Underutilisation of ADR in ISDS: Resolving Treaty Interpretation Issues

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Abstract

Since the adoption of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law Conciliation Rules, only a small number of investor-state disputes have been referred to conciliation. The common formulation of investor-state dispute settlement (ISDS) clauses, that carry advance consent to conciliation and arbitration in investment treaties, suggests that the choice between these two dispute resolution mechanisms may have conflicting interpretations. Under one interpretation, disputants have an option to choose conciliation and then proceed with arbitration; the other interpretation suggests that selection of conciliation is to the exclusion of arbitration. Incentives, such as the recent adoption of the Singapore Convention on Mediation and proposed amendments by ICSID, have been put forward to promote alternative dispute resolution mechanisms in ISDS. This Article, however, argues that recourse to investor-state conciliation will not increase unless mediation/conciliation are made mandatory before arbitration, and the source of conflicting interpretations of the choice between conciliation and arbitration is eliminated.

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Introduction

Over the years, practice has shown that when it comes to the choice between arbitration and conciliation in investor-state dispute settlement (ISDS), the parties seem to favor arbitration.[1]

Only thirteen conciliation cases have been registered under the International Centre for Settlement of Investment Disputes (ICSID) Conciliation Rules (and the Additional Facility Conciliation Rules) since 1982, and only one of them is a treaty-based investor-state conciliation.[2] The rest are contract-based investor-state disputes.[3] As for investor-state conciliation under the United Nations Commission on

1. Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 Harv. Negot. L. Rev. 71 (2013); Gabriel Bottini & Veronica Lavista, *Conciliation and BITs*, *in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009) 358 (Arthur W. Rovine ed., 2010); Ucheora O. Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, 4 Transnat'l Disp. Mgmt. (2007).

2. Karagiannis v. Republic of Alb., ICSID Case No. CONC/16/1 (pending).

3. *Id.*; Barrick (Niugini) Ltd. v. Indep. State of Papua N.G., ICSID Case No. CONC/20/1, Report (Apr. 9, 2021); La Cameroonians des Eaux (CDE) v. Republic of Cameroon & Cameroon Water Utils. Coop. (CAMWATER), ICSID Case No. CONC/19/1 (pending); Société d'Energie et d'Eau du Gabon v. Gabonese Republic, ICSID Case No. CONC/18/1, Report (Sept. 19, 2018); Republic of Eq. Guinea v. CMS Energy Corp., ICSID Case No. CONC(AF)/12/2, Report (May 12, 2015); Hess Eq. Guinea, Inc. & Tullow Eq. Guinea Ltd. v. Republic of Eq. Guinea, ICSID Case No. CONC(AF)/12/1 (pending); RSM Prod. Corp. v. Republic of Cameroon, ICSID Case No. CONC/11/1, Report (June 11, 2013); Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/1, Report (Apr. 6, 2006); TG World Petroleum Ltd. v. Republic of Niger, ICSID Case No. CONC/03/1, Party Settlement (Apr. 8, 2005); SEDITEX Eng'g Beratungsgesellschaft für dieTextilindustrie m.b.H. v. Madag., ICSID Case No. CONC/94/1, Report (July 19, 1996); Tesoro Petroleum Corp. v. Trin. & Tobago, ICSID Case No. CONC/83/1, Party Settlement (Nov. 27, 1985); SEDITEX Eng'g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madag., ICSID Case No. CONC/82/1, Party Settlement (June 20, 1983); S'holders of SESAM v. Cent. Afr. Rep., ICSID No. CONC/07/1, Report (Aug. 13, 2008).

International Trade Law (UNCITRAL) Conciliation Rules, the extent of those Rules' usage is largely unknown. This is because parties are free to conduct conciliation proceedings under the UNCITRAL Conciliation Rules ad hoc, without registering their case with any of the dispute resolution institutions. This is unlike ICSID, which requires parties to register their conciliation cases.[4]

Such preference for arbitration and underutilization of alternative dispute resolution (ADR) mechanisms in ISDS are informed by two factors: (1) ADR proceedings are non-binding by nature, and (2) settlement agreements reached through ADR mechanisms such as mediation or conciliation, up until recently, did not enjoy universal enforceability.[5] Therefore, ADR has been actively promoted as an additional step in the ISDS process over the last few years.[6] The need for mediation and conciliation in an already established ISDS regime can be explained by increasingly formalized, time- and cost-consuming arbitration procedures, albeit with unpredictable and inconsistent outcomes.[7] In contrast, ADR mechanisms such as conciliation/mediation can serve as a time- and cost-saving dispute resolution mechanism, and are also more likely to preserve investment relationships between investors and states. ADR mechanisms can prevent disputes from escalating to

4. G.A. Res. 35/52, UNCITRAL Conciliation Rules, art. 8 (July 23, 1980).

5. Catharine Titi, Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism, in Mediation in International Commercial and Investment Disputes 21, 24 (Catharine Titi & Katia Fach Gómez eds., 2019); Edna Sussman, Investor-State Dispute Mediation: The Benefits and Obstacles, in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009), *supra* note 1, at 321.

6. Frauke Nitschke, The ICSID Conciliation Rules in Practice, in *Mediation in International Commercial and Investment Disputes*, *supra* note 5, at 121, 143; Susan D. Franck, U*sing Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID Rev. 66 (2014); Wolf von Kumberg, Jeremy Lack & Michael Leathes, *Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come*, 29 ICSID Rev. 133 (2014).

7. By the end of 2020, there were 1104 known treaty-based investor-state arbitration cases, comprising 740 concluded cases, 354 pending cases, and ten status-unknown cases. The number of new cases also appears to be rising. This information was collected from UNCTAD's Investment Policy Hub and the ICSID Case Database in December 2020. *Investment Dispute Settlement Navigator*, UNCTAD Inv. Pol'y Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement [https://perma.cc/3F2G-GDXR] (last visited Apr. 3, 2022); *Cases*, ICSID, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx [https://perma.cc/XF97-HZBU] (last visited Apr. 3, 2022); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1558 (2005); Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns About Costs, Transparency, Third Party Funding and Counterclaims*, EJIL:TALK!: Blog Eur. J. Int'l L. (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/ [https://perma.cc/2QTK-N92E].

investor-state arbitration or resolve an already commenced case before the tribunal renders the final award.[8]

For the purposes of this Article, ADR includes conciliation, mediation, negotiation, and consultation. There is no universal definition of mediation. Overall, however, it can be described as a process where a neutral third party actively engages in the resolution of the dispute between the involved parties by facilitating a mutually favorable outcome. Conciliation, a process similar to mediation, offers a more formal and structured dispute resolution procedure with relevant procedural rules in place.[9] Historically, the term conciliation applied to investor-state disputes whereas the term mediation was more common for international commercial dispute settlement. Today the difference between these two terms has largely disappeared. In this Article, the terms conciliation and mediation are set in this broader definition and used interchangeably.[10]

In June 2018, after four years of discussions, UNCITRAL Working Group II finalized the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.[11] The Singapore Convention on Mediation is the instrument promising to ensure the universal enforceability of settlement agreements reached during both international commercial

8. Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*, 12 U.C. Davis J. Int'l L. & Pol'y 7 (2005); Anthea Roberts & Taylor St John, *UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest*, EJIL:TALK!: Blog Eur. J. Int'l L. (Apr. 30, 2019), https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/ [https://perma.cc/4DPJ-B5QV].

9. Jaemin Lee, *Settling Investment Disputes Through Mediation: Possibilities and Limitations*, *in* The Asian Turn in Foreign Investment 327, 329 (Mahdev Mohan & Chester Brown eds., 2021).

10. For discussion on the interchangeable use of the terms "mediation" and "conciliation," see Chester Brown & Phoebe Winch, *The Confidentiality and Transparency Debate in Commercial and Investment Mediation*, *in* Mediation in International Commercial and Investment Disputes, *supra* note 5, at 321.

11. United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), Aug. 7, 2019, U.N. Doc. 73/198; G.A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Jan. 3, 2019); Nadja Alexander, *It's Done:The Singapore Convention on Mediation*, Kluwer Mediation Blog (Aug. 9, 2019), http://mediationblog.kluwerarbitration.com/2019/08/09/its-done-the-singapore-convention-on-mediation/ [https://perma.cc/SF5W-B992]; Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, *in* Mediation in International Commercial and Investment Disputes, *supra* note 5, at 360.

and ISDS proceedings.[12] On August 2, 2018, ICSID announced the fourth and most extensive changes to its rules, which include the new ICSID Mediation Rules.[13] Since then, ICSID has published five working papers, the latest (Working Paper number 5) of which was released in June 2021.[14] Both the new ICSID Mediation Rules and proposed amendments to the ICSID Conciliation Rules (originally adopted in 1967) rely on the Singapore Convention on Mediation to provide an enforcement mechanism to settlement agreements reached through these rules.[15] Increased express references to investor-state mediation can also be observed in a new generation of international investment agreements (IIAs), which is quite atypical for older generation treaties such as bilateral investment treaties (BITs).[16] This is because in most BITs, the ISDS clauses usually only provide for negotiation/

12. While the Singapore Convention on Mediation is an instrument for the universal enforceability of mediated settlement agreements, some level of controversy remains among scholars and practitioners on whether the Singapore Convention, apart from international commercial disputes, will also apply to investor-state disputes. This question has arisen because the term "commercial" was left undefined in the Convention. A more detailed analysis of the Convention and other supporting evidence suggests that investor-state mediated settlement agreements will likely fall under the scope of the Singapore Convention on Mediation. *See* Surya Kapoor, *Singapore Convention Series: How Does the Singapore Mediation Convention Affect International Dispute Resolution? ISDS Perspective*, Kluwer Mediation Blog (Nov. 15, 2019), http://mediationblog.kluwerarbitration.com/2019/11/15/singapore-convention-series-how-does-the-singapore-mediation-convention-affect-international-dispute-resolution-isds-perspective/ [https://perma.cc/C7M4-MY8P]; 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 (2019).

13. Ana Ubilava & Luke Nottage, *ICSID's New Mediation Rules: A Small but Positive Step Forward*, ICSID (Aug. 3, 2018), https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava_Notage_10.17.2018.pdf [https://perma.cc/8BYT-HMM9].

14. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules* (ICSID Working Paper, Paper No. 5, 2021), https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf [https://perma.cc/BB6B-GU44].

15. ICSID Secretariat, Proposals for Amendment of the ICSID Rules—Synopsis 11 (2018), https://icsid.worldbank.org/sites/default/files/publications/Synopsis_English.pdf [https://perma.cc/PW5M-LE76].

16. *E.g.*, Comprehensive Economic and Trade Agreement (CETA), Canada-E.U., art. 8.20, Oct. 20, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA]; EU-Singapore Investment Protection Agreement annex 6, Oct. 19, 2018 [hereinafter E.U.-Singapore IPA]; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) art. 9.18, Mar. 8, 2018; Agreement for the Reciprocal Promotion and Protection of Investments, Argentina-UAE, art. 20, Apr. 16, 2018; Free Trade Agreement, Peru-Australia, art. 8.19, Feb. 11, 2020; United States-Mexico-Canada Agreement (USMCA) art. 14.D.2, July 1, 2020; Daniel Behn, Malcolm Langford & Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. World Inv. & Trade 188 (2020).

consultations in the early stages of a dispute, whereas third-party procedures are typically offered for the later stages of an investor-state dispute.[17] These cooperative efforts promise an unprecedented "treatification" of investor-state mediation.

Notwithstanding these recent incentives, mediation has almost always been regarded as a voluntary step in the ISDS process up until recently. In a 2020 Queen Mary University of London survey, which was aimed at determining investors' perceptions towards ISDS, where 63 percent of the respondents expressed support for mandatory mediation as a precondition to arbitration in ISDS.[18] More specifically, 30 percent said they "strongly favor" mandatory investor-state mediation, 34 percent "somewhat favor," 22 percent "strongly oppose," 11 percent "somewhat oppose," and 3 percent did not have a view on the subject. However, unlike the investors who seem to be more receptive to including a mandatory ADR step in ISDS, academics and commentators by and large meet this idea with skepticism and deem it unnecessary.[19] Opponents of mandatory investor-state mediation argue that greater enforceability of settlement agreements through the Singapore Convention on Mediation will suffice to increase recourse to optional and purely voluntary investor-state mediation, negating the need to make mediation/conciliation a mandatory step.[20] Skeptics also argue that mediation is not a universally and automatically applicable dispute resolution mechanism for all investor-state disputes.[21] Therefore, they suggest that mediation/conciliation should not be incorporated as a compulsory, automatic step as a precondition to arbitration, which would then apply to all investor-state disputes under the relevant treaty.

However, it is questionable whether the (pre-Singapore Convention) non-enforceability of settlement agreements was, indeed, a primary cause for the underutilization of ADR (mediation/conciliation)

17. Bottini & Lavista, *supra* note 1.

18. Queen Mary U. London & Corp. Couns. Int'l Arb. Grp. (CCIAG), 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS 24 (May 2020).

19. Ana Ubilava, *Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems*, 21 J. World Inv. & Trade 528 (2020); Welsh & Schneider, *supra* note 1; 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. Franck & Anna Joubin-Bret eds., 2011); U.N. Comm'n on Int'l Trade L., Working Group III (ISDS Reform), *Draft Summary Possible Reform of Investor-State Dispute Settlement (Addendum)*, ¶ 18, U.N. Doc. A/CN.9/WG.III/XXXIX/CRP.1/Add.1 (Oct. 5, 2020).

20. Youtube AAIL, *UNCITRAL Working Group III Virtual Pre-Intersessional Meeting (Afternoon Session)*, YouTube (Nov. 15, 2020).

21. Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, 2020 J. Disp. Resol. 327, 329 (2020).

in ISDS in the first place. This Article identifies a significant conflict in the proper interpretation of the advance consent to conciliation and arbitration provided by host states in ISDS clauses of various IIAs, which could be contributing to the underuse of ADR in ISDS. A common interpretation suggests that the choice of one method, such as conciliation, is used to the exclusion of the other, usually arbitration. If this is correct, meaning the usual treaty wording creates a sort of "fork in the road," it is not surprising that investors and their legal advisors almost always choose the arbitration route over conciliation or mediation. Relatedly, we should question the assumption that improving the enforceability of settlement agreements will result in significantly increased use of voluntary ADR, including investor-state mediation because there exist other significant impediments to such use.

First, the ISDS clauses that carry advance consent to the ICSID Convention or its Rules suggest that the choice between conciliation and arbitration can have conflicting interpretations.[22] Anecdotal evidence indicates that in some cases, claimants had an impression that the fork in the road principle applied to the choice between conciliation and arbitration, and therefore recourse to conciliation regardless of the outcome (successful or unsuccessful) would jeopardize their right to subsequent arbitration.[23]

Second, the ISDS clauses that carry advance consent to the UNCITRAL Rules often have express consent to the UNCITRAL Arbitration Rules only. The absence of advance consent to the UNCITRAL Conciliation Rules could be another reason for their rare application to investor-state disputes.

In what follows, this Article examines the forms of consent to ICSID to identify the conflicting interpretations of the choice between conciliation and arbitration. It also examines the forms of consent to the UNCITRAL Rules in IIAs to illustrate the absence of express reference to the UNCITRAL Conciliation Rules.

Part I provides a detailed analysis of existing formulations of ISDS clauses and identifies their conflicting interpretations. Part II examines the three most common types of advance consent to ISDS to determine whether conciliation and arbitration are to the exclusion of each other. Part II employs the interpretative tools provided by the 1969 Vienna Convention on the Law of Treaties to determine the correct meaning

22. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

23. Discussed in detail in the following parts of this Article.

assigned to the ISDS clauses of IIAs.[24] Finally, this Article discusses ways to address the existing conflicting interpretations of advance consents to ISDS.

I. Formulation of ISDS Clauses and Problems with Interpretation

For an ISDS procedure to be initiated, the state must have consented to a foreign investor bringing claims directly against it, through previously agreed dispute settlement mechanisms. Such consent is incorporated in IIAs such as bilateral investment treaties (BITs) and free trade agreements (FTAs). ISDS clauses not only refer the parties to arbitration for dispute resolution, but also can provide consent to ADR mechanisms such as conciliation. However, express reference to conciliation in international investment treaties is relatively rare compared to advance consents to arbitration.[25]

The majority of BITs were concluded in the 1990s—after the dissolution of the Eastern bloc and the economic liberalization of both Asian socialist and Latin American countries—to cater to newly emerging economies that wanted to engage in international investment markets.[26] The increased treatification of that time saw IIAs written in relatively similar language, especially ISDS clauses.[27] In their empirical study, Professors Wolfgang Alschner and Dmitriy Skougarevskiy observe that, generally, international investment treaties have varying levels of consistency.[28] For example, while the United States and the

24. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties].

25. Bottini & Lavista, *supra* note 1. For example, a recent empirical dataset identified 1125 treaties with advance consent to conciliation (of which 37 had references to both conciliation and mediation) out of over 3000 existing international investment agreements. Daniel Kang & Joel Sherard-Chow, Ctr. for Int'l Law-National U. of Sing., Dataset on Investor-State Conciliation and Mediation Provisions (June 2021), https://cil.nus.edu.sg/publication/dataset-on-investor-state-conciliation-and-mediation-provisions-15april2021/ [https://perma.cc/U3WF-CGLG].

26. *See generally* Lauge N. Skovgaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (2015); Henry Veltmeyer, *Liberalisation and Structural Adjustment in Latin America: In Search of an Alternative*, 28 Econ. & Pol. Wkly. 2080 (1993).

27. Noah Rubins, *Comments to Jack C. Coe Jr's Article on Conciliation*, 4 Transnat'l Disp. Mgmt. (2007).

28. Tomer Broude, Yoram Z. Haftel & Alexander Thompson, *The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts*, 20 J. Int'l. Econ. L. 391 (2017); Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. Int'l Econ. L. 561 (2016); Shotaro Hamamoto & Luke Nottage, *Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution*, 8 Transnat'l Disp. Mgmt. 1 (2011).

United Kingdom do not favor major divergence from their model templates, Switzerland, another major outbound investor, seems to be more flexible and will adjust its model template in accordance with the terms of negotiation.[29] Developing economies seem to have more diverse wordings in their pool of IIAs compared to developed states. Some authors suggest that developing countries find it difficult to be rule-makers and are more often rule-takers.[30] This undoubtedly reflects the fact that many developing countries have little negotiating power against their developed counterparts.[31] Apart from treaty drafting, states also differ in their treaty updating practices. For example, while the United Kingdom has maintained its treaty template with no major changes over several decades, the United States and Canada have made significant amendments to their existing treaty templates. Further, European Union states have experimented with treaty wording, particularly during the earlier stages of forming their BITs.[32] Such differences in treaty drafting practices also impact the diverse language found in ISDS clauses and affect how consents to arbitration and conciliation are worded and formulated.

Despite the abovementioned inconsistency in the language of provisions, the outline of an ISDS clause is relatively similar in most IIAs from the 1990s to the 2000s. Such IIAs typically provide a multi-tiered dispute resolution process, as demonstrated in the following example from the BIT between South Korea and Austria:

> (1) Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.
>
> (2) If a dispute according to paragraph (1) cannot be settled within three months of a written notification of a sufficiently detailed claim, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be submitted for conciliation or arbitration to the International Centre for Settlement of Investment Disputes . . . [33]

29. Alschner & Skougarevskiy, *supra* note 28, at 577. Japan is similarly flexible, as seen especially in its earlier BITs. Shotaro Hamamoto & Luke Nottage, *Japan*, *in* Commentaries on Selected Model Investment Treaties 347, 352–53 (Chester Brown ed., 2013).

30. Poulsen, *supra* note 26, at 47–70. *Cf.* Luke Nottage, Julien Chaisse & Sakda Thanitcul, *International Investment Treaties and Arbitration Across Asia: A Bird's Eye View*, *in* International Investment Treaties and Arbitration Across Asia 1 (Julien Chaisse & Luke Nottage eds., 2018) (especially in recent years).

31. Alschner & Skougarevskiy, *supra* note 28, at 577. *But see* Poulsen, *supra* note 26, at 64 (discussing when Romania directly pushed the UK to conclude a BIT).

