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COMPELLING PARTIES TO MEDIATE INVESTOR-STATE DISPUTES: NO PRESSURE, NO DIAMONDS?

*James M. Claxton

I. INTRODUCTION

There are few areas of international law that are more dynamic, or more fraught with controversy, than investor-state dispute settlement (ISDS). In its most common form, ISDS empowers investors to arbitrate claims against states hosting their investments on the basis of entitlements in treaties.¹ This system has been called “dramatically different from anything previously known in the international sphere.”² Not only do investment treaties grant corporate and private investors international legal rights, aberrant to classical international law, but those rights are enforceable under arbitration agreements in the treaties to which the investors are evidently not party.³ This system has captured public attention, and sometimes drawn ire, with notorious cases like the Yukos arbitration against Russia for claims of more than \$114 billion and cigarette-packaging arbitrations brought by Philip Morris against Australia and Uruguay.⁴

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¹ See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 237-38 (1995).

² *Id.* at 256.

³ In investment treaties, the home state of the investor and state hosting the investment agree that investors can arbitrate claims. Consent in a given arbitration can be thought of as two-stage process: the respondent state consents in the treaty and the claimant investor consents by filing a notice of arbitration once a dispute has arisen or by otherwise notifying the state of its consent. The same principle can explain the operation of consent under domestic investment laws that provide for arbitration. *E.g.*, *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, *Investment Treaties*, ¶¶ 12.2, 12.3 (Sep. 16, 2003), 10 ICSID Rep. 240 (2007).

⁴ See *Yukos Universal Ltd. (Isle of Man) v. Russ. Fed’n*, PCA Case Repository No. AA 227, Final Award ¶ 63 (July 18, 2014), <https://pcacases.com/web/sendAttach/420>; *Philip Morris Brad Sarl (Switz.), Philip Morris Products S.A. (Switz.), and Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, *Cigarette Packaging*, (July 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf; *Philip Morris Asia Ltd. V. Commonwealth of Australia*, PCA Case Repository No. 2012-12, Final Award Regarding Costs (July 8, 2017), <https://pcacases.com/web/sendAttach/2190>.

Supporters may argue that investment protections can encourage stable, long-term investments, strengthen the rule of law, and promote economic development. From this perspective, arbitration ensures that treaty protections are meaningful by offering a venue for enforcing investor rights outside of the courts of the host state. Critics argue that the special entitlements that the treaties confer on corporations can have unintended consequences, including preferential state treatment of foreign investors and the “chilling” of state regulation for the public good as governments and administrative agencies allow fear of investor claims to shape their policies.⁵ Critics also denounce investor-state arbitration as illegitimate in part because it empowers private individuals, often corporate lawyers, to sit in judgement of the acts of public authorities.⁶

Criticisms of the investment law system have led stakeholders, including the European Union (EU) and United Nations (U.N.), to explore systemic reforms that include the use of mediation as an alternative or complement to other forms of dispute resolution.⁷ Mediation tends to be faster, less expensive, and more conducive to preserving relations between parties.⁸ This initiative coincides with a steady global awakening to the potential of mediation including the introduction of mandatory mediation in various domestic court systems,⁹ an EU Directive on mediation,¹⁰ prioritization of mediation to resolve “Belt and Road” disputes,¹¹ and the signing of the Singapore Convention, the first-ever international mediation treaty, in August 2019.¹²

⁵ U.N. Conference on Trade and Development (UNCTAD), *UNCTAD's Reform Package for the International Investment Regime* 48-52 (2018), <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-> (last visited 24 August 2019) [hereinafter *Reform Package*].

⁶ *Id.* at 48. See generally UNCTAD, IIA Issues Note: Reforming Investment Dispute Settlement: A Stocktaking (March 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf (surveying of issues and proposed reforms).

⁷ See European Commission, Consultation Document, *Prevention and Amicable Resolution of Disputes Between Investors and Public Authorities Within the Single Market*, EUROPEAN COMMISSION (July-Nov. 2017), https://ec.europa.eu/info/sites/info/files/2017-investment-protection-mediation-consultation-document_en_1.pdf [hereinafter *Prevention and Amicable Resolution*]; Comm'n on Int'l Trade Law (UNCITRAL), Working Group III on Investor-State Dispute Settlement Reform, *Possible Reform of ISDS - Cost and Duration*, §60, U.N. Doc. A/CN.9/WG.III/WP.153 (Aug. 31, 2018) [hereinafter *Possible Reform*] (“[t]he Working Group may wish to note that despite increasing efforts to promote forms of dispute settlement other than arbitration, such as mediation, still remain under-used in ISDS”).

⁸ *The Advantages of Mediation Cases Over Traditional Lawsuits*, FINDLAW, <https://adr.findlaw.com/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html>, (last visited Nov. 11, 2019).

⁹ See *infra* Part VI (discussing mandatory mediation and its variations in domestic legal system).

¹⁰ Council Directive 2008/52, art. 1, 2008 O.J. (L 136).

¹¹ *Guidance Notes on Resolving Belt and Road Disputes Using Mediation and Arbitration*, ICC: INT'L CHAMBER OF COM., <https://iccwbo.org/publication/icc-guidance-mediation-belt-road-disputes>, (last visited 24 August 2019). See generally Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. OF INT'L ARB. 479, 479 (2008); Kim M. Rooney, *Turning the Rivalrous Relations Between Arbitration and Mediation into Cooperative or Convergent Modes of a Dispute Settlement Mechanism for Commercial Disputes in East Asia*, 12 CONTEMP. ASIA ARB. J. 107 (2019).

¹² G.A. Res. 73/198, at 1 (Dec. 20, 2018).

Yet resistance to investor-state mediation runs deep and is complicated by structural and political barriers.¹³ This includes the reluctance of state agents facing investor claims to agree to settle those claims out of fear that voluntary settlement may suggest weakness, corruption, or deference to foreign investors, all of which may come at high political cost to the agent.¹⁴ This conundrum raises questions that are familiar to domestic lawmakers: Should parties be compelled to mediate? If so, what form should compulsions take?

This article surveys the merits and demerits of compulsions in the investor-state context. It concludes that a range of compulsions at various pressure points by diverse stakeholders would help to overcome obstacles to investor-state mediation and result in greater satisfaction with ISDS while enhancing the legitimacy of the system.

The article will proceed as follows: Part II provides the historical context to international investment law and the use of mediation to resolve investor-state disputes; Part III considers the advantages of mediation compared to arbitration; Part IV examines the reasons that mediation has not been used more often to resolve investor-state disputes; Part V considers recent initiatives to promote the use of international mediation; Part VI provides an overview of compulsions to mediate in domestic legal systems; Part VII examines how incentives and compulsions to mediate might be integrated into the ISDS system; Part VIII surveys conceptual and practical problems with compulsion to mediate; and Part IX concludes by proposing an approach to compulsions in ISDS that might be achievable.

II. HISTORICAL CONTEXT

A. *The Genesis of International Investment Law*

The modern system of investment law has roots in the treatment of foreigners and their property by foreign states.¹⁵ From the Middle Ages, parties that were mistreated abroad relied on their home states to take up their grievances with the states where the harm occurred.¹⁶ Provided that the governments were willing to get involved, claims were resolved at the state level by negotiations and sometimes by claims commission and arbitral tribunals.¹⁷ This system of “diplomatic protection”

¹³ Daniel Weinstein & Mushegh Manukyan, *Making Mediation More Attractive for Investor-State Disputes*, KLUWER ARB. BLOG (Mar. 26, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/>.

¹⁴ Seraphina Chew, Lucy Reed, & J. Christopher Thomas QC, *Report: Survey on Obstacles to Settlement of Investor-State Disputes*, CTR. FOR INT’L L., NAT’L U. OF SING., (Sept. 2018), <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf>.

¹⁵ Francis J. Nicholson S.J., *The Protection of Foreign Property Under Customary International Law*, 6 B.C.L. REV. 391, 391 (1965).

