

# An Australian Perspective on Investor-State Mediation

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## Table of Contents

<b>Executive Summary</b> .....	<b>1</b>
<b>Introduction</b> .....	<b>2</b>
<b>Definitions</b> .....	<b>4</b>
<b>1. Concerns Related to Investment Arbitration</b> .....	<b>5</b>
1a. Time, Damages and Costs .....	7
1b. Unpredictability .....	11
1c. Unaccountability of Foreign Investors .....	16
<b>2. Australia’s Tumultuous Relationship with ISDS</b> .....	<b>18</b>
2a. History & Current State of Affairs .....	19
2b. Reactions and Misunderstandings .....	21
<b>3. Mediation’s Potential in ISDS</b> .....	<b>25</b>
3a. Overcoming Challenges Related to ISDS .....	25
3a.i. Exploring Interests .....	26
3a.ii. Evaluative Mediator .....	27
<b>4. Incorporating Mediation in the TPP and other Australian IITs</b> .....	<b>28</b>
4a. Negotiation and Mediation Pre-requisites in IITs .....	28
4a.i. Unclear as to Mandatory Nature .....	28
4a.ii. Proposal for Pre-requisites Clause .....	30
4b. Government Prevention Mechanisms.....	30
4b.i. The Australian Government.....	31
4b.ii. Peru and Colombia’s Prevention Techniques .....	32
4c. Implementation of Mediation Within the TPP.....	37
4c.i. A Suitable Arb-Med-Arb Combination.....	40
4c.ii. Proposal for TPP .....	48
<b>Conclusion</b> .....	<b>48</b>
<b>Annex I: Bibliography</b> .....	<b>i</b>

## **Executive Summary**

Australia has always had a tumultuous relationship with investor state dispute settlement ('ISDS') clauses. Whether to include arbitration clauses in an international investment treaty ('IIT') or a bilateral investment treaty ('BIT') has always been a difficult policy decision and Australia now decides on a case-by-case basis. Most Australian ISDS clauses contain an initial negotiation period, in which parties may settle by way of mediation before proceeding to arbitration.

However, this clause to negotiate has often been held non- mandatory. As such, arbitrations can proceed despite parties failing to genuinely negotiate. This thesis focuses on making the process one that is more efficient and beneficial to Australia by suggesting that negotiation, particularly mediation, should be seriously considered in the ISDS process. The thesis proposes a more effective initial negotiation clause to be inserted in the Trans-Pacific Partnership ('TPP'), which relies on mediation.

Settlement can be effectively facilitated through the process of mediation as a primary step. The process of arbitration, on the other hand, certainly has its place in ISDS but it should not be used as a first resort due to the fact that it can be a very long, costly, one-sided and an unpredictable process. Australia could learn from other countries, which have faced more investment arbitrations and have implemented prevention mechanisms within their governments, such as Peru and Colombia. ISDS clauses providing for mediation could have increased potential of successful settlements if the governments involved also upgraded their respective governmental agencies to centralise information regarding ISDS claims and facilitate negotiation channels.

Asian States such as China, Singapore and Japan already have an advanced legal culture of mediation, sometimes allowing the arbitrator to also serve as mediator. Given that the TPP has an Asia-Pacific focus, any ISDS clause should reconcile the Asian culture of mediation with the Western need for a final and binding outcome. This thesis proposes continuing mediation alongside arbitration, allowing an already appointed arbitral tribunal to either render an award if parties fail to settle or to render a consent award within the terms of the parties' settlement if mediation is successful.

## **Introduction**

The Australian Government is in the midst of negotiating the TPP, the Philip Morris case is simmering in the waters and all the while, Australian citizens are wondering whether the TPP will also inhibit the Australian Government's power to legislate. The health of its citizens is at stake, particularly if the legislation affects investor giants. Meanwhile, the Australian Government is also most likely trying to fit the arbitration in its budget and Australian citizens are scratching their heads, wondering if it is all worth it or just a legal quagmire that could lead to a significant waste of resources.

It is from this reality that I write my thesis, with a view to exploring a more practical way of ISDS. I have chosen to focus on mediation as an alternative or support to arbitration. This is because I believe it is an area that has much potential to bring back a sense of practicality and reality to the resolution of investor-state disputes. It seems that many arbitrations become legal paradigms of confusion and the real issues at stake become vacuumed up in the legal jungle of technical arguments, which sometimes lead to extravagant awards. Such awards bear real monetary consequences for the State and ignore obligations of the foreign investor relating to their investment in the host State, thereby arguably missing half of any one dispute. I believe that mediation is the answer to reconciling the grievances of foreign investors with the respective grievances of the host State and its citizens in relation to the investment.

