under Mediation Category 5.

Mediation Category 7: Mediation provisions with detailed procedural rules

94. Mediation Category 7 has been created to identify IIAs that provide for detailed mediation procedural rules. We found seven, which represent 13.2% of all IIAs with investor-State mediation provisions.¹¹⁰ Some examples of these rules are set out below.
95. The EU-Singapore IPA (2018)¹¹¹ and the EU-Vietnam IPA (2019)¹¹² contain a “Mediation Mechanism for Disputes between Investors and States” in an Annex. IIAs such as the Canada-EU CETA (2016)¹¹³ allow mediation rules to be formulated after conclusion of the treaty. Pursuant to Article 8.44.3(c) of this CETA, its Committee on Services and Investment adopted ISDS Rules for Mediation on 29 January 2021.¹¹⁴ Under these three EU agreements, a Code of Conduct developed for arbitrators is applied *mutatis mutandis* to mediators.¹¹⁵ The EU agreements, however, do not provide advance consent to investor-State mediation.
96. The Indonesia-Singapore BIT (2018)¹¹⁶ contains mediation provisions generally similar to those found in the EU-Singapore IPA. The China-HK CEPA IA, the China-Macau CEPA IA, and the China-Taiwan Province of China Cross-Straits Bilateral Investment

¹¹⁰ Kun Fan (n 16) 337, discusses five of these treaties.

¹¹¹ EU-Singapore Investment Protection Agreement (2018) (‘EU-Singapore IPA’).

¹¹² EU-Singapore Investment Protection Agreement (2018) (‘EU-Vietnam IPA’).

¹¹³ Canada-EU Comprehensive and Economic Trade Agreement (2016) (‘Canada-EU CETA’) art 8.20(2).

¹¹⁴ See Global Affairs Canada, ‘Decision No 002/2021 of the Committee on Services and Investment of January 29, 2021 adopting rules for mediation for use by disputing parties in investment disputes’ (29 January 2021) <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rules-mediation-regles.aspx?lang=eng>> accessed 22 February 2021.

¹¹⁵ For further discussion on this point, see Claxton (n 16).

¹¹⁶ Indonesia-Singapore BIT (2018) art 16.

Protection and Promotion Agreement (2012) also contain detailed mediation provisions. They are unique because they do not provide for ISDS arbitration.¹¹⁷

Chart of all IIA mediation categories

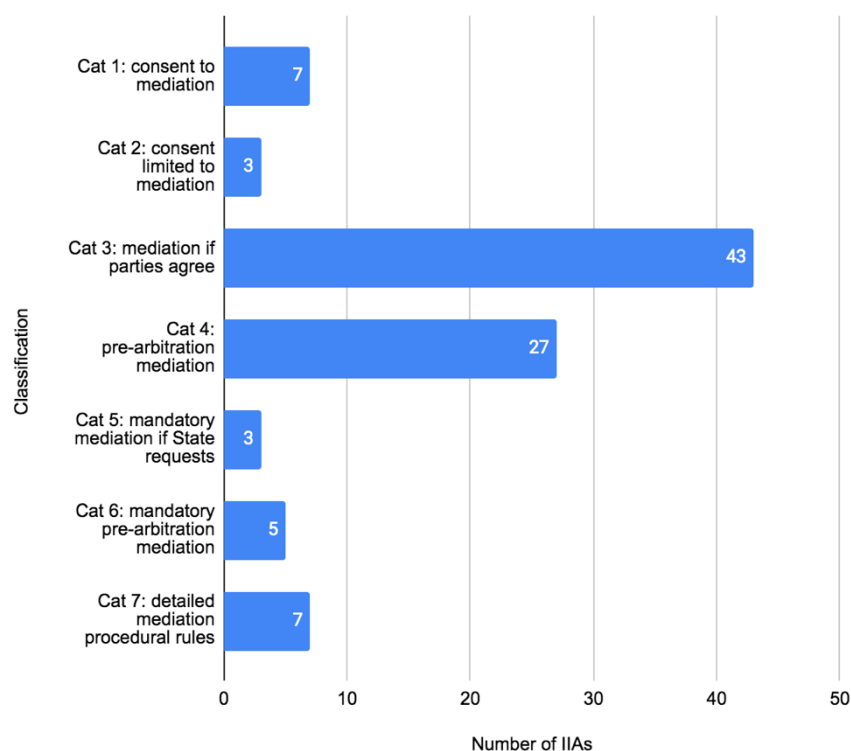


Chart 8: Bar Graph Summarising Mediation Categories

97. To summarise our findings, **Chart 8** above sets out the total number of IIAs that fall into each of the 7 Mediation Categories we have formulated. The Chart includes more IIAs than the total number of IIAs in our dataset that refer to mediation in their ISDS provisions (53) because some treaties fall into more than one category.