¹⁶ DINAH L. SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS 2 (2010).

¹⁷ *Id.* at 2.

contributed to the development of some customary law standards of treatment of aliens both in procedural rights and substantive rights, including the nature of fair treatment and compensation for legal expropriation.¹⁸

A lack of legal certainty about these standards and gaps in protection led to the conclusion of contracts and eventually treaties with provisions on investment protection.¹⁹ The practice of concluding bilateral and multilateral investment treaties took off after World War II amidst increasing international economic integration.²⁰ Throughout this time, there have been various unsuccessful attempts to create a centralized system of international investment law and dispute resolution as exists for international trade under the World Trade Organization.²¹ In the 1960s, notably, a draft multilateral treaty with a catalog of investor protections was prepared under the auspices of the Organisation for Economic Co-operation and Development (OECD).²² While the treaty never entered into force, its text has proven to be an influential reference of substantive and procedural standards for states concluding bilateral and multilateral investment treaties.²³ At the time of this writing, there were 2,898 such investment treaties and 389 instruments with investor protections.²⁴

B. *The Genesis (and Exodus) of Investment Mediation*

It is a remarkable fact that the spread of arbitration to resolve investor-state disputes has its genesis in international mediation.²⁵ In the 1950s and 1960s, the International Bank for Reconstruction and Development (commonly “World Bank”) administered conciliations of high-profile investment disputes including Iran’s nationalization of its oil industry, Egypt’s nationalization of the Suez Canal Company, and a financial dispute between the city of Tokyo and French bond

¹⁸ For additional historic context see, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 500 (6th ed. 2003); ANDREW NEWCOMBE & LLUIS PARADELL, INTERNATIONAL INVESTMENT TREATIES: LAW AND ARBITRATION 1-73 (2009); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 88-123 (2d ed. 2015).

¹⁹ Eustace Chikere Azubuike, *The Place of Treaties in International Investment*, 19 ANN. SURV. OF INT’L & COMP. L. 155, 155-56 (2013).

²⁰ *Id.* at 158-61.

²¹ *Id.* at 171.

²² CSABA KOVÁCS, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW § 1.03 (2018).

²³ *Id.* at § 1.03.

²⁴ UNCTAD, *Investment Policy Hub: International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Oct. 28, 2019). These numbers will continue to be updated, so it would best serve the reader to check the most current numbers. *Id.*

²⁵ Int’l Ctr. for Settlement of Indiv. Disp. (ICSID), *History of the ICSID Convention* II-1 6 (1968), <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> [hereinafter *ICSID Convention History*]. This article does not explore differences between “conciliation” and “mediation.” The important distinction is between mediation and conciliation, on one hand, and arbitration, on the other, which was succinctly summed up by Aron Broches as he wrote about the establishment of the ICSID: “[i]n distinguishing conciliation or mediation from arbitration it has been said that ‘mediation recommends, arbitration decides.’” *Id.* See also UNCITRAL Working Group II on the Work of Its Sixty-Eighth Session, U.N. Doc. A/CN.9/WG.II/WP.205, at 4 (2018) (evidencing a similar lack of emphasis on distinctions between conciliation and mediation by replacing the former term with the latter because “mediation” is “a more widely-used term”).

holders.²⁶ Based on this experience, General Counsel Aron Broches saw potential in the institutionalization of a standing disputes facility within the World Bank system.²⁷ The International Centre for Settlement of Investment Disputes (ICSID) was established on this basis with conciliation as a focal point.²⁸

In the first two decades of operations, ICSID actively promoted its services and published model clauses for conciliation and arbitration.²⁹ Yet states showed little interest in ICSID's conciliation services, much to the astonishment of Broches.³⁰ They instead preferred arbitration and began concluding investment contracts and treaties with ICSID arbitration clauses.³¹ These clauses sowed the seeds for a rapid escalation of arbitrations in the late 1990s while ICSID's conciliation facility went mostly unused.³² This trend has continued to the present day with consistent increases in the number of arbitrations registered at ICSID and no appreciable increase in the number of conciliations.³³

C. Consequences of the Rise in Arbitration

The predominance of the use of arbitration to resolve investor-state disputes has contributed to the development of the practice and an understanding of its features. A corps of stakeholders has formed from the ranks of arbitrators, lawyers, academics, and government officials, and institutions that support the system and hold it to account.³⁴ The result of this activity has been a focalization of professional and public attention on arbitration as a means of resolving investor-state disputes.³⁵

²⁶ ANTONIO R. PARRA, *THE HISTORY OF ICSID* 22-23 (2d ed. 2017). In these instances, conciliation was used instead of arbitration because the World Bank did not want to assume responsibility for imposing a binding decision on the parties. *Id.*

²⁷ *Id.*

²⁸ *Id.* at 23-24, 123 n.104.

²⁹ *See generally id.*

³⁰ *See generally id.*

³¹ *See generally id.*

³² *See generally id.*

³³ ICSID, *The ICSID Caseload – Statistics 2019-2* 8, ICSID (2019), [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf). By the end of June 2019, there have been only 12 ICSID conciliations over the history of its operations with no meaningful increase in conciliations over time. During the same period, ICSID has registered 728 arbitrations under the ICSID Convention and Additional Facility Rules. Of course, these figures do not tell the whole story as there have been mediations of investor-state disputes that were not administered under the ICSID Conciliation Rules; the precise number of investor-state mediations is elusive given that mediations are normally confidential. *Id.*

³⁴ *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 *DUKE L. J.* 459, 464-65 (2015).

³⁵ Concerning popular attention, in the English-language press alone the phenomenon of investor-state arbitration has been the subject of attention by the *New York Times*, *The Economist*, the *Washington Post*, and the *Wall Street Journal*. Franck & Wylie, *supra* note 33, at 463-464 (2015); *see also* Luke Nottage, *International Arbitration and Society at Large*, *CAMBRIDGE COMPENDIUM OF INT'L COM. & INV. ARB.* (Andrea Bjorklund, Franco Ferrari, & Stefan Kroll, eds.) (forthcoming 2019) (available at <https://ssrn.com/abstract=3116528>) (considering how engagement with society renders international arbitration more visible and promotes its expansion).

The history of mediation of investor-state disputes has been less animated. Due to various factors considered later in this article, the practice of investor-state mediation and its benefits are not always well defined or understood. Perceived differences in the role of the mediator and assumptions based on domestic mediation practice may exacerbate the uncertainty. Meanwhile, the community of investor-state mediation stakeholders is small with a comparatively limited number of qualified mediators who have experience with disputes between investors and states.

III. COMPARATIVE ADVANTAGES OF MEDIATION

In the arbitration between Achmea and the Slovak Republic, the tribunal made an uncouth remark to the parties at the close of the hearing on the merits:

[A] settlement in this case would be a good thing, in that the aims approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case . . . should the Parties desire to seek out somebody who might act as a mediator or reconciliator, the Secretary-General of the PCA might be in a position to assist.³⁶

Despite this observation, the parties did not attempt mediation but pressed forward in arbitration proceedings.³⁷ There were five additional rounds of written submissions,³⁸ a second arbitral hearing,³⁹ and related proceedings at multiple levels of the German courts.⁴⁰ The case also gave rise to proceedings before the Court of Justice of the EU that resulted in a judgment largely undoing the system of intra-EU investment treaty arbitration.⁴¹ While it cannot be said that a mediated settlement would have led to a better or faster outcome,⁴² the observation by the tribunal is a reminder that disputing parties, entrenched in their warring camps, may fail to see the potential benefits of mediation.

Mediation is well-positioned to address dissatisfaction with investor-state arbitration.⁴³ Mediation tends to have high rates of settlement and higher levels of

³⁶ Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic, PCA Case Repository No. 2008-13, Final Award, ¶ 60 (Dec. 7, 2012).