I aim to shed more light on the concerns related to arbitration, namely the expensive legal costs, extravagant damages, lengthy proceedings, unpredictability as to the outcome, unaccountability of foreign investors and the limited nature of the damages. I explore misconceptions related to arbitration and clarify some mistaken beliefs such as the belief that arbitrators are bias towards foreign investors. Statistics show that arbitrators are neutral and unbiased. However the system in which they act is not.

I discuss mediation's potential in ISDS by uncovering its unique ability to explore the real issues at hand, creating more fulfilling solutions for both parties. I also suggest that States and companies worried about using mediation in ISDS due to the fact that coming to a negotiated settlement would make them accountable for their decision could employ an evaluative mediator who could suggest a solution, upon request.

Incorporating mediation in the TPP should be supported and actively negotiated for by the Australian Government. My thesis proposes that mediation be inserted into the TPP as a pre-requisite to arbitration and also inserted into the arbitration clause as a simultaneous process. This would increase chances of a fair settlement. Since much of international investment law depends on the particular wording of clauses in IITs, I will explore case law and commentary to determine a working draft clause that accurately reflects its intentions and serves the purpose to encourage mediation.

I explore mediation and negotiation from an Australian legal perspective, all the while noting the approaches of other countries in ISDS. I particularly look at two Latin American States' governments' initiatives to prevent and manage investor-state disputes and I suggest that the Australian Government implement a central ISDS agency. I also look at the Asian legal culture of mediation in order to define an appropriate style of clause for the TPP and argue that since the focus of the TPP is on the Asian-Pacific region, the text cannot ignore the legal culture of mediation in much of that region. I explore the processes involving mediation in arbitration used in the ISDS centres of China, Japan and Singapore in order to determine a viable ISDS clause proposition for the TPP. I found that the best approach is to insert a clause that is open to mediation and arbitration hybrids, yet this need not mean that the arbitrator also must serve as a mediator, as will be shown through the example of Singapore.

I hope to submit this thesis to the Australian Government in order to highlight the need to support the inclusion of mediation in the TPP and future IITs. I have worked to produce an analytical paper that proposes mediation as a solution but nevertheless I have evaluated both the positive and negative legal aspects of this solution.

I believe that such procedures of alternative dispute resolutions ('ADR'), particularly mediation, have a strong potential for effectively settling investor-state disputes. My thesis is an invitation to the Australian Government to capitalise on this potential.

## Definitions

For the purpose of this thesis, the reader is presumed to bear knowledge in investment arbitration and the general terms that are used in this area of law. However, as this thesis strongly focuses on alternative dispute resolution ('ADR') such as direct negotiation, mediation and conciliation, it is necessary to further clarify the definition of such processes. The clarification given below has been adapted for this thesis from definitions obtained from the United Nations Conference on Trade and Development.<sup>1</sup>

Direct negotiations are those between parties by means of direct contact in order to exchange interests and proposals. They do not involve the facilitation of third parties.

Mediation is an informal process of facilitated negotiation involving the assistance of a third party, namely the mediator. The mediator's involvement ranges from fostering dialogue between the parties to effectively proposing and arranging a workable settlement to the dispute. Mediators can take upon an evaluative or facilitative role and can switch roles at any time during the mediation. Upon request, an evaluative mediator may give an opinion on the likely outcome of an arbitration proceeding and propose optimal solutions to the settlement of the dispute. Mediators generally focus on assisting the parties to reach a settlement while maintaining a productive relationship between the parties. As such, mediators focus on making the communication between the disputants more effective, paying attention to the negotiation process along the way. It can be understood as an "assisted negotiation."

Conciliation, on the other hand, is generally understood as a more structured process of facilitated negotiation, involving the assistance of a third party, namely the conciliator. The conciliator's main objective is to settle the dispute amicably. Conciliators have substantial control over the process and focus on concrete solutions, while addressing substantive issues through advisory work. Notable, due to the

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<sup>1</sup> The United Nations Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America) edited by Susan D. Franck and Anna Joubin-Bret (Geneva and New York 2011) <[http://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20108_en.pdf)> accessed 23 July 2015.

flexibility of the styles and process of mediation, conciliation could largely resemble mediation if the mediator takes on an evaluative approach.

## **1. Concerns Related to Investment Arbitration**

ISDS came into existence with solid motives and aspirations including particularly the objective of increasing the attractiveness for developed countries to invest in developing countries. ISDS would act as an incentive because it provided investors with the guarantee of arbitration by an independent arbitral tribunal that would be independent from the host State's judiciary in case of a dispute with the State. Developed countries' investors therefore did not risk having to litigate in the developing countries' courts if the developing country expropriated the investment. Increased foreign investment in developing countries became necessary during the sixties when official development aid could no longer provide the amount of investment that developing countries needed.<sup>2</sup> Further, rating agencies would take ISDS clauses into account when determining the credit rating of a country.<sup>3</sup> As such, ISDS made it easier for foreign investors to obtain political risk insurance in relation to their investment in developing countries, which increased the incentive to invest.

