THE USE OF MEDIATION FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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Abstract

"It might well be found when the Convention came into operation, that conciliation activities under the auspices of the Centre proved more important than arbitral proceedings."[1] *These words pronounced in 1963, by Aron Broches in Addis Ababa at one of the World Bank's meetings for the negotiation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"]—(known as the Washington Convention) which was to create the International Centre for Settlement of Investment Disputes ["**ICSID**"]—did not prove to be prophetic. As a flagship institution for the settlement of investment disputes, ICSID has effectively offered conciliation and arbitration as means of dispute settlement since its entry into force in 1966. Since its establishment in 1966 to June 30, 2021, ICSID had administered a total of 838 cases. Among these, only thirteen were requests for conciliation, and they were either under the procedure provided for by the ICSID Convention (eleven cases) or under its additional mechanism (two cases). Translated into percentages, the result is just over 1.5 percent.*

I. Introduction

The statistics provided by the International Chamber of Commerce ["**ICC**"] and the London Court of International Arbitration ["**LCIA**"] are similar as well. While the ICC conciliation activity has become anecdotal nowadays, the ICC arbitration system, since its creation, has been accompanied by a widely used conciliation procedure (80 percent of the cases) before the Second World War.[2] The ICC announced that in 2020, out of 946 cases registered, mediation and other amicable dispute resolution procedures represented approximately about 8 percent of the total, without distinguishing in these data between commercial and investment disputes.[3] The LCIA, which does not make this distinction either, announced, that in 2020, a total of 444 cases were referred to it. Out of this, 407 had been registered for arbitration and three had been put up for mediation.[4]

Addressing the issue of recourse to mediation for the settlement of investment disputes, even by extending it to the use of conciliation, which will be considered as equivalent for the purposes of

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1 ICSID, HISTORY OF THE ICSID CONVENTION, Vol. II–1, 242 (2001).

2 On this issue, *see* E.A. Schwartz, *La conciliation internationale et la CCI*, BULL. ICC INT'L. CT. ARB., 5(2) 99 (1994); Eduardo Silva Romero, Emmanuel Jolivet & Florian Grisel, *Aux origines de l'arbitrage commercial contemporain: l'émergence de l'arbitrage CCI* (1920–1958), REV. ARB. 403 (2016).

3 *See* INT'L CHAM. COMM., *ICC Dispute Resolution Statistics: 2020*, *available at* https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/.

4 *See* LCIA, *2020 Annual Casework Report*, *available at* https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx.

this study,[5] means dealing with a phenomenon whose advent has been announced for ages,[6] but whose concrete manifestations are so episodic and discreet that they are difficult to detect, to the point that they hardly interest the most informed observers, at least in French-speaking doctrine.[7]

Apart from their very modest use, mediation and/or conciliation procedures do not appear to have encouraging results in the settlement of investment disputes. The results of the procedures conducted under the aegis of the ICSID are thus disappointing. Out of nine completed procedures, two were promptly withdrawn at the request of the parties (average duration of one year),[8] and the other seven resulted in the issuance of a report by the Conciliation Commission ["**Commission**"] (average duration of sixteen months since the constitution of this Commission), which on six occasions noted the impossibility of reaching an agreement between the parties.[9] Further, two of these conciliation procedures were followed by an arbitration procedure, which, led to an extension of the duration of the dispute.[10]

In view of this hardly encouraging panorama, the activity of the Multilateral Investment Guarantee Agency ["**MIGA**"]—another international organisation under the aegis of the World Bank—is an exception. Though mediation is absent from the text of the Convention Establishing the Multilateral Investment Guarantee Agency ["**MIGA Convention**"] that took place in Seoul in 1985, and led to the creation of MIGA—disputes between MIGA and insured investors are settled by arbitration under Article 58 of the MIGA Convention—an informal and low-profile *MIGA's* Dispute Mediation Service created in 1996.[11] MIGA's primary purpose is to offer its good offices for the amicable settlement of a dispute arising in connection with an investment insured by it, in

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5 Conciliation and mediation are two alternative dispute resolution methods by which a third party (the conciliator or the mediator) attempts to bring the parties to an amicable settlement of their dispute through an agreement between them. The more or less active role of this third party in reaching an amicable settlement (proposal or not of an amicable solution) depends more on the attitude of the parties and the personality of this third party than on the name given to the procedure. Moreover, the terms mediation or conciliation are used interchangeably in the field of international dispute resolution, as the following developments show.

6 In addition to the prophecy of Aaron Broches cited above, *see, e.g.,* L. Nurick & S.J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1 ICSID REV.–FILJ 340 (1986), who are surprised from the very first lines of their article at the low recourse to ICSID conciliation compared to what was expected.

7 *But see* Ali Bencheneb, *La conciliation et la médiation en droit des affaires internationales*, *in* REGARDS CROISÉS FRANCO MAGHRÉBINS SUR LES MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS, REVUE FRANCO MAGHRÉBINE DE DROIT, 2014, N°21, 259–274; W. Benhamida, *Litiges relatifs aux investissements internationaux et modes alternatifs de règlement des différends: un nouveau champ d'exploration*, *in* LA MÉDIATION EN MATIÈRE CIVILE ET COMMERCIALE (2012). The literature in English is much more developed. One can quote, but not exhaustively, Jack J. Coe Jr., *Towards a Complimentary Use of Conciliation in Investor–State Disputes – A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. POL'Y 7 (2005) [*hereinafter* "Jack J. Coe"]; E. Van Ginkel, *Toward Mandatory ICSID Conciliation, Reflections on Professor Coe's Article on Investor–State Conciliation*, in RESHAPING THE INVESTOR–STATE DISPUTE SETTLEMENT SYSTEM – JOURNEYS FOR THE 21ST CENTURY 3 (Anna Joubin-Bret & Jean E. Kalicki eds. 2015) [*hereinafter* "E. Van Ginkel"]; S. Franck, Integrating Investment Treaty Conflict and Dispute Systems Design, 92 MINN. L. REV. 161 (2007); S.M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?,* 22 ICSID REV.–FILJ 237 (2007); J.W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty–Based, Investor–State Dispute Resolution*, 31 FORDHAM INT'L L. J. 138, 162 (2008); J. Coe, *Settlement of Investor–State Disputes through Mediation – Preliminary Remarks on Process, Problems and Prospects*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 73 (R.D. Bishop ed., 2009).

