



**Promoting Investor-State Conciliation and Mediation:
Lessons from Historic and Less Well-Known Treaty Practice**

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May 2022

ABSTRACT

By studying the ICSID Convention, the earliest investment treaties as well as less well-known investment treaties, this article produces new insights and useful lessons on how to draft investor-State dispute settlement provisions that promote the use of mediation and conciliation to settle investor-State disputes. Treaty language originating in Israeli, Indian and Finnish investment treaties could provide guidance to drafters considering how to provide advance consent to mediation or conciliation that does not preclude an investor's ability to arbitrate a dispute. Indian and UAE investment treaties demonstrate how subtle differences in wording could create a mandatory requirement to attempt mediation or conciliation before there may be recourse to arbitration, an optional requirement, or even obviate advance consent to arbitration. The failed attempt to conciliate the *Vodafone v. India* dispute illustrates the importance of providing advance consent to mediation or conciliation, and of specifying which mediation or conciliation rules will govern.

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)
6. 'Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis' (2022) (forthcoming ICSID Review journal article; advance access available at <https://doi.org/10.1093/icsidreview/siab049>)

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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.

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

Brian Chang, 'Promoting Investor-State Conciliation and Mediation: Lessons from Historic and Less Well-Known Treaty Practice,' NUS Centre for International Law Project on Investor-State Conciliation and Mediation Working Paper 22/01 (May 2022) <https://cil.nus.edu.sg/publication/Promoting_Investor-State_Conciliation_and_Mediation/> accessed DD Month YYYY.

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Executive Summary and Key Policy Recommendations

The ICSID Convention was carefully drafted to ensure the possibility of advance consent to conciliation followed by arbitration if conciliation failed. This is evident from the text of the ICSID Convention (Articles 26 and 35), the drafters' intentions expressed in its preparatory work, and subsequent documents such as the ICSID Institution Rules of 1968 and two sets of ICSID Model Clauses. The ICSID Secretariat initially suggested in its Model Clauses that States consider providing advance consent to arbitration only, conciliation only, or two different models of conciliation followed by arbitration.

The first investment treaty clauses to refer to investor-State conciliation varied considerably, before largely adopting what may be described as the "Dutch-Anglo Model" (providing advance consent to "conciliation or arbitration") propagated first by the Netherlands, and subsequently by the United Kingdom. No treaty adopted the two models of conciliation followed by arbitration suggested by the ICSID Secretariat, although one of these models was adopted in the investment contract giving rise to the most well-known ICSID conciliation. It is suggested that one of the reasons why 12 out of 13 ICSID conciliations to date arise from investment contracts is because some of the underlying contracts adopted the language of the ICSID Model Clauses' option that requires mandatory conciliation before parties may have recourse to arbitration.

This article presents good arguments for why ISDS provisions following the "Dutch-Anglo Model" of providing advance consent to "conciliation or arbitration" do not impose a fork-in-the-road choice whereby an election of one option precludes subsequent recourse to the other. The conjunction "or" has several ordinary meanings, and does not necessarily denote exclusive alternatives. A contextual and purposive interpretation would take into account the drafting intention behind most investment treaties to encourage amicable settlement and efficient dispute resolution, and incorporate the understanding that the ICSID Convention was specifically drafted to enable advance consent to conciliation followed by arbitration. Finally, archival research of early Dutch and British documents discussing the earliest Dutch BITs and the earliest British Model IPPAs, illustrate how Dutch and British negotiators had as one of their primary objectives securing access to investor-State arbitration at ICSID. The documents do not disclose any intention to make an investor election for conciliation at ICSID preclude subsequent recourse to arbitration, or indeed any consideration of this issue.

Key Policy Recommendations

Treaty and model clause drafters wishing to promote the use of conciliation and mediation may wish to consider the following policy recommendations, drawn from the historic and less well-known treaty practices discussed within the article.

1. Provide advance consent to investor-State conciliation and mediation:

States have historically demonstrated their willingness to provide advance consent to conciliation in more than 806 investment treaties, and should continue this practice with regards to both conciliation and mediation. States that include a standing offer to conciliate or mediate would incur minimal costs, since they retain the freedom of walking away from settlement discussions if/whenever they so wish. But the inclusion of advance consent to conciliation or mediation in ISDS provisions would send a strong signal to investors as well as other stakeholders (e.g., line ministries, sub-national governments) that the State is genuinely willing to engage in structured, third-party amicable settlement discussions in case investment disputes arise. Finally, as demonstrated in the failed attempt to reach an agreement to conciliate in the India-Vodafone retrospective tax dispute, it may be difficult to reach an agreement to conciliate in the heat of a dispute, resulting in unnecessary time and expense being lost to arbitration, even though the Indian government ultimately made an offer to settle its investor-state disputes concerning retrospective taxation.

2. Advance consent provisions should include a default reference to specific mediation or conciliation rules, and be clear that the choice of conciliation/mediation or arbitration does not preclude future or parallel recourse to the other:

As demonstrated by the disagreement over what conciliation rules to adopt in the India-Vodafone retrospective tax dispute, disagreement over the preliminary issue of what set of conciliation rules or mediation rules to use may become an obstacle to the commencement of conciliation or mediation. Drafters may easily pre-empt this issue by specifying a pre-selected set of mediation or conciliation rules that the mediation/conciliation would follow by default, in the absence of an agreement between the parties to adopt a different set of rules. The easiest way of achieving this would be to provide advance consent to conciliation/mediation under a specific set of conciliation/mediation rules, such as the ICSID Mediation Rules, the ICSID Conciliation Rules, the UNCITRAL Mediation Rules, the UNCITRAL Conciliation Rules, the IBA Rules for Investor-State Mediation, or the rules of other administering institutions.

Drafters should also be careful to avoid imposing a fork-in-the-road between non-binding means of third-party assisted amicable dispute resolution (such as conciliation and mediation), and binding means of adjudication (such as arbitration and domestic court proceedings), unless this is intended. Even if no such fork-in-the-road is intended, drafters should be careful to avoid ambiguity or unclear language that may support such an interpretation. In particular, drafters should avoid or take especial care with the use of the word “or” and similar linking words between non-binding means and binding means of dispute settlement, and take care to ensure that fork-in-the-road provisions do not include conciliation and mediation within their scope.

3. If drafters wish to make conciliation or mediation a mandatory pre-condition to arbitration, they should be very careful with how they structure this requirement:

Small differences in language may have big consequences, as demonstrated by contrasting the ISDS provisions of the Armenia-UAE BIT (2016) with those of other UAE BITs set out below; and the ISDS provisions of the three Indian BITs discussed below.

The evolution of ISDS provisions to include time limits to file an arbitration claim may necessitate new “tolling provisions” to suspend those time limits while conciliation or mediation proceedings are ongoing.

4. Language promoting conciliation and mediation should not limit their use to pre-arbitration phase, but also enable their use during arbitration/in parallel proceedings:

Newer ISDS provisions are beginning to demonstrate a recognition of the value of having a conciliation or mediation run in parallel with arbitration, or at different stages of the arbitral proceedings. The arbitral proceedings may enable the parties to realise the merits and weaknesses of their legal positions and arguments, and tribunal rulings on jurisdiction and/or the merits in particular may serve as an impetus to settlement discussion.

5. Institutions should draft guidance documents or model agreements to help disputing parties suspend arbitration proceedings and attempt conciliation or mediation:

Beside model clauses/and or treaty provisions that can be included in future treaties, institutions wishing to promote ISDS mediation and/or conciliation may wish to consider drafting guidance or model agreements to suspend arbitration proceedings and attempt conciliation or mediation, for use in ISDS arbitration that are based on the existing stock of IIAs and investment contracts.

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Introduction

1. The primary goal of this article is to inform treaty negotiators and drafters of investment treaties, dispute resolution clauses, model investment treaties and model clauses about what treaty language promotes investor-State conciliation and mediation most effectively.
2. The groundswell of interest in mediation and conciliation as alternatives to arbitration in investor-State dispute settlement (ISDS) is demonstrated by the recent adoption by the ICSID Administrative Council of new ICSID Mediation Rules and more flexible ICSID Conciliation Rules,¹ and the circulation of draft Model Clauses on Mediation and draft Model Guidelines on Mediation by the UNCITRAL Secretariat within the context of UNCITRAL Working Group III's work on dispute prevention and alternative dispute resolution (to arbitration),² amongst many other recent developments. This interest in third-party assisted means of amicable dispute settlement has arisen because of the time and expense associated with arbitration, and because of mediation and conciliation's potential to produce savings of time and costs, creative and consensual outcomes that go beyond the award of monetary compensation, and preserve the investor-State relationship.³
3. This article is based upon a study of the ICSID Convention, early investment treaties, and less well-known treaty (of Israel, Finland, India, UAE and Colombia). It builds on previous work done to review 3815 international investment agreements (IIAs) and create

¹ International Centre for Settlement of Investment Disputes (ICSID), 'ICSID Administrative Council Approves Amendment of ICSID Rules' (*ICSID News Releases*, 21 March 2022)

² See the following Notes by the UNCITRAL Secretariat: uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf (July 2021); and UNCITRAL Secretariat, uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_guidelines_on_mediation.pdf (July 2021), both accessed 30 March 2022. See also 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.

³ For a recent exposition on the potential advantages and pitfalls of investor-State mediation, see Esme Shirlow, "The Promises and Pitfalls of Investor-State Mediation" in Lisa Sachs et al (eds) *Yearbook on International Investment Law and Policy 2019* (OUP 2021). On costs, see 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)). For older expositions on the potential advantages of conciliation and mediation, see Anna Joubin-Bret and Jan Knorich (eds) *Investor-State Disputes: Prevention and Alternative to Arbitration* (UNCTAD 2010) 31–40; and Thomas Walde, 'Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective' (2004) TDM 1.

a dataset of 1141 IIAs that refer to mediation or conciliation in their ISDS provisions.⁴ This article seeks to avoid replicating the good work that has been done to discuss the most well-known and recent examples of treaty provisions referring to mediation or conciliation.⁵ Instead, it draws on the dataset to find early and less well-known treaty provisions that nevertheless may provide useful insights and lessons for treaty drafters.⁶

4. The article proceeds in three Parts. Part I takes the reader through an analysis of historical treaty practice, including the position set out by the ICSID Convention and the ICSID Secretariat (Part I.A), Dutch and UK treaty practice, and the early treaty practice of other States (Part I.B). Part I.C then considers how to interpret treaties following the Dutch-Anglo model while Part I.D considers fork-in-the-road provisions. Part I.E wraps up by considering the new approach adopted by Dutch treaty drafters in the 2019 Dutch Model BIT. In Part II, the author considers the less well-known treaty practice of 5 States, and the lessons that may be drawn from them. Part II.A discusses Israeli treaty practice (from 2003-4); Part II.B. discusses Finnish treaty practice (in the early 1990s); Part II.C. discusses Indian treaty practice (from 1994 to 2009), including a case study of a failed attempt to commence a conciliation in the *Vodafone v. India* dispute; Part II.D. discusses UAE treaty practice (since 2012); while Part II.E discusses Colombia treaty practice (since 2008). Finally, Part III concludes by summarising key findings and policy recommendations, including suggested modifications to the treaty language found in Part II that could be adapted into future treaties to promote mediation and conciliation.

⁴ Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, 'Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis,' forthcoming at ICSID Review; NUS Centre for International Law (CIL) 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/>. For the present article, the author also closely examined other investment treaties from 1959 to 1978 contained in the first binder of ICSID, *Investment Treaties: The Treaty Collection* (Oceana 2005)

⁵ See for example, 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 29 March 2022; Kun Fan, 'Mediation of Investor-State Disputes: A Treaty Survey' (2020) *Journal of Dispute Resolution* 327-42; and James Claxton, 'Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation' (2020) *Asian Journal on Mediation* 34. 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/>>.

⁶ The full dataset, including 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, is 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) <<https://cil.nus.edu.sg/wp-content/uploads/2021/06/Dataset-on-Investor-State-Conciliation-and-Mediation-Provisions-15April2021.pdf>>

Part I: Historical Treaty Practice

5. The first investment treaty clauses to refer to investor-State conciliation varied considerably, before largely adopting what may be described as the “Dutch-Anglo Model” (providing advance consent to “conciliation or arbitration”) propagated first by the Netherlands, and subsequently by the United Kingdom. Although the ICSID Secretariat suggested two slightly differing clauses for mandatory conciliation followed by arbitration, these suggestions were not adopted by any treaty (though it was adopted in the investment contract giving rise to the most well-known ICSID conciliation), and there is evidence that Aron Broches, the founding Secretary-General of ICSID, approved of the Dutch-Anglo Model. The possible interpretation of the Dutch-Anglo Model to mean that an initiation of arbitration or conciliation precludes subsequent recourse to the other mode of dispute resolution, has arguably been a reason for the low usage of investor-State conciliation. The remainder of this Part expands and elaborates on the analysis summarised in this paragraph.