³⁷ See generally *id.*

³⁸ These comprise one round of written submission on quantum, one round of post-hearing briefs, and three rounds of cost submissions. *Id.* at ¶¶ 63, 70-72.

³⁹ *Id.* at ¶ 65.

⁴⁰ See *id.* at ¶¶ 74-75.

⁴¹ E.g., European Commission Press Release, Single Market: Commission Welcomes Member States' Commitments to Terminate All Bilateral Investment Treaties Within the EU (Jan. 17, 2019); ASA Board, *The Cost of Achmea*, 36 ASA BULL. 533, 533 (2018).

⁴² *The Cost of Achmea*, *supra* note 41, at 554 (stating that “[w]hat is of concern is the series of far-reaching and unintended consequences that Achmea could bring about, in particular the fear that this decision, whether right or wrong as a matter of European law, may come at great cost not only to European investors, but to the European ideal itself”).

⁴³ See S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 2068 (1973); Anna Joubin-Bret and Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: the IBA Investor-State Mediation Rules*, 29 ICSID REV. 17, 19 (2012),

user satisfaction than adversarial forms of dispute resolution.⁴⁴ The process is normally faster and less expensive than arbitration, a particular advantage in the investor-state context where the median length of arbitration proceedings is four years and four months, and where median costs are approximately \$4.2 million for claimants and \$3.4 million for respondents.⁴⁵ Additionally, mediation addresses concerns about private arbitrators sitting in judgment over states because the disputing parties in mediation set the terms of any settlement agreement, and where they cannot agree, the mediator has no authority to impose a decision on them.⁴⁶

Mediation also has a higher potential than arbitration to preserve or reestablish business relations frayed by disputes, as the process has greater potential to be more collaborative than arbitration.⁴⁷ This can lead to a settlement that better accounts for the disputing parties' common interests.⁴⁸ The advantage is amplified in investment disputes as investments, by their nature, call for amicable business relations over a longer term than many commercial transactions.⁴⁹ A mediated settlement can also avoid reputational damage to businesses and states that might result from protracted and public arbitration proceedings.⁵⁰

IV. UNDERUTILIZATION OF MEDIATION

While the confidentiality of mediation makes it difficult to determine how frequently investor-state mediations take place, statistical evidence,⁵¹ experts,⁵² and

[https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Aproved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Aproved%20by%20IBA%20Council%204%20Oct%202012).pdf).

⁴⁴ E.g., Centre for Effective Dispute Resolution (CEDR), *The Seventh Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience*, CEDR (May 11, 2016), [https://www.cedr.com/docslib/The_Seventh_Mediation_Audit_\(2016\).pdf](https://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf) (indicating an 86% aggregate success rate for mediation in an audit of 319 mediators in the United Kingdom).

⁴⁵ Matthew Hodgson, *Damages and Costs in Investment Treaty Arbitration Revisited*, GLOBAL ARB. REV. (Dec. 14, 2017), <https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited> (last visited Aug. 24, 2019) (providing median costs and duration for cases from 2013 to May 2017). These figures do not include time and costs in related actions, such as annulment proceedings. *Id.*

⁴⁶ *Mediation vs. Arbitration vs. Litigation: What's the Difference?*, FINDLAW, <https://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html> (last visited on Nov. 7, 2019).

⁴⁷ *Mediation, Arbitration & Collaborative Law*, NOLO, <https://www.nolo.com/legal-encyclopedia/mediation> (last visited Nov. 7, 2019).

⁴⁸ *Mediation vs. Arbitration vs. Litigation*, *supra* note 46.

⁴⁹ World Bank Group, *The ICSID Caseload – Statistics (2019–2)* 12, ICSID (June 30, 2019), [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf) (demonstrating that ICSID cases are commonly based on investments in the oil, gas, mining, electric power, and other energy projects).

⁵⁰ See generally Jeremy Glover, *Mediation: Is it Ever Reasonable to Decline a Request to Mediate?*, FENWICK ELLIOTT (Feb. 2015), <https://www.fenwickelliott.com/research-insight/articles-papers/alternative-dispute-resolution/mediation-decline-request-mediate>.

⁵¹ World Bank Group, *supra* note 49, at 14 (showing that 35% of cases are discontinued or settled with 5% of the resulting settlement agreements reduced to arbitral awards).

⁵² Lucy Reed, *Suite for ISDS: Mediation, Arbitration, Appellate Bodies*, 9 KOREAN ARB. REV., 58, 64 (2017). Professor Lucy Reed, who has 35 years of experience in investor–state dispute settlement, opines that a large portion of investor–state disputes whose outcomes are predictable are not settled. *Id.* According to her

institutions⁵³ suggest that mediation could be used more often. A more difficult question is why it is not. Professor Michael Reisman answered this question succinctly in an article on the subject from 2011:

[I]n States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having ‘betrayed’ the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal careers.⁵⁴

This observation, a compelling explanation on its face, has been corroborated by other commentators⁵⁵ and has empirical support. A 2016 report by the Centre for International Law at the National University of Singapore (CIL Report) found that states are more reluctant to settle disputes than investors and that the main reason for their reluctance is a preference to defer responsibility for deciding disputes to third-party adjudicators.⁵⁶ Underlying this concern is fear of allegations or prosecution for corruption, fear of public criticism, and fear of setting a settlement precedent that might encourage other investors to make claims.⁵⁷ The two other main obstacles to settlement, according to the survey, are a breakdown of the relationship between the investor and state and unrealistic expectations about the outcome of the case.⁵⁸

The CIL Report can be meaningfully compared to a larger survey of international commercial and investment mediation, the results of which were published at about the same time (ICM Survey).⁵⁹ While the ICM Survey did not focus on obstacles to mediation or investor-state mediation in particular, it did explore how parties engaged in international commerce and investment could be encouraged to attempt mediation.⁶⁰ The results suggest that the most effective means include better dissemination of information about the effectiveness of the procedure, the conduct of the procedure, and the costs of the procedure.⁶¹

experience as counsel and arbitrator, she suggests a 30–40–30 split whereby 30% of disputes could readily have been settled, 40% might have been settled, and 30% are unlikely to have settled. *Id.*

⁵³ See *Prevention and Amicable Resolution*, *supra* note 7.

⁵⁴ Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV. 1, 26 (2009).

⁵⁵ See Nancy Welsh and Andrea Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 87 (2013). Welsh and Schneider consider the decision of Argentina to devalue its currency to mitigate its economic crises and the arbitration claims that this engendered, asking, “[h]ow could the government negotiate the payment of millions of dollars to a foreign company to compensate it (and its domestic partners) for its economic loss when Argentina’s citizens and wholly-owned domestic companies clearly had lost so much more?” *Id.*

⁵⁶ Chew, Reed, & Thomas, *supra* note 14, at 15-16.

⁵⁷ *Id.* at 12-14.

⁵⁸ *Id.* at 23-25.

⁵⁹ Strong, *supra* note 43, at 1973.

⁶⁰ *Id.*

⁶¹ *Id.* at 2037-38, 2079.

Read together, these studies suggest distinct obstacles to investor-state mediation including accountability avoidance by government agents on one hand and a lack of understanding about the process, its costs, and its potential benefits on the other.⁶² The factors may overlap: a state agent concerned that settlement might anger the public may not appreciate common features of mediation, such as confidentiality of the proceedings or the possibility to settle some issues while leaving other more sensitive claims for arbitration.⁶³ This suggests that overcoming obstacles may require addressing various types of resistance from different sources.

Nevertheless, these studies should not be considered the last word on obstacles to settlement in investor-state cases despite the insights that they provide. The CIL Report generated only a “relatively small” sample of forty-seven responses in the estimation of the authors of the report themselves.⁶⁴ The ICM Survey generated a more significant 221 responses, but the study methodology did not distinguish between commercial and investment disputes, and more than one-third of respondents reported that they did not have significant personal experience with international dispute resolution.⁶⁵ These shortcomings encourage further empirical work on obstacles to mediation and means of overcoming them.