8 In both cases, the conciliation procedure aimed at reaching a settlement of the dispute was probably successful because it resulted in the settlement of the dispute outside the conciliation procedure.

9 ICSID, *The ICSID Caseload Statistics (Issue 2020–2)*, at 8, 9, 15, *available at* https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%28202 0-2%20Edition%29%20ENG.pdf. More detailed data is presented in the Annex.

10 *See* Annex.

11 *En ce sens v. Ch. Leathley*, *in* INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW 266–267 (2007).

order to avoid having to compensate the foreign investor for a proven loss. MIGA's "*proactive facilitation efforts*" take many forms, including representations to the host state of the consequences that would result from a dispute with the foreign investor made public because of its jurisdiction. MIGA acts either as a facilitator, or as a mediator,[12] in the resolution of disputes. In a document dated October, 2015, MIGA boasted an excellent success rate, revealing that it had intervened in nearly hundred cases almost always successfully with two exceptions.[13] This result certainly explains why MIGA now accepts offers to mediate disputes concerning foreign investments that it had not handled before. MIGA has published reports on a few cases in which it has intervened successfully, such as a dispute between the Italian company Idreco S.r.l and the Argentine Republic, or a dispute between forty-two claimants (including Greek citizens) and Ethiopia over expropriations during the time of Mengistu's government.[14] MIGA, however, makes it clear that it intervenes on a selective basis and mentions nothing of the failures it has suffered. For example, in the case brought before the ICSID in the matter of *ABCI Investments N.V.* v. *Republic of Tunisia Ltd.*, two MIGA mediation procedures were attempted—one before the arbitration procedure was registered by the ICSID, and the other after the arbitral tribunal rejected the objection to its jurisdiction raised by the defendant State. Both attempts at mediation were unsuccessful.[15]

No other institution active in the settlement of investment disputes reports on the good results it achieves through mediation. It is, therefore, difficult to speak of success. There are of course causes for this, and understanding them can provide lessons for the future. Therefore, the following reflections will begin with (I) an analysis of the causes of the failure observed, which will be followed by (II) proposals to encourage the use of mediation.

II. Reasons for the failure

There are various reasons for the failure of mediation. On a first look, it will be noted that the instruments of mediation are diverse, but suffer from poor visibility (A). The second pitfall, which undoubtedly stems from the first—while certainly more important—is the scarcity of clauses providing for the use of mediation in the settlement of investment disputes (B).

A. The Low Visibility of Mediation Instruments

Numerous instruments have been issued to provide a framework for the settlement of international disputes through mediation or conciliation. Some of these instruments are specific to the settlement of investment disputes, while others are broader in their scope, but are undoubtedly applicable to disputes relating to an investment transaction. While there may not be a plethora of instruments organising mediation, there is no shortage of them either. This in fact is not the problem. Rather, at issue is that these instruments are issued by institutions that are primarily known for their arbitration activity, and the same obscures the offer of mediation or conciliation that these institutions provide. To illustrate this point in a non-exhaustive manner, reference may be made to the following:

- The ICSID Convention alongside arbitration;

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12 MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA), *Dispute Resolution and Claims*, *available at* https://www.miga.org/Documents/Dispute_Resolution_and_Claims.pdf.

13 *Id.*

14 MIGA, *Legal Services*, *available at* https://www.miga.org/sites/default/files/archive/Documents/Page83-85.pdf.

15 The author of these lines should point out that he acted as counsel to ABCI in this litigation from 2005 to 2008.

- The ICC and its Mediation Rules, which are far less well-known than its Arbitration Rules;[16]
- The United Nations Commission on International Trade Law ["**UNCITRAL**"] and its Conciliation Rules, which are far less well-known than its work in the field of arbitration (UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules 2010);[17]
- The International Bar Association ["**IBA**"] and its Rules for Investor-State Mediation;[18]
- The LCIA and its Mediation Rules.[19]

All these institutions which propose instruments for the settlement of disputes through mediation or conciliation (regulations issued by the institution or even the ICSID Convention Arbitration Rules) are first and foremost known for their activities in the field of arbitration, a subject on which they prefer to speak. For these institutions, the settlement of disputes refers more to arbitration than to mediation. This may be unfortunate, but that is the way it is.

Other institutions less marked with the seal of arbitration, intervene for the settlement of investment disputes. This is the case of MIGA, which offers an informal mediation service to reduce the possibility of irremediable claims that would oblige it to compensate the insured investor. However, this service which was initially created only for investors who were beneficiaries of the MIGA insurance, and then offered on a selective basis to other investors is not well known. It is not clear whether MIGA wishes to institutionalise this service, which would then compete with the activity of its sister institution, the ICSID.

In recent years, however, initiatives have been taken to develop the use of mediation or conciliation for the settlement of investment disputes. The International Mediation Institute ["**IMI**"], a non-governmental organisation working to develop mediation as a means of dispute settlement, has set up a working group dedicated to mediation for the settlement of investor-state disputes (Investor-State Mediation Task Force) which published a document in September, 2016, highlighting the skills required of persons likely to be appointed as mediators for the settlement of this type of dispute.[20] The Energy Community, an international organisation set up in October, 2005 in Athens between the European Union and Eastern European countries,[21] created a Dispute Resolution and Negotiation Centre in October 2016, which places mediation at the centre of its mechanism.[22] The

16 International Chamber of Commerce (ICC), Rules of Arbitration 2021.

17 United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules 1980, *available at* http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/1980Conciliation_rules.html.