Asia-Pacific treaty practice

98. Our research has highlighted that Asia-Pacific States have been a significant driver behind the increase in IIAs with investor-State mediation provisions. Asia-Pacific States (or their administrative regions) have been parties to 21 of the 53 IIAs (39.6%).

¹¹⁷ The China-HK CEPA IA is described in further detail in Fan (n 16) and David Ng, 'The Way Forward for Mediation as a Reform Option for ISDS' (UNCITRAL Working Group III Virtual Pre-Intersessional Meeting on the Use of Mediation in ISDS, Hong Kong, December 2020), paras 76-79, 95 and 106.

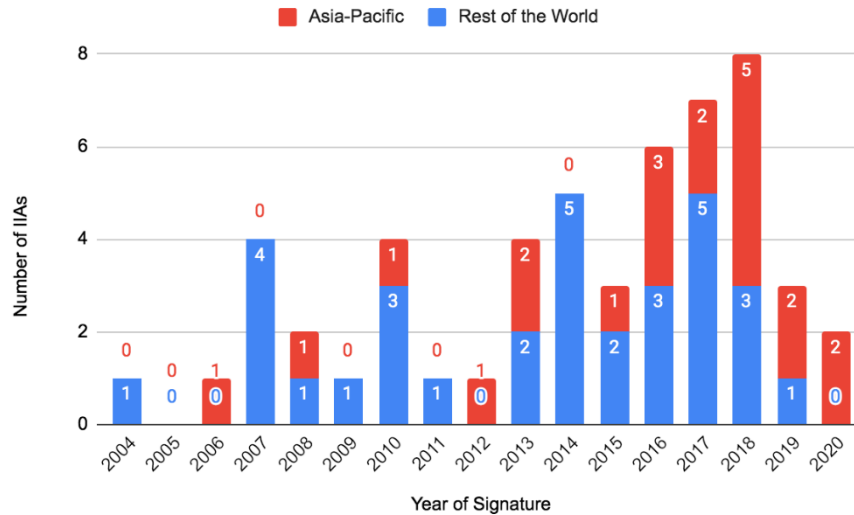


Chart 9: Signed IIAs Referring to Investor-State Mediation by Geographic Origin

99. **Chart 9** presents a geographical breakdown of all IIAs with investor-State mediation provisions, with the red segments of the bars representing Asia-Pacific States and the blue segments indicating the rest of the world. An IIA is deemed to have been signed by an “Asia-Pacific” State if at least one party to the IIA is from the Asia-Pacific region (excluding Middle Eastern/West Asian States like the UAE, Iraq and Jordan).
100. The Chart commences from the first IIA to refer to mediation – the 2004 CAFTA-DR – and shows a significant increase in the number of investor-State mediation provisions involving at least one Asia-Pacific State in the mid to late 2010s. Asia Pacific States (or their administrative regions) with the most number of IIAs with investor-State mediation provisions include: Singapore (6), Australia (5), China (4), the Republic of Korea (4) and Vietnam (4).

Part V: Interpreting “Arbitration or Conciliation” Provisions or Unqualified Submissions to ICSID Jurisdiction

101. A divergence of views exists as to whether Conciliation Category 1 and 3 provisions in effect impose a fork in the road pursuant to which an investor’s choice of one dispute resolution method (e.g. arbitration) precludes recourse to the other (e.g. conciliation). We will first examine this issue in relation to Conciliation Category 3 (i.e. IIAs that provide for unqualified submissions to ICSID jurisdiction) and then address how the issue is dealt with in the context of Conciliation Category 1 (i.e. IIA provisions referring to “conciliation or arbitration”).