I.A. The ICSID Convention and the ICSID Secretariat’s Position

6. The drafting of the ICSID Convention was inspired by the World Bank’s experience with mediating and conciliating investor-State disputes in the 1950s.⁷ It is clear that the drafters of the ICSID Convention, particularly Aron Broches, intended to allow States to consent to conciliation, arbitration, or a combination of both, such as conciliation followed by arbitration. This is apparent from statements by Aron Broches at two regional consultative meetings of legal experts discussing draft versions of the ICSID Convention. Broches explained during one meeting that “the intention of the [draft Convention] was to leave the parties free to choose between conciliation, arbitration, or a combination of both.”⁸ At another meeting, Broches explained that “the jurisdiction of the Center was defined in Section 1 to include procedures for conciliation and arbitration; this was not intended to

⁷ Antonio Parra, “Black’s Bank” and the Settlement of Investment Disputes’ in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 152-154. See also World Bank Oral History Program, Interview with Aron Broches (Washington, D.C., 18 April 1984) 29, and 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.

⁸ ICSID (n 7) 413. See Frauke Nitschke, ‘The ICSID Conciliation Rules in Practice’ in Titi and Fach Gomez (n 3) 122-4 for a detailed analysis of the drafting history of the ICSID Convention, and explanation of how the ICSID Conciliation Rules work in practice. See also ICSID (n 7) 563-4, 68 for the positions of a few other delegates, some of whom believed that conciliation should precede arbitration while others argued for the scope of the ICSID Convention to be limited to conciliation alone.

exclude the possibility that in certain cases arbitration would follow conciliation if the conciliation effort failed.”⁹

7. The text of the ICSID Convention also clearly anticipates the possibility of conciliation preceding arbitration, as Article 35 of the ICSID Convention excludes the use of communications from conciliation proceedings in subsequent arbitration or legal proceedings. Article 26 of the ICSID Convention was also carefully drafted to limit its scope of application to arbitration only, and not to include conciliation (whereas Article 25 applied to both arbitration and conciliation). Article 26 states that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...” By limiting the scope of this exclusive remedy principle to arbitration only, the drafters of the ICSID Convention deliberately preserved the possibility that conciliation may be followed by other remedies, including arbitration.
8. Following the conclusion of the ICSID Convention, the ICSID Secretariat operated on the understanding that States could consent to conciliation, arbitration, or conciliation followed by arbitration. For instance, Note C to Rule 1 of the ICSID Institution Rules as published in 1968 explains 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).”
9. Also in 1968, the ICSID Secretariat promulgated Model Clauses recording consent to investor-State dispute settlement which suggested that parties could provide consent to resolving their disputes via one of three options: “[conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within -time limit- of the communication of the report of the Conciliation Commission to the parties, by arbitration]”.¹⁰
10. The third option suggested by the ICSID Secretariat has been adopted by parties in some investment contracts, mostly notable in the first ICSID conciliation, *Tesoro v. Trinidad*

⁹ ICSID (n 7) 255.

¹⁰ ICSID, ‘Model Clauses Recording Consent for Settlement of Investment Disputes’ (1968) 7 ILM 1159, 1161-1163. Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018) fn 61 citing Antonio Parra, *The History of ICSID* (OUP 2012) 132 fn 88, notes that “The primary drafter of the model clauses was Paul Szasz, the same young lawyer who drafted ICSID’s Rules of Procedure.” St John fn 62 further notes that “Broches and Szasz took care to ensure the clauses in this document could be modified so as to comply with many legal traditions.”

and Tobago, which provided advance consent to “conciliation followed, if the dispute remains unresolved within six months of the communication of the report of the Conciliation Commission to the parties, by arbitration”.¹¹ The use of similar language in other investment contracts, which essentially requires that conciliation be attempted before the disputing parties may resort to arbitration, may be a possible explanation as to why 12 out of the 13 ICSID conciliations to date are disputes arising out of investment contracts, whereas only 1 of the ICSID conciliations to date arose out of a treaty. The ICSID Model Clauses available on the ICSID website still suggest the same three options as the 1968 Model Clauses.¹²

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I. "The [Government]/[name of constituent subdivision or agency]/ of name of Contracting State (hereinafter the 'Host State') and name of investor (hereinafter the 'Investor') hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (hereinafter the 'Centre') all/ disputes arising out of this agreement [or relating to any investment made under it], for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the 'Convention')."

Figure 1: Extract from 1968 Model Clauses (n 10)

11. However, research of all 1125 investment treaty clauses that mention conciliation (concluded before 31 December 2020) shows that none of them adopted the precise language of the third option suggested by the ICSID Secretariat in its 1968 Model Clauses or a similar option suggested in the 1969 Model Clauses “designed for use in Bilateral Investment Agreements”. This is difficult to square with research showing that the ICSID Secretariat and its founding Secretary-General Aron Broches played an important role in promoting the adoption of clauses in investment treaties providing consent to investor-

¹¹ Lester Nurick and Stephen Schnably, ‘The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago’ (1986) ICSID Rev-FILJ 340, 344

¹² ICSID, ‘Model Clauses’ <<https://icsid.worldbank.org/resources/content/model-clauses>> last accessed 8 April 2022

State dispute settlement at ICSID.¹³ Given this role, why were the ICSID Secretariat's suggested formulas never adopted by States?

12. Part of the explanation may lie in the bias contained within the ICSID Secretariat's 1969 Model Clauses designed for use in Bilateral Investment Agreements, which generally suggests that States provide consent to arbitration at ICSID throughout the Model Clauses, and suggests only once in an introductory paragraph that "If it is desired to refer also to conciliation, a phrase along the following lines might be substituted for the words 'for settlement by arbitration': 'conciliation followed, if the dispute remains unresolved within -a stated time limit-, by arbitration'.¹⁴ Although this bias towards arbitration was justified on the basis that only arbitration "ensures a definitive resolution in terms of an enforceable award binding on both parties", and may also have been justified as a simplification of the 1968 text that provided three options throughout the model clauses, this bias may have obscured the option of conciliation followed by arbitration.

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(a) Obligatory or automatic submission

I. Consent to jurisdiction

"Each Contracting Party hereby agrees to submit [, at the request of any national of the other Party,] any legal dispute arising out of an investment [made after the date of this Agreement] [made pursuant to the provisions of this Agreement] [made by a national of the other Party] to the jurisdiction of the International Centre for Settlement of Investment Disputes for settlement by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States."

Figure 2: Extract from 1969 Model Clauses for BITs (n 14)

13. A more important part of the explanation may lie in the widespread adoption of the Dutch-Anglo Model (providing advance consent to "conciliation or arbitration") first found in

¹³ St John (n 10)

¹⁴ ICSID, 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes designed for use in Bilateral Investment Agreements' (1969) 8 ILM 1341, 1343-4, para 5. Note that the text of the 1969 option differs slightly from the 1968 Model Clauses (n 10) because it does not require the conciliation commission to produce a report, merely the passage of time from the commencement of the conciliation.

the Indonesia-Netherlands BIT concluded in 1968, thereby providing an alternative text that had actually been agreed between States. As will be discussed later, the Indonesia-Netherlands BIT has particular importance as the first BIT recording consent to the settlement of disputes at ICSID, and both the Netherlands and the United Kingdom began concluding investment treaties adopting the Dutch-Anglo Model.

14. Finally, archival research shows that Aron Broches and the World Bank played an important role in fostering the inclusion of a reference to ICSID in the Indonesia-Netherlands BIT, and that UK negotiators were instructed in 1981 to tell their negotiating counterparts that the Secretary-General of ICSID had approved language providing advance consent to “conciliation or arbitration”.¹⁵ This suggests that Broches and the ICSID Secretariat were endorsing the adoption of investor-State dispute settlement clauses following the Dutch-Anglo Model, as part of their efforts to promote the inclusion of references to ICSID in BITs, notwithstanding the fact that the ICSID Model Clauses suggested a different text.

¹⁵ St John (n 10) 195-204 (describing the ICSID Secretariat’s efforts to promote the inclusion of references to ICSID in early BITs, and citing the UK government’s 1981 negotiating brief explaining the UK model treaty to future negotiators (which includes a ISDS clause providing advance consent to “conciliation or arbitration”) as stating: “It could be useful to mention in negotiation that the wording of this Article has been approved by the Secretary General of ICSID” (Aron Broches).

I.B. The Rise of the Dutch-Anglo Model

15. Although the very first reference to investor-State conciliation may be found in a Protocol to the Germany-Iran BIT (1965), this reference to conciliation is contingent on the investor and State party forming a separate agreement to arbitrate commercial disputes, and does not refer to the ICSID Convention.¹⁶

I.B.1. Dutch Treaty Practice

16. The second reference to investor-State conciliation may be found in the Indonesia-Netherlands BIT (1968), which is also the first investment treaty that makes a reference to the ICSID Convention to resolve investor-State disputes. Article 11 of this treaty provides:

“The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment.”¹⁷ [underline added]

17. The Explanatory Memorandum submitted to the Dutch parliament does not elaborate on why the particular phrasing of “conciliation or arbitration” was agreed, but it explains that the Dutch government’s view of this provision was that:

In the event of [an investor-State] dispute, both the investor and the State shall have the right to require that the dispute be submitted to arbitration or mediation [“arbitrage of bemiddeling”; underline added] under the rules of [the ICSID Convention]. The other party shall not be able to evade the handling of the dispute by the authorities designated in that treaty at the request of one of the parties to the dispute.

This article does not exclude the possibility that an investor may agree with the State in which he will invest a different procedure for the settlement of disputes.¹⁸

¹⁶ Germany-Iran BIT (1965), Protocol.

¹⁷ Indonesia-Netherlands BIT (1968, since terminated and replaced) art 11

¹⁸ Explanatory Memorandum accompanying the ratification of the Indonesia-Netherlands BIT in the Dutch Parliament (Tweede Kamer der Staten-Generaal, Parliamentary Year 1968–1969, [10133, nr 3](#)) 5. This is the author’s unofficial translation of the Dutch text, which reads as follows:

18. The Explanatory Memorandum further elaborates that the Indonesian government, and subsequent counterparties to Dutch BITs, were incentivised to agree on an investor-State dispute settlement procedure in Dutch BITs by the Dutch Investment Reinsurance Act of 1969.¹⁹ This Act provides that the Dutch government would provide reinsurance to protect Dutch investors against non-commercial risks (such as expropriation; nationalisation; prohibitions on the transfer of capital; losses due to war, civil insurrection; etc), on the condition that the host State of the investment has reached a satisfactory agreement with the Dutch government on (a) the rules that apply to protect Dutch investments and (b) the procedure in the event of a dispute between the investor and the host State.²⁰

“In geval van een zodanig geschil zullen zowel de investeerder als de Regering van het desbetreffende land het recht hebben te verlangen dat het geschil aan arbitrage of bemiddeling wordt onderworpen volgens de regelen van de Conventie van Washington van 18 maart 1965 (de zgn. Wereldbankconventie; Trb. 1966, 152). Aan de behandeling van het geschil door de in dat verdrag aangeduide Instanties op verzoek van één der partijen bij het geschil zal de andere partij zich niet kunnen onttrekken.

Dit artikel sluit overigens niet de mogelijkheid uit, dat een investeerder met de Regering van het land, waarin hij zal investeren, een andere geschillenregeling overeenkomt.”

The use of “bemiddeling” in this explanatory memorandum where subsequent explanatory notes use “conciliatie” suggests that the Dutch government understood investor-State mediation and conciliation to be interchangeable concepts at this early stage. Note that Aron Broches initially believed that this provision did not provide advance consent to conciliation or arbitration, but only imposed an obligation on Contracting Parties to give consent when an investor requested conciliation or arbitration. See Aron Broches, “Bilateral Investment Protection Treaties and Arbitration of Investment Disputes” in Jan C. Schultz and Albert Jan van den Berg (eds.) *The Art of Arbitration, Essays on International Arbitration* (Kluwer Law, 1982) 66 (“The above-quoted provision would not, however, by itself, enable the investor to institute proceedings before the Centre”). However, the tribunal in *Churchill Mining v Indonesia* held that a similar “shall assent” provision in the Indonesia-United Kingdom BIT (1978) provided advance consent to conciliation or arbitration. See *Churchill Mining plc v Republic of Indonesia*, ICSID Case No. ARB/12/14, Decision on Jurisdiction (24 February 2014) para 231.

¹⁹ Explanatory Memorandum (ibid) 3. Note that the Dutch Investment Reinsurance Act of 1969 has been repealed and replaced by the Framework Act for Financial Provisions. See US Department of State, [2010 Investment Climate Statement - Netherlands](#) (2010). The Germans similarly made the availability of investment insurance conditioned on the existence of a bilateral investment protection agreement. See Lauge Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence” in Karl Sauvant (ed) *Yearbook on International Investment Law and Policy 2009/2010* (OUP 2010) 539, 555.