32. Alschner & Skougarevskiy, *supra* note 28.

33. Agreement Between the Republic of Korea and the Republic of Austria for the Encouragement and Protection of Investments art. 8, Mar. 14, 1991, https://investmentpolicy.

So, it seems that the dispute resolution process can be divided into two stages: the first stage is attempted amicable settlement, and the second stage is a formal phase when ICSID or UNCITRAL dispute resolution mechanisms come into play through advance consent already provided in the ISDS clause. The process is illustrated in Figure 1.

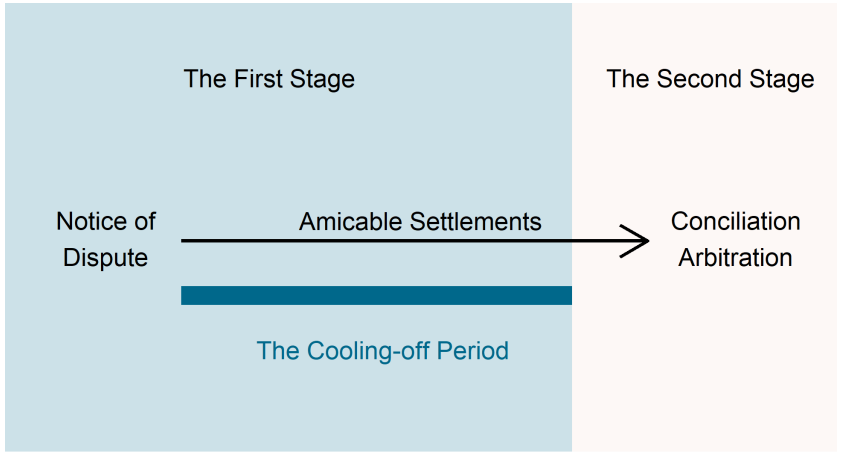

Figure 1. ISDS Timeline

A. The First Stage

The first stage, attempted amicable settlements, begins in the early days of a dispute. It is a time period that starts from the notification of the dispute and ends just before formal dispute resolution proceedings are initiated (for example, arbitration). IIAs usually encourage parties to attempt resolution of their disputes amicably through negotiations and consultations during "cooling-off periods."[34] Cooling-off periods are stipulated periods of time, usually three or six months (but sometimes more), to allow parties to attempt amicable settlement before initiating investor-state arbitration (ISA).[35] Regardless of which dispute resolution mechanism the parties choose in this stage, having recourse to ADR does not jeopardize the right of the party to initiate ISA.

unctad.org/international-investment-agreements/treaty-files/195/download [https://perma.cc/CZC2-5EX5].

34. U.N. Conf. on Trade & Dev., Dispute Settlement: Investor-State, at 23–24, U.N. Doc. UNCTAD/ITE/IIT/30, U.N. Sales No. E.03.II.D.5 (2003); U.N. Conf. on Trade & Dev., Investor-State Disputes: Prevention and Alternatives to Arbitration, at xxv, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010) [hereinafter Investor-State Disputes: Prevention and Alternatives to Arbitration].

35. Investor-State Disputes: Prevention and Alternatives to Arbitration, *supra* note 34.

Four types of references made to ADR can be observed in IIAs in the first stage of dispute resolution. The first type, which is especially characteristic in older BITs, is an open-ended reference made to amicable settlements.[36] This situation arises when parties are encouraged to try and settle amicably without reference to any particular ADR mechanisms. An example of an open-ended reference to amicable settlements is the Germany-Lebanon BIT, which provides that "[f]or the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute will try to solve the case, as far as possible, amicably."[37] It provides for amicable settlement as the first step towards conflict resolution but does not mention any specific ADR mechanism.

The second type references negotiations and consultations only. For example, Article 18(4) of the Japan-Ukraine BIT refers parties to consultations without mentioning third-party facilitated ADR mechanisms, before directing the dispute to arbitration:

> If the investment dispute cannot be settled through such consultations within six months from the date on which the disputing investor requested in writing the disputing Party for consultations, the disputing investor may, subject to subparagraph 7(a), submit the investment dispute to one of the following international arbitrations . . . .[38]

The third type of reference is when, in addition to negotiations and consultations, parties are encouraged to resolve their disputes through third-party auspices such as mediation and conciliation. For example, the Turkey-United States BIT has an additional reference to third-party procedures if negotiations are unsuccessful, but does not clarify which procedural rules or institutions are to govern such procedures:

> In the event of an investment dispute between a Party and a national or company of the other party, the parties to the dispute should initially seek a resolution through *consultations and negotiations* in good faith. If such consultations and negotiations are unsuccessful, the dispute may be settled through the use of a *non-binding third party procedures* upon which such national or company and the Party mutually agree. If the dispute cannot be resolved through the foregoing procedures, the

36. Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, 29 ICSID Rev. 17, 18 (2014).

37. Agreement Between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments art. 9(1), Mar. 18, 1997, 2070 U.N.T.S. 351.

38. Agreement Between Japan and Ukraine for the Promotion and Protection of Investment art. 18(4), Feb. 5, 2015, https://treaties.un.org/doc/Publication/UNTS/No%20Volume/53787/Part/I-53787-080000028047ddfd.pdf [https://perma.cc/QX4J-W32v].

> dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures.[39]

Another practice, similar to the one above, is to combine negotiations and consultations with non-binding third-party procedures, but again without further clarification as to procedural rules or institutions. This trend is evident in the US Model BIT, which provides that "[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures."[40]

The fourth type of reference is when an ISDS clause also stipulates the corresponding procedures to follow for such mediation or conciliation processes. This is a relatively rare occurrence.[41] Most BITs are silent on which mediation or conciliation rules to use and what procedures to follow.[42] Article 26 of the Japan-Colombia BIT is an example of the fourth type of reference. There, the ISDS clause provides for all types of ADR mechanisms, including third-party facilitated conciliation, and stipulates the ICSID Conciliation Rules as the procedure for such conciliation:

> 1. In the event of an investment dispute, the disputing parties shall, as far as possible, settle the dispute amicably through *consultations and negotiations* which may include the use of *non-binding and third-party procedures*.
> 3. As *one of the* non-binding and third-party procedures referred to in paragraph 1, the disputing *parties may agree* to submit the investment dispute to conciliation procedure under the ICSID Convention or under the ICSID Additional Facility Rules.[43]

While the abovementioned ISDS clause provides for conciliation separate from the arbitration phase, the BIT remains unclear as to whether recourse to conciliation in the first stage precludes later arbitration. This is because according to Article 27(5) of the Japan-Colombia

39. Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments art. VI, Dec. 3, 1985, T.I.A.S. No. 90518 (emphasis added).

40. *2012 US Model Bilateral Investment Treaty*, Off. U.S. Trade Rep. art. 23, § B (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/V4N6-THC5]; *Bilateral Investment Treaties and Related Agreements*, U.S. Dep't of State, https://2009-2017.state.gov/e/eb/ifd/bit/index.htm [https://perma.cc/63GK-E5TQ] (last visited Apr. 3, 2022).

41. CETA, *supra* note 16, ch. 8, § F, art. 8.19.

42. Jeswald Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 Ford. Int'l. L.J. 138 (2007).

43. Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment arts. 26(1), (3), Sept. 12, 2011, https://wipolex.wipo.int/en/text/249603 [https://perma.cc/9SW8-V3XA].

BIT, parties can proceed with arbitration if they cannot settle the dispute through the consultations and negotiations referred to in Article 26, although Article 27(5) is silent on what happens if the conciliation procedures are attempted but unsuccessful:

> If the investment dispute cannot be settled within seven months and fifteen days from the date on which the disputing investor requested the disputing Party in writing for consultations and negotiations referred to in Article 26, the disputing investor may submit a claim referred to in paragraph 2 to one of the following arbitrations: [44]

One would expect that the explanation as to whether conciliation would be to the exclusion of arbitration and vice versa would be found in the ICSID Convention itself or else in its Arbitration and Conciliation Rules. However, as discussed in Part B below, the ambiguity in many BITs extends to the interpretation of the ICSID Convention as well.

Quite often, ISDS stakeholders and commentators interpret the reference to a voluntary ADR mechanism in an ISDS clause as mandatory.[45] For example, Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel classify Article 8.20 of the Comprehensive Economic and Trade Agreement as providing for compulsory mediation before arbitration.[46] Yet according to Article 8.20, "[t]he disputing parties may at any time agree to have recourse to mediation," which is clearly an option provided to the parties, because of the inclusion of the word "may." Hence, it can be argued that this formulation does not provide for a mandatory mediation clause.

The non-uniform and general wording of cooling-off periods has also been reflected in inconsistent tribunal decisions on the matter.[47] Some tribunals have found that non-compliance with the requirements of an ISDS clause, in particular the cooling-off period, was a bar to the jurisdiction of the ensuing ISA tribunal. For example, some tribunals had to examine the pre-arbitration communications and attempts of the claimants to settle amicably in order to determine whether there had been compliance with corresponding requirements and hence whether the tribunals had jurisdiction over the cases.[48] Other tribunals found that

44. *Id*., art. 27(5).

45. *Investment Dispute Settlement Navigator*, *supra* note 7.

46. Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, The Political Economy of the Investment Treaty Regime 9 (2017).

47. U.N. Conference on Trade & Dev., Investor-State Dispute Settlement: A Sequel, UNCTAD Series on Issues in International Investment Agreements II, at 197, U.N. Doc. UNCTAD/DIAE/IA/2013/2 (2014) [hereinafter *Investor-State Dispute Settlement*].

48. Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 31, 2001). The tribunal had to determine

cooling-off periods represented a mandatory requirement that had to be complied with.[49] Moreover, in *Wintershall v. Argentina*, the tribunal declined jurisdiction when it found that the pre-arbitration requirement had not been met.[50] By contrast, in another set of cases, tribunals have treated cooling-off periods as procedural and directory by nature, so that compliance with such a requirement did not constitute a mandatory precondition and bar the jurisdiction of the relevant ISA tribunals.[51]

Under existing case law, the disputing parties may simply initiate negotiations or consultations, as provided for in the first stage of ISDS clauses, to satisfy the pre-arbitration requirement for subsequent arbitral tribunals. There is no such pre-arbitral requirement for third-party neutral dispute resolution mechanisms such as conciliation and mediation. While mediation can be initiated at any point in time throughout the ISDS process, if the parties so agree, unless mediation is provided in a mandatory format as a precondition to arbitration, it is very unlikely for the disputants to voluntarily engage in yet another step before arbitration once the negotiations and consultations fail.

whether the claimant had complied with the requirement of the "Agreement between Italy and Morocco for the Promotion and Protection of Investment, Italy-Morocco, July 18, 1990" to try to resolve the dispute amicably within the cooling-off period by examining the communications of the parties. *See also* American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11 (2002). Here, the tribunal found that the claimant's unsuccessful attempt to negotiate still constituted compliance with the art. VII(2) requirement of the "Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, T.I.A.S. 94-1020." *See also* Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006). The tribunal found that despite the claimant's unsuccessful attempt to settle amicably through negotiations, it had complied with the requirements of the BIT text; Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. World. Inv. & Trade 231 (2004).

49. Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2, Order (Mar. 16, 2006; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010); Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010); Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait, ICSID Case No. ARB/18/2, Award (Nov. 1, 2019).

50. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008).

51. *See, e.g.*, Ethyl Corp. v. The Government of Canada, Award on Jurisdiction, June 24, 1998, 7 ICSID Rep. 2 (2005); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406 (2005); Occidental Petroleum Corp. & Occidental Exploration and Production Co. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sep. 9, 2008); Olin Holdings Ltd. v. State of Libya, Case No. ICC-20355/MCP, Award on Jurisdiction (June 28, 2016); *see also* Schreuer, *supra* note 48; *Investor-State Dispute Settlement*, *supra* note 47, at 59.

To date, treaties providing mediation or conciliation as a mandatory precondition to arbitration are rare. For example, according to the Sweden-India BIT, the investor must either exhaust local remedies (or other previously agreed means of dispute resolution) or initiate ICSID Conciliation before being allowed to have recourse to arbitration:[52]

> Article 9 Disputes between an Investor and a Contracting Party
> (1) Any dispute between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
> (2) If such a dispute has not been amicably settled within a period of six months the Investor that is party to the dispute may submit the dispute for resolution according to the *following options*:
> (a) to the courts or administrative tribunals of the Contracting Party that is party to the dispute; *or*
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; *or*
> (c) to international conciliation under the Rules of the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL').
> 3. Should the investor fail to exercise the options in paragraph 2 (a) and (b) of this Article or where the conciliation proceedings under Article 2 (c) of this paragraph are terminated other than by the signing of a settlement agreement, the dispute shall be referred to binding international arbitration . . . .[53]

As stipulated in Article 9 of the Sweden-India BIT above, conciliation is not the only mandatory precondition to arbitration, but rather just one option of a few. Therefore, conciliation could be bypassed if the claimant opted for exhausting local remedies (courts or administrative tribunals) or other previously agreed mechanisms.

An unconventional multi-tier ISDS clause is provided in two recent treaties signed in 2019: the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) and the Hong-Kong-United Arab Emirates BIT (HK-UAE BIT).[54] The uniqueness of the ISDS provisions of both treaties manifests in the unilaterally mandatory

52. Rubins, *supra* note 27 (emphasis added).

53. Agreement Between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of Investments (Sweden-India BIT) art. 9, July 4, 2000.

54. Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) art. 14.24, Mar. 4, 2019; Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of The United Arab Emirates for the Promotion and Reciprocal Protection of Investments (Hong Kong-UAE. BIT) art. 8, Mar. 6, 2020.

nature of conciliation (mediation), which becomes a precondition to ISA. However, when initiated, conciliation becomes mandatory only for the claimant investor.[55]

Both the IA-CEPA and the HK-UAE have a three-tier dispute resolution system: amicable settlement through standard consultations during cooling-off periods, an additional conciliation step before arbitration, and, finally, ISA through the ICSID or UNCITRAL Arbitration Rules (or the Stockholm Chamber of Commerce in the case of the HK-UAE). Article 14.23 of the IA-CEPA stipulates that "[i]f the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor . . . ."[56]

There are two possible scenarios for the claimant to proceed to ISA under IA-CEPA: (1) if there was no conciliation initiated, then the claimant can proceed from consultations to ISA after 180 days; (2) if conciliation was initiated, then the claimant would have to go through consultations, followed by a conciliation proceeding. Only if the conciliation proceeding was unsuccessful could the claimant gain access to arbitration.[57] Conciliation proceedings are allocated an additional 120 days in the ISDS timeline.[58]

As in the IA-CEPA, under the HK-UAE BIT, the claimant has two ways to reach the ISA phase. If the respondent State (referred to as the Contracting Party in the Article) does not initiate conciliation, then the claimant can proceed directly to ISA once the cooling-off period for consultations ends. According to Article 8:

> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the investor covered by this Agreement shall, as far as possible, be settled amicably through consultation between the parties to the dispute . . .
> (3) When required by the Contracting Party, if the dispute cannot be settled amicably within six months from the date of receipt of the

55. Ana Ubilava, *Mandatory Investor-State Conciliation in New International Investment Treaties: Innovation and Interpretation*, Kluwer Mediation Blog (Sept. 5, 2020), http://mediationblog.kluwerarbitration.com/2020/09/05/mandatory-investor-state-conciliation-in-new-international-investment-treaties-innovation-and-interpretation [https://perma.cc/CC52-6HS6].

56. IA-CEPA, *supra* note 54, art. 14.24.

57. Ana Ubilava & Luke Nottage, *Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties*, *in* New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution 115 (Luke Nottage et al. eds., 2021).

58. IA-CEPA, *supra* note 54, art. 14.24.

> written notice, it shall be submitted to the competent authorities of that Contracting Party or arbitration centres thereof, for conciliation . . .
> (5) If the dispute cannot be settled amicably within six months from the date 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 by arbitration by submitting the dispute to [arbitration].[59]

Note that paragraph (3) specifies the dispute shall be submitted for conciliation "[w]hen required by the Contracting Party," with no other reference to mandatory conciliation procedures. In other words, only if the conciliation is initiated by the respondent State does it become mandatory for the claimant to participate in order to have access to arbitration where the conciliation has been unsuccessful. Conciliation is allocated six months, which is a little longer than what is provided under the IA-CEPA.

B. The Second Stage

When a dispute is not settled amicably in the first stage, the claimant usually has the option to proceed to the second stage—the more formal dispute resolution stage. Here, the wording of IIAs refers the parties to specific arbitration or conciliation rules and corresponding facilities, which have previously been agreed by the host and home states. In most IIAs, these rules are either the ICSID Convention and Rules or the UNCITRAL Arbitration Rules.[60] The problems that arise with ADR in the second stage relate to the way advance consents are formulated. In disputes governed by ICSID, when the party to the dispute is choosing between ICSID conciliation and arbitration, it may consider one to be in exclusion of the other because of how IIAs describe consent to dispute resolution mechanisms. In disputes governed by UNCITRAL, sometimes consent is only explicitly given to the UNCITRAL Arbitration Rules, not to the UNCITRAL Conciliation Rules.

1. Advance Consents to ICSID

As with the first stage, however, the formulation of ISDS clauses in IIAs is not uniform. In IIAs, consents to ICSID in the second stage can be grouped into three categories.

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59. Hong Kong-UAE BIT, *supra* note 54.

60. In a small number of cases, an investor-State dispute under the UNCITRAL Arbitration Rules may, with the agreement of the parties, be administered by the LCIA or PCA (as described in Alschner & Skougarevskiy's empirical study, *supra* note 28).

The first is when an ISDS clause contains consent to both conciliation and arbitration. In such a case, the clause appears to provide a choice between conciliation and arbitration, and most IIAs seem to copy this language.[61] This is because most IIAs use the phrase "conciliation *or* arbitration," indicating a choice between the two processes. For example, Article 10(4) of the Albania-Greece BIT provides that disputes "shall be submitted for settlement by *conciliation or arbitration* to the International Centre for the Settlement of Investment Disputes."[62]

This type of phrasing has caused controversy, both in terms of interpretation and practice.[63] The root of the problem is that conciliation is usually not provided for in the first stage in this type of ISDS clause. Instead, conciliation is only offered after that stage and as an alternative to arbitration in the second stage. This can result in uncertainty as to whether the choice of conciliation operates to preclude the right to pursue arbitration afterward. In other words, the party is put to a one-off initial selection between options. According to the UN Conference on Trade and Development, "if one party opts for conciliation . . . the other party is prevented from instituting or ultimately insisting on arbitral proceedings unless it is clearly provided for that unsuccessful conciliation is followed by arbitration at some stage."[64] Therefore, unless an ISDS clause explicitly allows for arbitration after an unsuccessful conciliation, this view suggests that conciliation is to the exclusion of arbitration. However, such clear-cut wording for the choice between conciliation and arbitration is rare in IIAs. And even in IIAs with "conciliation or arbitration" language, an either-or choice is only one interpretation of the phrase out of several other contradictory interpretations, which will be discussed in detail below.

The second type of common treaty wording is when consent is given explicitly to arbitration under the ICSID Convention. Article 26 of the ICSID Convention states that the "[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."[65] The general scholarly interpretation of this clause is that this exclusion, apart

61. August Reinisch, *2.2 Selecting the Appropriate Forum*, *in* Dispute Settlement: General Topics, U.N. Doc UNCTAD/EDM/Misc.232/Add.1 (2003).

62. Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments, Aug. 1, 1991 (Greece-Albania BIT) (emphasis added).

63. Bottini & Lavista, *supra* note 1.

64. Reinisch, *supra* note 61, at 13.

65. ICSID Convention, *supra* note 22, art. 26.

from local remedies, also includes conciliation,[66] though this is a controversial assumption this Article challenges. Accordingly, one would assume that if an IIA dispute settlement clause only contains consent to arbitration under the ICSID Convention, this excludes the right of the claimant to have recourse to conciliation. For example, Article 9 of the Georgia-Finland BIT specifies arbitration under ICSID and UNCITRAL and does not mention conciliation.[67] However, Part II of this Article shows that advance consent to arbitration does not exclude conciliation before or even during (in parallel to) arbitration proceedings and that recourse to conciliation does not then jeopardize the claimant's access to arbitration.