18 International Bar Association (IBA) Rules for Investor–State Mediation 2012, *available at* https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

19 London Court of International Arbitration (LCIA) Mediation Rules (2020), *available at* https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx.

20 INT'L MED. INST., *IMI Competency Criteria for Investor–State Mediators*, IMI (Sept. 16, 2016), *available at* https://www.imimediation.org/wp-content/uploads/2017/07/IMI-IS-Med-Competency-Criteria625483FINAL-19-September-2016.pdf.E**rror! Hyperlink reference not valid.**

21 For more information on this international organisation, *see* its website, ENERGY COMMUNITY, *available at* https://www.energy-community.org/aboutus/whoweare.html.

22 We the following argument find in the explanatory memorandum to the act creating this Centre (2016/3/ECS): "Noting that alternative dispute settlement methods such as mediation and conciliation are gaining importance as alternatives to litigation and arbitration, especially due to their focus on preserving the relationship between the parties, their flexible approach and their minimal costs."

Centre for Effective Dispute Resolution (CEDR), a non-governmental organisation based in London, stated in 2009 that investment-receiving states must strengthen the legal framework for the amicable settlement of investment disputes.[23]

Will these initiatives the list of which is not exhaustive bear fruit? It is to be hoped that they will, but it should be noted that while they aim, notably, to combat the lack of visibility of mediation as a means of settling investment disputes, they do not address—with the exception of the CEDR—the central problem, which is the lack of clauses providing for recourse to conciliation or mediation in the instruments regulating international investments.

B. Little or poorly planned recourse to mediation

The purpose of the instrument for the settlement of investment disputes is the offer to settle investment disputes expressed by states in investment treaties in the broadest sense, be it Bilateral Investment Treaties ["**BIT**"], Free Trade Agreements containing investment provisions or other forms of international agreements. It must be acknowledged that mediation is almost always ignored in the dispute settlement offer made by states in these treaties, as noted in two recent studies, one published in November, 2012 by the Organisation for Economic Co-operation and Development (OECD) analysing one thousand six hundred and sixty of these treaties concluded by fifty-four States,[24] and the other published in 2014 by the United Nations Conference on Trade and Development.[25] The vast majority of investment treaties contain a dispute settlement clause providing for an attempt to settle the dispute directly between the parties, before a jurisdictional means of dispute settlement (arbitration or recourse to state courts) can be implemented.[26] There are, however, a few international treaties and investment laws that reserve a place for mediation as an alternative to arbitration, or as a prerequisite to arbitration, or even as the sole alternative to state courts.

Among the instruments proposing the use of mediation or conciliation as an alternative to arbitration, there are already a few BITs, including the one concluded in 2000 between the Netherlands and Uganda, Article 9 of which reads as follows:

> "*Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by*

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23 On this work, *see* M. Stevens & B. Love, *Investor–State Mediation: Observations on the Role of Institutions*, *in* 3 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION – THE FORDHAM PAPERS 389 (2010). *See* also the website of this organisation.

24 Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute settlement provisions in international Investment agreements: a large sample survey*, OECD INV. DIV. (2012) 18, *available at* https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf.

25 *Investor–State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2013/2, 60–62 (2014).

26 By way of illustration, Article 8 of the Agreement between the Government of the French Republic and the Government of the Republic of Tunisia concerning the Reciprocal Encouragement or Protection of Investments, Tun.–Fr., Oct. 20, 1997 reads as follows:
"Any investment dispute between one of the Contracting Parties and a national or company of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned. If such a dispute has not been settled within six months from the time it was raised by either party to the dispute, it shall be submitted at the request of either party to arbitration by the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965."

conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965."[27] (emphasis added)

It is also possible to cite the old Tunisian law of 1969 on investments, Article 20 of which reads as follows:

"*Any dispute between the foreign investor and the Government arising out of the investor's act or any action taken by the Government against the investor shall be settled in accordance with arbitration and conciliation procedures.*

These are the procedures provided for:

- or within the framework of bilateral investment protection agreements concluded between Tunisie and the State of which the investor is a national;

- or within the framework of the International Convention for the Settlement of Relative Disputes aux Investments between States and Nationals of other States, convention ratified by law no. 66-33 of 3 May 1966."[28] (emphasis added)

Other state legislations continue to offer this choice, such as the Jordanian Investment Law currently in force.[29] Where arbitration and conciliation are offered as means of settlement of investment disputes, the choice between these two methods is implicitly or expressly left to the most diligent party, i.e., almost always to the investor. Further, it also seems that the investor prefers to opt for arbitration. Thus, Article 20 of this Tunisian law of 1969 (since abrogated), served as the basis for two procedures before the ICSID, and these were two arbitration procedures.[30]

In a few other texts, recourse to conciliation or mediation *before* arbitration is either a *possibility* or an *obligation*.

It is a *possibility* which is also recommended, and is one of the methods of amicable settlement (consultation, negotiation) referred to in the "*cooling-off*" period of the dispute by Article 23 of the 2004 Model BIT proposed by the United States:

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27 Agreement on encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands, Uganda–Neth., art. 9, Mar. 18, 1965, *available at* https://investmentpolicy.unctad.org/international–investment–agreements/treaty–files/2091/download. Underlined by us. Such provisions are also found in some of the BITs concluded by Japan, such as the BIT signed with Uzbekistan on August 15, 2008.