²⁰ See for example, US Department of State, [2009 Investment Climate Statement - Netherlands](#) (2009): “According to article 7b of the Dutch Investment Reinsurance Act 1969 (WHI), reinsurance of investments in Less Developed Countries can only take place if a satisfactory agreement has been reached with the recipient country regarding regulations which will apply to Dutch investment in that country. The act covers procedures that will be followed in the case of a dispute between the investor and the host country on recovery of indemnity resulting from the insurance of the investment. Investment in countries with which the Netherlands has concluded a bilateral investment treaty is eligible for coverage under the Investment Reinsurance Arrangement (IRA).” See also Explanatory note accompanying the ratification of the Netherlands-Tanzania BIT (1970), Netherlands-Uganda BIT (1970, since terminated and replaced), Netherlands-Sudan BIT (1970) and Kenya-Netherlands BIT (1970) in the Dutch Parliament (Tweede Kamer der Staten-Generaal, Parliamentary Year 1970, [11350, nr 1](#)) 2.

19. Archival research shows that the Indonesia-Netherlands BIT was concluded against a backdrop of efforts to promote references to ICSID by Aron Broches and the ICSID Secretariat generally around the world, and especially in the Netherlands and Indonesia.²¹ Indeed, the third treaty referring to investor-State conciliation was also concluded by Indonesia (the Belgium-Indonesia BIT (1970)), and the next six treaties were concluded by the Netherlands.²²
20. Put differently, of the first ten investment treaties to mention conciliation in their investor State dispute settlement provisions, seven were concluded by the Netherlands. Of these, six provided advance consent to ICSID “conciliation or arbitration”, while one provided that the State parties “shall give sympathetic consideration to” investor requests for “conciliation or arbitration”.²³ While there is some variation in the language of the six treaties providing advance consent to “conciliation or arbitration” (e.g. two of them require the exhaustion of local remedies)²⁴, the first-mover status of the Netherlands in concluding treaties that provide advance consent to “conciliation or arbitration” administered by ICSID means that it may be considered to be the primary author and promoter of the Dutch-Anglo Model.
21. The Netherlands’ early treaty practice influenced other States to adopt ISDS provisions that provide advance consent to “conciliation or arbitration”, following which they became more willing to sign investment treaties with other parties based on the Dutch-Anglo Model. Between 1968 and 2013, the Netherlands signed 77 investment treaties that included this formulation, with a few exceptions that accommodate language requested by the other State party. These 77 investment treaties represent the vast majority of the investment treaties concluded by the Netherlands. The Netherlands’ first Model BIT of

²¹ St John (n 10) 200-1.

²² Netherlands-Uganda BIT (1970, since terminated and replaced) art XII; Kenya-Netherlands BIT (1970) art 11; Malaysia-Netherlands BIT (1971) art 12; Morocco-Netherlands BIT (1971) art XIII; Netherlands-Singapore BIT (1972) art XI; Republic of Korea-Netherlands BIT (1974, since terminated and replaced) art 6. The explanatory notes submitted to the Dutch parliament for each of these agreements do not provide further clarity on why the phrasing of “conciliation or arbitration” was agreed, and generally provide less detail than the Explanatory Memorandum for the Indonesia-Netherlands BIT. The Explanatory Notes for the Morocco-Netherlands BIT (Parliamentary Year 1971-1972, [11873, nr 1](#)), Netherlands-Singapore BIT (Parliamentary Year 1972-1973, [12232, nr 1](#)), and Republic of Korea-Netherlands BIT (Parliamentary Year 1974-1975 [13330 nr 1](#)) use the language of “conciliatie- of arbitrage” (conciliation or arbitration) rather than “bemiddeling of arbitrage” (mediation or arbitration).

²³ Kenya-Netherlands BIT (1970) art 11 was the exception in which there was no advance consent, but a promise that States parties “shall give sympathetic consideration to” investor requests for “conciliation or arbitration”.

²⁴ Malaysia-Netherlands BIT (1971) art 12 and Netherlands-Singapore BIT (1972) art XI.

1979,²⁵ and its Model BITs of 1987, 1997 and 2004 also included ISDS provisions that provide advance consent to “conciliation or arbitration”.²⁶

I.B.2. Early Treaty Practice of Other States

22. Turning to the early investment treaty practice of other States, many States initially adopted different formulations but eventually shifted to the Dutch-Anglo Model. For example, the first three investment treaties referring to ICSID or investor-State conciliation concluded by Belgium or the Belgium-Luxembourg Economic Union (BLEU) provided advance consent to “conciliation and arbitration”,²⁷ in a clause that closely echoes the structure of the 1969 ICSID Model Clauses for Bilateral Investment Agreements.²⁸ However, these treaties use the phrase “conciliation and arbitration”, in place of the three options suggested by the ICSID Secretariat. Article 10 of the Belgium-Indonesia BIT (1970) provides that:

Each Contracting Party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any disputes relating to a measure contrary to this agreement, pursuant to the Convention of Washington of 18th of March 1965, 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.

*This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.*²⁹ [underline added]

23. Thereafter, the treaties concluded by Belgium and BLEU adopt the advance consent to “conciliation or arbitration” formulation of the Dutch-Anglo Model.³⁰

²⁵ Nico Schrijver and Vid Prislán, “The Netherlands” in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013) 535, 581.

²⁶ The Netherlands’ 2019 Model BIT abandons the Dutch-Anglo Model, and may result in a significant evolution in Dutch practice going forward. This is discussed in further detail in Part I.E.

²⁷ Belgium-Indonesia BIT (1970, since terminated) art 10; BLEU-Republic of Korea BIT (1975, since terminated and replaced) art 8; and Belgium-Egypt BIT (1977, since terminated and replaced) art IX.

²⁸ Taylor St John (n 10) 202-3, citing ICSID (n 7) cl I, which reads: “Each Contracting Party hereby agrees to submit any legal dispute arising out of an investment to the jurisdiction of the International Centre for Settlement of Investment Disputes for settlement by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.”

²⁹ Belgium-Indonesia BIT (1970), art 10.

³⁰ See, inter alia, BLEU-Romania BIT (1977, since terminated and replaced) art 3; BLEU-Singapore BIT (1978) art 9; BLEU-Malaysia BIT (1979) art 10; BLEU-Cameroon BIT (1980) art 10; and Bangladesh-BLEU BIT (1981) art 6.

24. Similarly, the first two investment treaties referring to ICSID concluded by Italy provide an undifferentiated reference to ICSID jurisdiction,³¹ but Italy subsequently adopts many treaties following the Dutch-Anglo Model or that provide consent to arbitration only.³² Archival research shows that Aron Broches travelled to and had discussions in Italy and Belgium in 1967 and 1968, suggesting that Broches played a role in persuading Italy and Belgium to conclude investment treaties referring to ICSID shortly after his trips.³³
25. Another notable early treaty is the Republic of Korea-Tunisia BIT (1975), the first investment treaty between two developing States that referred to conciliation. Art 8 of this treaty provides advance consent to conciliation only, and does not provide consent to arbitration, reflecting the preference expressed during the drafting of the ICSID Convention by some delegations for limiting investor-State dispute settlement to conciliation only. However, this treaty is the only one of its kind amongst 1141 treaties studied in detail.³⁴ Both the Republic of Korea and Tunisia generally adopt the Dutch-Anglo Model thereafter.

I.B.3. United Kingdom Treaty Practice

26. The United Kingdom commenced its investment treaty program in the early 1970s, concluding its first BIT with Egypt in June 1975.³⁵ The UK Foreign and Commonwealth Office prepared a draft Model Investment Promotion and Protection Agreement (IPPA) in 1972, which the FCO stated was “in line with an OECD consensus, and very close to

³¹ Chad-Italy BIT (1969) art 7 and Côte d'Ivoire - Italy BIT (1969) art 7. These two treaties were not found through the normal research methodology as they do not mention conciliation, but were instead found by researching ICSID's Investment Treaty Collection (n 4). Chad-Italy BIT (1969) art 7 provides that: “Any investment dispute subject to this Agreement, which would be between a Contracting State (or any institution or organization dependent or controlled by the same State) and physical or juridical person having the nationality of another State, shall be subject to the jurisdiction of the International Center for the Settlement of Investment Disputes, Washington under the Convention of 18 March 1965.”

³² Six investment treaties concluded by Italy provide advance consent to “conciliation or arbitration”: Italy-Tunisia BIT (1985), art 8; Italy-Kuwait BIT (1987), art 8; Italy-Malaysia BIT (1988), art 10; Italy-Philippines BIT (1988), art 9; Italy-Korea, Republic of BIT (1989), art 10 and Egypt-Italy BIT (1989), art 9. However, Italy also concluded four investment treaties during the same time period that provide consent to arbitration only: China-Italy BIT (1985) Protocol Ad Article 5; Sri Lanka-Italy BIT (1987) Protocol Ad Article 5; Hungary-Italy BIT (1987, since terminated), art 9; and Bulgaria-Italy BIT (1988, since terminated) art 7.

³³ St John (n 10) 201-4.

³⁴ Art XI of the Lebanon-Spain BIT (1996), provides 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 contracting parties is not a member of the ICSID Convention.

³⁵ Chester Brown and Audley Sheppard, “United Kingdom” in Chester Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013) 697, 702-4.

the agreements concluded by other European countries”.³⁶ This means that the UK is likely to have had the benefit of being able to review the first investment treaties concluded by the Netherlands and Belgium/BLEU, as well as the ICSID Model Clauses. However, the text of the draft Model IPPA prepared by the FCO only included advance consent to arbitration at ICSID.³⁷ Even after this text was amended to include conciliation as an alternative to arbitration, the FCO was focused in the UK’s investment treaty program on ensuring the inclusion of ISDS provisions that provide advance consent to arbitration, and was not focused on ensuring the inclusion of provisions for conciliation.³⁸

27. The UK embraced the Dutch formulation of providing advance consent to “conciliation or arbitration” in 8 of its first 10 BITs,³⁹ and subsequently in 49 of its BITs throughout the 1970s, 1980s and 1990s.⁴⁰ Archival research shows that the UK included within Article 8 of its Model IPPA (May 1981 version) an ISDS clause providing advance consent to “conciliation or arbitration” at ICSID, and that treaty negotiators were instructed to “do our best to secure this wording”, and were told that “[i]t could be useful to mention in negotiation that the wording of this Article has been approved by the Secretary-General of ICSID.”⁴¹
28. 43 of the 49 investment treaties signed by the UK that provide advance consent to “conciliation or arbitration” are largely similar in language and structure to Article 8(1) of the Egypt-United Kingdom BIT (1975), which reads as follows:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as the “Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature

³⁶ Ibid, 703-4, citing FCO Memo Enclosing Draft Model IPPA (31 October 1979).

³⁷ Ibid, 703-4, and 744, citing FCO Memo Enclosing Draft Model IPPA (31 October 1979) and 1972 Draft Model IPPA.

³⁸ The lack of focus on ensuring a provision for conciliation resulted in its omission in the ISDS provisions of the Belize-UK BIT (1982) art 8; Saint-Lucia-UK BIT (1983) art 8; Panama-UK BIT (1983) art 7; Haiti-UK BIT (1985); and China-UK BIT (1986) art 7. In all of these agreements the UK focused on securing, and did in fact obtain, a provision consenting to investor-State arbitration (but not conciliation). See Eileen Denza and Shelagh Brooks, “Investment Protection Treaties: United Kingdom Experience” (1987) ICLQ 908, 915.

³⁹ The exceptions were the Singapore-United Kingdom BIT (1976) which provides advance consent to ICSID arbitration only, and the Thailand-United Kingdom BIT (1978), which does not provide for ISDS at all.

⁴⁰ The latest UK BIT found in the research which provides advance consent to “conciliation or arbitration” is the Mozambique-United Kingdom BIT (2004).

⁴¹ St John (n 10) 204, citing Model IPPA (April 1981 Version): General Negotiating Brief. UK FCO 69/658.

at Washington on 18 March 1965... any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former... If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies[, through conciliation] or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. [underline added; note that the square bracketed portion “[through conciliation]” was removed in subsequent BITs]

29. The main British innovation over the previously discussed Dutch treaty language is the inclusion of the sentence: “In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.” Properly understood, this is a sentence that preserves the investor’s right to initiate its preferred mode of dispute settlement. Without this sentence in Dutch or British BITs, it may be possible for the disputing State that is party to the investor-State dispute to initiate its preferred mode of dispute settlement, and to block the investor from initiating the other mode of dispute settlement by claiming that the consent has been perfected and other remedies are now excluded (e.g. Art. 26, ICSID Convention).⁴² Viewed in that light as a rights-preservation measure, this sentence may not necessarily impose a fork-in-the-road choice on the investor.
30. The remaining 6 BITs⁴³ adopt a simpler reference to conciliation or arbitration at ICSID along the lines of the Indonesia-United Kingdom BIT (1976):

⁴² Note: Article 26, ICSID Convention only applies to arbitration, but not to conciliation. It states that “consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...” See also Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 89.

⁴³ Indonesia-United Kingdom BIT (1976), art 7(1); Romania - United Kingdom BIT (1976), art 4; Jordan-United Kingdom BIT (1979), art 6; Philippines-United Kingdom (1980), art X, United Kingdom-Yemen BIT (1982), art 7; Albania-United Kingdom BIT (1994), art 8.