The third type is when the ISDS clause refers to the ICSID Convention in general. For example, Article 8 of the Lebanon-Slovakia BIT provides a reference to the ICSID Convention. It provides that "the investor shall be entitled to submit the case . . . to . . . the International Centre for Settlement of Investment Disputes."[68]

Consent to the ICSID Convention without specifying the ICSID Arbitration and ICSID Conciliation Rules has generally been interpreted as consent to both, a view reinforced by Article 25 of the ICSID Convention. In the case of *SPP v. Egypt*, the tribunal held that consent to the jurisdiction of the Centre (ICSID) meant that the investor could choose from the dispute resolution mechanisms that the Centre offered; either conciliation or arbitration.[69] For example, the E.U.-Singapore Investment Protection Agreement provides for comprehensive procedures for the first stage—consultations, followed by a separate article on mediation and ADR mechanisms before initiating arbitration: "Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party."[70] Despite the obvious intention of the parties to the free trade agreement to encourage ISM prior to arbitration by providing an additional explanatory provision, this still does not guarantee that recourse to ICSID Conciliation would not jeopardize the right to proceed with arbitration as it does not refer to conciliation. This

66. Bottini & Lavista, *supra* note 1; Christoph H. Schreuer, The ICSID Convention: A Commentary 348 (2009).

67. Agreement Between the Government of the Republic of Finland and the Government of Georgia on the Promotion and Protection of Investments (Georgia-Finland BIT), Nov. 24, 2006.

68. Agreement Between the Lebanese Republic and the Slovak Republic for the Promotion and Reciprocal Protection of Investments (Lebanon-Slovakia BIT) art. 8, Feb. 20, 2009.

69. Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992), 3 ICSID Rep. 189 (1995).

70. E.U.-Singapore IPA, *supra* note 16, ch. 3, § A, art. 3.4(2).

is because the second stage of the dispute resolution process provided in Article 3.6 of the FTA refers parties to the ICSID Convention in general. However, the ICSID Convention does not provide a clear and direct interpretative tool to determine whether having initial recourse to conciliation under ICSID would be a bar to arbitration.

This problem applies to each of the three types of consents listed above. While in the first case, there is ambiguity with the conjunction "or," in the second case, advance consent is given to arbitration only, leaving it open to interpretation whether conciliation could still be used at any stage without barring arbitration. As for the third case, while the case law suggests that consent to the ICSID Convention means consent to all the dispute resolution mechanisms provided by it, it is unclear whether recourse to conciliation first would impede the right to subsequent arbitration.

2. Advance Consents to UNCITRAL

The formulation of ISDS clauses that reference UNCITRAL is different from the formulation of those that refer to ICSID. The most common reference to UNCITRAL in IIAs is a reference to the UNCITRAL Arbitration Rules.[71] In contrast, express consent to the UNCITRAL Conciliation Rules is quite rare.[72] For example, while Article 6.21(3)(b) of the India–Singapore CECA specifically mentions both conciliation and arbitration under ICSID, Article 6.21(3)(c) only contains consent to arbitration under UNCITRAL:

> 3. . . . the investor may submit the dispute to:
> (a) the courts or administrative tribunals of the disputing Party;
> (b) the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention . . .; or
> (c) arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).[73]

71. According to the UNCTAD investment policy website (*Investment Dispute Settlement Navigator*, *supra* note 7), out of over 2500 mapped international investment agreements, 1632 IIAs carried an ISDS clause. Apart from the IIAs already examined in this Article, a random selection of IIAs demonstrates common trends of reference to UNCITRAL in IIAs. The sample consisted of three to five IIAs, each from America, Europe and Asia, with 24 IIAs total for the periods 1982–1987, 1988–1993, 1994–1999, 2000–2005, 2006–2011, 2012–2017, and 2018–2019.

72. Out of all the IIAs examined in this Article, only the Sweden-India BIT, *supra* note 53, contains an explicit reference to the UNCITRAL Conciliation Rules.

73. Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore (CECA) art. 6.21(3)(c), June 29, 2005 [hereinafter CECA].

According to Article 1 of the UNCITRAL Conciliation Rules, the Rules only apply if both parties have provided their explicit consent.

> (1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.[74]

Article 1 should not be understood as a requirement to have previously provided consent to conciliation in the IIAs, but rather as a statement that parties are free to agree on UNCITRAL Conciliation proceedings at any time before or during their dispute. Therefore, the absence of prior express consent to the UNCITRAL Conciliation Rules does not preclude the parties from initiating conciliation proceedings for the settlement of their disputes at any point during their ISDS process. But it is questionable whether this option (or opportunity) is known to the disputants unless it is explicitly mentioned in the primary instrument of their dispute: the ISDS clause of the IIA. Further, it is highly unlikely for parties heading towards ISA after an unsuccessful negotiation/consultation to agree on having another non-binding dispute resolution mechanism as an additional step before arbitration. That is, unless such a step is made mandatory.

The problematic interpretation of the choice between the ICSID Conciliation and Arbitration Rules as requiring one to the exclusion of the other could explain the rare occurrence of conciliation proceedings under ICSID. However, the consent formulation in ISDS clauses is not necessarily the sole reason UNCITRAL Conciliation Rules are rarely used. An additional reason could be that there is simply not enough information on disputes that settle through conciliation under UNCITRAL because unlike ICSID they are not registered under any institutional dispute resolution body.

II. Choosing Between Conciliation and Arbitration

As discussed above, there are three types of references to ICSID in the ISDS clauses of BITs. A reference to "conciliation or arbitration," a reference to the ICSID Arbitration Rules only, and a reference to the ICSID Convention. Determining the significance of the conjunction "or" in the first reference type will help shed light on a question raised by all three types: whether conciliation is to the exclusion of arbitration.

74. UNCITRAL Conciliation Rules, *supra* note 4, art. 1.

In the second type, when reference is made to ICSID Arbitration only, consent is deemed to be given only to arbitration.[75] This interpretation seems relatively straightforward at first glance. Consent to the jurisdiction of ICSID can be given via IIAs before the dispute arises, after a dispute has arisen, the latter being relatively rare in practice.[76] This includes consent to conciliation proceedings under ICSID. Therefore, even when an ISDS clause provides consent to arbitration only, it should not preclude the claimant from initiating conciliation prior to arbitration. The other question, however, is whether initiating conciliation first would bar access to arbitration.

When reference is made to the ICSID Convention, the third type of reference, consent is deemed to be given to all the dispute resolution mechanisms under the auspices of the Convention. Therefore, according to this interpretation, the claimant has access to both conciliation and arbitration. Yet it is unclear whether the ICSID Convention requires a separate agreement between the parties to first initiate conciliation and then arbitration, or whether the claimant is free to proceed with conciliation first without the need to have prior consent from the respondent.

The three types of consent, as outlined above, are linked and lead to the same question, which calls for the need to determine whether conciliation can be initiated before arbitration without jeopardizing the rights of the parties to arbitration.

One interpretation defines the phrase "conciliation or arbitration" as conciliation in exclusion of arbitration, meaning if conciliation is initiated first, the claimant will be barred from initiating arbitration regardless of the outcome of the conciliation.

Another view is that conciliation is to the exclusion of arbitration only if it is successful and the dispute has been resolved between the parties. This corresponds with the general requirement of ISDS clauses that there should be an existing dispute for the parties to initiate any type of dispute resolution mechanism, arbitration in particular. Therefore, it is essential to establish the correct interpretation of ISDS clauses in BITs with the following wording— "conciliation or arbitration." The goal here is to determine whether the conjunction "or" used in such sentences means "instead."

This can be achieved by employing the interpretative tools provided in the Vienna Convention, a primary instrument for treaty interpretation under public international law. The rules of the Vienna

75. Schreuer, *supra* note 66.

76. ICSID Convention, *supra* note 22, art. 25.

Convention reflect customary international law upheld by the International Court of Justice as well as other international courts.[77] Article 31 (General Rule of Interpretation) consists of four elements, all of which should be read as one tool of interpretation:

> 1. 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.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[78]

Article 31(1) is the most commonly applied interpretative tool by the various dispute resolution tribunals compared to the rest of its subclauses.[79] It stipulates four tests that should be applied when interpreting a treaty or its provisions: (a) good faith, (b) ordinary meaning, (c) context, and (d) object and purpose. Article 31(2) further extends the scope of "context" by encompassing the preamble, annexes, and conclusion texts of the treaty that is to be interpreted. Article 31(3) provides for the opportunity to engage subsequent agreements and practices related to the treaty in question, as well as the corresponding rules of international law that can be used for interpretative purposes. Article 31(4) discusses the possibility of a special meaning given to the terms

77. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 138 (Feb. 3); Pulp Mills on the River Uruguay (Arg. v Uru.), Judgment, 2010 I.C.J. 14, ¶ 65 (Apr. 20); Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. 625, ¶¶ 37–38 (Dec. 17); Appellate Body Report, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 61, WTO Doc. WT/DS213/AB/R (Nov. 28, 2002).

78. The Vienna Convention on the Law of Treaties, *supra* note 24, art. 31.

79. J. Romesh Weeramantry, Treaty Interpretation in Investment Arbitration 40 (2012).

of the treaty by the parties. This subclause can be used instead of, or in conjunction with, the ordinary meaning test provided in Article 31(1).

This Article applies the rules of interpretation provided by the Vienna Convention to disentangle the ambiguous meanings of ISDS clauses in BITs, as well as the interrelationship of conciliation and arbitration in the ICSID Convention.