28 Investment Law 2016, art. 20 (Tunis.).

29 The Investment Law (Law No. 30 of 2014) art. 43 (Jordan) ("The investment disputes between the Governmental parties and the investor will be settled amicably within a maximum period of six months, otherwise the two parties to the dispute may resort to the Jordanian courts, settle disputes according to the Jordanian Arbitration Law or resort to alternative means for resolving disputes by mutual agreement of both parties."). For a more explicit choice in favour of conciliation (ICSID), *see*, the previous version of the Jordanian law (1995 Law), as cited by W. BENHAMIDA, INTERNATIONAL INVESTMENT DISPUTES AND ALTERNATIVE DISPUTE RESOLUTION: A NEW FIELD OF EXPLORATION, at 298 [*hereinafter* "BENHAMIDA"].

30 Business Ghaith R. Pharaoh v. Tunisia, ICSID Case No. ARB/86/1; ABCI v. Tunisia, ICSID Case No. ARB/04/12.

"*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non- binding, third-party procedures.*"[31]

Recourse to conciliation or mediation before being able to initiate arbitration proceedings is in other cases an *obligation*, a solution retained by the new Tunisian investment law of 2016. Indeed, in a Title VI entitled "*Settlement of Disputes,*" Article 23 of the 2016 Tunisian Investment Law, provides:

"*Any dispute arising between the Tunisian State and the investor in connection with the interpretation or application of the provisions of this law shall be settled through conciliation procedures unless one of the parties waives it in writing.*

The parties are free to agree on the procedures and rules governing conciliation.

Failing this, the rules of the United Nations Commission on International Trade Law on conciliation shall apply.

Where the parties conclude a compromise agreement, the said agreement shall take the place of law with regard to the parties who undertake to execute it in good faith and as soon as possible."[32] (emphasis added)

Article 24 of the same law then provides that it is only in the event of failure of the negotiation procedure that foreign investors, unlike Tunisian investors (unless the latter have made an *objectively international* investment), may initiate arbitration proceedings, if they have the agreement of the Tunisian State for this purpose.

Finally, conciliation or mediation may be the *only* alternative means of dispute settlement provided for, with a good example of the same being the BIT concluded on May 23, 1975 between Tunisia and South Korea, Article 8 of which reads as follows:

"*Pursuant to the Convention on the Settlement of Investment Disputes Relating to Investments signed on 18 March 1965 and at the request of a national or legal entity of either Contracting Party who considers that he has suffered damage as a result of non-observance of the provisions of this Agreement, the other Contracting Party undertakes forthwith and irrevocably to submit to the conciliation procedure.*

This commitment implies the renunciation of the requirement to exhaust beforehand the recourse to the administrative and judicial courts."[33]

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31 Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment (2004), art. 23. *See* Agreement Between Japan and The Republic of Colombia for the Liberalization, Promotion and Protection of Investment, Japan–Colom., Sept. 12, 2011. This provision has inspired other States, as it is found almost identically in the BIT concluded in 2011 between Colombia and Japan, Article 26.1 of which reads as follows: "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."

32 Investment Law 2016, art. 23 (Tunis.).

33 Accord Entre le Gouvernement de la République de Corée et le Gouvernement de la République Tunisienne Relatif a l'encouragement et la Protection Reciproque des Investissements, S. Kor.–Tunis., art. 8, Nov. 8, 1975, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1839/download [*hereinafter* "S. Kor.–Tunis. BIT"]. A few other BITs contain similar provisions. *See* Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of India for the Promotion and Reciprocal Protection of

It should be noted that the commitment made by the states parties to this Treaty is only to submit to the conciliation procedure, not to reach an amicable settlement of the dispute. It is an obligation of means, not of result. It cannot, therefore, be concluded that conciliation (ICSID in this case) is the exclusive means of settling disputes falling within the scope of this Treaty.[34] In the event of failure of the conciliation, which is always possible, the unsatisfied party remains with the possibility to implement the dispute settlement procedure under ordinary law, i.e., to refer the matter to the competent state court. It should not be forgotten that the success of a conciliation or mediation procedure depends on the goodwill of the parties to the dispute. This fundamental characteristic is both a strength, and a weakness of these methods of dispute settlement. This characteristic must be taken into account when considering how to encourage the use of one of these amicable means of settling investment disputes.

III. Encouraging the Use of Mediation

There are advantages to using mediation. The outcome of the procedure is, on average, quicker and cheaper; and the mediation procedure has the undeniable attraction of remaining under the control of the parties to the dispute.[35] As long as the parties are in the process of trying to settle their dispute amicably, they retain control over the course of the procedure—whether it be its pace, its outcome, or the issues to be dealt with. Keeping control of the dispute rather than leaving it to a third party who will decide its outcome is traditionally seen as an advantage of mediation over jurisdictional methods of dispute resolution, illustrated by the adage that "*a bad settlement is better than a good trial*." Developing the use of mediation, therefore, appears to be desirable and is a stated objective of many legislators and institutions. However, developing the use of mediation presupposes the removal of (A) legal obstacles, and (B) political and psychological reluctance.

A. Removing legal obstacles

Unfortunately, there are many legal obstacles that hinder the development of mediation. In order to overcome them, it would be advisable to multiply the number of clauses providing for recourse to mediation or conciliation by taking necessary care during their drafting. The beginning and end of this procedure, which is very dependent on the will of the parties, should then be better supervised. Finally, care should be taken not to make this procedure subject to the jurisdiction of the courts to the detriment of its voluntary nature, a tendency already denounced by Philippe Fouchard at the time.[36]

As has been pointed out, the first legal obstacle to the development of mediation in the settlement of investment disputes is the lack of provisions for its use. Admittedly, nothing prohibits—in the silence of the applicable texts—a host State and a foreign investor at the dawn of their dispute,

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Investments, Swed.–India, art. 9, July 4, 2000, *available at* https://investmentpolicy.unctad.org/international–investment–agreements/treaty–files/1602/download. This is the case of Article 9 of the BIT concluded in 2000 between India and Sweden, which also provides for the use of conciliation (under the UNCITRAL Rules) as a means of dispute settlement.