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 Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965... any dispute that may arise in connection with the investment. [underline added]

31. The language of the Egypt-UK BIT (1975), with the exception of the square bracketed portion of “through conciliation”, was used as the standard negotiating template in subsequent UK BIT negotiations. The UK approach to negotiating BITs was to use a draft model IPPA as the basis of the negotiations, and the UK was generally successful in obtaining its preferred provisions as the FCO was prepared to walk away from negotiations, but was not prepared to see its preferred provisions greatly diluted or open to wide interpretation.⁴⁴

I.B.4. Sub-Conclusion: The Spread of the Dutch-Anglo Model

32. Although the precise language agreed in individual investment treaties differs, the Dutch and the British were highly consistent in seeking to conclude investment treaties that provided advance consent to “conciliation or arbitration” at ICSID, giving rise to the “Dutch-Anglo Model” described in this article.⁴⁵
33. The early-mover status of the Dutch and British negotiators was undoubtedly influential in persuading many other States to adopt variations of the “Dutch-Anglo Model”. Once States had concluded an investment treaty with either the Dutch or British that contained

⁴⁴ Brown and Sheppard (n 35), 704, citing FCO Memo Enclosing Draft Model IPPA (31 October 1979) 1. See also Lauge Poulsen, *Bounded rationality and the diffusion of modern investment treaties diplomacy: The politics of investment treaties in developing countries* (CUP 2015).

⁴⁵ Cf Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) JIEL 561, Figure 4, demonstrating that the UK and Netherlands have exceptionally consistent treaty networks, with “the UK having an average of 70% consistency across its vast network of 100 BITs concluded over a span of 35 years.” The French were the major outliers that did not adopt the Dutch-Anglo model. The earliest French BITs that refer to ICSID (France-Tunisia BIT (1972, since terminated and replaced) art 3; and France-Zaire (today known as Democratic Republic of the Congo) BIT (1972) art 9), and many French BITs concluded in the 1970s and 1980s provide for references to ICSID jurisdiction, without specifically mentioning conciliation or arbitration. Space precludes a full discussion of French treaty practice, which is highly varied. See Weeramantry, Chang and Sherard-Chow (n 4), Part V for a discussion of why an undifferentiated reference to ICSID jurisdiction permits both conciliation and arbitration, 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) 365-6 for further discussion of conciliation in French BITs.

a clause providing advance consent to “conciliation or arbitration” at ICSID, they became more comfortable and willing to conclude investment treaties with other States that included similar clauses.⁴⁶ Other States may have looked at the early investment treaties when deciding how to word an investor-State dispute settlement clause, and decided to adopt the Dutch-Anglo Model.⁴⁷

34. A peculiar set of 51 BITs following the Dutch-Anglo Model contain investor-State provisions that have language expressing advance consent to arbitration, but thereafter include language specifying that the investor has the right to choose between conciliation or arbitration.⁴⁸ Such BITs appear to have copied the language of the UK BITs that “[i]n the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose”. Because these 51 BITs may arguably provide advance consent to conciliation or arbitration, they are included within the set of 703 investment treaties providing advance consent to “conciliation or arbitration”.
35. The legacy of the Dutch-Anglo Model is that a total of 703 investment treaties contain clauses or structures that provide advance consent to “conciliation or arbitration”, comprising a significant majority (62.4%) of the 1125 investment treaties that contain a reference to conciliation, and an overwhelming majority (87.2%) of the 806 treaties that provide advance consent to conciliation. It has been argued that the wording of these treaties is one of the principal reasons for the relative under-utilisation of investor-State conciliation. This article now turns to this issue.

⁴⁶ See for example, Denza and Brooks (n 38), 915, which states that, “Negotiators in this field commonly do of course seek to use as precedents IPPAs which the other State has previously concluded-but may be met with the reply that advantages in earlier agreements derived from a specially close political relationship or were given at a time of economic weakness or in the context of an overall bargain.”

⁴⁷ See for example, Alschner and Skougarevskiy (n 46), which notes that “Israel was so inspired by British BITs that it copied and pasted British treaty language into its own agreements without ever having signed a treaty with the UK.”

⁴⁸ Three examples of this type of provision can be found in the Georgia-Greece BIT (1994) art 9, the Sweden-Uzbekistan BIT (2001) art 8, and the Namibia-Switzerland BIT (1994) art 9.

I.C. How to Interpret Treaties Following the Dutch-Anglo Model

36. As discussed above in section I.A, the text of the ICSID Convention, the drafters' intentions expressed in the preparatory work, and subsequent documents such as the ICSID Institution Rules of 1968 and two sets of ICSID Model Clauses all envisaged that parties might consent to some combination of conciliation and arbitration, including the specific possibility of consent to conciliation that might be followed by arbitration. However, the predominance of the Dutch-Anglo Model providing advance consent to "conciliation or arbitration" in investment treaties referring to conciliation, and the possible interpretation of such treaties to mean that an election of conciliation precludes subsequent recourse to arbitration, has been argued to be one of the principal reasons for the under-utilisation of conciliation in investor-State disputes.⁴⁹
37. It is important to note at the outset that there are many other possible reasons why conciliation has been relatively under-utilised in investor-State dispute settlement. These include:
- The lack of express references to conciliation in the majority (70%) of 3815 investment treaties studied;
 - The lack of awareness of conciliation procedures, and the lack of good legal counsel on how to use them;⁵⁰
 - This problem is exacerbated by the small number of ICSID conciliation cases to date;
 - The nature of investor-State disputes may make it difficult to obtain consent to conciliation, mediation and/or settlement agreements;
 - Disputing parties and their counsel may prefer arbitration as it provides binding adjudication of disputed issues, shifts decision-making responsibility to the arbitral tribunal, and leads to widely enforceable awards;⁵¹
 - State officials may prefer to "blame" the arbitral tribunal rather than take responsibility for a settlement; this may be especially true in systems where

⁴⁹ Ana Ubilava, 'Underutilisation of ADR in ISDS: Resolving Treaty Interpretation Issues' (SSRN 2020) <<https://ssrn.com/sol3/abstract=3762843>> accessed 30 March 2022. Eric van Ginkel, 'Toward Mandatory ICSID Conciliation: Reflections on Professor Coe's Article on Investor-State Conciliation' (2006) 21 Mealey's Int'l Arb Rep 68, 69.

⁵⁰ Noah Rubins, 'Comments to Jack C. Coe Jr's Article on Conciliation' (2006) 21 Mealey's Intl Arb Rep 63. Walde (n 3).

⁵¹ Kenneth Vandavelde, *Bilateral Investment Treaties* (OUP 2010) 437-8

state officials are afraid of being accused of wrongdoing or there are no legal frameworks authorizing negotiated settlements of investor-State disputes;⁵²

- Finally, although there is a significant amount of informal negotiation / amicable settlement activity between investors and States, parties may not see value in involving third-party conciliators and mediators.
38. Nevertheless, it is not unreasonable for investors to avoid choosing to attempt conciliation, with its uncertain outcome, if there is even a small risk that this would preclude their ability to submit the dispute to arbitration thereafter.
39. Turning back to the question of how to interpret investment treaties that adopt the Dutch-Anglo Model providing advance consent to “conciliation or arbitration”, the starting point would be to apply the general rule of treaty interpretation set out in Article 31(1) of the VCLT (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). Aust notes that this article contains only one rule, and that the interpreter must consider each of the three elements: the text of the treaty, the context, and the object and purpose of the treaty. Aust goes on to note that there is no hierarchy of legal norms between Articles 31(1), and the two paragraphs addressing context, Article 31(2) and 31(3), but states that they create a logical progression, with the interpreter beginning with the text, followed by the context, and then other matters such as subsequent materials.⁵³ The remainder of this section will apply this general approach.
40. The ordinary meaning of the word “or” in “conciliation or arbitration” is not determinative, as “or” is a conjunction that does not necessarily denote exclusive alternatives, but may instead be used denote non-exclusive alternatives (i.e. conciliation or arbitration, or both). Garner’s Dictionary of Legal Usage explains that “or” can be used in an inclusive sense as well as an exclusive sense, and notes that virtually every book on drafting legal documents contains a section on the potential ambiguity of the words “or” and “and”.⁵⁴ Garner goes on to note that West Publishing’s Words and Phrases has more

⁵² For more on the 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)

⁵³ Anthony Aust, *Modern Treaty Law & Practice* (3rd edn, CUP 2013) 208

⁵⁴ Garner’s *Dictionary of Legal Usage* (3rd edn, OUP 2011) 639. Note that many of the early Dutch BITs, including the Indonesia-Netherlands BIT (1968), Netherlands-Uganda BIT (1970); Kenya-Netherlands BIT (1970); Netherlands-Singapore BIT 1972); and Republic of Korea-Netherlands BIT (1974) used English as their authentic

than 68 pages of digested cases interpreting the word “or” in a broad array of senses.⁵⁵ In a similar vein, Stroud’s Judicial Dictionary of Words and Phrases states that “or” is “prima facie an alternative word... It is, however, not always disjunctive.”⁵⁶ This point is illustrated by the Decision on Jurisdiction in *Planet Mining v. Indonesia*, in which the tribunal found that the use of the word “or” in Article XI(4) of the Australia-Indonesia BIT (1992, since terminated and replaced) was “the result of an infelicitous drafting rather than a deliberate choice entailing specific consequences”, because the tribunal’s review of Australian BITs containing similar dispute settlement clauses showed that Australia always used the conjunction “and” between the two subparagraphs, and the Australia-Indonesia BIT with Indonesia was the only BIT where the word “or” appeared.⁵⁷

41. The 1968 edition of Black’s Law Dictionary, produced before the initiation of the British investment treaty programme, attempts to define “or” as a “disjunctive particle used to express an alternative or to give a choice of one among two or more things”, but in the very next paragraph acknowledges that “[o]r is frequently misused; and courts will construe it to mean “and” where it was so used... However, where the word “or” is preceded by the word “either”, it is never given a conjunctive meaning.”⁵⁸ IIAs adopting the Dutch-Anglo Model generally do not include the word “either” as a coordinating conjunction with the word “or”, which would indicate a disjunctive use of the word “or” requiring an exclusive choice between the two options.
42. Given that the ordinary meaning of the word “or” is not determinative, it is necessary to look beyond a search of diverse dictionaries, and to consider the object and purpose of the treaty, as the ICJ did in the *Avena* case.⁵⁹ The author has argued elsewhere that IIAs adopting the Dutch-Anglo Model containing ISDS provisions that provide advance consent to “conciliation or arbitration” should be subject to a contextual and purposive

language, and therefore use the English phrase “conciliation or arbitration” rather than the Dutch phrase “conciatie- of arbitrage”.

⁵⁵ *ibid*, citing Words & Phrases (West 1972) in which Vol 30, 66-98 digest cases deciding that “or” should be construed as “and”.

⁵⁶ Stroud’s Judicial Dictionary of Words and Phrases (10th edn, Sweet & Maxwell 2020) Vol 2, 931-2. The same text may be found in 5th edn, Sweet & Maxwell 1986, Vol 4, 1782)

⁵⁷ *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para 168.

⁵⁸ Henry Black, Black’s Law Dictionary (rev. 4th edn, West 1968). Newer editions of Black’s Law Dictionary edited by Bryan Garner (since the 7th edn in 1999) have removed the entry for the word “or” and instead provide an entry for this word in Garner’s Dictionary of Legal Usage (n 54).

⁵⁹ *Case Concerning Avena and other Mexican Nationals (Mexico v. USA)*, Judgment of 31 March 2004 [2004] ICJ Rep 12 at 48, para 84, as cited in Richard Gardiner, *Treaty Interpretation* (OUP 2008) 169.

interpretation – taking into account the drafting intention behind most IIAs is to encourage amicable settlement and efficient dispute resolution – which would permit dispute resolution through conciliation without precluding recourse to arbitration if conciliation is unsuccessful.⁶⁰

43. The author presently builds on this argument, by arguing that when IIAs adopting the Dutch-Anglo Model include a reference to the ICSID Convention,⁶¹ this opens the door to an interpretation of the words “conciliation or arbitration [under the ICSID Convention]” that incorporates the correct understanding of the ICSID Convention as a treaty which allows the specific possibility of consent to conciliation that might be followed by arbitration. This possibility is clearly anticipated in Articles 26 and 35 of the ICSID Convention, Note C to Rule 1 of the ICSID Institution Rules of 1968, and in two sets of Model Clauses drafted by the ICSID Secretariat.⁶² An analogous approach was taken by the tribunal in *Alpha Projektholding v. Ukraine*, in which the tribunal found that:

“[W]hen a State party to a BIT agrees to protect certain kinds of economic activity, and when the BIT provides that disputes between investors and States relating to such activity may be resolved through ICSID arbitration, it is appropriate to interpret the BIT as reflecting the State’s understanding that that activity constitutes an “investment” within the meaning of the ICSID Convention as well.”⁶³

44. Based on the above, the author argues that the best interpretation of an ISDS provision providing advance consent to “conciliation or arbitration [under the ICSID Convention]” is that it provides consent to a first election for either conciliation or arbitration, and also to a subsequently election for the alternative.⁶⁴ Given that there are different ordinary meanings of the conjunction “or”, a contextual and purposive interpretation would take into account the drafting intention behind most investment treaties to encourage amicable settlement and efficient dispute resolution, and incorporate the understanding that the

⁶⁰ Weeramantry and Chang (n 4), Part V; See also Rubins (n 50) 66 and van Ginkel (n 49). Cf Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 89.