As the treaties are assumed to have been drafted in good faith, the ordinary meaning test provided by Article 31(1) of the Vienna Convention is the first step in the process of interpretation. The ordinary meaning is the "current and normal, regular and usual meaning" attributed to a particular term of the treaty by the parties.[80] When considering "conciliation or arbitration," the usual meaning of the term "or" needs to be defined. According to the Oxford Dictionary, the conjunction "or" is used to coordinate elements between which there is an alternative.[81] Therefore, placing the conjunction "or" between the words conciliation and arbitration suggests that these two dispute resolution mechanisms are alternatives to one another. It is, however, debatable whether being alternatives also implies that they are exclusive of one another. For example, Article 11(1) of the Sweden--Hungary BIT stipulates a very clear intention of the drafters to provide for a choice between two alternatives. According to Article 11(1):

> Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration . . . If the parties to such a dispute have different opinions as to whether conciliations or arbitration is the more appropriate method of settlement, the *investor shall have the right to choose*.[82]

Yet it is unclear whether there is a fork in the road principle assigned to this choice between conciliation or arbitration similar to, for example, an exclusive choice between local courts and arbitration. Examining the ordinary meaning of the word "or" does not provide a definitive answer to the question at hand and thus needs to be interpreted in conjunction with other interpretative tools provided by Article 31 of the Vienna Convention.[83]

80. Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission*, *in* The Law of Treaties Beyond the Vienna Convention 105, 109 (Enzo Cannizzaro ed., 2011).

81. *Or*, Oxford Eng. Dictionary, https://www.oed.com/view/Entry/132129?rskey=2qOsAr&result=9#eid [https://perma.cc/G3G2-42G8].

82. Agreement Between the Government of the Kingdom of Sweden and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments (Sweden-Hungary BIT), Apr. 21, 1987 (emphasis added).

83. Aguas Del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3,

According to Article 31(4) of the Vienna Convention, a term should be interpreted in accordance with its ordinary meaning unless it is established that the parties have intentionally attributed a special meaning to it. So, it must be established if a special meaning is usually assigned to the word "or" in the texts of BITs that have the phrase "conciliation or arbitration" in their ISDS clauses. None of the BITs that have the "conciliation or arbitration" wording appear to have defined the term "or" differently or given it a special meaning in the text. Romesh Weeramantry provides a very detailed analysis of the in-practice application of the subclauses of Article 31 of the Vienna Convention by the various international investment tribunals.[84] The interpretative tools provided by Article 31 are required and employed because the treaty in question has not assigned a special meaning to the term in the first place. Weeramantry further suggests that Article 31(4) of the Vienna Convention is "likely to assume relevance when the special meaning is able to be derived from materials or circumstances external" to the treaty in question.[85] External materials directly relevant to the text of BITs, which could provide a special meaning to the phrase "conciliation or arbitration," are the ICSID Convention and ICSID Arbitration and Conciliation Rules.

The need to incorporate the ICSID Convention and Rules into the interpretation process also becomes evident when applying the object and purpose test to IIAs and ISDS clauses.[86] While the objectives of IIAs may differ from treaty to treaty, the primary goal is usually to encourage economic cooperation between states. This is achieved by ensuring that the standards of treatment for foreign investments are met and warranted through ISDS clauses. The phrase "conciliation or arbitration" is usually encountered in ISDS clauses that refer parties to the ICSID Convention and Rules. Quoting Prosper Weil from *Tokios Tokeles v. Ukraine*, "it is not for the Parties [to a BIT] to extend the jurisdiction of ICSID beyond what the Convention provides for. It is the Convention which determines the jurisdiction of ICSID . . . ."[87] The ICSID Convention and its rules, however, do not offer a direct explanation on how the choice between conciliation and arbitration should be interpreted through the Convention itself.

Decision on Jurisdiction, (Oct. 21, 2005), 20 ICSID Rev.—FILJ 450 (2005); Weeramantry, *supra* note 79, at 49.

84. Weeramantry, *supra* note 79.

85. *Id.* at 96.

86. The Vienna Convention on the Law of Treaties, *supra* note 24, art. 31.

87. Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion, ¶ 16 (Apr. 29, 2004), 20 ICSID Rev.—FILJ 245 (2005). Also quoted in Weeramantry (n 79) 97.

This leads to the next test—the context in which the phrase "conciliation or arbitration" is used in BITs. That context could be determined with the help of similar or identical phrases provided in other provisions of the same treaty.[88] A choice between two ADR clauses, similar to the phrase "conciliation or arbitration," is often encountered in the first stage when encouraging the parties to settle their disputes through negotiations and consultations. An interesting trend can be observed in some of the BITs that have these types of references. The choice between consultations and negotiation is sometimes provided with the conjunction "and," but at other times with the conjunction "or."[89] However, when it comes to the choice between conciliation and arbitration in the second stage, it is almost always formulated with the conjunction "or" (albeit in the same article of the same treaty that had reference to "negotiations and consultations" in the first stage).[90] Unlike the duo of conciliation and arbitration where arbitration renders a binding outcome, negotiations and consultations are non-binding and amicable by nature. The claimant is always free to choose between consultation and negotiation, or in fact initiate both consecutively and even concurrently as long as there is an ongoing dispute between the parties. In the case of conciliation and arbitration, however, arbitration does not entail an amicable process and yields outcomes very different from the former. Therefore, the intention of the drafters could have been to purposefully differentiate the type of choice between consultations and negotiations from the choice between conciliation "or" arbitration by using conjunctions that carry different meanings. But this is not the case; the conjunctions "and" and "or" are both used for negotiations and consultations (in different treaties) without having any special intention assigned to them.

The terms of the treaty do not exist in isolation but are instead tightly connected with the other treaty provisions as well as external sources. While IIAs provide the wording "conciliation or arbitration," no further contextual definition is provided. Here, the context needs to

88. Weeramantry, *supra* note 79, at 59 (listing a number of tribunals that employed the same approach to interpretation as the one used above). In particular, the tribunals observed how a similar or identical term to the one they were interpreting was used in other articles of the same treaty. *See* The Loewen Group, Inc. & Raymond L. Loewen v U.S., ICSID Case No. ARB(AF)/98/3, Award on Jurisdiction, ¶ 40 (Jan. 5, 2001), 7 ICSID Rep. 421 (2005) (ICSID Arbitral Tribunal, Case No, 5 January 2001); ADF Group Inc. v U.S., ICSID Case No. ARB(AF)/00/1, Award, ¶¶ 164–65 (Jan. 9, 2003), 6 ICSID Rep. 470 (2004).

89. CECA, *supra* note 73, art. 6.21(2); Agreement Between the Republic of Austria and Georgia for the Promotion and Protection of Investments (Austria-Georgia BIT) art. 12(1), Oct. 18, 2001.

90. CECA, *supra* note 73, art. 6.21(3)(b).

be analyzed in conjunction with Articles 31(3)(b) and (c) of the Vienna Convention.[91] Therefore, to interpret the meaning of "conciliation or arbitration," this Article not only examines context within the text of IIAs but also uses interpretation from the ICSID Convention and Rules. The ICSID Convention and Rules do not provide a straightforward answer to the question posed. Yet analyzing the meaning and context of these dispute resolution mechanisms within ICSID can still shed some light on the questions at hand.

The Preamble of the ICSID Convention reads, "[a]ttaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit disputes if they so desire."[92] While it is clear from the text of the Preamble that ICSID provides both dispute resolution options for the disputing parties, the choice between conciliation and arbitration is worded with the conjunction "or." This is identical to the ISDS clauses of IIAs that result in conflicting interpretations. But, later on in the text of the ICSID Convention, conciliation and arbitration are mentioned with the conjunction "and." Considering this seemingly trivial but arguably crucial difference, it seems as if the drafters did not apply much meaning to the difference between "and" and "or." The version of the Preamble that uses the conjunction "or" could have been simply copied into the texts of IIAs which then spread amongst the States as they joined the practice of concluding treaties, especially from the 1990s onwards.

Article 26 of the ICSID Convention poses the potential risk of conflicting interpretations: "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."[93] According to Christoph Schreuer, "the better view appears to be that the exclusion of any other remedy would go beyond judicial proceedings."[94] However, it is questionable whether going beyond judicial proceedings also includes conciliation. While Article 26 limits consent to arbitration, it does not mean that the same restriction applies to conciliation; that is, consent to conciliation does not bar the right to arbitration. This is because a similar provision to Article 26 would exist for conciliation in the text of the ICSID Convention if consent to conciliation was to bar

91. The Vienna Convention on the Law of Treaties, *supra* note 24.
92. The ICSID Convention, *supra* note 22, pmbl.
93. *Id.*, ch. ii, art. 26.
94. Schreuer, *supra* note 66, at 402.

arbitration.[95] Additionally, Article 35 of the ICSID Convention also seems to allow the possibility of arbitration after conciliation:

> Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.[96]

It states that information acquired during conciliation will not be used during subsequent arbitration. Further, Article 28(2) (Request for Conciliation) stipulates:

> The request shall contain the information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.[97]

Article 36(2) (Request for Arbitration) of the ICSID Convention contains an identical provision, but on the subject of arbitration.[98]

So, it seems like conciliation does not bar the party from access to the procedural rules of both conciliation and arbitration. The same goes for consent to arbitration, which does not seem to preclude the claimant from accessing both the conciliation and arbitration procedural rules. If that was not the intention of the drafters, it is logical to assume that consent to one would not automatically give access to the rules of procedure of both dispute resolution mechanisms, as it does now. In particular, Article 28(2) would read, "[t]he request shall contain . . . their consent to conciliation in accordance with the rules of procedure for the institution of conciliation proceedings." And for Article 36(2), the wording would be, "[t]he request shall contain . . . their consent to arbitration in accordance with the rules of procedure for the institution of arbitration proceedings." According to Eric van Ginkel:

> [I]f the claimant (first) chooses conciliation under Article 28 of the Convention, the theory is that the other party may well be prevented from instituting arbitral proceedings,—unless it has been clearly provided (in the investment agreement, the applicable bilateral investment agreement or other document in which the State has given its

95. Rubins, *supra* note 27, at 4.

96. The ICSID Convention, *supra* note 22, ch. iii, § 3, art. 35.

97. *Id.*, ch. iii, § 1, art. 28(2).

98. The provision reads, "[t]he request shall contain the information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings." *Id.*, ch. iv, § 1, art. 36(2).

> consent to ICSID dispute resolution) that a conciliation proceeding not resulting in a settlement may be followed by arbitration.[99]

Nevertheless, Ginkel further suggests that nothing precludes arbitration and conciliation running concurrently or even staying the arbitration proceedings while engaging in conciliation. Parties may initiate conciliation any time before or during the arbitral proceedings if there is an existing dispute to conciliate.