The World Bank Group introduced the International Centre for the Settlement of Investment Disputes ('ICSID') as a reaction to the increasing need for an international institution to provide a coherent set of procedural rules for ISDS. The World Bank saw itself as particularly concerned given the opportunity that ISDS represented to developing countries in attracting new foreign investment.<sup>4</sup>

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<sup>2</sup> European Parliament, Directorate-General for External Policies, Policy Department, Dr Pieter Jan Kuijper, 'Investment Protection Agreements as Instruments of international Economic Law', <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO\\_STU\(2014\)534979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf)> accessed 10 July 2015.

<sup>3</sup> OECD Investment Policy Perspectives 2008, Kathryn Gordon, 'Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development', <<http://www.oecd.org/finance/insurance/44230805.pdf>> accessed 10 July 2015.

<sup>4</sup> European Parliament, Directorate-General for External Policies, Policy Department, Dr Pieter Jan Kuijper, 'Investment Protection Agreements as Instruments of international Economic Law', <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO\\_STU\(2014\)534979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf)> accessed 10 July 2015.

Despite the clear advantage that ISDS conferred, at the time, on developed states' investors investing in developing countries, there was another incentive for ISDS clauses among developed States. Even where developed States could trust the other State's courts to an extent, much inconsistency existed during the 19<sup>th</sup> century as to the content of the investment law between European countries and the US, on the one hand, and Central and South American countries on the other. Little commonality existed as to the proper treatment of foreign investment, particularly national treatment or an independent international minimum standard of treatment.<sup>5</sup>

The state of affairs has changed since the historical rise of ISDS. The underlying reasons for its growth seem to have destabilised. The original justification that concluding IITs would attract foreign investment seems to have become less explicit and some would argue, inexistent.<sup>6</sup> Some would also suggest that such development justifications have been exchanged for utilitarian reasons.<sup>7</sup> There are only few IITs that explicitly refer to the facilitation of the mutual flow of capital in their preambles, namely the Turkish BITs, CETA and TTIP.<sup>8</sup> More recent studies suggest that providers of political risk insurance do not reliably take IITs or BITs into account when deciding the terms of insurance, but also that in-house counsel do not view IITs or BITs as playing a major role in their companies' foreign investment decisions.<sup>9</sup>

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<sup>5</sup> Ibid.

<sup>6</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment?' (2010) 51(2), 397, Virginia Journal of International Law, <<http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf>> accessed 13 July 2015; Lauge N. Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' Yearbook on International Investment Law and Policy 2009/2010 (New York: Oxford Press, 2010), 539-574 <[http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge\\_poulsen](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen)> accessed 13 July 2015.

<sup>7</sup> European Parliament, Directorate-General for External Policies, Policy Department, Dr Pieter Jan Kuijper, 'Investment Protection Agreements as Instruments of international Economic Law', <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO\\_STU\(2014\)534979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf)> accessed 10 July 2015.

<sup>8</sup> Ibid.

<sup>9</sup> Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment?' (2010) 51(2), 397, Virginia Journal of International Law, <<http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf>> accessed 13 July 2015; Lauge N. Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' Yearbook on International Investment Law and Policy 2009/2010 (New York: Oxford Press, 2010), 539-574 <[http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge\\_poulsen](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen)> accessed 13 July 2015.

For the above reasons, international investment arbitration has come against some criticism in recent times. Now that developed countries are also being sued as much as developing countries for uncompensated expropriation, the question of whether to have an ISDS clause in IITs or BITs is becoming all the more prominent.<sup>10</sup>

Although investment arbitration is a worthy means of peaceful dispute settlement as it provides an independent alternative to domestic court litigation, it must be recalled that investment arbitration can be extremely costly, lengthy, unpredictable, limited in the nature of damages and fail to impose accountability on foreign investors. This thesis will use several case studies to show the real concerns of arbitration.

### **1a. Time, Damages and Costs**

This part of the thesis will first analyse the exuberant expenditure of time and money on damages, legal fees and expert fees, endured in investor-state arbitration.