⁶¹ See for example, the provisions cited above for the Netherlands-Indonesia BIT (1968) (n 17); the Egypt-UK BIT (1975) (para 28) and the Indonesia-UK BIT (1976) (n 43).

⁶² Discussed above in Part I.A.

⁶³ *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para 314 (cited in Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016) 153.)

⁶⁴ For a different argument reaching the same conclusion, see Ubilava (n 49)

ICSID Convention was specifically drafted to enable advance consent to conciliation followed by arbitration.

45. This argument is strengthened by archival research of early Dutch and British documents discussing the earliest Dutch BITs and the earliest British Model IPPAs.⁶⁵ These documents illustrate how Dutch and British negotiators had as one of their primary objectives securing access to investor-State arbitration at ICSID. The documents also do not disclose any intention to make an investor election for conciliation at ICSID preclude subsequent recourse to arbitration, or indeed any consideration of this issue.
46. Nevertheless, although there are good reasons to show that “conciliation or arbitration” provisions should not be interpreted as imposing a fork-in-the-road choice in which an election of one option precludes an election of the other, the reality remains that the uncertainty over how to interpret such provisions will make many investors and their counsel afraid of attempting conciliation for fear of losing their right to arbitration. The lesson for future treaty drafters is to ensure that advance consent provisions are more clearly drafted in the future, with no ambiguity about whether they impose a fork-in-the-road choice between amicable means of dispute settlement and binding means of adjudication, unless such ambiguity is desired.
47. This problem is not necessarily unique to conciliation provisions, and could apply equally to ISDS provisions granting advance consent to mediation. For example, the Bahrain-Russian Federation BIT (2014) art 8(2)(d) appears to provide advance consent to “arbitration or mediation” under the Additional Facility Rules of the ICSID,⁶⁶ and future drafters, if not careful, might end up repeating the problem by providing advance consent to “mediation or arbitration”.

⁶⁵ See for example, nn 18, 20 and 22; and n 37. Schrijver and Prislán (n 25) 547 notes that Dutch explanatory memoranda have been used in several cases to confirm a specific interpretation of a treaty’s provision, and may be considered as a supplementary means of interpretation within the meaning of article 32 of the VCLT. See also Makane Moïse Mbengue “Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)” (2016) ICSID Review-FILJ 388, 396.

⁶⁶ The better view is that this provision contains a mistranslation of “arbitration or conciliation” or an unintentional drafting error. The ICSID Additional Facility Rules only provide for conciliation and arbitration, even after the 2022 rules amendment (as the new ICSID Mediation Rules are a distinct set of rules), and ICSID was not yet contemplating the adoption of new Mediation Rules during the time when this BIT was agreed.

I.D. Interpreting Fork-in-the-Road Provisions and Drafting Better Provisions

48. The author has also argued elsewhere that, where there is an absence of express fork-in-the-road language applying to conciliation besides the conjunctive “or”, one should not be read into the ISDS provision.⁶⁷ An example of a clear fork-in-the-road provision applying to conciliation may be found in the Colombia-India BIT (2009), art 10. This provides:

...

3. If the dispute is not so settled in accordance with paragraphs 1 and 2 within six months from the date of the written notice of the dispute under paragraph 1, the investor may choose to submit it for resolution:

a. To the relevant courts or competent tribunals of the Contracting Party in whose territory the investment was made; or

b. To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

c. To arbitration in accordance with this subparagraph...

4. The choice made by the investor to submit a dispute either under paragraph 3(a) or (b) or (c) of this Article shall be final.

49. In the above ISDS provision, the fork-in-the-road language in paragraph 4 clearly applies between conciliation and the other methods of dispute resolution, allowing investors to choose only one of the three dispute settlement mechanisms listed within the provision. However, such precise fork-in-the-road provisions are rare.⁶⁸

50. Fork-in-the-road provisions are generally intended to require investors to choose between binding methods of dispute settlement, such as arbitration at ICSID, ad hoc arbitration under the UNCITRAL Arbitration Rules, and domestic proceedings, and it is not always clear that such fork-in-the-road provisions were intended to apply between conciliation

⁶⁷ Weeramantry, Chang and Sherard-Chow (n 4), Part V.

⁶⁸ Ubilava (n 49) 26-7 cites as another example the Guatemala-Israel BIT (2006), art 8. Ubilava further notes, based on a close examination of other BITs concluded by Guatemala and Israel, that the inclusion of conciliation within the scope of the fork-in-the-road provision was unintentional.

and arbitration. For example, Article 10.21 of the Investment Chapter of the Malaysia-New Zealand FTA provides:

1. If the dispute cannot be resolved as provided for in Article 10.20 (Consultations and Negotiations) within 180 days from the date of the request for consultations and negotiations then, unless the parties to the dispute agree otherwise, the dispute shall, at the choice of the disputing investor, be submitted to:

(a) conciliation or arbitration by the International Centre for the Settlement of Investment Disputes (“ICSID”) under the Convention on the Settlement of Investment Disputes between States and National of other States, done at Washington on 18 March 1965;

(b) arbitration under the rules of the United Nations Commission on International Trade Law (“UNCITRAL”) adopted by the United Nations General Assembly on 15 December 1976; or

(c) if the disputing parties agree, any other arbitration institution, including conciliation or arbitration at the Regional Centre for Arbitration, Kuala Lumpur (“RCAKL”);

provided that resort to one of the fora under subparagraphs (a) to (c) shall exclude resort to the others.

51. In such ISDS provisions, once the investor has selected one of the listed dispute resolution fora, the fork-in-the-road principle will operate to bar the investor from having recourse to other listed dispute resolution fora. However, it remains unclear whether the fork-in-the-road principle was intended to apply between conciliation and arbitration if the investor selects ICSID as its preferred dispute resolution fora.
52. One lesson for future treaty drafters that wish to impose a fork-in-the-road between binding methods of dispute resolution, is to consider and draft clear treaty language indicating whether the fork-in-the-road principle also applies to conciliation or mediation.

I.E. Dutch Treaty Practice Revisited: A New Approach in a New Model BIT

53. Although the language of The Netherlands' 2019 Model BIT has not yet been adopted in any treaties, it may be worth noting given The Netherlands' role as a promulgator of the Dutch-Anglo Model of treaties providing advance consent to "conciliation or arbitration", to examine the latest approach suggested by Dutch treaty negotiators.
54. Compared to its earlier treaties and Model BITs,⁶⁹ The Netherlands' 2019 Model BIT takes a significant leap forward by incorporating conciliation and mediation practices in far more detailed and nuanced provisions, including provisions that: encourage the use of conciliation and mediation in its alternative dispute resolution clause (Art. 17(1)) and its consultation clause (Art. 18(1)); provide that any alternative dispute resolution of a dispute may be agreed at any time, including during arbitral proceedings (Art. 17(1)); state that settlement agreements should generally be publicly available while excluding confidential information (Art. 17(2)); and grant advance consent to ICSID conciliation and arbitration through a general reference to ICSID jurisdiction (Art. 19(1)(a)). Some of the 2019 Model BIT's relevant provisions are set out below:

Article 17 Alternative dispute resolution

1. Any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced. A disputing party shall give favorable consideration to a request for negotiations, conciliation or mediation by the other disputing party.

2. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.

Article 18 Consultations

1. Where a dispute has not been resolved in a manner as provided for under Article 17, an investor of a Contracting Party alleging a breach of a provision in Section 4 of this Agreement, may submit a written request for consultations

⁶⁹ Schrijver and Prislán (n 25) 535, 580-3 establishes that the language of "conciliation or arbitration" was used until and including The Netherlands' 2004 Model BIT, the immediate predecessor of the 2019 Model BIT.

to the other Contracting Party. During these consultations, the disputing parties may use non-binding third party procedures, such as good offices, conciliation or mediation.

...

Article 19 Submission of a claim

1. If a request for consultations has been submitted according to the procedures laid down in Article 18 and where such consultations do not result in a resolution of the claim within six months from the date of the written request for consultations, the investor may submit a claim under one of the following sets of rules on dispute settlement:

a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention) or in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (ICSID Additional Facility), where the conditions for proceedings pursuant to the ICSID Convention do not apply...

b) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules), with the understanding that the Permanent Court of Arbitration (PCA) shall administer the proceedings...

55. Because Article 19(1)(a) provides a general reference to ICSID jurisdiction, it may be interpreted to provide advance consent to arbitration, conciliation, mediation and fact-finding at ICSID or arbitration and conciliation through the ICSID Additional Facility Rules (where the jurisdictional conditions for ICSID Convention proceedings are not met).
56. Since there is no clear fork-in-the-road language within the Article 19(1)(a) reference to the ICSID Convention and Article 19(1) refers to “sets of rules on dispute settlement”, the ordinary meaning of the text (interpreted together with the correct understanding of the ICSID Convention) is that investor requests for conciliation would not preclude subsequent recourse to arbitration. Following the ICSID Administrative Council’s adoption of rule amendments in 2022, the ICSID Convention’s “sets of rules on dispute settlement” now encompasses the ICSID Institution Rules, the ICSID Arbitration Rules,

the ICSID Conciliation Rules, the ICSID Mediation Rules, and the standalone the ICSID Fact-finding Rules. The Additional Facility Rules now encompass arbitration and conciliation rules. Supposing Article 19(1) of The Netherlands' 2019 Model BIT is incorporated, unchanged, into a BIT signed after the ICSID Administrative Council's adoption of the 2022 rule amendments, there may be a strong argument to be made that the drafters intended to incorporate all of ICSID's sets of rules on dispute settlement, including the new mediation rules and the standalone fact-finding rules.

57. Some may argue that Article 17(1) indicates that a further, more specific consent is required to conciliation or mediation proceedings by the disputing parties. However, it is equally plausible to interpret Article 17(1) to mean that when a disputing State requests conciliation or mediation proceedings, the disputing investor should give favourable consideration to this request, while Article 19(1) provides advance consent by the State to investor requests for conciliation and mediation proceedings under ICSID's "sets of rules on dispute settlement", or conciliation and arbitration under the Additional Facility Rules.
58. Nevertheless, Article 19 could be improved by making it clearer that an investor election to commence ICSID conciliation or mediation does not preclude subsequent recourse to arbitration, as this may be a concern to investors considering their options.

Part II: Less Well-Known Treaty Practice

59. Multi-tiered dispute resolution clauses (sometimes called hybrid dispute resolution clauses) provide for one or more steps to be undertaken before arbitration. For example, many IIAs include a multi-tiered dispute resolution clause providing for a fixed period of negotiations and consultations before the investor may resort to arbitration. This section is not concerned with discussing the most recent examples of multi-tiered dispute resolution clauses or developing a typology of multi-tiered clauses, as there are many useful studies on these matters already.⁷⁰ Instead, this section aims to introduce and discuss multi-tier dispute resolution clauses that have not yet been sufficiently covered in the academic literature, with the goal of assisting drafters of the next generation of multi-tiered dispute resolution clauses.

⁷⁰ See for example, ICSID Secretariat (n 5); Kun Fan (n 5); Claxton (n 5); and Bottini and Lavista (n 45).

II.A: Israeli Treaty Practice – Advance Consent to Conciliation and Arbitration; No Requirement to Conciliate

60. Israel has concluded 4 BITs that provide advance consent to conciliation and arbitration, and that ensure that there is consent to arbitration if the conciliation is unsuccessful or not attempted.⁷¹ These BITs allow the investor to elect for conciliation, but do not require them to do so. Article 8 of the Israel-Serbia BIT (2004) is representative of such BITs, and provides:

1. *Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled by negotiations.*

2. *If a dispute under paragraph 1 of this Article cannot be settled within six months from the written notification of this dispute, it shall, upon the request of the investor, be settled as follows:*

(a) by the decision of a competent court of the Host Contracting Party; or

(b) by conciliation, or if conciliation is not chosen or if either side deems that the conciliation is unsuccessful; or

(c) by arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, D.C., on 18th March 1965, provided that both Contracting Parties are parties of this Convention; or

(d) by an ad hoc tribunal of arbitration, which is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)...

3. *Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article...*

⁷¹ 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. Unfortunately, Israeli treaty practice after 2004 eliminates the clause “*or if conciliation is not chosen or if either side deems that the conciliation is unsuccessful*”. See for example, Israel–South Africa BIT (2004), art 8; Guatemala–Israel BIT (2006), art 6; Israel–Ukraine BIT (2010) art 8; and Israel–Myanmar BIT (2014), art 8.