Moreover, according to Noah Rubins, adopting a restrictive interpretation of the words "conciliation or arbitration" "would be contrary to the consensual nature of conciliation and would unnecessarily limit the parties in their search for an efficient and mutually acceptable resolution of their dispute."[100] If the initial intention of such wording was to limit the choice to either conciliation or arbitration, nobody would choose conciliation because it yields a non-binding outcome. Yet parties, in general, are always free to initiate non-binding third-party assisted procedures without limiting their access to arbitration (similar to first stage references to ADR proceedings such as negotiations and consultations, which are not a bar to subsequent arbitration during the second stage). Hence, interpreting a consensual non-binding mechanism as a choice that excludes binding arbitration would not be reasonably justifiable.

There is an exception to the common wording of ISDS provisions that provides a choice between conciliation or arbitration. The Guatemala-Israel BIT carries a very rare provision that provides for four dispute resolution mechanisms including conciliation, and states that choosing one of these will exclude any other. Specifically, according to Article 8:

> 2. If a dispute under paragraph 1 of this Article cannot be settled within six (6) months of a written notification of this dispute, it shall be on the request of the Investor settled as follows:
> (a) by a competent court of the Host Contracting Party; or
> (b) *by conciliation*; or
> (c) by arbitration by the International Center for the Settlement of Investment Disputes (ICSID) . . .
> (e) by an ad hoc arbitration tribunal, which is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) . . .
> 4. *The choice of one dispute settlement mechanism will exclude any other.* Notwithstanding the above, an investor who has submitted the dispute to national jurisdiction may have recourse to the arbitral

99. Eric van Ginkel, *Toward Mandatory ICSID Conciliation?—Reflections on Professor Coe's Article on Investor-State Conciliation*, 4 Transnat'l Disp. Mgmt. 1 (2007).

100. Rubins, *supra* note 27.

> tribunals mentioned in paragraph 2 of this Article so long as a judgment has not been delivered on the subject matter of the dispute by a national court.[101]

The intention of the drafters seems to be quite straightforward, in that they wanted the fork in the road principle to apply to courts, conciliation, and arbitration under ICSID and UNCITRAL. Conciliation is a non-binding dispute resolution mechanism that could precede or be used concurrently with arbitration—especially if the parties have not reached a settlement and the proceedings were unsuccessful. Yet this clause reads that if conciliation is initiated, it bars access to courts and arbitration, which seems an odd thing to have in an ISDS provision. Curiously, according to the second sentence of Article 8(4), the fork in the road principle seems to apply to courts and arbitration only, which suggests that the wording where conciliation was to the exclusion of arbitration was formulated erroneously. This is because paragraph 4 provides for a reservation to the exclusion. It considers the possibility of proceeding to arbitration even when a dispute has already been submitted to local courts, but only before the court judgment has been issued. If the drafters had intentionally included conciliation in the exclusion list, then a similar reservation would also apply to cases in which conciliation was unsuccessful. This is the case with Article 9 of the India-Israel BIT:

> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
> (2) Any such dispute which has not been amicably settled within a period of six months may, if both parties agree, be submitted:
> (a) for resolution in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies: or
> (b) to international conciliation.
> (3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph 2 of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration.[102]

101. Agreement Between the Government of the State of Israel and the Government of the Republic of Guatemala for the Reciprocal Promotion and Protection of Investments (Guatemala-Israel BIT) art. 8, Nov. 7, 2006 (emphasis added).

102. Agreement Between the Government of the Republic of India and the Government of the State of Israel for Promotion and Protection of Investments (Israel-India BIT) art. 9, Feb. 18, 1997.

Adding to the uncertainty as to whether conciliation may have been unintentionally excluded in the Guatemala-Israel BIT is that no other BIT concluded in English by Israel[103] and Guatemala[104] with other jurisdictions applies the fork in the road principle to conciliation. A nearly identical provision to Article 8 of the Guatemala-Israel BIT is in the Guatemala-Trinidad and Tobago BIT and the Belgium-Luxembourg Economic Union-Guatemala BIT.[105] In both cases, however, conciliation is not included in the list of dispute settlement mechanisms that are in exclusion of one another.

To eliminate any remaining ambiguities or doubts regarding the nonexclusive nature of the phrase "conciliation or arbitration" in IIAs, a supplementary interpretative tool can be used in the form of Article 32 of the Vienna Convention:

> Article 32 Supplementary means of interpretation
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.[106]

Due to its non-mandatory character, this interpretation test has not been used as often as Article 31 – the general rule of interpretation.

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103. Israel has concluded 36 BITs in total.

104. The remaining BITs concluded by Guatemala that were available in English did not have conciliation and/or a limitation to one forum: Agreement Between the Government of the Republic of Guatemala and the Government of the Russian Federation on Promotion and Reciprocal Protection of Investments (Guatemala-Russian Federation BIT), Nov. 27, 2013; Agreement Between the Republic of Austria and the Republic of Guatemala for the Promotion and Protection of Investments (Austria-Guatemala BIT), Jan. 16, 2006; Agreement Between the Government of the Republic of Finland and the Government of the Republic of Guatemala on the Promotion and Protection of Investments (Finland-Guatemala BIT), Apr. 14, 2005; Agreement Between the Republic of Guatemala and the Czech Republic for the Promotion and Reciprocal Protection of Investments (Czech Republic-Guatemala BIT), July 8, 2003; Agreement Between the Republic of Guatemala and the Kingdom of the Netherlands on the Promotion and Reciprocal Protection of Investments (Guatemala-Netherlands BIT), May 18, 2001; Agreement Between the Government of the Republic of Korea and the Government of the Republic of Guatemala for the Promotion and Protection of Investments (Korea-Guatemala BIT), Aug. 1, 2000.

105. Agreement Between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments (Guatemala-Trinidad and Tobago BIT) art. 10, June 23, 2016; Agreement Between the Belgo-Luxemburg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Guatemala BIT) art. 10, Sep. 1, 2007.

106. The Vienna Convention on the Law of Treaties, *supra* note 24, art. 32.

While Article 32 includes "preparatory work of the treaty," it does not limit "supplementary means of interpretation" to certain types of documents. As Weeramantry points out, "the canvas of potentially applicable Article 32 interpretative aids or guidelines thus remains large."[107] There have been cases where the International Court of Justice examined other treaties with the same subject matter or even with a similar provision in order to clarify an ambiguous provision in a treaty.[108] For example, according to Makane Mbengue, "other treaties on the same subject matter may be considered as supplementary means of interpretation in the sense of Article 32."[109] Therefore, an interpretative guide of one treaty can be applied to determine the interpretation of the phrase "conciliation or arbitration" in another.

The 2016 Guide on Investment Mediation issued by the Secretariat of the Energy Charter Mediation seems to be the only document providing a direct interpretation of the phrase "conciliation or arbitration."[110] The aim of this guide is to explain the mediation process provided in Article 26 of the Energy Charter Treaty (ECT), which gives the claimant a choice to provide unconditional consent to ICSID Conciliation, among other options.[111] Article 26 (Settlement of Disputes Between an Investor and a Contracting Party) stipulates:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

107. Weeramantry, *supra* note 79, at 102.

108. Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176 (Aug. 27) (examining the similar words: renounces claiming in two Declarations); Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8) (examining the provisions by looking at other Conventions dealing with a similar subject matter); Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20) (examining other various types of agreements that provided similar terms); Case Concerning Oil Platforms (Iran v. U.S.), Preliminary Objection Judgment, 1996 I.C.J. 803 (Dec. 12) (examining other treaties with a similar provision).

109. Makane Moïse Mbengue, *Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)*, 31 ICSID Rev. - Foreign Inv. L.J. 388, 395 (2016).

110. The Energy Charter Conf., Guide on Investment Mediation (2016).

111. The Energy Charter Treaty (ECT) art. 26, Dec. 17, 1994, 2080 U.N.T.S. 95.

> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international *arbitration or conciliation* in accordance with the provisions of this Article.[112]

According to the Guide, the ambiguity around the choice between conciliation and arbitration has existed since 1992, when, during the negotiations on the Basic Agreement draft 10, the Australian delegation stated that "it will be necessary to find wording to ensure that going to conciliation does not prevent a party then seeking arbitration."[113] The Guide, however, suggests that the fork in the road clause only refers to domestic proceedings and that the restriction does not apply to conciliation.[114] The Guide further adds: "[E]ven if an investor starts international arbitration under Art. 26.4 ECT or under the agreement of the parties after the dispute arises, there is still a possibility of staying the proceedings and attempting to resolve the dispute through conciliation."[115]

Indeed, the Guide not only interprets the wording of "conciliation or arbitration" as the right to first initiate conciliation and then pursue arbitration, but it also states that even when arbitration is being initiated first, under the ICSID Convention, the parties can always have recourse to conciliation by staying the arbitration proceedings. Therefore, if the wording of ECT Article 26 is interpreted as a choice between conciliation and arbitration without the exclusion of either, then it could also very well serve as a basis for interpreting the wording of IIAs signed by ECT Member States containing an identical phrase.

Compared to earlier standalone BITs, free trade agreements now usually include a more comprehensive ISDS procedure for the first stage of the dispute resolution process. In particular, individual articles and provisions are dedicated to providing a detailed description of what the early consultations/negotiations or conciliation/mediation process should entail. These initiatives are a positive step toward promoting more ADR in ISDS.[116] However, the second stage of the dispute resolution remains the same: recourse to ICSID in general, only to ICSID Arbitration Rules, or a choice between ICSID Conciliation and Arbitration Rules.[117]

112. *Id.*, art. 26.

113. Energy Charter Secretariat, Conflict Prevention and Dispute Resolution: Main Provisions and Instruments 114 (2016) (quoting Energy Charter Secretariat, Basic Agreement Draft 10, annex 5 (Mar. 19, 1992)).