102. As to Conciliation Category 3, Schreuer et al argue that:

*undifferentiated references to [ICSID]’s jurisdiction provide the party instituting proceedings with a choice between the two methods [i.e. conciliation or arbitration]. A choice once made can only be changed by agreement between the parties. Nevertheless, it is advisable to specify in advance which of the two methods is to be used, possibly providing for conciliation followed by arbitration if necessary. If both methods are offered, it is desirable to indicate which party has the choice between them. Failure to clarify these points in advance may lead to surprising results. For instance, a host State that is aware of an investor’s intention to institute arbitration may rush to initiate conciliation, thereby blocking access to arbitration.*¹¹⁸

103. The ICSID Convention’s preparatory work aligns with a different view. In particular, comments by Aron Broches indicate that an IIA’s unqualified reference of a dispute to ICSID’s jurisdiction should not exclude recourse to a mix of both ICSID conciliation and arbitration if the need arose. Statements made by Mr Broches during two consultative meetings of legal experts are instructive. At one meeting held in December 1963, he observed that the jurisdiction of ICSID was conceived to include procedures for conciliation and arbitration, which “was not intended to exclude the possibility that in certain cases arbitration would follow conciliation if the conciliation effort failed”.¹¹⁹ At a subsequent meeting in February 1964, he commented that the intention of the

¹¹⁸ Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 89.

¹¹⁹ ICSID, *History of the ICSID Convention*, Vol 2 Part 1 (2009 reprint) 255.

Convention “was to leave the parties free to choose between conciliation, arbitration or a combination of both.”¹²⁰

104. In relation to the text of the ICSID Convention, Article 25 is formulated in general terms and deals with consent to the “jurisdiction of the Centre”. It does not specify that ICSID’s jurisdiction is limited exclusively to one mode of dispute resolution, i.e. either to Chapter III (Conciliation) *or* Chapter IV (Arbitration) of the ICSID Convention. Moreover, Article 35 of the Convention clearly anticipates the possibility of arbitration after a conciliation procedure because it expressly precludes the use in a subsequent arbitration of communications made in the conciliation proceedings. Further, no prohibition on the consecutive or concurrent use of both conciliation and arbitration is found in other provisions of the ICSID Convention, the ICSID Institution Rules,¹²¹ the ICSID Arbitration Rules or the ICSID Conciliation Rules. For completeness, we note (as mentioned in our discussion on Conciliation Category 4) that Article 2 of the ICSID Additional Facility Rules speaks of conciliation “and” arbitration. Additionally, nothing in the ICSID Additional Facility Rules indicates that initiating a conciliation precludes recourse to arbitration or vice versa.

105. Based on the ICSID Convention’s preparatory work and our interpretation of the Convention set out above, we conclude that without explicit language to the contrary Conciliation Category 3 provisions provide unqualified consent either to arbitration or conciliation, or a combination of both. If these generic provisions are construed to mean that an investor’s initial attempt to resolve the dispute through conciliation would preclude subsequent recourse to arbitration, that would constitute an overly technical interpretation that contravenes the spirit and aims of both the ICSID Convention and investment protection treaties.

¹²⁰ ICSID (ibid) 413, cited in Nitschke (n 5) 123. See also Aron Broches, “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): 338 (“Although the [ICSID] Convention does not expressly so provide there is no reason why parties, if they so desire, cannot agree to have recourse first to conciliation and, in case the conciliation effort fails, to submit the dispute to arbitration.”).

¹²¹ Although Rule 1 of the ICSID Rules of Procedure for the Institution of Arbitration and Conciliation Proceedings (Institution Rules) requires a request to institute proceedings to specify whether it relates to arbitration or conciliation, Note C to Rule 1 of the Institution Rules as published in 1968 provides that “the Convention deals separately – though in identical terms – with requests for conciliation and for arbitration. This, of course, does not prevent the submission of a dispute first to conciliation and, if the parties cannot be reconciled, then to arbitration (cf. Article 35 of the Convention).” ICSID Regulations and Rules (1968) 28.