61. Treaty drafters wishing to encourage the use of conciliation or mediation may wish to consider adapting this model to provide advance consent to mediation, and to include a reference to specific conciliation or mediation rules. A reference to specific conciliation or mediation rules that are selected in advance by the Contracting States would make it easier for the investor to request conciliation or mediation, by eliminating the need to negotiate specific rules or specific terms governing the conciliation or mediation with the State (at a time when the dispute is crystallising and the parties may find it difficult to agree on anything).

II.B: Finnish Treaty Practice – Advance Consent to Conciliation and Arbitration; No Requirement to Conciliate

62. Fourteen BITs concluded from 1990 to 1994, including 9 BITs concluded by Finland,⁷² include a multi-tiered ISDS provision providing advance consent to arbitration, and subsequently including a paragraph stating that:

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.

63. This provision is attributed to Finland because the Finland-Poland BIT (1990) is the first to contain such language, although Belarus, Czech Republic, Denmark, Kyrgyzstan, Ukraine and Vietnam were willing to sign BITs including this provision with counterparties apart from Finland.⁷³
64. This provision appears to provide advance consent to conciliation, allowing but not requiring the investor to choose conciliation and then to submit the dispute to arbitration. It may be contrasted against the UK BIT practice of including clauses that state “*In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.*” The latter clause may be interpreted to require the investor to make a preclusive choice between conciliation or arbitration, with no right to request the other procedure once the choice has been made.

⁷² Finland–Poland BIT (1990, terminated 2019) art 10(2); Denmark–Poland BIT (1990, terminated 2019) art 9(4); Czech Republic–Finland BIT (1990) art 8; Finland–Slovakia BIT (1990) art 8(2); China–Czech Republic BIT (1991, terminated 2006) art 9(3); Belarus–Finland BIT (1992, terminated 2008) 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, terminated 2020) art 8(2); Finland–Uzbekistan BIT (1992) art 8(2); Kyrgyzstan–Ukraine BIT (1993) art 7(3); and Ukraine–Vietnam BIT (1994) art 6(3).

⁷³ Alschner and Skougarevskiy (n 45) 26 describe Finnish treaty practice as “two periods of remarkable internal consistency” between [a] 1985 and 1992, and [b] 1999 until 2009 surrounding “a third much less consistent treaty-making period in the mid-1990s”. The 9 Finnish BITs cited above fall within the first period of internal consistency.

II.C: Indian Treaty Practice – Diverse; Demonstrates the Difficulty of Reaching a Separate Agreement to Conciliate

65. Indian treaty practice is highly diverse, as India appeared to negotiate different investor-State dispute settlement clauses with many of its BIT partners in the 1990s and 2000s. Some India treaties provide advance consent to conciliation and arbitration with a structure that is designed to consent to arbitration if conciliation is unsuccessful or not attempted,⁷⁴ while others require the disputing parties to agree to conciliate,⁷⁵ and a few require conciliation to be attempted before there may be recourse to arbitration.⁷⁶ Because India has yet to sign the ICSID Convention, Indian IIAs are the largest source of treaty references to the UNCITRAL Conciliation Rules. While most of India’s BITs have been terminated pursuant to an Indian government decision in 2015 to terminate and replace India’s BITs,⁷⁷ several of its FTAs contain ISDS provisions providing advance consent to “conciliation or arbitration” that remain in force at the time of writing.⁷⁸
66. An example of an Indian IIA providing advance consent to conciliation and arbitration with a structure designed to consent to arbitration if conciliation is unsuccessful or not attempted,⁷⁹ may be found in Article 9 of the Finland–India BIT (2002, terminated 2019), which reads as follows:

⁷⁴ See for example, Cyprus–India BIT (2002, terminated 2017) art 9; Finland–India BIT (2002, terminated 2019) art 9 (discussed below); India–Serbia BIT (2003, terminated 2020) art 9; Bosnia and Herzegovina–India BIT (2006, terminated 2019) art 9; and India–Slovenia BIT (2011, terminated 2017) art 11.

⁷⁵ See for example, India–United Kingdom BIT (1994, since terminated), art 9; India–Israel BIT (1994), art 9; Bangladesh–India BIT (2009), art 9. Bottini and Lavista (n 45) 367 report that 11 other terminated BITs require the parties to reach a separate agreement consenting to conciliation.

⁷⁶ See for example, India–Sweden BIT (2000, terminated 2017) art 9; and the India–Uruguay BIT (2008, terminated 2017) art 9 (discussed below).

⁷⁷ . The official data on whether an Indian BIT has been terminated may be found at Department of Economic Affairs, Ministry of Finance, Government of India, “Bilateral Investment Treaties (BITs)/Agreements” <<https://dea.gov.in/bipa>> last accessed 29 March 2022. For BITs remaining in force at the time of writing that provide advance consent to conciliation, see for example, India–Philippines BIT (2000), art 8; Colombia–India BIT (2009), art 10; India–Lithuania BIT (2011), art 9. Bottini and Lavista (n 45) 367 report that eight other terminated BITs provide advance consent to conciliation.

⁷⁸ See for example, India–Singapore CECA (2005), art 6.21; India–Japan EPA (2011) art 96; India–Malaysia FTA (2011), article 10.14. The ASEAN–India Investment Agreement (2014), art. 20 was signed in 2014 but has yet to enter into force.

⁷⁹ See n 74 for other treaties with similar provisions.

Article 9: Investment Disputes

...

(2) If such a dispute cannot be settled amicably within a period of three months from the date at which either party to the dispute requested amicable settlement, the investor that is party to the dispute may submit the dispute for resolution as follows:

(a) to the competent courts, judicial or administrative bodies of the Contracting Party that is party to the dispute, or with the consent of the Contracting Party to its arbitral bodies; or

(b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or

(3) should the options in paragraph (2) of this Article not be exercised. or where the conciliation proceedings under paragraph (2)(b) of this Article are terminated other than by signing of a settlement agreement, the dispute may be referred to international arbitration according to the following provisions... [sic]⁸⁰

67. The structure of the above provision is carefully worded to ensure that, while there is a fork-in-the-road applying between investor recourse to domestic proceedings (paragraph (2)(a)) and investor recourse to investor-State arbitration (paragraph (3)), the fork-in-the-road does not apply to the investor attempts to seek conciliation or mediation. Because the UNCITRAL Conciliation Rules are very similar to modern commercial mediation rules (e.g. the UNCITRAL Mediation Rules), provisions like the above essentially provide advance consent for investors to attempt mediation, while not requiring the investor to attempt mediation as a precondition for arbitration.

⁸⁰ Note the incorrect use of periods and lower-case “s” in paragraph (3) are copied from the text of the BIT obtained from UNCTAD IIA Navigator on 31 March 2022. See United Nations Conference on Trade and Development (UNCTAD), ‘International Investment Agreements Navigator’ <<https://investmentpolicy.unctad.org/international-investment-agreements/>> accessed 31 March 2022 [henceforth referred to as “UNCTAD IIA Navigator”]

68. The India-Netherlands BIT (1995, terminated 2016) is an example of an Indian BIT providing for conciliation if the parties make a separate agreement to conciliate, and advance consent to arbitration, which may follow an unsuccessful attempt at conciliation. A number of other Indian BITs adopt a similar approach, although their exact language differs.⁸¹

Article 9 Investment disputes

- (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.*
- (2) If the dispute cannot be thus resolved as provided in paragraph (1) of this Article within three months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules of Conciliation 1980, if both parties to the dispute so agree.*
- (3) If either party to the dispute does not agree to conciliation within one month of the reference or where it is so referred but conciliation proceedings are terminated other than by the signing of a settlement agreement, or if no reference is made to international conciliation, the dispute may be referred to arbitration as follows...
[underline added]*

69. India's retroactive taxation dispute with Vodafone under the India-Netherlands BIT (1995) illustrates why it may be preferable for IIAs to provide advance consent to conciliate under specific rules, as it may be difficult to reach a separate agreement to conciliate in the heat of a dispute. Reporting on the disputing parties' attempts to reach a separate agreement to conciliate is sparse and may not reflect the full legal rationales of the parties, but the following narrative is a first attempt to synthesize an account of events.

⁸¹ See n 75 for treaties with similar provisions.

II.C.1 Case Study of Vodafone-India Retrospective Tax Dispute

70. Before initiating arbitration, Vodafone sought in 2013 to reach an agreement to conciliate under the 1980 UNCITRAL Conciliation Rules,⁸² which is an optional procedure provided for in the India-Netherlands BIT (1995), that requires a separate agreement to conciliate. The Government of India initially refused this request on the advice of then-Law Minister Ashwani Kumar that it would not be legal as a matter of internal law for the Government of India, but once Kapil Sibal took over as Law Minister and said that it would be legal, the Indian Cabinet agreed to offer to engage in a conciliation under the Indian Arbitration and Conciliation Act rather than the UNCITRAL Conciliation Rules.⁸³ The Government of India further stated the position that, if a settlement was reached, it would need to be approved by the whole Cabinet, and the outcome would ultimately need to be vetted by the Indian Parliament as it would require amendment of the Income Tax Act.⁸⁴ Vodafone refused the Government of India's offer to conciliate under the Indian Arbitration and Conciliation Act, insisting on the UNCITRAL Conciliation Rules, and subsequently filed a notice of arbitration under the India-Netherlands BIT (1995). The Indian government then withdrew its offer to conciliate the dispute,⁸⁵ and the case went to arbitration.
71. Besides the importance of having advance consent to conciliate or mediate under specific rules, the above account highlights the importance of clarifying the issue of who would authorize a settlement agreement, and describing the process of authorizing and implementing a settlement agreement. The newly amended ICSID Conciliation Rules,⁸⁶ the new ICSID Mediation Rules⁸⁷ and the IBA Rules for Investor-State Mediation⁸⁸ attempt to address this issue by requiring the parties, during the first session or at an early stage of the conciliation or mediation proceedings, to identify a representative who is authorized to settle the dispute and/or describe the process necessary for a settlement agreement to be authorized.

⁸² [Vodafone responds to government's conciliation offer on tax dispute](#) - Economic Times - December 31, 2013

⁸³ [Vodafone/India conciliation: legal but unlikely and not imminent](#) - FT - May 15, 2013

⁸⁴ [Cabinet approves non-binding conciliation to resolve Vodafone tax issue](#) - India Today - June 4, 2013

⁸⁵ [Vodafone India indecisive on conciliation talks: P. Chidambaram](#) - Financial Express - February 14, 2014

⁸⁶ Rule 31, ICSID Conciliation Rules (2022)

⁸⁷ Rule 20(4), ICSID Mediation Rules

⁸⁸ International Bar Association (IBA), 'IBA Rules for Investor-State Mediation' (2014) 29 ICSID Rev-FILJ 1-16, Article 9(3).

72. Finally, two (terminated) Indian BITs require conciliation to be attempted before there may be recourse to arbitration: the India-Sweden BIT (2000, terminated 2017) art 9;⁸⁹ and the India-Uruguay BIT (2008, terminated 2017) art 9.

Article 9. Settlement of Disputes between an Investor and a Contracting Party

...

(2) If a dispute cannot be settled amicably within six (6) months from the date when it was raised, either party may submit it for resolution:

(a) In accordance with the laws of the Contracting Party accepting the investment before competent judicial, arbitral or administrative authorities of that Contracting Party; or

(b) Under international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) If either party has recourse to the procedures mentioned in paragraphs 2 (a) or 2 (b), this shall include the preclusion of subsequently adopting another form of reparation. However, in the framework of the procedure referred to in Paragraph 2 (b), if the conciliation ends without the conclusion of an agreement to resolve the matter, the dispute may be referred to arbitration. The arbitration procedure shall be as follows... [underline added]⁹⁰

73. As can be seen from the second sentence of paragraph (3), this provision only provides advance consent to arbitration if one of the parties has previously submitted the dispute for conciliation under paragraph 2(b) and the conciliation did not result in a settlement agreement. The critical difference between this provision and the similar provision in the Finland-India BIT (2002) is the replacement of the initial clause at the start of paragraph (3) of the Finland-India BIT (“*should the options in paragraph (2) of this Article not be exercised, or*”) with a clear fork-in-the-road provision.

⁸⁹ Rubins (n 51) 65, explains that this provision has 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.”

⁹⁰ Author’s unofficial translation of Spanish text, as only Spanish copies could be found on UNCTAD IIA Navigator.

74. The first sentence of paragraph (3) includes a fork-in-the-road that makes clear that once a disputing party elects for one of the procedures mentioned in paragraph (2)(a) or (b), that party is precluded from the other procedure. However, this fork-in-the-road provision leaves some lack of clarity on the issue of, if one of the disputing parties attempts to resolve a dispute under domestic procedures (paragraph 2(a)), is *the other disputing party* precluded from attempting conciliation (paragraph 2(b)) and arbitration if conciliation fails to produce a settlement? Put differently, if the State sues an investor under a domestic procedure specified in paragraph (2)(a), is the investor then precluded from recourse to conciliation and arbitration under paragraph 2(b)?
75. Future drafters may wish to consider addressing this type of issue through clearer language specifying that the fork-in-the-road principle only applies to the party electing for one of the choices, if the drafters wish to preserve the other party's ability to seek arbitration. In this particular treaty provision, the issue could have been easily addressed by adding three words ("by that party") to the end of the first sentence of paragraph (3).