34 *Contra* BENHAMIDA, *supra* note 29, at 294–296, which presents this procedure as being exclusive of any other.

35 A unanimous observation noted by all the authors. *See, e.g.,* CHRISTOPHER SCHREUER, THE ICSID CONVENTION: A COMMENTARY 444–445 (2d. ed. 2009).

36 Philippe Fouchard, *Alternative Dispute Resolution and Arbitration. L'évolution des modes de règlement des litiges du commerce international*, OECD, *available at* http://www.oecd.org/internet/consumer/1878948.pdf. In the same vein and in relation to the settlement of investment disputes, *see* BENHAMIDA, *supra* note 29, op. cit. at 307–309; XIMENA BUSTAMANTE, *Investor State Mediation, reflections on its feasibility from a process perspective*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW IN MEMORIAM THOMAS WÄLDE, 284 (Todd Weiller & Freya Baetens eds. 2011).

from deciding to set up a mediation procedure; for example, during the period of attempted amicable settlement provided for by most of the treaties in force.[37] However, experience shows that if a mediation clause has not been provided beforehand, the chances of such a procedure being initiated are much lower. In the nine conciliation procedures conducted under the auspices of the ICSID for which we know of the instrument that allowed this procedure, the conciliation procedure was in each case provided for in a provision that existed prior to the emergence of the dispute.[38]

Referring to mediation in a text means drawing the attention of the parties to the dispute to the possibility of using it. But drawing the parties' attention to this dispute settlement mechanism is not enough, especially if one wants to impose mediation or conciliation as a preliminary step towards a jurisdictional settlement of the dispute. The dispute settlement clause must be carefully drafted with this in mind, avoiding any ambiguity, such as the one recently discovered in an old, but little-known multilateral treaty, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ["**APPI-OIC Treaty**"]. Proposed for signature in 1981 by the fifty-seven Member States of the Organisation of the Islamic Conference ["**OIC**"], the APPI-OIC entered into force in February, 1988. At present, the Trade Preferential System of the OIC ["**TPS – OIC**"] has been signed by 33 OIC Member States and 25 have ratified it.[39] The long Article 17 of **APPI-OIC** Treaty relating to the settlement of disputes between investors and host States begins with an introductory paragraph worded as follows:

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

As the body in question has not yet been set up, the investor has access to conciliation and arbitration. Article 17 of the APPI-OIC Treaty is not unambiguous because while this introductory paragraph seems to give the choice between recourse to conciliation or arbitration, the following paragraphs make conciliation (presented in the first subdivision)[40] the prerequisite for arbitration

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37 In this sense, *see* United Nations Conference on Trade and Development, *Investor–State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2013/2, 2014, at 62–64.

38 Dispute settlement clause in the contract or inserted in a treaty or investment law. *See* Annex.

39 Agreement for Promotion, Protection and Guarantee of Investments among the OIC Member States, Organisation of the Islamic Conference, Feb. 1988, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download [*hereinafter* "APPO–OIC Treaty"]. The 25 OIC Member States that have ratified the APPO–OIC Treaty are as follows: Burkina Faso, Cameroon, Egypt, Gabon, Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Tunisia, Turkey, Uganda, United Arab Emirates and United States of America.

40 *Id.*; Article 17(1) of the APPI–OIC Treaty reads as follows:
"Pending the establishment of a body for the settlement of disputes arising from this Agreement, any disputes that may arise shall be settled by conciliation or arbitration in accordance with the following rules.
1. Conciliation
(a) If both parties to the dispute have agreed to resort to conciliation, the agreement should include a description of the dispute, the requests of both parties to the dispute and the name of the conciliator chosen by both parties. The parties concerned may request the Secretary–General to select the conciliator;
(b) The conciliator's task shall be limited to reconciling the different points of view and making proposals likely to lead to a solution acceptable to the parties concerned. The conciliator will submit a report within the time limit determined by the task to be carried out, which will be notified to the parties concerned. This report cannot be opposed to both parties in the event that the dispute is brought before the judicial authorities."

(presented in the second subdivision).[41] The English version of the text is equally ambiguous,[42] and this provision has already been interpreted by an arbitral tribunal as offering the possibility for the investor to have direct recourse to arbitration. Indeed, the dispute settlement mechanism provided by the APPI-OIC Treaty has already been used once, in a case between a Saudi Arabian National, Mr. Hesham T. M. Al-Warraq, and the Republic of Indonesia. In this case, the arbitral tribunal was constituted applying the UNCITRAL Arbitration Rules. In its decision on jurisdiction rendered on June 21, 2012, the Tribunal opined that pending the establishment of the body referred to in Article 17 of the APPI-OIC Treaty, the same Article does indeed constitute an offer of arbitration that can be implemented by investors who can avail themselves of this Treaty.[43] More specifically, the arbitrators decided that the investor claimant has under this Treaty—three possibilities: either conciliation, arbitration (choice made by the Claimant in the case of *Hesham T. M. Al Warraq* v. *Republic of Indonesia*), or conciliation, and then in case of failure of the latter, arbitration. Was this the wish of the drafters of the APPI-OIC Treaty? One may doubt it, but the clumsiness in the drafting of Article 17 has opened the door to another interpretation.

Better supervision of the beginning and the outcome of the procedure in order to be able to override a lack of will—or even ill will on the part of one of the parties—is another way forward. It should be noted immediately that the remedies proposed here are by their very nature limited because of the predominant role played by the goodwill of the parties for the success of a mediation or conciliation procedure but it is possible to mitigate certain risks.