PART V. PROMOTION OF INTERNATIONAL MEDIATION

Whatever the source of the obstacles, the past ten years has seen measures to encourage the uptake of international mediation generally.⁶⁶ Governments,⁶⁷ public entities,⁶⁸ and private organizations⁶⁹ have taken steps to promote and facilitate the mediation, which has coincided with growing recognition of its potential by

⁶² See generally *id.*

⁶³ *Id.* at 2037-38.

⁶⁴ Chew, Reed, & Thomas, *supra* note 14, at 6.

⁶⁵ Strong, *supra* note 43, at 2016-18.

⁶⁶ Strong, *supra* note 43, at 2037.

⁶⁷ See, e.g., European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, PARL. EUR. DOC. 2066(INI) (2016) (noting the inclusion of the promotion of cross-border mediation of civil and commercial disputes as part of its Mediation Directive and the adoption of laws to facilitate international mediation by Member States).

⁶⁸ The International Finance Corporation and World Bank Group have taken a number of steps to promote mediation generally and international mediation particularly, including the publication of online books that assist client countries to adopt and integrate mediation services. See generally WORLD BANK GROUP, MEDIATION SERIES: MEDIATION ESSENTIALS (2017) (ebook); NADJA ALEXANDER, MEDIATION SERIES: INTEGRATED CONFLICT MANAGEMENT DESIGN WORKBOOK (2017) (ebook); NADJA ALEXANDER & FELIX STEFFEK, MEDIATION SERIES: MAKING MEDIATION LAW (2017) (ebook).

⁶⁹ See, e.g., ICC, *Mediation Rules*, ICC (2014), <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/> (revising ICC rules for mediation); Int'l Inst. for Conflict Prevention & Resolution (CPR), *About*, CPR, <https://www.cpradr.org/about> (last visited Nov. 13, 2019). The International Institute for Conflict Prevention & Resolution has undertaken a number of initiatives including an ADR guide for European businesses operating in Europe and an “ADR Pledge” whose subscribers, including more than 4,000 companies and 1,500 law firms, commit to ADR principles. *Id.*

businesses and business advisors.⁷⁰ Meanwhile, dispute resolution institutions have improved their mediation services and have found ways to make mediation more attractive in international cases⁷¹ as new institutions dedicated entirely to international mediation have come into being.⁷²

A. *United Nations Instruments on International Mediation*

A watershed event in the development of international mediation occurred in August 2019 as forty-six states—including China, India, South Korea, and the United States—signed a United Nations protocol for international mediation.⁷³ The Singapore Convention supports international mediation by facilitating the enforcement and recognition of settlement agreements resulting from mediation and by harmonizing standards for relief.⁷⁴ The instrument was published together with a revised model law for mediation (Model Law) that is available for the international community of states to adopt, in whole or in part, to revise and modernize their laws.⁷⁵

The Singapore Convention provides for relief for settlement agreements that result from the mediation of international commercial disputes and extends to at least those investment disputes that are commercial in nature.⁷⁶ While “commercial” is not defined in the text, the working group meant for the term to be interpreted

⁷⁰ See, e.g., White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* 5, WHITE & CASE (2018), <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> (finding a preference increase from 34% to 50% for combining alternative dispute resolution with international arbitration since 2015); PwC, *Global Pound Conference Series, Global Data Trends and Regional Differences* 13, PwC (2017), <https://www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf> (reporting that 51% of those surveyed identified preventative pre-dispute or pre-escalation processes as central to the future of commercial dispute resolution); Int’l Mediation Inst. (IMI), *2016 International Mediation & ADR Survey, Census of Conflict Management and Stakeholder Trends* 5, IMI (2016) http://www.odreurope.com/assets/site/content/IMI_survey_2016.pdf (finding that across the globe, interest in international mediation is growing and business advisors and potential users understand mediation better).

⁷¹ See, e.g., Singapore Int’l Mediation Ctr. (SIMC), *Arb-Med-Arb*, SING. INT’L MEDIATION CTR. <http://simc.com.sg/dispute-resolution/arb-med-arb/> (last visited Jan. 8, 2020). The SIAC-SIMC Arb-Med-Arb Protocol, a collaborative process under the auspices of the Singapore International Arbitration Centre (SIAC) and the SIMC that facilitates the enforcement of mediated settlement agreements. *Id.*

⁷² See, e.g., Florence Int’l Mediation Chamber (FIMC), *About Us*, FIMC, <http://www.fimcmediation.com/about-us/> (last visited Nov. 13, 2019).

⁷³ The full list of signatories can be found at *List of Signatory Countries*, SING. CONVENTION, <https://www.singaporeconvention.org/official-signatories.html> (last visited Nov. 13, 2019).

⁷⁴ G.A. Res. 73/198, *supra* note 12, at 4 (Dec. 20, 2018) (“If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.”). The term “recognition” was avoided in the text of the convention because that term is understood differently in different jurisdictions. Adeline Chong, *Singapore Convention on Mediation*, CONFLICT OF LAWS (Aug. 7, 2019), <http://conflictoflaws.net/2019/singapore-convention-on-mediation/>.

⁷⁵ See G.A. Res. 73/199 (Dec. 20, 2018).

⁷⁶ Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 22–23 (2019).

broadly and consistent with the companion Model Law, which provides that “commercial” includes investments.⁷⁷ However, states can make reservations under the convention that limit or foreclose this possibility by requiring the agreement of disputing parties before the convention will apply and by excluding settlement agreements to which the state, its agencies, or agents of the agencies are parties.⁷⁸

While the need for the convention has been explained by demand for greater certainty about the enforcement of settlement agreements resulting from mediation, commentators have suggested that it may have limited practical effect because mediated settlements result from party agreement, which bodes well for compliance.⁷⁹ Yet the convention may have particular utility in the investor-state context where changes in government and policy may encourage states to renounce settlement agreements. This dynamic is already visible where changes in governments have caused states to renege on commitments to foreign investors and terminate investment treaties.⁸⁰ In these conditions, the Singapore Convention may play an important role by fortifying mediated settlement agreements with the force of international law.

Regardless of its impact in practice, the Singapore Convention should lend greater legitimacy to international mediation and advance understanding of its features. It should also place mediation and arbitration on equal footing on the international plane in an important sense. The “New York Convention” for international arbitration, signed in 1958, facilitates the recognition and enforcement of arbitral awards and is considered by many to be the motor behind the rise in international arbitration as well as one of the most successful international private law treaties ever concluded.⁸¹ The Singapore Convention offers a counterpoint for mediation with similar ambitions and provisions for relief.

B. Promotion of Investor-State Mediation

Beyond general efforts to promote international mediation, attention is being paid to investor-state mediation in particular with both the public and private sectors engaged in its promotion and in exploring its potential. Efforts over the past decade include public consultations by the EU,⁸² practice guidelines by the Energy Charter,⁸³ and investor-state mediation rules published by the International Bar Association

⁷⁷ G.A. Res. 73/199, *supra* note 75.

⁷⁸ G.A. Res. 73/198, *supra* note 12, at 7–8.

⁷⁹ Strong, *supra* note 43, at 2051, 2055 (noting that the international legal and business communities believe it is more difficult to enforce agreements to mediate international commercial disputes than to enforce agreements to mediate domestic disputes, and that a convention supporting enforcement of international mediated settlements would encourage mediation in their countries).

⁸⁰ Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. OF POL. SCI. 741, 742 (2008).

⁸¹ United Nations, General Assembly, *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, N.Y. ARB. CONVENTION (June 10, 1958), <http://www.newyorkconvention.org/english>.

⁸² *Prevention and Amicable Resolution*, *supra* note 7.

⁸³ Energy Charter Conference, *Guide on Investment Mediation*, CCDEC 2016 12 INV (July 19, 2016).

(IBA).⁸⁴ Meanwhile, ICSID's engagement in investor-state mediation is deepening with recent publications, the development and implementation of investor-state mediation training,⁸⁵ and proposed mediation rules available for adoption in any investor-state case.