II.D: UAE Treaty Practice – Subtle Differences Raises Question Over Advance Consent to Arbitration

76. Although the Hong Kong-UAE BIT (2019) has drawn attention as an example of an IIA in which States (but not investors) may compel conciliation,⁹¹ we found similar provisions in several earlier UAE BITs: the Estonia-UAE BIT (2011), the Serbia-UAE BIT (2013), and the Mauritius-UAE BIT (2015).
77. Like Article 8 of the Hong Kong-UAE BIT (2019), Article 9 of the Estonia-UAE BIT (2011) provides that:

3. When required by the Contracting Party, if the dispute cannot be settled amicably within six months from the moment of receipt of the written notice, it shall be submitted to the competent authorities of that Contracting Party or arbitration centers thereof, for conciliation.

4. If the dispute cannot be settled amicably within six months from the moment of receipt of the written notice or from the start of the conciliation referred to in paragraph 3 of this Article, the dispute shall upon the request of the investor be settled as follows...

(b) by arbitration by the International Centre for Settlement of Investment Disputes (ICSID)...

*(c) by arbitration by three arbitrators in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)...*⁹²

78. Paragraph (4)(b) and (c) of this provision clearly provide advance consent to arbitration, while the first sentence of Paragraph (4) makes clear that the investor may have recourse

⁹¹ Hong Kong, China Special Administrative Region (SAR)-United Arab Emirates BIT (2019) art 8(3). See for example, Claxton (n 5) at 11, Ana Ubilava, 'Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation' (Kluwer Mediation Blog, 5 September 2020) <<https://http://mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation/>> accessed 31 March 2022.^[L]^[SEP]

⁹² The Angola-UAE BIT (2017) art 11 may contain a drafting error as its paragraph 4 appears similar to that of the Estonia-UAE BIT (2011), but its paragraph 3 appears to state that the host State of the investment may require the dispute to be submitted to its competent courts ("tribunal competente") rather than conciliation (*conciliação*). The Portuguese text of this provision, obtained through the UNCTAD IIA Navigator, states:

"3. Se a Parte Contratante o exigir, se o litígio não puder ser resolvido de forma amigável no prazo de três meses a contar da recepção da notificação por escrito, o litígio será submetido ao tribunal competente da Parte Contratante em cujo território o investimento é efectuado.

4. Se o litígio não puder ser resolvido amigavelmente no prazo de seis meses a contar do momento da recepção da notificação por escrito ou do início da conciliação referida no n.º 3 do presente artigo, o litígio será resolvido, a pedido do investidor, da seguinte forma..."

to arbitration (1) if six months have elapsed after the receipt of a written notice and the respondent State did not require conciliation; or (2) if six months have elapsed from the start of a conciliation proceeding required by the respondent State (which may be required after six months have elapsed after the receipt of a written notice, per paragraph (3)).

79. By contrast, subtle differences in the wording of the Mauritius-UAE BIT (2015) and Armenia-UAE BIT (2016)⁹³ raises important questions about their implications. These treaties appear not to provide advance consent to investor-State arbitration, except where the State makes an optional request for “conciliation and mediation”. This is because of the omission of language providing for advance consent to arbitration in the case where the dispute cannot be settled within six months “*from the moment of receipt of the written notice*” in paragraph 4, unlike the other UAE treaties referenced above. To illustrate this issue, Article 10 of the Armenia-UAE BIT is quoted below:

1. An investor that has a dispute with a Contracting Party should initially attempt to settle it amicably through consultations and negotiations.

2. To start consultations and negotiations, the investor shall deliver to the competent authority of the relevant Contracting Party a written notice. The notice shall specify...

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...

(a) by a competent Court of the [host State] ...

(b) by arbitration centres of the [host State]...

(b) by arbitration [by ICSID] ... or

(d) or by arbitration in accordance with the [UNCITRAL Arbitration Rules]

⁹³ Although the UNCTAD IIA Navigator 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 Navigator 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.

80. Like the first set of UAE BITs discussed above, the first sentence of paragraph 4 states that the investor may have recourse to arbitration if six months have elapsed from the start of a conciliation or mediation proceeding required by the respondent State (which may be required after three months have elapsed after the receipt of a written notice, per paragraph 3). However, paragraph 4 does not specifically provide consent to arbitration in the scenario where a specified time period has elapsed after the receipt of a written notice and the respondent State did not require conciliation or mediation. Moreover, paragraph 3 makes it clear that the State has the discretion to decide whether to require conciliation or mediation. Therefore, as stated above, the implication is that the treaties appear not to provide advance consent to investor-State arbitration, except where the State makes an optional request for “conciliation and mediation”.
81. The UAE has also demonstrated a willingness to experiment with other language requiring or encouraging conciliation or mediation, most notably in the Costa Rica-UAE BIT (2017) and the Rwanda-UAE BIT (2017).
82. The Costa Rica-UAE BIT (2017) clearly requires that conciliation or mediation be attempted as a mandatory and condition precedent to arbitration (Article 14(4)). It further provides clear procedures and time periods, including a requirement that the dispute be submitted for conciliation or mediation three months (Article 14(3)), and a provision stating that arbitration may take place six months after the commencement of the conciliation or mediation while noting that the parties have flexibility to extend the period for conciliation or mediation ((Article 14(5)). However, it includes a time limit of three years for the submission of claims to arbitration (Article 14(16)), and does not include a “tolling provision” specifying that the time limit to bring a claim may be suspended while the parties are engaged in mediation or conciliation (or consultations and negotiations). The relevant provisions are quoted below:

Article 14. Dispute Settlement between a Party and an Investor from the other Party

Consultations and negotiations

1. An investment controversy that arises between an investor and a Party ... will be resolved, to the extent possible, through consultation and negotiation.

2. To initiate consultations and negotiations, said investor shall notify the defendant of the investment dispute by submitting a notice of the dispute (notice of dispute) in writing. The notice of dispute shall include...

Third party procedures

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.

Submission of a claim to arbitration

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....

Consent to arbitration and, conditions and limitations to the consent of each Party...

16. No claim may be submitted to arbitration under this Agreement, if more than three years have elapsed from the date on which the plaintiff had or should have had knowledge of the alleged violation... of this Agreement and knowledge that the plaintiff suffered loss or damage.

83. The Rwanda-UAE BIT (2017) includes novel language that encourages but does not require the use of mediation and conciliation during a mandatory 4 month (120 days) cooling off period before a claim may be submitted to arbitration. It states that:

Article 12 Mediation and Conciliation

1. In lieu of, or in addition to, the mandatory negotiation requirement, the parties to the investor-State Dispute may agree to mediation or conciliation, without prejudice to their rights, claims and defenses under this Agreement.

2. *The parties to the Investor-State Dispute shall agree upon the rules applicable to (i) the mediation or conciliation of the dispute and (ii) the method of appointment of the mediator or conciliator.*

Article 13 Conditions Precedent to the Submission of a Dispute to Arbitration

1. *An Investor-State Dispute may be submitted to arbitration in accordance with Article 14 below only if the following conditions have been met:*

a. The Investor party to the Investor-State Dispute has consented in writing to arbitration in accordance with Article 14 below;

b. One hundred twenty (120) days, or any other time period agreed upon by the parties, since the receipt by the Contracting Party concerned of the Notice of Intent have elapsed and the Investor-State Dispute has not been settled amicably;

c. no mediation or conciliation procedure is pending between the parties to the Investor-State Dispute....

f. No investment dispute may be submitted for resolution by arbitration if more than three years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the alleged breach and loss or damage that the latter has allegedly incurred....

Article 15. Other Proceedings

1. *If other dispute settlement procedures have been initiated by an entity or individual related to the Investor party to the Investor-State Dispute with respect to any Measures alleged to be in breach of this Agreement and if such other procedures are pending on the date of commencement of the arbitration proceedings pursuant to Article 14 above, the arbitral tribunal established under Article 14 shall stay the arbitration proceedings until the end of such other proceedings.*

2. *Upon completion of such other proceedings initiated by an entity or individual related to the Investor party to the Investor-State Dispute, the arbitral tribunal established under Article 14 shall proceed with the arbitration proceedings and take into account the outcome of such other proceedings in the interest of avoiding conflicting decisions, in order to ensure the fair and efficient resolution of the Investor-State Dispute, and in particular to avoid double recovery....*

84. While the requirement to terminate mediation or conciliation proceedings prior to the commencement of arbitration (Article 13(c)) may arise from the understandable desire to prevent double recovery (set out in Article 15(2)), this requirement may limit the

flexibility that is sometimes required to reach an amicable settlement of the dispute. For example, in certain circumstances, the continuation of the mediation or conciliation in parallel with the arbitration may assist in reaching settlement of some discrete or even all issues. Moreover, the time limit of three years to bring a claim (stated in Article 13(f)) and the lack of a tolling provision while mediation or conciliation proceedings are ongoing, may result in the investor needing to terminate the mediation or conciliation proceeding in order to preserve its right to arbitration.

85. Finally, it may have been preferable for the drafters to agree in advance the applicable mediation or conciliation rules and the method of appointment of the mediator or conciliator. As seen in the Vodafone-India case study described above, such agreement may be difficult to reach in the heat of a dispute.

III.E: Colombia Treaty Practice – Simple Provision Encouraging Mediation and Conciliation Before or During Arbitration

86. Since 2008, Colombia has inserted the following provision in many of its IIAs:

Nothing in this Article shall be construed as to prevent the parties to a dispute from referring their dispute, by mutual agreement, to ad hoc mediation or conciliation before or during the arbitral proceedings.

87. These provisions may be found in 9 of Colombia's IIAs, namely: China-Colombia BIT (2008) art 9(3); BLEU-Colombia BIT (2009) art 7(3); Colombia-United Kingdom BIT (2010) art 9(6); Colombia-Republic of Korea BIT (2010) art 12(3); Colombia-Northern Triangle FTA (2013) art 12.18(3); Colombia-Republic of Korea FTA (2013) art 8.17(2); Colombia-Singapore BIT (2013), art 13(6); Colombia-Turkey BIT (2014) art 12(4); and the Colombia-UAE BIT (2017) art. 15(2).
88. While these provisions do not provide advance consent to conciliation or mediation, as indicated by the requirement for a separate agreement, they are novel in being the first ISDS provisions to recognize that conciliation and/or mediation may be useful during arbitral proceedings, as well as before arbitral proceedings.⁹⁴ For example, conciliation or

⁹⁴ Jack Coe, 'Concurrent Co-Mediation: Towards a More Collaborative Centre of Gravity in Investor-State Dispute Resolution' in Titi and Fach Gomez (n 3). Other ISDS provisions that recognize the potential of conciliation and mediation during arbitral proceedings include: The ASEAN Comprehensive Investment Agreement (2009) art 30); the Burkina Faso-Canada BIT (2015), art 23; EU-Canada Comprehensive Economic and Trade Agreement (2016) art 8.20(1); Argentina-Chile FTA (2017) art 8.23(1); EU-Singapore Investment Protection Agreement (2018) art

mediation may be used to help narrow down the issues in dispute, or to achieve a full resolution of the dispute at different stages of the arbitral proceedings, such as: once the parties have seen each other's full legal cases; once the parties have concluded their arguments on jurisdiction; once the arbitral tribunal has made a ruling on jurisdiction; once the parties have concluded their arguments on the merits; or once the arbitral tribunal has made a ruling on the merits. Research shows that many investor-State disputes are settled after the filing of the notice of dispute, but before the final resolution of the dispute by the arbitral tribunal,⁹⁵ and conciliation and mediation could play a greater role in helping disputing parties settle their disputes in the future.

3.4(1); Singapore-Indonesia BIT (2018) art 16(1); EU-Vietnam IPA (2019) art. 3.31; and Canada-Chile FTA (2019) art G-20(1).

⁹⁵ See for example, Roberto Echandi and Priyanka Kher, 'Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration (2014) ICSID Rev-FILJ 41; Ana Ubilava, 'Amicable Settlements in Investor-State Disputes' (2020) J World Investment & Trade 528.