At the outset of the proceedings, it is the possible inertia of a party that can be circumvented by setting up the organ of the proceedings without its assistance. More specifically, it is a question of providing for a method of appointing the mediator or setting up the Conciliation Committee while overcoming the lack of cooperation in this respect by one of the parties. Thus, in the absence of agreement of the parties on this matter, the institution may appoint the missing mediator(s) or conciliator(s), as a modality provided, for example, in Article 30 of the ICSID Convention in the case of ICSID and in Article 5.2 of the ICC Mediation Rules–provided that there is an agreement between the parties on the use of mediation or conciliation as the sole or preliminary means of settling their dispute.

Once appointed, the mediator or conciliator may invite both parties, including the most reluctant one, to at least attend an initial meeting to explore the chances of success of an attempt at an amicable settlement.

It is then possible to oblige the parties to pursue in good faith the mediation or conciliation procedure in an attempt to reach an amicable settlement of their dispute. This is undoubtedly what

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41 The latter part of Article 17(1) of the APPI–OIC Treaty reads as follows:
"(a) If the two parties to the dispute have failed to reach an agreement as a result of their recourse to conciliation, or if the conciliator fails to submit his report within the specified time limit, or if the two parties do not agree on the proposed solutions, each party shall have the right to refer the dispute to the Arbitral Tribunal for decision.
(b) Arbitration proceedings shall commence with a notification by the party making a request for arbitration to the other party to the dispute, explaining the nature of the dispute and the name of the arbitrator it will appoint. The other party […]."

42 APPI–OIC Treaty, *supra* note 39.

43 Hesham T.M. Al Warraq v. Republic of Indon., Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, ¶ 81 (June 21, 2012), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf.

is expressed in the aforementioned provision of Article 8 of the BIT concluded on May 23, 1975 between Tunisia and South Korea by which the States parties to the Treaty undertake, at the request of an investor from the other state party "*to submit to the conciliation procedure.*" It should be noted that the obligation is not bilateralised—it does not weigh on the foreign investor and remains unclear.

The commitment to participate in a conciliation procedure does not require that a settlement of the dispute be reached in this way. It cannot be required of any party whatsoever that they reach (under what constraint?) an amicable settlement of their dispute. It would then be wise to specify the contours of this obligation to participate in the procedure and ensure that the parties attend at least the first meeting organised by the mediator or conciliator; make at least one serious proposal for an amicable settlement and/or participate for a minimum period of time in the procedure, etc. The fact remains that it is possible to oblige the parties to an investment dispute to attempt to settle it through mediation or conciliation. In the latter case, it is advisable to provide for a two-stage mechanism in the event of a dispute arising: first, recourse to mediation or conciliation, and then, if this fails, recourse to a jurisdictional method of dispute settlement, in particular, arbitration. With such a mechanism, attempting to settle the dispute by means of mediation or conciliation for the minimum agreed period would be a prerequisite, failure to comply with which would lead to the premature declaration of inadmissibility of the request for arbitration.[44] In reality, therefore, it is merely a marginal adjustment of the current overwhelming trend followed in investment treaties and laws, which consists of providing for an informal attempt to settle the dispute amicably before submitting it to a tribunal, whether state or arbitral.[45] It may be considered that the intervention of a third party in the dispute at the stage of attempting to settle it amicably would give the dispute a better chance of success, insofar as the refusal by one of the parties to attempt to settle it amicably will be noted by that third party. Although the reasons for the failure of his or her mission are not communicated to the court (a general rule laid down, for example, by Article 34 of the ICSID Convention), the prior intervention of a mediator, or a conciliator, will have drawn the attention of both parties to the existence of the dispute, its contours, and the consequences of its failure to settle amicably.

The outcome of the mediation or conciliation procedure could also be improved. First of all, it is necessary to make clear what will happen next if the mediation or conciliation fails. Foreseeing the possibility of the failure of the mediation or conciliation by announcing the next procedure may be seen as an anticipation of this failure, but this risk may be counterbalanced by highlighting the advantages of mediation in relation to what awaits the parties in the subsequent procedure.

Above all, it is necessary to give effect to the amicable settlement reached if the procedure is successful. The risk here is that one of the parties may refuse to implement the settlement agreement reached by the parties, rendering the entire procedure followed so far unnecessary. However, it has to be noted that several solutions exist to the same.

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44 On this question of the consequences of not respecting the procedural steps prior to arbitration, *see* Ali Bencheneb, *La conciliation et la médiation en droit des affaires internationales*, *in* REGARDS CROISÉS FRANCO MAGHRÉBINS SUR LES MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS, REVUE FRANCO MAGHRÉBINE DE DROIT 259–274 (2014).

45 *Id.*

First is to assimilate the settlement agreement concluded to an arbitral award, thus giving it the authority of *res judicata*, allowing it to be enforced in the event of non-execution by one of the parties. This solution has been adopted by the California International Arbitration and Conciliation Act, (CIACA),[46] which is not without its problems because it is not clear whether most jurisdictions around the world, when asked to enforce such an *award* under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, would agree to recognise the "*award*."[47] Under French law, the parties to a conventional mediation procedure may apply for the approval of the settlement agreement they have reached, thereby making the agreement enforceable. However, all parties to the settlement agreement must agree for the same,[48] and the effectiveness of this mechanism outside the European Union remains unanswered.[49]