VI. COMPULSIONS TO MEDIATE IN DOMESTIC LEGAL SYSTEMS

In contrast to the investor-state context, mediation has become part of the fabric of the legal systems of some states, including the United States of America and Australia, and is on the ascent in other states including India and China.⁸⁶ These jurisdictions and others have used incentives in other states.⁸⁷ Compulsions to mediate vary in the types of disputes covered and the consequences of noncompliance, while styles of mediation vary by jurisdiction.⁸⁸ For the purposes of this article, compulsions can be grouped into three broad, overlapping categories: financial incentives, mandatory instruction, and mandatory mediation.

Financial incentives are used by states to encourage parties to mediate or penalize parties that obstruct mediation. Some courts waive or reduce court fees for parties that settle their disputes through mediation, while others withhold public

⁸⁴ Anna Joubin-Bret and Barton Legum, *The IBA Rules for Investor-State Mediation*, INT'L BAR ASS'N MEDIATION COMMITTEE (Oct. 4, 2012), [https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf) (last accessed 24 August 2019). These rules have been used in at least one investor-state mediation brought under a treaty. Luke Eric Peterson, *In an Apparent First, Investor and Host State Agree to Try Mediation Under IBA Rules to Resolve an Investment Treaty Dispute*, IA REPORTER (April 14, 2016), <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/>. They have influenced other sets of mediation rules. Asian Int'l Arbitration Ctr., *Resolving your Disputes, the Asian Way - The New Mediation Rules of the Asian International Arbitration Centre (AIAC)*, AIAC (March 22, 2018), [https://www.aiac.world/news/249/Resolving-your-Disputes,-the-Asian-Way---The-New-Mediation-Rules-of-the-Asian-International-Arbitration-Centre-\(AIAC\)](https://www.aiac.world/news/249/Resolving-your-Disputes,-the-Asian-Way---The-New-Mediation-Rules-of-the-Asian-International-Arbitration-Centre-(AIAC)).

⁸⁵ In greater detail, recent initiatives include an issue of the ICSID Review dedicated to alternative dispute resolution and primarily to mediation, a series of video interviews about investor-state mediation published on the ICSID website, investor-state mediator trainings with the support of CEDR, the International Mediation Institute, and the International Energy Charter offered in Asia, Europe, North America, and the Middle East, and the planned addition of new mediation rules for investor-state cases that can be applied even where the disputing parties have no links to ICSID member states. See Ana Ubilava & Luke Nottage, *ICSID's New Mediation Rules: A Small but Positive Step Forward* (August 3, 2018) (unpublished paper) (available at https://icsid.worldbank.org/en/amendments/Documents/Ubilava_Nottage_10.17.2018.pdf).

⁸⁶ F. Peter Phillip, *World Mediation Forum Part 2: Italy, Poland, China, India, France... and even Texas!*, BUS. CONFLICT MGMT. (Mar. 9, 2019), <http://www.businessconflictmanagement.com/blog/2019/03/world-mediation-forum-part-2-italy-poland-china-india-france-and-even-texas/>.

⁸⁷ Jonathon Rodrigues, *Safeguarding the Pillars of Mediation in India*, MEDIATE (Apr. 2019), <https://www.mediate.com/articles/rodrigues-mediation-in-india.cfm>.

⁸⁸ See, e.g., THE VARIEGATED LANDSCAPE OF MEDIATION, A COMPARATIVE STUDY OF MEDIATION REGULATION AND PRACTICES IN EUROPE AND THE WORLD (Manon Schonewille & F. Schonewille eds., 2014) (surveying different approaches); MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE (Klaus J. Hopt & Felix Steffek eds., 2012).

funding to parties that do not meet with a mediator.⁸⁹ In several jurisdictions, judges are empowered to take a party's refusal to use mediation or to attend a mediation information session into consideration when awarding costs.⁹⁰

Mandatory instruction aims at assuring that parties bound for the courts understand the mediation process and its potential benefits.⁹¹ Some jurisdictions require lawyers to advise parties about mediation when litigation is contemplated⁹² or enable judges to inform parties about mediation once proceedings are underway.⁹³ Parties may otherwise be required to attend a mandatory informational session about mediation conducted by a mediator or mediation service provider in the course of judicial proceedings.⁹⁴

There are also states that sanction mandatory mediation.⁹⁵ This obligation goes beyond an information session with a mediator to an actual attempt to reach a mediated settlement, though the two may be included in the same process.⁹⁶ Mandatory mediation may be prescribed by law as a condition to litigation⁹⁷ or ordered by a judge who determines that mediation could offer a better result than ongoing court proceedings.⁹⁸

VII. COMPULSIONS TO MEDIATE INVESTOR-STATE DISPUTES

The many ways that domestic legal systems have found to compel parties to mediate beg the question whether incentives or compulsions should be used to

⁸⁹ Giuseppe De Pali, Ashley Feasley & Flavia Orecchini, Quantifying the Cost of Not Using Mediation - A Data Analysis, PARL. EUR. DOC. PE 453.180 19 (2011), accessible at <https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>.

⁹⁰ *E.g.*, Achieving a Balanced Relationship Between Mediation and Judicial Proceedings, The Implementation of the Mediation Directive, PARL. EUR. DOC PE 571.395 11-12 (2016), accessible at http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf [hereinafter *Achieving a Balanced Relationship*].

⁹¹ *Id.* at 12.

⁹² *E.g.*, Mediation Act 2017 (Act No. 27/2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html>. The act states that solicitors must advise their clients to consider mediation and provide them with “information in respect of mediation services” and information about “the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and... the benefits of mediation” while a “statutory declaration” that a solicitor has complied with this provision must be filed when court proceedings are issued, and the court may adjourn the proceedings if the statutory declaration is not filed. *Id.* at §§ 14(1)-(3).

⁹³ *Id.*, at §16(1)(b).

⁹⁴ Achieving a Balanced Relationship, *supra* note 90, at 16; *e.g.*, Czech Republic and Italy for certain civil and commercial disputes and in Lithuania, Luxembourg, and the United Kingdom for family law disputes. *Id.*

⁹⁵ Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 368, 373 (2001).

⁹⁶ *Id.* at 384.

⁹⁷ *E.g.*, The Commercial Courts Act, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, No. 28, Acts of Parliament, 2018 (India), at §12A (requiring commercial disputes be submitted to mediation in India before being brought in court if it does not require immediate interim relief).

⁹⁸ *E.g.*, 28 U.S.C. § 652 (2012). Whereby “[a]ny district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties’ consent, arbitration.” *Id.*

promote investor-state mediation.⁹⁹ If fear of political reprisal is a predominant obstacle, government agents may reject mediation out of hand and press forward with expensive and lengthy arbitration proceedings against the best interests of their constituents, who will ultimately bear the costs of any adverse award.¹⁰⁰ A better understanding of the mediation process and its benefits may not be enough to change this situation. Although mediation is not appropriate for every dispute, accountability of government agents for refusing to mediate, introduced in treaties or dispute-resolution practice, might be useful to ensure that mediation is given serious consideration as an alternative or complement to arbitration.¹⁰¹

A. *Treaty Practice*

The most natural source for any provisions that may compel or encourage mediation is in investment treaties themselves. International investment treaties have long included provisions that require disputing parties to take time to cool off before initiating arbitration proceedings, but in recent years, an increasing number of investment instruments have gone further. The Indonesia-Australia Comprehensive Partnership Agreement provides that a respondent state can compel mandatory conciliation against a claimant investor.¹⁰² Other treaties identify mediation as an option during the cooling-off period or make general provisions for mediation.¹⁰³ In

⁹⁹ Some commentators have considered the use of compulsory measures in their work. Welsh & Schneider, *supra* note 55, at 87; Lisa Bingham, *Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION-II 33 (Susan D. Frank & Anna Joubin-Bret eds., 2011), https://unctad.org/en/Docs/webdiaeia20108_en.pdf; Wolf von Kumberg, *Making Mediation Mainstream: An Application for Investment Treaty Disputes*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION-II 71 (Susan D. Frank & Anna Joubin-Bret eds., 2011), https://unctad.org/en/Docs/webdiaeia20108_en.pdf.