106. Our position finds support also in the writings of other commentators. Nitschke has reviewed the ICSID Convention's drafting history and points out that the drafters “ultimately decided to give maximum flexibility to the disputing parties” as to their choice of arbitration or conciliation.¹²² Rubins has asserted that limiting a general reference to ICSID jurisdiction “would be contrary to the consensual nature of conciliation, and would unnecessarily limit the parties in their search for an efficient and mutually-acceptable resolution of their dispute.”¹²³ Additionally, Van Ginkel contends that “there is nothing in the ICSID Convention that prevents arbitration and conciliation proceedings from being conducted concurrently”.¹²⁴
107. We turn now to Conciliation Category 1, which concerns IIA provisions that refer expressly to “arbitration or conciliation”. Some may argue that they give rise to a binary choice between arbitration or conciliation that automatically excludes future recourse to one method when the other is chosen. While a strict textual interpretation might emphasise the disjunctive “or” in “arbitration or conciliation” IIA provisions, a contextual and purposive interpretation – taking into account the drafting intention behind most IIAs is to encourage amicable settlement and efficient dispute resolution – would permit dispute resolution through conciliation without precluding recourse to arbitration if conciliation is unsuccessful. Importantly, the absence of an explicit fork in the road (as found in Conciliation Category 4 provisions) suggests that Conciliation Category 1 (and Conciliation Category 3) provisions do not extinguish rights to one dispute resolution method when another is chosen.
108. The question whether a basic ISDS provision providing advance consent to “conciliation or arbitration” constitutes a type of fork in the road has not yet been determined by an investment treaty tribunal. Of relevance, however, are three known investment arbitration decisions concerning a more complex “conciliation or arbitration” provision contained in Article 17 of the OIC Investment Agreement, which reads as follows:

[...] Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:

¹²² Nitschke (n 5) 123.

¹²³ Rubins (n 90).

¹²⁴ Eric van Ginkel, ‘Toward Mandatory ICSID Conciliation: Reflections on Professor Coe’s Article on Investor-State Conciliation’ (2006) 21(4) Mealey’s Int’l Arb Rep 68, 69.

1. Conciliation

a) *In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties.*

b) *The task of the conciliator shall be confined to bringing the different view points closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it.*

2. Arbitration

a) *If the two parties to the dispute do not reach an agreement by virtue of their resort to conciliation [...] or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not agree on accepting the solutions proposed therein, then each party can resort to the Arbitration Tribunal to issue the final decision in the dispute [...]*¹²⁵ [emphasis added]

109. Two different approaches have been adopted by the arbitral tribunals that have interpreted this provision. An important question before these tribunals was whether conciliation under Article 17 constitutes a mandatory pre-condition to arbitration. The tribunal in *al-Warraq v Indonesia*¹²⁶ held that under Article 17 “conciliation and arbitration are separate forms of dispute resolution which may be used either sequentially or alternatively, and the fact that there is no prior conciliation agreement is not an obstacle to an investor-state arbitration,” reasoning, in part, that “[t]he opening phrase of Article 17 clearly refers to ‘arbitration or conciliation’ as alternatives.”¹²⁷
110. A different result was reached by the tribunal in *Itisaluna v Iraq*, which focused on the text of Article 17(2) and held that it provides general consent to arbitration, “subject (on the Tribunal’s analysis) on the fulfilment of the condition precedent of prior resort to, and exhaustion of, the conciliation process”.¹²⁸

¹²⁵ *Itisaluna v Iraq*, Award (n 91) para 51 (based on the certified English translations submitted by the disputing parties). The paragraph numbering in Article 17 follows that of the original text.

¹²⁶ *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012).

¹²⁷ *ibid*, para 79.

¹²⁸ *Itisaluna v Iraq* (n 91), para 190. Note also the Dissenting Opinion of Arbitrator Peter, para. 231-234.