Inserting the agreement of the parties in an arbitral award (known as an award of agreement between the parties) is another solution, but it presupposes the existence of an arbitral procedure. However, dispute resolution institutions that offer arbitration and conciliation (or mediation) as a means of settling disputes, force the parties to choose one or the other proceeding, without allowing the parties to conduct both at the same time. The first sentence of Article 26 of the ICSID Convention thus provides that "*[C]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.*" On reading the rest of this Article, it appears that the other remedies referred to are first and foremost domestic, administrative or judicial remedies. But the broad wording chosen undoubtedly makes it possible to go beyond this and include mediation and conciliation procedures. It might, however, be interesting to allow an arbitration procedure and a conciliation procedure to be carried out at the same time in order to allow an amicable agreement, if reached between the parties through the consultation procedure, to be inserted in the award made at the end of the arbitration procedure as provided in Article 43 of the ICSID Arbitration Rules. This proposal, which is not new,[50] requires a number of precautions to be taken to ensure the integrity of the two parallel proceedings.[51] Despite the additional costs that it could generate, it is not without its appeal.[52]

The entire doctrine agrees on the weakness represented by the uncertainties relating to the legal force of the settlement agreement reached, which is a real obstacle to recourse to mediation or conciliation. It is interesting in this respect to note that the ICSID Convention is concerned with the recognition and enforcement of arbitral awards made under the aegis of the ICSID (Articles 53 to 55 of the ICSID Convention), but not with the follow-up given to the recommendations

46 E. Van Ginkel, *supra* note 7.

47 *Id.*

48 Décret n° 2012–66 du 20 janvier 2012 relatif à la résolution amiable des différends [Decree n° 012–66 of 20 Jan. 2012 relating to the amicable resolution of disputes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 20, 2012.

49 CODE DE PROCEDURE CIVILE [C. CIV.] [CIVIL PROCEDURE CODE], art. 1535 (Fr.); Décret n° 2012–66 du 20 janvier 2012 relatif à la résolution amiable des différends [Decree n° 012–66 of 20 Jan. 2012 relating to the amicable resolution of disputes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 20, 2012, art. 2; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L. 136), 3–8 recalls the implementation of European Directive 2008/52/EC of May 21, 2008 on certain aspects of mediation in civil and commercial matters, which only has effect in relation to the Member States of the European Union.

50 Jack J. Coe, *supra* note 7; E. Van Ginkel, *supra* note 7.

51 *Id.*

52 These costs should not, however, be higher than those of proceedings in which arbitration succeeds mediation or conciliation. And be lower if an amicable agreement is reached before the outcome of the arbitration proceedings.

issued by a Conciliation Commission (Article 34 of the ICSID Convention), in particular when they note the agreement reached between the parties. Should an international approval procedure not be created, within the ICSID or even beyond, to confer binding and enforceable force on the provisions of the agreement reached between the parties at the end of the international mediation or conciliation procedure? This question is currently being considered by UNCITRAL, whose working group is considering an "*instrument relating to the enforcement of international trade agreements resulting from conciliation*;"[53] but the outcome is uncertain.

However, the establishment of such a procedure is unlikely to be sufficient to bring about much wider use of mediation in the settlement of investment disputes, as, political and psychological reluctance will still remain.

B. Overcoming Political and psychological hurdles

There is a time for litigation and a time for mediation. The success or failure of a mediation or conciliation procedure will indeed depend on the state of mind of the parties; a state of mind that evolves over time. Just as sociologists and psychologists, lawyers can testify to this reality.[54]

In addition to this psychological obstacle common to all mediation procedures, there is also a political obstacle that is particularly present during mediation or conciliation procedures. In these procedures, one of the recognised advantages of mediation or conciliation also faces a disadvantage due to the divisive and emblematic nature of litigation relating to international investments. Such disputes almost always originate from a request by a foreign investor complaining about the conduct of the host State. It is a confrontation between the defence of a private interest and the general interest, which the defendant State would generally drape itself in. A successful mediation will then require each party to abandon part of its claims, to compromise in order to reach an agreement—made of reciprocal concessions—with the other party. The contours of the transactional act that brings a solution to the dispute are defined (or at least accepted) by the parties to the dispute. The parties to the dispute are, therefore, the creators of the agreement that resolves the dispute, and they bear the paternity of it.

It is then possible to reproach the representatives of the parties, and in particular, those of the defendant State, for the very existence of a transaction or at least its content:

- "*How were you able to compromise on the general interest?*"
- "*How is it that you have accepted the other party's demands to such an extent at the expense of those that you should have made prevail?*"
- "*Why didn't you opt for a jurisdictional method of dispute resolution whose outcome could have been more advantageous to us?*"

Accusations of collusion with the opposing party, or even corruption, are then not far off. So, how can we make those who were not involved in the mediation process understand—those who hear about this case without having the slightest legal knowledge and/or without measuring the

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53 *See* UNCITRAL's website, *available at* http://www.uncitral.org/uncitral/fr/commission/working_groups/2Arbitration.html.

54 *See, e.g.,* S.M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?*, 22 ICSID REV. FILJ, 237–240 (2007).

economic and political stakes, in a context of widespread mistrust of those who are leading us—that the solution adopted was the best one, that it was the one that best preserved the interests of the State?[55] We should also point out here the very strong reticence that exists in French public law towards any process leading to the payment by a public law entity of sums that it does not owe.[56]

In view of these perils, in the current context, resorting to mediation for the representatives of the parties (and especially for the representatives of the State) is, therefore, risky. The solution that allows one to evade his or her responsibility as a representative of one of the parties is then to entrust the settlement of the dispute to a third party who will resolve it without the parties' agreement, and this third party can only be the judge or the arbitrator. Recourse to a judicial method of dispute resolution transfers the task of settling the dispute—and the responsibility that accompanies it – to a third party. Further, if the decision handed down is perceived as unsatisfactory, the third party may be blamed and the representatives of the parties,[57] may be blamed less easily.

Until the risk described above is precisely circumscribed (because it seems impossible to eliminate it), resorting to mediation or conciliation to settle a dispute relating to foreign investment may be perceived as presenting a greater risk than the benefits it provides. This is certainly the greatest obstacle to the development of amicable means of dispute settlement in international investment law. Further, on this last aspect of the problem addressed in this article, like Giovanni Drogo scanning the Tartar desert from the top of Fort Bastiani,[58] I see little sign of the hoped-for change.