¹⁰⁰ While the issue of accountability avoidance is not unique to investor-state mediation, it may be especially pronounced in this sector. Agents in commercial disputes may face greater countervailing accountability from partners or shareholders concerned more about the financial outcome than how a decision to settle may be perceived. Welsh & Schneider, *supra* note 55, at 87.

¹⁰¹ To elaborate this point, while a government official may reason there is little to lose by leaving the resolution of a dispute to an arbitral tribunal, this thinking might change if there were possible legal or financial consequences analogous to those in domestic systems. An obligation to attempt mediation, or compulsions in that direction, would give the official the necessary political cover for entering into settlement negotiations and avoid any suggestion of weakness by the state. Once engaged in the process, the official might see a benefit in a mediated settlement to some or all claims or at least become more familiar with the process and its potential benefits. *Id.*

¹⁰² Indonesia-Australia Comprehensive Partnership Agreement art. 14.23(1), Indon.-Austl., Mar. 4, 2019, <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/iacepa-chapter-14-investment.aspx>.

¹⁰³ *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping> (last visited Aug. 24, 2019) (suggesting that about 28% of treaties signed since 2010 provide for mediation). These percentages were determined by utilizing filters and finding 50 out of the 181 IIAs signed since 2010 included either a voluntary or compulsory ADR clause (conciliation or mediation). Some notable examples include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and side instruments between New Zealand, on one

a few instances, treaties provide rules of procedure to support the mediation process.¹⁰⁴

An approach with broader ambitions would be the promulgation of a multilateral treaty that facilitates investor-state mediation. One model for such an instrument is the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention), which effectively alters the dispute resolution clauses of existing investment treaties to provide for greater transparency while also enabling contracting states to tailor their preferences through reservations.¹⁰⁵ A similar approach might be taken to introduce incentives to mediate or compulsory mediation procedures into existing investment treaties.

An advantage of the use of treaties is that it enables contracting states to set any compulsory provisions on their own terms, which would pay greater due to party autonomy than compulsion by institutions and arbitrators.¹⁰⁶ Under this approach, the decision to mediate is taken by treaty negotiators who are normally removed from the type of personal concerns that government agents facing claims by investors may experience.¹⁰⁷ Treaty means would also benefit from scale. While an arbitrator suggesting mediation to disputing parties might generate some attention from commentators, as with Achmea, the impact of a treaty that prioritizes mediation or that makes mediation a pre-condition to arbitration has the potential to bring about

hand, and Brunei, Malaysia, and Vietnam, on the other, which added the requirement for state consent to arbitration after mandatory negotiation that may include mediation. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources*, NEW ZEALAND FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#side> (last visited Aug. 24, 2019). Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), China-H.K., Sept. 29, 2003, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2657/download>; Comprehensive Economic and Trade Agreement, EU-Can., Oct. 30, 2016, (noting the attention to defining the mediation process). An interesting early example of compulsion to mediate can be found in the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, presently under revision, which establishes mediation as the default dispute resolution procedure absent party agreement to an alternative. Investment Agreement for the COMESA Common Investment Area art. 26(4), May 23, 2007, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06t1.pdf>.

¹⁰⁴ E.g., Free Trade Agreement art. 3.31, EU-Viet., Oct. 17, 2018,

https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157337.pdf; Free Trade Agreement art. 3.4, EU-Sing., Oct. 19, 2018, <https://data.consilium.europa.eu/doc/document/ST-7972-2018-REV-1/en/pdf>.

¹⁰⁵ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Mar. 17, 2015, 22 U.N.T.S. 3 [hereinafter *Convention of Transparency*].

¹⁰⁶ Welsh & Schneider, *supra* note 55, at 71 (discussing the incorporation of mediation provisions in investment treaties, including a compulsory information session as provisioned in domestic laws); see *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* 43, ICSID,

https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf (observing that consent to jurisdiction by investors and states under the dispute resolution clause of an investment agreement will be found in different instruments, for instance in a dispute resolution clause of a treaty for the state and in the request to initiate proceedings under that clause for the investor).

¹⁰⁷ Welsh & Schneider, *supra* note 55, at 93 n.75.

cultural change and serve as a model for states that resolve to introduce provisions for mediation in their investment treaties.

B. *Dispute-Resolution Practice*

Outside of investment treaties, dispute resolution practice offers additional opportunities to compel parties to mediate. ICSID and the Permanent Court of Arbitration, which administer most investor-state arbitrations, could play an important role in encouraging or compelling parties to mediate. Meanwhile, dispute-resolution institutions seeking to attract investor-state cases could promote investor-state mediation as part of their growth strategies. Drawing on the experience of domestic courts and commercial arbitration practice, institutions could encourage investor-state mediation by:

- publishing model clauses that provide for mediation, mediation as a pre-condition to arbitration, and concurrent mediation-arbitration proceedings,
- advising parties in arbitration proceedings on mediation services within or outside of the institution,
- assuring ease of transfer of cases from arbitration to mediation within the institution or to third-party mediation providers through adapted procedures,
- provisioning financial incentives for transferring cases from arbitration to mediation by refunding arbitration lodging fees, waiving mediation lodging fees, or adjusting administrative fees,
- obligating tribunals and parties to seek to resolve disputes efficiently and in a cost-efficient manner in institutional rules (which may, for instance, empower arbitrators to identify claims suitable for mediation or take obstructions to mediation into account when apportioning costs),
- publishing information about the potential advantages of mediation over arbitration in the investor-state context, and
- publishing information, anonymized where necessary, about investor-state mediations that the institution has administered.¹⁰⁸

Arbitrators could likewise compel parties to mediate or otherwise set a general expectation that parties should not refuse mediation unreasonably when it is proposed. The authority to take such measures could already be derived from the rules of many institutions.¹⁰⁹ Depending on the circumstances of a case, arbitrators could employ measures such as:

¹⁰⁸ While these measures are directed at investor-state mediation, they could of course be adopted to promote international mediation more generally. See generally *E.g.*, Klaus Peter Berger & J. Ole Jensen, *The Arbitrator's Mandate To Facilitate Settlement*, 40 *FORDHAM INT'L L. J.* 887, 892-93 (2017); ICSID Convention art. 44. Oct. 14, 1966, 575 U.N.T.S 159 ("If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.").

¹⁰⁹ *E.g.*, *id.* ("If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."). This might eventually be read together with revised ICSID rules on efficiency discussed in later in this section. *Id.*

- identifying cases or individual claims that are suitable for mediation,
- reminding parties to consider mediation of their dispute at various points throughout the arbitration proceedings, and
- shifting costs onto a party that obstructs mediation or that unreasonably refuses a proposal to mediate proposed by an opposing party or the tribunal.¹¹⁰

C. “Hardening” Efficiency Obligations

The timing may be particularly favorable to consider how compulsions to mediate that have become standard in some domestic legal systems might be used in the ISDS system. In October 2018, the IBA published a report on consistency, efficiency, and transparency in investment-treaty arbitration that suggests the revision of investment treaties to encourage disputants to use alternative dispute resolution techniques.¹¹¹ The report concludes that investment treaties should make clear that “disputants should resort to international arbitration only after they are convinced that negotiations and various forms of alternative dispute settlement techniques would not be successful.”¹¹² The following month, a United Nations working group tasked with considering ISDS reform concluded that changes to the system are needed and that mediation could be used as an alternative to arbitration to address user concerns about procedural cost and duration.¹¹³

These high-profile pronouncements on the use of mediation to resolve investor-state disputes efficiently come at a time when efficiency obligations are increasingly imposed by dispute-resolution institutions.¹¹⁴ In 2016, the ICC Court of Arbitration announced a policy of penalizing arbitrators who unjustifiably delay the release of their awards after proceedings have closed.¹¹⁵ Other institutions obligate parties and tribunals to ensure that proceedings are efficient in the institutional arbitration rules themselves, including the proposed ICSID rules of procedure for arbitration,¹¹⁶ mediation,¹¹⁷ and conciliation.¹¹⁸ Some institutions have also built specific

¹¹⁰ While such financial penalties might come too late to promote mediation in such cases in which they are applied, the effect may encourage parties in future disputes to mediate. *See generally id.*

¹¹¹ Int’l Bar Ass’n, Report (IBA), *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* 11 n. 41 (2018), <https://www.ibanet.org/Search/Search.aspx?query=consistency,%20efficiency%20and%20transparency>.