111. In a third unpublished award, the tribunal in *Navodaya Trading v Gabon* reportedly acknowledged that the treaty’s wording was not a model of clarity, but held that Article 17(2) should not bar arbitration where there had been no prior recourse to conciliation. The tribunal emphasised the unambiguous wording of Article 17’s *chapeau*, which provided that disputes could be settled by conciliation “or” arbitration, and also the wording of Article 17(1) (titled “Conciliation”) which applied “[i]n case the parties to the dispute agree on conciliation”.¹²⁹
112. We find the reasoning of the tribunals in *al-Warraq v Indonesia* and *Navodaya Trading v Gabon* to be persuasive. They consider Article 17(2)(a) within the broader context of Article 17. Unless there is an unambiguous contrary indication in the language of an IIA such as the OIC Investment Agreement, we see important reasons why the vital goals of IIAs, such as dispute resolution efficiency and flexibility, should add support to an interpretation that allows parties first to explore solutions through amicable conciliation and thereafter (if necessary) to resort to arbitration.
113. We also consider that the decisions in *al-Warraq* and *Navodaya Trading* lend support the position that IIA provisions that grant advance consent to “conciliation or arbitration” (Conciliation Category 1) should not be read as giving rise to a fork in the road but instead permit those modes of dispute resolution to be used alternatively, simultaneously or sequentially.

¹²⁹ Damien Charlotin, ‘Uncovered: Kaufmann-Kohler chaired tribunal confirms that OIC Agreement contains consent to arbitration, but ultimately dismisses mining claims on the merits’ (*Investment Arbitration Reporter*, 17 February 2021).

Part VI: Conclusions and Recommendations

114. As we noted at the outset, two positive IBRD conciliation and mediation experiences involving investor-State disputes in the late 1950s inspired Aron Broches to contemplate the establishment of ICSID. Despite this early inspirational role, conciliation and mediation have remained dormant mechanisms in ISDS for more than half a century and their potential is yet to be realised. But we may be on the verge of their awakening given the groundswell of recent conciliation and mediation activity: mediation rule development at ICSID and UNCITRAL; conciliation rule updating at ICSID; guideline setting at the Energy Charter Conference and the International Mediation Institute; and reform development at UNCITRAL's Working Group III.¹³⁰
115. Notwithstanding these welcome developments, a substantial amount of work still remains to be done. For example, by encouraging the conclusion of more IIAs with investor-State conciliation and mediation provisions, by improving the quality of those provisions, by educating both State officials and investors as to the benefits of conciliation and mediation, and by training government professionals how (i) to assess whether conciliation or mediation will be worth pursuing in a given dispute, (ii) to participate effectively in conciliation and mediation procedures, (iii) to design commercially viable settlement options that will offer realistic ways forward for both the investor and the State, (iv) to manage and deal with potential criticisms directed at any settlement by affected stakeholders and civil society in general, and (v) to establish a cross departmental administrative framework to support investor-State conciliations, mediations and settlements.
116. *Quantitative results:* We intended the research described in this article to be a contribution mainly to the first and second points made above, i.e. increasing the number and quality of IIAs with investor-State conciliation and mediation provisions. As to increasing the number of these IIAs, our quantitative research draws attention to a real need for an increase. Our results show that the proportion of IIAs containing conciliation or mediation ISDS provisions is low: out of the total number of signed IIAs (3815) included in the UNCTAD IIA Navigator and WTIEDIT databases¹³¹ only 29.9% (or 1141) refer to investor-State conciliation or mediation. In other words, 70% of IIAs

¹³⁰ See nn 8-13 above.

¹³¹ As at 15 April 2021.

do not provide for or promote mediation or conciliation in the event of a dispute between an investor or a host-State. A closer analysis shows an even more arid landscape. For conciliation, only 19.1% of IIAs signed during 2010 to 2020 referred to investor-State conciliation. And while references to investor-State mediation are gradually increasing, our percentage analysis shows that only a small fraction of IIAs refer to investor-State mediation, for example, only 4.7% of IIAs signed during the period 2004 to 2020 referred to investor-State mediation. Even the highest annual mediation reference rate in IIAs – 17.4% of all signed IIAs in 2018 – indicates that limited consideration is given by IIA drafters to investor-State mediation. These figures highlight considerable room for an increase in reference rates to investor-State conciliation or mediation within IIAs. In this connection, we look forward to ICSID’s new mediation rules as they will create an opportunity to promote more understanding of investor-State mediation, and in turn bring about more references to mediation in future IIAs.