114. *Id.*

115. The Energy Charter Conf., *supra* note 110, § 2.2(iv).

116. E.U. – Singapore IPA, *supra* note 16, ch. 3, § A, art. 3.4; CETA, *supra* note 16.

117. E.U. – Singapore IPA, *supra* note 16, ch. 3, § A, art. 3.6; CETA, *supra* note 16, art. 8.23.

It seems like the drafters of IIAs put in extra effort by defining ADR procedures but relied on the ICSID Convention for interpretation without providing further clarification as to the wording of their own IIAs. In its present form, the ICSID Convention does not provide such clarification. Despite the scale of recently proposed amendments by ICSID, such amendments only cover the ICSID Rules and do not extend to the ICSID Convention.[118] However, neither the proposed amendment of the ICSID Conciliation Rules nor of the ICSID Arbitration Rules addresses the question whether the choice between conciliation and arbitration means choosing one in exclusion of the another. As Ginkel and Rubins pointed out, the phrase "conciliation or arbitration" stipulated in IIAs likely does not limit the choice of the claimant.[119] Instead, when IIAs refer to conciliation and arbitration, such wording expands the choice to both dispute resolution mechanisms. This interpretation is also supported by the text of the ICSID Convention as discussed above.

Therefore, if conciliation is not explicitly stipulated to be in exclusion of arbitration in the relevant treaty, then such proceedings should be deemed to be allowed by the ICSID Convention. Even when there is a provision that states that conciliation is in exclusion of any other remedy (as in the rare case of the Guatemala-Israel BIT), it should not be read as a singular sentence. If that statement is not supported by the rest of the text of the IIA, then there is room to believe that the fork in the road principle was unintentionally imposed on conciliation.

The use of ADR mechanisms in the form of institutional conciliation during the second stage is rare. Thus, case law cannot assist with how the choice between conciliation and arbitration is to be made. The first known treaty-based investor-state conciliation initiated under ICSID is *Xenofon Karagiannis v. Republic of Albania*, and invokes the Albania—Greece BIT. The text of that BIT provides for "conciliation or arbitration": the wording which has caused so much of the ambiguity in interpretation thus far.[120]

Possible Solutions and Concluding Remarks

Over the decades, it has been believed that investor-state conciliation was underutilized due to the non-enforceability of any resulting settlement agreement. Based on this belief, some argue that having relevant procedural rules in place and improving enforceability for

118. Ubilava & Nottage, *supra* note 13.
119. Ginkel, *supra* note 99; Rubins, *supra* note 27.
120. Karagiannis v. Republic of Alb., ICSID Case No. CONC/16/1 (pending).

settlement agreements will be enough to warrant popularization of investor-state mediation—therefore, the need for mandatory investor-state mediation disappears. This Article challenges that argument by instead advancing a hypothesis that the reason for underutilization of investor-state conciliation is embedded in the wording of advance consents to ISDS that are incorporated into IIAs. This Article illustrates that the current, common ISDS formulation may mistakenly suggest that there is a fork in the road when it comes to the choice between conciliation and arbitration, with one being to the exclusion of the other. This interpretation has consequently resulted in the obvious preference of arbitration over conciliation. Therefore, it is fair to assume that such ambiguously worded advance consents will continue to have a negative impact on the prospects of conciliation in ISDS regardless of recent incentives for promoting more ADR mechanisms.

The following conclusions can be drawn from this analysis concerning the conflicting interpretations of the choice between conciliation and arbitration:

Consent to conciliation was not intended to be in exclusion of arbitration by the drafters of the ICSID Convention. Therefore, the phrase "conciliation or arbitration" provided in the ISDS provisions of IIAs should not be perceived as a bar to arbitration as long as there is an existing dispute between the parties that was not resolved by conciliation.

Consent to the ICSID Arbitration Rules in the ISDS provisions of IIAs should not be interpreted as excluding conciliation. Arbitration as a binding dispute resolution mechanism yields final awards. The objective of Article 26 of the ICSID Convention was not to exclude conciliation. Instead, its purpose was to ensure that claimants would not take their already resolved dispute, in which there was a binding and final award, to domestic courts or vice versa. When analyzing other parts of the ICSID Convention and Rules, as well as the nature of conciliation and supplementary means of interpretation such as the ECT, it becomes obvious that consent to arbitration does not preclude a party from initiating conciliation. Moreover, in a case where conciliation is initiated first, if the dispute between the parties was not settled, they would still have access to arbitration.

Consent to the ICSID Convention, in general, should be interpreted as consent to all the dispute resolution mechanisms under the auspices of ICSID. This is because there is nothing in the ICSID Convention or its Rules that denies the parties access to both the conciliation and arbitration rules of procedure.

It is possible to eliminate the ambiguities associated with the use of the ICSID Conciliation Rules by amending relevant areas of international investment law. There are two ways to do so: make relevant changes to the ICSID Convention and Rules; or make relevant changes to the wording of ISDS clauses in individual IIAs.

A. Making Changes to the Convention and Rules

Amendments to the ICSID Convention could entail two approaches. One is inserting some additional language within Article 26 of the ICSID Convention, which would clarify that arbitration is not in exclusion of conciliation or other amicable dispute resolution mechanisms. This is to also take into consideration the new ICSID Mediation Rules, which the parties of the dispute are entitled to have access to at any time before or during arbitration proceedings. The updated Article 26 would read as follows:

> 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 *except for conciliation and other amicable dispute resolution mechanisms.* A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

The second area of amendment could be the addition of a new article to Chapter III of the ICSID Convention (which concerns conciliation), or the addition of a sentence to any of the existing articles in that chapter. The sentence, or the article, would clearly state that recourse to conciliation before or during arbitration is not a bar to subsequent arbitration if the conciliation proceedings are unsuccessful and the dispute is not resolved. It would be necessary to make an identical or similar addition to Chapter IV of the ICSID Convention, which concerns arbitration.

The problem with amending the ICSID Convention, however, is that a majority of two-thirds of its member States is required for any change to be adopted.[121] Even after having the support of the majority, the amendment would need to be ratified, accepted, or approved, conditional upon the individual regulations of each of the contracting states.

A less complex procedure should be utilized to make amendments to the ICSID Arbitration and Conciliation Rules. Additional provisions could be added to the Rules, which could clarify that conciliation is not in exclusion of arbitration and vice versa. The only possible downfall of amending the Rules is that the controversy associated with Article 26 of the ICSID Convention may remain as long as the Convention is not also

121. The ICSID Convention, *supra* note 22, ch. ix, art. 66(1).

amended. On the one hand, the new articles of both the Arbitration and Conciliation Rules would state that they are not in exclusion of one another unless the dispute has been successfully resolved. On the other hand, Article 26 of the ICSID Convention would still mandate the same: that consent to arbitration would be deemed in exclusion of any other remedy. However, even with the existing wording of both the Convention and Rules, it can be argued that conciliation is most likely not included in the exclusive list of "any other remedy." Moreover, if the Rules specifically stipulate that arbitration is not in exclusion of conciliation as well as other amicable dispute resolution mechanisms, then both Article 26 of the Convention and the new amended Rules could be read and interpreted as one. By doing this, the Rules would fill the gap in Article 26 of the ICSID Convention. Therefore, making changes to the ICSID Rules would only produce positive results, with less hassle. However, amending the ICSID Convention along with the Rules would need the involvement of multiple States, and ensuring such involvement would require a colossal effort.

As determined by this Article, consent to the UNCITRAL Arbitration Rules in IIAs does not pose actual interpretation problems. This is stipulated in Article 1 of the UNCITRAL Conciliation Rules:

> (1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.[122]

Even when there is no explicit consent to the UNCITRAL Conciliation Rules, nothing precludes the parties from commencing conciliation proceedings at any time during their dispute, if the parties agree. Therefore, amendments to the UNCITRAL Rules would not be necessary.

B. Making Changes to IIAs

Another way to eliminate the issues associated with conciliation would be to clarify the correlation between conciliation and arbitration in ISDS clauses that provide consent to ICSID and UNCITRAL dispute settlement mechanisms. This could be achieved by adding relevant explanatory paragraphs to the ISDS clauses such as: "nothing precludes the parties from initiating conciliation or any other ADR mechanism at any time during the dispute;" or "choosing one of conciliation and arbitration does not exclude the other as long as the dispute remains unresolved."

This process would only require the involvement of two states at a time. Reaching agreements on this matter would probably be easier between two states compared to negotiations between multiple member

122. UNCITRAL Conciliation Rules, *supra* note 4, art. 1.

states, in the case of ICSID. Nevertheless, it would require renegotiation of over three thousand existing BITs. This would be massive in scale, and it could take years for all of them to be updated and ultimately impact the ISDS process. A way forward for clarification of the fork in the road issue is to use a similar method to that employed by the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency).[123] In 2014, UNCITRAL adopted Rules on Transparency, but these only applied to ISAs conducted under the UNCITRAL Arbitration Rules that arose from IIAs concluded on or after 1 April 2014. However, the application of these Rules was extended to investor-state disputes arising out of treaties concluded even before 2014, through the Mauritius Convention on Transparency.[124] This is a unique multilateral instrument adopted by UNCITRAL that was created with the sole purpose of ensuring that the 2014 UNCITRAL Rules on Transparency could be retrofitted to disputes arising out of treaties concluded before 2014. This unique combination allows for the fast, efficient, and wide-reaching incorporation of investment treaty reforms.[125]

The issue of conflicting interpretations of ISDS clauses in IIAs will take time to resolve. It may be years before a unified approach is put in place by those wishing to remove any remaining obstacles to investor-state conciliation. Meanwhile, the Singapore Convention on Mediation is a promising step toward encouraging more ADR in ISDS. Recent incentives of ICSID are also directed towards the facilitation of the increased use of mediation in investor-state disputes. Once implemented in practice, both developments may, indeed, prove to be successful in promoting increased use of mediation and conciliation in investor-state disputes. But it is also possible for the rate of recourse to investor-state conciliation to remain low unless the source for conflicting interpretations of the choice between conciliation and arbitration is eliminated, in spite of the prospect of enforceability of settlement agreements promised by the Singapore Convention on Mediation. Barring such elimination, another way to ensure that ADR is not only incorporated but also fully used in ISDS would be to make investor-state mediation a mandatory and automatic step as a precondition to arbitration.

123. G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency) (Dec. 10, 2014).

124. Ubilava & Nottage, *supra* note 57, at 115.

125. CIDS, Gabrielle Kaufmann-Kohler & Michele Potestà, Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? 27 (June 3, 2016), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf [https://perma.cc/ZDV2-8TMH].