Part III: Lessons Learnt and Conclusions

89. This article has shown how the ICSID Convention was carefully drafted to ensure the possibility of consent to conciliation followed by arbitration if conciliation failed, and how the ICSID Secretariat suggested in its Model Clauses two models of mandatory conciliation followed by arbitration. However, one of the reasons for the low use of conciliation to date is that most (703 out of 806; or 87.2%) ISDS provisions that provide advance consent to conciliation instead adopted the Dutch-Anglo Model of providing advance consent to “conciliation or arbitration”. While there are good arguments demonstrating why such provisions do not impose a fork-in-the-road choice whereby attempting conciliation precludes subsequent recourse to arbitration, the uncertainty over how to interpret such provisions has resulted in investors and their counsel being afraid of attempting conciliation.
90. Treaty and model clause drafters wishing to promote the use of conciliation and mediation may wish to consider the following policy recommendations, drawn from the historic and less well-known treaty practices listed above.
1. **Provide advance consent to investor-State conciliation and mediation:** States have historically demonstrated their willingness to provide advance consent to conciliation in more than 806 investment treaties, and should continue this practice with regards to both conciliation and mediation. States that include a standing offer to conciliate or mediate would incur minimal costs, since they retain the freedom of walking away from settlement discussions if/whenever they so wish. But the inclusion of advance consent to conciliation or mediation in ISDS provisions would send a strong signal to investors as well as other stakeholders (e.g., line ministries, sub-national governments) that the State is genuinely willing to engage in structured, third-party amicable settlement discussions in case investment disputes arise.⁹⁶ Finally, as demonstrated in the failed attempt to reach an agreement to conciliate in the Vodafone-India retrospective tax dispute, it may be difficult to reach an agreement to conciliate in the heat of a dispute, resulting in unnecessary time and expense being

⁹⁶ One of the reasons why line ministries or sub-national governments are not willing to engage in mediation or conciliation is that they are unfamiliar with the process and afraid that it may not be seen as a legitimate means of resolving investor-State disputes. The inclusion of advance consent to conciliation and mediation in ISDS provisions by the State’s treaty drafters may help to increase the domestic legitimacy of these modes of dispute settlement.

lost to arbitration, even though the Indian government ultimately offered to settle all of its investor-State disputes relating to retrospective taxation.

2. Advance consent provisions should include a default reference to specific mediation or conciliation rules, and be clear that the choice of conciliation/mediation or arbitration does not preclude future or parallel recourse to the other: As demonstrated by the disagreement over what conciliation rules to adopt in the India-Vodafone retrospective tax dispute, disagreement over the preliminary issue of what set of conciliation rules or mediation rules to use may become an obstacle to the commencement of conciliation or mediation. Drafters may easily pre-empt this issue by specifying a pre-selected set of mediation or conciliation rules that the mediation/conciliation would follow by default, in the absence of an agreement between the parties to adopt a different set of rules. The easiest way of achieving this would be to provide advance consent to conciliation/mediation under a specific set of conciliation/mediation rules, such as the ICSID Mediation Rules, the ICSID Conciliation Rules, the UNCITRAL Mediation Rules, the UNCITRAL Conciliation Rules, the IBA Rules for Investor-State Mediation, or the rules of other administering institutions such as the Permanent Court of Arbitration or the International Chamber of Commerce's International Centre for ADR. If the drafters wish to specify additional terms governing the mediation/conciliation, such as a provision suspending the time limit to initiate arbitration while mediation/conciliation proceedings are ongoing, the drafters could include these terms in subsequent paragraphs. An alternative option may be for the drafters to specify all the terms and rules governing an *ad hoc* conciliation or mediation procedure within the IIA, following the example of Article 3.4 and Annex 6 of the EU-Singapore Investment Protection Agreement (2018) (which was subsequently transplanted and modified in Article 16 of the Singapore-Indonesia BIT (2020)).

Drafters should also be careful to avoid imposing a fork-in-the-road between non-binding means of third-party assisted amicable dispute resolution (such as conciliation and mediation), and binding means of adjudication (such as arbitration and domestic court proceedings), unless this is intended. Even if no such fork-in-the-road is intended, drafters should be careful to avoid ambiguity or unclear language that may support such an interpretation. In particular, drafters should avoid or take especial care with the use of the word "or" and similar linking words between non-binding means

and binding means of dispute settlement, and also take care to ensure that fork-in-the-road provisions do not include non-binding means of amicable dispute resolution within their scope.

One possible model demonstrating how advance consent to mediation/conciliation can be provide as a non-preclusive alternative to arbitration is the treaty language first adopted by Israel in its treaty practice between 2003 and 2004. Such treaty language could be modified as follows:

2. *If a dispute under [the above paragraphs of this Article] cannot be settled within [six months] from the written notification of this dispute, it shall, upon the request of the investor, be settled as follows:*

(a) *by the decision of a competent court of the Host Contracting Party; or*

(b) *by [mediation/conciliation] under [preferred mediation/conciliation rules], or if [mediation/conciliation] is not chosen or if either side deems that the [mediation/conciliation] is unsuccessful; or*

(c) *by arbitration ...;*

While this modified treaty language still uses the word “or” between different options, the crucial inclusion of the clause “*or if [mediation/conciliation] is not chosen or if either side deems that the [mediation/conciliation] is unsuccessful; or*” results in mediation/conciliation becoming a non-preclusive alternative to the other listed options for dispute settlement. However, drafters contemplating the use of such language will still have to be careful to ensure that, if any fork-in-the-road provisions are included below the list of options for dispute settlement, this does not apply to mediation/conciliation.

Another possibility may be to adopt the structured model cited above in Article 9 of the Finland-India BIT (2002, terminated 2019) of adopting an ISDS provision that separates the advance consent to conciliation/mediation and arbitration into different paragraphs, and provides consent to arbitration if conciliation/mediation is unsuccessful or not attempted. A modified version of such treaty language might read:

(2) If such a dispute cannot be settled amicably within a period of three months from the date at which either party to the dispute requested amicable settlement, the investor that is party to the dispute may submit the dispute for resolution as follows:

(a) to [domestic proceedings]; or

(b) to [mediation/conciliation] under the [preferred conciliation/mediation rules]; or

(3) should the options in paragraph (2) of this Article not be exercised. or where the conciliation proceedings under paragraph (2)(b) of this Article are terminated other than by signing of a settlement agreement, the dispute may be referred to international arbitration according to the following provisions...

Finally, a third and very compelling possibility demonstrated by existing treaty practice (although there are others) may be to include language similar to the rights-preserving language first seen in Finland's treaty practice in the early 1990s, to the effect of: "*Notwithstanding the provisions ... relating to the submission of the dispute to arbitration the investor shall have the right to commence [mediation/conciliation] under [preferred mediation/conciliation rules] [before the dispute is submitted for arbitration/at any time before or during the arbitral process]. [The State shall attend the first meeting of the mediation/conciliation].*" The inclusion of such language within ISDS provisions is a compelling option because it should generally prevail over any other language suggesting or creating a fork-in-the-road between conciliation/mediation and binding means of adjudication.

3. If drafters wish to make conciliation or mediation a mandatory pre-condition to arbitration, they should be very careful with how they structure this requirement: It should be noted at the outset, that for mandatory pre-conditions to arbitration to be successful, the dispute settlement provision would have to be carved out of the scope of the MFN clause.⁹⁷ Several other lessons in treaty drafting may be learnt from the treaties discussed above.

⁹⁷ Claxton (n 5). For further considerations when drafting investor-State dispute settlement provisions for conciliation and mediation, see ICSID Secretariat, 'Background Paper on Investment Mediation' (July 2021)

The ISDS provisions of the Armenia-UAE BIT (2016) and the Mauritius-UAE BIT (2015) may limit advance consent to arbitration to situations where the State has exercised its discretion to require mandatory conciliation or mediation, because of the crucial omission of the other pathway to arbitration: when the investor has provided a written notice of dispute but the State did not require mandatory conciliation or mediation.

The ISDS provisions of the India-Finland BIT (2002, terminated 2019), the India-Netherlands BIT (1994, terminated 2016) and the India-Uruguay BIT (2008, terminated 2017) demonstrate how small differences in wording can result in big differences in practice: although all three ISDS provisions have similar structures and language, only the India-Uruguay BIT requires that conciliation be attempted before the disputing parties may have recourse to arbitration.

The Costa Rica-UAE BIT (2017) has generally well-drafted provisions that require conciliation or mediation be attempted as a mandatory and condition precedent to arbitration with clear procedures and time periods (Article 14(3) to (6)). However, it may impose some time pressure on the investor to bring a claim while settlement negotiations are ongoing (which may be viewed by the other party as a hostile act), as it includes a time limit of three years for the submission of claims to arbitration (Article 14(16)), and does not include a “tolling provision” specifying that the time limit to bring a claim may be suspended while the parties are engaged in mediation or conciliation (or consultations and negotiations).⁹⁸

4. Ensure that language promoting conciliation and mediation does not limit their use to pre-arbitration phase, but enables their use during arbitration/in parallel proceedings (e.g. **Colombia treaty practice; cf. Rwanda-UAE BIT**): To date, most ISDS provisions that refer to mediation refer to mediation and conciliation as an option to be attempted in the negotiations and consultations stage, before the dispute goes to

https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf accessed 19 July 2021 (particularly Section 5 entitled Concluding Notes)

⁹⁸ Argentina-Chile FTA (2017) art 8.23(5) contains an example of a tolling provision, which provides “In the event that the disputing parties agree to resort to mediation, the time limits set out in Article... shall be suspended from the date on which the disputing parties agree to resort to mediation until the date on which either disputing party decides to terminate the mediation. Any decision by a disputing party to terminate the mediation shall be communicated by letter sent to the mediator and to the other disputing party.”

arbitration.⁹⁹ However, many practitioners believe that this is an especially difficult time to agree on mediation or conciliation. The parties may have already attempted negotiations before the investor filed its notice of dispute, and may not want to engage in mediation or conciliation. Alternatively, because the investor may have been disputing with other government entities, the government ministry or agency responsible for handling investor-State disputes may not have been aware of the dispute until a notice is filed, and the government will often need to spend the time after the filing of the notice (“cooling off period”) to collect information about the case and coordinate its response, before the government is able to attempt negotiation.¹⁰⁰

Newer ISDS provisions are beginning to demonstrate a recognition of the value of having a conciliation or mediation run in parallel with arbitration, or at different stages of the arbitral proceedings. The arbitral proceedings may enable the parties to realise the merits and weaknesses of their legal positions and arguments, and tribunal rulings on jurisdiction and/or the merits in particular may serve as an impetus to settlement discussion.

The adoption of provisions encouraging mediation or conciliation during arbitral proceedings, or stating that mediation and conciliation may be agreed to at any time including during arbitral proceedings, such as those found in Colombia’s treaty practice, would be a good first step in this direction. However, such provisions could do more, by either providing advance consent to conciliation or mediation during arbitration, or by exhorting the State to give sympathetic consideration to a request for conciliation or mediation during arbitration, bearing in mind the potential savings of time and expense if this conciliation or mediation is successful. The provisions could also be more specific in setting out which conciliation or mediation rules would be

⁹⁹ See Weeramantry, Chang and Sherard-Chow (n 4) Chart 8. Out of 53 IIAs that refer to mediation, 27 IIAs refer to mediation as an option that may be attempted by the parties in the pre-arbitral phrase, 3 IIAs refer to mediation as an option that may be compelled by the State during the pre-arbitral phrase, while 5 IIAs refer to mediation as a mandatory requirement that must be attempted before arbitration. In contrast, most ISDS provisions that refer to conciliation list it as an option at the same stage as arbitration.

¹⁰⁰ Bart Legum, ‘The Difficulties of Conciliation In Investment Treaty Cases: A Comment On Professor Jack C. Coe Jr’s ‘Towards A Complementary Use of Conciliation In Investor-State Disputes – A Preliminary Sketch’ (2006) 21 Mealey’s Intl Arb Rep 72, 73.

used by default, in order to remove disagreement over governing rules as an obstacle to mediation/conciliation.

5. Institutions should draft guidance and model agreements to suspend arbitration proceedings and attempt conciliation or mediation: Beside model clauses/and or treaty provisions that can be included in future treaties, institutions wishing to promote ISDS conciliation and/or mediation may wish to consider drafting guidance documents and model agreements to assist disputing parties that wish to suspend arbitration proceedings and attempt conciliation or mediation for use in ISDS arbitration that are based on the existing stock of IIAs and investment contracts.

The simplest form of a model agreement would include a provision agreeing to mediate or conciliate under a specific set of rules, and a provision agreeing to suspend the arbitral proceedings and until the mediation or conciliation proceeding is terminated by means of a settlement agreement or at the request of a disputing party. Optionally, the model agreement could include an agreement on the names of mediator(s)/conciliator(s) if the parties are able to reach this before the initiation of mediation/conciliation proceedings.

A model agreement could also include further optional provisions (if the parties are able to agree on these provisions before the initiation of mediation/conciliation proceedings, and do not need the third party neutral's intervention to facilitate party agreement) such as:

- an overall timeframe for the mediation/conciliation (that can be extended by party agreement);
- whether the parties desire facilitative or evaluative third-party intervention;
- to specify a code of conduct applicable to the mediator/conciliator, if desired by the parties;
- tolling provisions to suspend any applicable time limits while the mediation proceedings are ongoing;
- provisions governing the enforceability of any settlement agreement (e.g. by transforming the settlement agreement into a consent award, or by meeting the

formal requirements for an international mediated settlement agreement that may be enforced under national laws implementing the Singapore Convention on Mediation);

- rules to govern the non-disclosure and non-use of communications made during the mediation/conciliation proceedings (if it is felt that the default rules under the specific mediation/conciliation procedural rules are insufficient); and
- rules governing how and what public statements may be made about the mediation/conciliation.