117. *Qualitative results:* We found better results in relation to the quality of investor-State conciliation and mediation provisions. Our assessment of the 1141 IIAs referring to investor-State conciliation and mediation showed that a good proportion contain advance consent to conciliation but not to mediation: out of the 1141 IIAs that referred to investor-State conciliation and/or mediation, 61.6% (or 703) contain advance consent to “conciliation or arbitration”, while only 0.6% (or 7) contain advance consent to mediation. If all IIAs that provide advance consent in Conciliation Categories 1, 2, 3, 4, 5, 6 and 10 are aggregated, they constitute 70.6% (or 806) of those 1141 IIAs.
118. *Need to clarify Conciliation Category 1 and 3 provisions:* Where advance consent to investor-State conciliation is included in an IIA, there is a greater chance that conciliation will be engaged because an investor may commence conciliation without having to obtain further consent from the host State. The quality of these types of provisions in Conciliation Categories 1 (“conciliation or arbitration”) and 3 (unqualified submission to ICSID jurisdiction) could be improved by clarifying that the choice of conciliation or arbitration does not preclude future or parallel recourse to the other. We have shown that there are good arguments that demonstrate these Categories should be interpreted to permit recourse to conciliation or arbitration or both but we believe conciliation will gain more prominence if future IIAs clarify that these provisions do not constitute a restrictive fork in the road. Although we did not find an IIA that provided advance consent to “mediation or arbitration”, if future IIAs are drafted with

this type of provision, our comments on Conciliation Category 1 would be equally applicable to them.

119. *Value-adding benefits of conciliation or mediation prior to or during arbitration:* We consider that the quality of IIA ISDS provisions may be improved if they encourage or require conciliation and mediation to be conducted prior to commencing an arbitration. The incorporation of such provisions in IIAs is low. We found that out of the 1141 IIAs referring to investor-State conciliation and/or mediation, only 11.5% (or 101) suggested to disputing parties that conciliation and/or mediation was a process that could take place (by way of agreement) during the pre-arbitration amicable settlement phase, and only 0.61% (or 7) required conciliation and/or mediation as a mandatory precondition to arbitration.¹³²
120. We see a value-adding role for pre-arbitration conciliation or mediation because in many cases a pre-arbitration requirement that the parties should themselves attempt to resolve the dispute in question through consultation or negotiation is often not effective. Without a strong willingness of all parties to settle a dispute, consultations or negotiations have the potential to be passive or unproductive experiences. In many cases, the dynamic of pre-arbitration interactions could change for the better if a skilled and expert third-party conciliator or mediator were involved.
121. Another effective process in some cases would be to run a conciliation or mediation procedure in parallel with arbitration. Although this may be viewed as adding extra expense and complexity, these two processes could complement and support each other in positive ways. For example, arbitration procedures such as document disclosure, oral argument, cross examination or questions from the tribunal may allow parties to fully realise the strengths and weaknesses of the arguments and evidence at issue. With the benefit of these arbitral “stress tests”, the willingness of parties to concede positions in a parallel conciliation or mediation may be heightened.¹³³ Currently, very few IIAs

¹³² The 2020 Queen Mary University of London-Corporate Counsel International Arbitration Group Survey: Investors’ Perceptions of ISDS (May 2020), at pages 24-25, surveyed 86 corporate counsel and management representatives, of whom 30% ‘strongly’ supported and 34% ‘somewhat’ supported mandatory mediation before arbitration. However, those respondents who participated in post-survey interviews generally held the position that mediation should not be forced upon the parties and were concerned that compelling mediation potentially increased time and costs. See <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>> accessed 19 July 2021.

¹³³ For more on parallel conciliation or mediation in the investor-State context, see Christine Sim (n 45) and Jack C. Coe Jr, ‘Concurrent Co-Mediation: Towards a More Collaborative Centre of Gravity in Investor-State Dispute Resolution’ in Catherine Titi and Katia Fach Gomez (n 5) 61.

encourage or directly offer this parallel procedure option. A mere 1.5% (or 17) of the 1141 IIAs mentioning conciliation and/or mediation expressly provide that these dispute resolution methods may take place during arbitration.