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55 *Id.* at 241. *See also* BENHAMIDA, *supra* note 29, at 307.

56 The Council of State decided more precisely in the Mergui judgment (EC, 19 March 1971, No. 79962, *ECR* p. 235) that "legal persons governed by public law must never be ordered to pay a sum which they do not owe". The term "condemned" refers much more to the outcome of judicial proceedings than to a settlement agreement between two parties, but the situation in which a legal person may be required to pay a sum of money following mediation or conciliation is close to that referred to in this decision of the Council of State. On this subject, *see* R. FERAL, *Le point de vue du juge administrative*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE, E. LOQUIN & S. MANCIAUX, 42 TRAVAUX DU CREDIMI, 205, 213 (2014).

57 The same concern often leads the representatives of the parties to choose counsels and arbitrators from among the best known, in order to clear them in the event of an unfavourable outcome: "we don't understand, we had chosen the most reputable counsels – the arbitrators".

58 DINO BUZZATI, THE DESERT OF THE TARTARS (1940).

Annex

List of conciliation proceedings conducted under the aegis of ICSID

1. *SEDITEX Engineering Consultancy for the textile industry m.b.h.* v. *Democratic Republic of Madagascar* (CONC/82/1)
   - Conciliation provided for in a contract;
   - Case registered on October 5, 1982; and
   - Rescission at the request of the parties on 20 June 1983 before the constitution of the Conciliation Commission

2. *Tesoro Petroleum Corporation* v. *Trinidad and Tobago* (CONC/83/1)
   - Conciliation provided for in a contract;
   - Case registered on August 26, 1983;
   - Conciliation Commission set up (single member) on January 6, 1984; and
   - Settlement accepted by the parties and procedure closed (Report of the Conciliation Commission rendered on November 27, 1985, pursuant to Article 33 of the Conciliation Rules).

3. *SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie m.b.H.* v. *Madagascar* (CONC/94/1)
   - Conciliation provided for in a contract;
   - Case registered on June 13, 1994;
   - Conciliation Commission set up (3 members) on September 23, 1994; and
   - Report of the Conciliation Commission delivered on July 19, 1996.

4. *TG World Petroleum Limited* v. *Republic of Niger* (CONC/03/1)
   - Conciliation provided for in a contract;
   - Case registered on December 8, 2003; and
   - Rescission at the request of the parties on April 8, 2005 before the constitution of the Conciliation Commission.

5. *Togo Electricity* v. *Republic of Togo* (CONC/05/1)
   - Instrument allowing conciliation unknown;
   - Case registered on May 20, 2005;
   - Conciliation Commission set up (3 members) on September 21, 2005;
   - Report of the Conciliation Commission delivered on April 6, 2006; and
   - Arbitration proceedings registered on April 10, 2006, *Togo Electricité and GDF-Suez Energie Services* v. *Republic of Togo* (ARB/06/7), which resulted in an award and subsequent annulment proceedings concluded in September 2011.

6. *Shareholders of SESAM* v. *Central African Republic* (CONC/07/1)
   - Conciliation provided for in a contract;
   - Case registered on August 13, 2007;
   - Conciliation Commission set up (3 members) on February 4, 2008; and
   - Report of the Conciliation Commission delivered on August 13, 2008.

7. *RSM Production Corporation* v. *Republic of Cameroon* (CONC/11/1)

- Conciliation provided for in a contract;
- Registered on September 19, 2011;
- Conciliation Commission set up (3 members) on February 17, 2012;
- Report of the Conciliation Commission delivered on June 11, 2013; and
- Arbitration proceedings registered on July 1, 2013 (withdrawal at the request of the parties following the amicable settlement registered on January 19, 2016).

8. *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited* v. *Republic of Equatorial Guinea* (CONC(AF)/12/1)

- Conciliation provided for in the contract;
- Affair registered on May 15, 2012;
- Suspension of the procedure until January 31, 2018, Conciliation Commission not yet constituted; and
- Currently pending.

9. *Republic of Equatorial Guinea* v. *CMS Energy Corporation and others* (CONC(AF)/12/2)

- Conciliation provided for in the contract;
- Case registered on June 29, 2012;
- Conciliation Commission constituted (single member) on July 6, 2012; and
- Report of the Conciliation Commission delivered on May 12, 2015.

10. *Xenofon Karagiannis* v. *Republic of Albania* (CONC/16/1)

- Conciliation provided for by the Greek-Albanian BIT (1991) and the Albanian law of 1993;
- Case registered on May 16, 2016;
- Conciliation Commission not yet constituted as at January 2021; and
- Currently pending.

11. *Société d'Energie et d'Eau du Gabon* v. *Gabonese Republic* (CONC/18/1)

- Conciliation provided for in a contract;
- Case registered on March 30, 2018;
- Conciliation Commission (3 members) constituted on April 30, 2018; and
- Report of the Conciliation Commission delivered on September 19, 2018.

12. *La Camerounaise des Eaux (CDE)* v. *Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)* (CONC/19/1)

- Conciliation provided for in a contract;
- Case registered on May 24, 2019;
- Conciliation Commission (3 members) constituted on September 4, 2019; and
- Pending (the Conciliation Commission held a hearing on conciliation by videoconference on November 30, 2020).

13. *Barrick (Niugini) Ltd* v. *State of Papua New Guinea* (CONC/20/1)

- Conciliation provided for in a contract;

- Case registered on July 22, 2020;
- Conciliation Commission (1 member) constituted on January 7, 2021 following appointment by the Chairman of the Administrative Council; and
- Currently pending.