¹¹² *Id.*

¹¹³ *Possible Reform, supra* note 7, at §§ 100-101 (proposing “[d]ispute resolution using means other than arbitration such as mediation, ombudsman facilities”).

¹¹⁴ ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 110 (2017).

¹¹⁵ ICC, *ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*, ICC (May 1, 2016), <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency>.

¹¹⁶ ICSID, *Proposals for Amendment of the ICSID Rules* 32 (Working Paper #3, Vol. 1, Aug. 2019), https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf [hereinafter *ICSID Proposed Rules*].

¹¹⁷ *Id.* at 219.

¹¹⁸ *Id.* at 175.

procedures into their rules that favor efficiency and that can be applied absent party agreement, including provisions for institutional consolidation of arbitrations¹¹⁹ and the appointment of a sole arbitrator rather than a tribunal of three.¹²⁰

In a notable parallel to this trend, in December 2018, a set of procedural and evidentiary rules aimed at efficiency were published following a decade of preparatory work.¹²¹ The Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) seek to achieve greater efficiency in arbitration by offering an alternative to the pervasive IBA Rules on the Taking of Evidence in International Arbitration.¹²² The Prague Rules contain myriad provisions that favor efficiency and that empower arbitrators to take a proactive role in managing cases to ensure efficiency.¹²³ The rules notably authorize tribunals to decide what evidence parties can submit and direct arbitrators to “assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration.”¹²⁴ By their terms, the Prague Rules may be applied by tribunals on their own initiative absent party agreement.¹²⁵

The pronouncements by the IBA and UNCITRAL, expanding provisions on efficiency in institutional rules, and the publication of the Prague Rules all demonstrate a shift in attitudes about efficiency in international dispute resolution proceedings. Efficiency is increasingly recognized not merely as a worthy goal, but as a procedural imperative that can be imposed on parties. These developments, taken together, evidence a trend that may favor incentives and compulsions to mediate investor-state disputes since mediation may offer significant advantages over arbitration in terms of cost and time efficiency.

VIII. POTENTIAL PROBLEMS WITH COMPULSIONS

A. *Practical Concerns*

Despite the potential benefits of the measures considered, compulsions to mediate face significant objections.¹²⁶ The more robust the incentive or compulsion, the more likely that such measure may be considered an infringement on party

¹¹⁹ E.g., H. K. Int’l Arbitration Ctr., 2018 Administered Arbitration Rules, at art. 35, HKIAC (2018), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf.

¹²⁰ E.g., ICC, Arbitration Rules arts. 21, 35, 71, ICC (March 1, 2017), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

¹²¹ Working Group from Civil Law Countries, Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), (Draft 1 Sept. 2018), <http://praguerules.com/upload/medialibrary/d29/d292354280e8ebc119bbe1ff49027b65.pdf> [hereinafter Prague Rules].

¹²² *Id.* at 2.

¹²³ *Id.* at 4.

¹²⁴ *Id.* at 10.

¹²⁵ *Id.* at 4.

¹²⁶ Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. OF CONFLICT RESOL. 479, 480 (2010).

autonomy or even a denial of access to justice where the investor seeks to proceed directly to arbitration.¹²⁷ Although investment mediation may be comparatively efficient, it remains an “investment” in time and money with uncertain results.¹²⁸ The process is not appropriate for every dispute and singling out and elevating mediation could crowd out other processes that are better suited to a given dispute, such as expert evaluation or adjudication, or that are amenable to the disputing parties.¹²⁹

Compulsions to mediate may also prove counterproductive given that they do not ensure good-faith participation in the mediation process. An investor or state could go through the motions of a mediation without any genuine intention to settle the dispute. Mediation can even be a means to obtain compromising information that can be used against a party in arbitration.¹³⁰ Although many mediation laws include rules on the admissibility of evidence in other proceedings to cope with this concern, the information obtained during a mediation can help to shape adversarial strategy and, in some cases, lead to evidence that is admissible.¹³¹

B. Treaty Practice

Beyond these practical concerns, there are specific obstacles to compulsions that are stipulated in treaties. Even where the will exists among contracting states, there are more than 3,000 investment treaties already in force, which limits instances where such provisions might be added to new treaties.¹³² While it is possible to renegotiate existing treaties to provide for mediation, it is unlikely that an awakening to the potential benefits of mediation alone would be sufficient incentive for states to enter into the often complex and politically-sensitive process of treaty renegotiation.¹³³ Although the conclusion of a large multilateral investment treaty with compulsory mediation provisions could have a significant impact, the prospect is limited because such treaties are not commonly concluded.¹³⁴

¹²⁷ Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?*, 6 J. OF SUSTAINABLE DEV. L. & POL'Y 222, 239 (2015).

¹²⁸ *Possible Reform*, *supra* note 7, at § 95.

¹²⁹ *Id.* at § 100, 101.

¹³⁰ E.g., UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* art. 11 (2018), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf.

¹³¹ Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 MO. L. J. OF DISP. RESOL. 1, 3-4 (1995).

¹³² ICSID, *Database of Bilateral Investment Treaties*, ICSID, <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx> (last visited Oct. 29, 2019).

¹³³ Esme Shirlow, *The Rising Interest in Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration*, KLUWER ARB. BLOG (September 29, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/>.

¹³⁴ *Id.*

A multilateral instrument with the purpose of introducing mediation provisions into existing treaties, on the model of the Mauritius Convention, would face different challenges.¹³⁵ The mere existence of such a treaty would not ensure wide adoption, and the initiative could set back ongoing efforts to promote investor-state mediation were it to fail.¹³⁶ Meanwhile, choices would have to be made about what incentives or obligations to include in the instrument and about the results of non-compliance: if the provisions did not go far enough, the instrument would be ineffective, and if they went too far, this would discourage ratification.¹³⁷

C. Dispute Resolution Practice

Although any number of compulsory procedures might be introduced into dispute resolution practice, it is easy to understand why they are not common. While institutions have different philosophies about the appropriate role to play in case management, even the most ardent supporters of mediation among them would resist pressing parties too hard to mediate for both policy and commercial reasons.¹³⁸ Competition for cases including investor-state disputes is growing,¹³⁹ and parties can avoid institutions that they consider to be too heavy-handed in case management.¹⁴⁰

Arbitrators, for their part, have little short-term financial incentive to encourage disputing parties to abandon arbitration for mediation.¹⁴¹ They will also quite naturally tend to avoid behavior that could discourage future appointments or lead to challenges of their awards, which might be triggered by perceived interference with party autonomy.¹⁴² The Achmea tribunal may have had this in mind as it counseled

¹³⁵ Nathalie Bravo, *The Mauritius Convention on Transparency and the Multilateral Tax Instrument: models for the modification of treaties?* 25 *TRANSNAT'L CORPS.* 85, 102 (2018), https://unctad.org/en/PublicationChapters/diaeia2018d5a5_en.pdf.

¹³⁶ *Id.* at 106.

¹³⁷ *Id.* at 102.

¹³⁸ Phillip S. Cottone, *Top 10 Specious Reasons Why Lawyers Won't Mediate*, NAT'L ASS'N OF REALTORS, <https://www.nar.realtor/about-nar/policies/top-10-specious-reasons-why-lawyers-wont-mediate> (last visited Nov. 13, 2019).