122. *Improving the drafting of investor-State conciliation or mediation provisions in IIAs:* Further enhancements in IIA drafting could be the inclusion of references to specific investor-State conciliation or mediation rules (e.g. the new ICSID conciliation or mediation rules (once completed)), preambles that encourage conciliation and mediation, tolling provisions whereby conciliation or mediation suspends any time limitation period within which to institute an arbitration, detailed procedural options such as non-binding commentaries that illustrate how time or costs will be saved if a certain procedure is adopted, guidelines on how to use conciliation or mediation to continue a productive relationship between the investor and the host State, or the empowerment of the arbitral tribunal to propose to the parties (in a non-binding manner) that certain issues may benefit from a separate conciliation or mediation procedure.
123. To promote an improvement in drafting IIAs, States may also consider drafting model IIA investor-State conciliation and mediation provisions that they could use during the negotiation of future IIAs. A number of points mentioned in relation to model conciliation or mediation clauses suggested below could also be included in these model IIA provisions.
124. *Model conciliation or mediation clauses:* Our examination of more than 1100 IIA investor-State conciliation or mediation provisions show that most are very general and leave much to the disputing parties to agree on in relation to the conduct of the conciliation or mediation between them. The general nature of these IIA provisions has highlighted the need to draft more detailed model investor-State conciliation or mediation clauses that may be adopted by the investor and host State after a dispute has arisen. These clauses may supplement and/or clarify the references to investor-State conciliation or mediation in an applicable IIA. We acknowledge, for example, that ICSID has its own model clauses that disputing parties may agree to if they wish to engage in ICSID conciliation but we see that there is a need to reassess the model clauses

that are currently available in the light of the many developments that are taking place in investor-State conciliation and mediation.¹³⁴

125. A new generation of model clauses could assist parties (and promote investor-State conciliation and mediation) by providing them with optional template language where they may need, for example, to formulate a more tailored consent to conciliation or mediation (including its duration and scope), to adopt a specific set of investor-State conciliation or mediation procedural rules, to identify any domestic procedural law that should be applied, to suspend arbitration proceedings and associated time limitation periods, to specify the number of conciliators and method of appointing them, to choose a code of conduct that the parties wish to apply or be guided by, to agree on the rules that will apply if the arbitration needs to be reactivated (including how to deal with communications made during the conciliation or mediation proceedings), to outline the method of terminating an arbitration if a full settlement is achieved in the conciliation or mediation, to address the extent to which the parties desire facilitative or evaluative third-party intervention, to allocate the responsibility for paying the fees of the conciliator(s) or mediator, and to agree on how a resulting settlement agreement will be enforced and/or the relevance or effect of the Singapore Mediation Convention.¹³⁵

126. *Final conclusion:* In summary, our research has revealed that a low proportion of IIAs contain investor-State conciliation and/or mediation provisions. It has also demonstrated that there are several ways to improve the quality of many of the currently existing provisions. We believe an increase in numbers of IIAs with well drafted conciliation and/or mediation provisions will send out a stronger signal from States that these dispute resolution methods are worthwhile and need more serious consideration by parties involved in investor-State disputes. In turn, this is likely to encourage and promote the utilization of these dispute resolution mechanisms in ISDS in the future. Once this begins to happen, we look forward to the day when investor-State conciliation

¹³⁴ See <https://icsid.worldbank.org/resources/content/model-clauses>. In this context, we welcome the draft model clauses and guidelines on investor-State mediation formulated by the UNCITRAL Secretariat. See the following Notes by the UNCITRAL Secretariat: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf (July 2021); and UNCITRAL Secretariat, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_guidelines_on_mediation.pdf (July 2021), both accessed 9 September 2021.

¹³⁵ For further considerations when drafting investor-State dispute settlement provisions for conciliation and mediation, see ICSID Secretariat, 'Background Paper on Investment Mediation' (July 2021) <https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf> accessed 19 July 2021 (particularly Section 5 entitled Concluding Notes), and Claxton (n 16).

and mediation are no longer “rarely observed” practices¹³⁶ but frequently deployed modalities of dispute settlement that efficiently achieve mutually beneficial results for both investors and States.

¹³⁶ Bart Legum, ‘Investor-State Mediation and State Authority’ (UNCITRAL WG III Webinar on the Role of Mediation in ISDS, 18 June 2020) accessed 3 February 2021. The quotation was made in relation to investor-State mediation but we are of the view that it applies equally to investor-State conciliation.