¹³⁹ In order to attract investor-state cases, some institutions known for administering commercial arbitrations have published investor-state arbitration rules including CIETAC (Arbitration Rules of the China International Economic and Trade Arbitration Commission for International Investment Disputes) and SIAC (Investment Arbitration Rules of the Singapore International Arbitration Centre). See also China International Economic and Trade Arbitration Commission (CIETAC), *Arbitration Rules*, CIETAC (2015), <http://www.cietac.org/Uploads/201904/5caae5be03bb5.pdf>. Singapore Int'l Arbitration Ctr. (SIAC), *SIAC Rules 2016*, SING. INT'L ARB. CTR. (2016), <http://www.siac.org.sg/our-rules/rules/siac-rules-2016#Top>.

¹⁴⁰ Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 *PEPP. DISP. RESOL. L. J.* 111, 113–16 (2002).

¹⁴¹ See Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 *Y.B. ARB. & MEDIATION* 1, 8 (2014).

¹⁴² *But see* Berger & Jensen, *supra* note 108; White & Case, *supra* note 70, at 6–7 (reporting instances of arbitrators from Switzerland, Germany, and Austria promoting alternative dispute resolution in the course of arbitration proceedings).

the parties about mediation, emphasizing that it was not the tribunal's role to "get involved in this in any way at all" as regards the election to mediate.¹⁴³

D. *Timing and Rationale*

There are also issues related to timing and justifications for compulsions. While the CIL Report and ICM Survey provide important insights, both surveys have empirical limits,¹⁴⁴ and the findings leave open questions.¹⁴⁵ It is particularly unclear how a better appreciation of the legitimacy of mediation as a process and a better understanding of the potential benefits of mediation by disputing parties, government agents, and the stakeholders who hold government agents accountable, might bear on concerns about accountability by government agents.¹⁴⁶

It would also be mistaken to consider compulsions to mediate in domestic legal systems to be a perfect analog for the investor-state context. The use of compulsory mediation in the EU has yielded mixed results.¹⁴⁷ Meanwhile the obstacles to mediation and underlying rationale for compulsions are distinctive in the investor-state context.¹⁴⁸ One would be forgiven, amidst the uncertainty, for concluding that present efforts should focus on expanding mediator training, reporting successful mediations, and ensuring that mediation occupies a central place in discussions about structural reforms.¹⁴⁹

¹⁴³ *Achmea*, PCA Case No. 2008-13, § 60.

¹⁴⁴ Chew, Reed, & Thomas, *supra* note 14, at 6 (generating only a small sample, in estimation of author, of 47 responses); Strong, *supra* note 43, at 2018 (generating 221 responses but more than one-third did not have significant personal experience with international dispute resolution and, perhaps more critically, the methodology and questions of the ICM survey did not distinguish between commercial and investment disputes).

¹⁴⁵ See generally Chew, Reed, & Thomas, *supra* note 14, at 6; Strong, *supra* note 43, at 2018. Further scholarship is needed, for instance, on incentives to encourage mediation, the potential impacts of compulsory elements on obstacles to investor-state mediation, and how the style of mediation, formality of the process, and degree of transparency might affect obstacles.

¹⁴⁶ See Federal Interagency ADR Working Group Steering Committee, *A Guide for Federal Employee Mediators*, IADR WG (May 9, 2006), https://www.adr.gov/pdf/final_manual.pdf.

¹⁴⁷ E.g., CARLOS ESPLUGUES, *Civil and Commercial Mediation in the E.U. after the transposition of the Directive 2008/52/EC on Mediation in Civil and Commercial Matters*, in CIVIL & COMMERCIAL MEDIATION IN EUROPE: CROSS-BORDER MEDIATION 485-771 (2014).

¹⁴⁸ See Giuseppe Di Palo, *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More...Directive*, EUR. PARLIAMENT (Nov. 21, 2018),

http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI%282018%29608847.

¹⁴⁹ Ian Macduff, *The Wisdom of Uncertainty: On Grey Zones in Mediation*, KLUWER MEDIATION BLOG (Feb. 26, 2017), <http://mediationblog.kluwerarbitration.com/2017/02/26/the-wisdom-of-uncertainty-on-grey-zones-in-mediation/>.

IX. CONCLUSION

Robert Browning said, “[m]y sun sets to rise again.”¹⁵⁰ Proponents of investor-state mediation likewise have reason to see renewed possibility to achieve today what was impossible to achieve yesterday. The ISDS system was built on the assumption that disputing parties would prefer conciliation. While those expectations went unrealized as arbitration rose to prominence, in recent years institutions, users, and academics have observed that facilitated negotiation could play a greater role in resolving investor-state disputes.¹⁵¹ The initiatives considered in this paper demonstrate that these views are gaining traction and are beginning to shape policy and dispute resolution systems.

Yet investor-state mediation remains uncommon and ambivalence among disputing parties runs deep. The reasons include a lack of understanding of the process and a reluctance by state officials to shoulder political responsibility for mediated settlements potentially perceived as disadvantageous to the public interest. The most straightforward way to overcome these obstacles, where the will exists, is internally in investment treaties through provisions that prioritize mediation or that make mediation a pre-condition to arbitration. Given that more than 3,000 treaties with investment protections are currently in force, broad change might nevertheless be difficult to achieve absent a multilateral instrument that extends the scope of mediation provisions to existing treaties as the Mauritius Convention does for transparency.¹⁵²

External compulsions by institutions and arbitrators could be used to encourage parties to consider mediation more seriously and begin chipping away at any reluctance of government officials to mediate by matching their accountability avoidance with countervailing accountability for decisions not to mediate. Such measures, which have proven successful in domestic jurisdictions, might also lend greater legitimacy to mediation through the affirmation by institutions and arbitrators of the potential benefits of mediation.¹⁵³

With these observations in mind, a package of measures to promote mediation to greater effect that would engage various stakeholders could include:

- by states, prioritization of mediation in new investment treaties and renegotiated treaties (including, for example, mandatory mediation information sessions or compulsory mediation absent opt-out);
- by dispute-resolution institutions, facilitation of concurrent arbitration and mediation proceedings, and the transfer of cases from arbitration to mediation

¹⁵⁰ *Robert Browning Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/robert_browning_149534 (last visited Oct. 21, 2019).

¹⁵¹ *Prevention and Amicable Resolution*, *supra* note 7, at 7.

¹⁵² *OECD Investment Policy Reviews: Kazakhstan 2017*, OECD ILIBRARY (2017), <https://doi.org/10.1787/9789264269606-en>.

¹⁵³ *Generation Ukraine*, ICSID CASE No. ARB/00/9, at ¶ 6.9(i).

- with adapted procedures and financial incentives (such as waiver of filing fees for transferred or concurrent cases and non-cumulative administrative fees);
- by arbitrators, identification to parties of disputes or claims suitable for mediation, and cost-shifting to account for a party's obstruction of mediation or unreasonable refusal to mediate; and
 - by service providers (or institutions), educational initiatives including informational sessions to discuss the benefits of mediation with disputing parties, as well as potential and existing contracting states to investment treaties.

Internal and external compulsions from diverse and respected sources may contribute to changing the prevailing paradigm that situates arbitration at the center of ISDS, and that undervalues mediation. The timing for a paradigm shift is opportune as investor-state mediation gains currency with the inclusion of mediation provisions in recent investment treaties, the signing of the Singapore Convention, investor-state mediation trainings, and recent pronouncements by the IBA and UNCITRAL that encourage the use of mediation in place of arbitration to resolve investor-state disputes.¹⁵⁴ Incentives and compulsions such as those considered in this article might contribute to make investor-state mediation more common and perhaps produce a few “diamonds” in the process.

¹⁵⁴ See Schnabel, *supra* note 76, at 2; Strong, *supra* note 43, at 1983.