Investment arbitration has become more and more expensive and time consuming. Just last year, on 18 July 2014, the Russian Federation was ordered to pay over US\$50.2 billion for a case that lasted over ten years in arbitration.<sup>11</sup> This was an exceptional case where the Russian Federation was held to have indirectly expropriated OAO Yukos Oil Company ('Yukos') in a 'devious and calculated' manner.<sup>12</sup> Despite the exceptional nature of this award, States need to be aware that arbitral tribunals can award a successful claimant damages copious amounts in

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<sup>10</sup> United Nations Conference on Trade and Development UCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS), Respondent States by development status (total as of end 2013) [Diagram showing: Transition 16%, Developed 27% and Developing 57%] (Vol.1 April 2014), 7 <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf)> accessed 16 July 2015.

<sup>11</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel); Julien Fouret and Pierre Daureu, 'Yukos Universal Limited (Isle of Man) v The Russian Federation *Enforcement of the Yukos Awards: A Second Noga Saga or a New Sedelmayer Fight?*' ICSID Review (Spring 2015) 30(2): 336 <<http://icsidreview.oxfordjournals.org/content/30/2/336.full.pdf+html>> accessed 27 June 2015; Daniela Paez-Salgado (Assistant Editor for South America), 'Gaillard and Banifatemi on Strategy Insights into the Yukos Arbitration at Harvard Law School' (*Kluwer Arbitration blog*, 18 February 2015) <<http://kluwarbitrationblog.com/blog/2015/02/18/gaillard-and-banifatemi-on-strategy-insights-into-the-yukos-arbitration-at-harvard-law-school/>> accessed 20 July 2015.

<sup>12</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1037.

damages. Further, the State will not be able to control the nature of those damages unless they come to a negotiated settlement by mediation or other means.

Certain commentators have labelled this “the Era of Mega-Arbitration.”<sup>13</sup> To put the Yukos Award in perspective, it is equivalent to around 11 per cent of Russia’s foreign exchange reserves, 10 per cent of its annual national budget and 2.5 per cent of the country’s GDP.<sup>14</sup> The Award is said to be more damaging to the Russian economy than the Western economic sanctions imposed on Russia for its actions in Ukraine.<sup>15</sup>

Some issues have been pointed out regarding the way that the arbitral tribunal came to award this considerably large amount of damages, namely, commentators have been uneasy regarding the date of valuation in this case. Not only did it not correspond to a date put forward by the claimant or respondent, however the arbitral tribunal used its own non-standard methodology to value Yukos on 30 June 2014 and neither expert ever had the opportunity to comment on the arbitral tribunal’s model.<sup>16</sup>

Another point of controversy in relation to the date of damages<sup>17</sup> regards the Energy Charter Treaty,<sup>18</sup> which provides that damages be based on the value of the company the day before the expropriation. Instead, the Tribunal followed the principles set out in the draft ILC articles, following the Chorzow Factory decision,<sup>19</sup> providing that the

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<sup>13</sup> Kavaljit Singh, ‘The Era of Mega-Arbitration: International Court Rules Against Russia in \$50 Billion Decision’ (*Madhyam- Ideas and Action for a Better World*, July 30 2014) <<http://www.madhyam.org.in/the-era-of-mega-arbitration-tribunal-awards-50-billion-against-russia-in-yukos-case/>> accessed 17 July 2015.

<sup>14</sup> *Ibid.*

<sup>15</sup> Kavaljit Singh, ‘The Era of Mega-Arbitration: International Court Rules Against Russia in \$50 Billion Decision’ (*Madhyam- Ideas and Action for a Better World*, July 30 2014) <<http://www.madhyam.org.in/the-era-of-mega-arbitration-tribunal-awards-50-billion-against-russia-in-yukos-case/>> accessed 17 July 2015; Jennifer Rankin, ‘Russia ordered to pay \$50 billion in damages to Yukos shareholders’ *The Guardian* (London 28 July 2014), <<http://www.theguardian.com/business/2014/jul/28/russia-order-pay-50bn-yukos-shareholders-khodorkovsky-court>> accessed 17 July 2015.

<sup>16</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1778; Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>17</sup> Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>18</sup> The Energy Charter Treaty and its Protocol on Energy Efficiency and Related Environmental Aspects (‘ECT’), signed 17 December 1994, entered into force 16 April 1998, Article 13(1) (definition of legal expropriation).

<sup>19</sup> *Chorzów Factory (Claim for Indemnity)* (Merits), *Germany v Poland*, 1928 P.C.I.J. Ser.A., No. 17, Judgment No. 13 (13 September 1928), 47.

claimant be made whole and be put back in the position it would have been in, absent the expropriation.<sup>20</sup> On this basis, as it found the expropriation to be unlawful and therefore not subject to the damages principles in the Energy Charter Treaty, the Tribunal awarded damages based on the higher of damages on the date of expropriation or the date of the award.<sup>21</sup>

This thesis will now turn to the extravagant costs involved in the case.<sup>22</sup> The Russian Federation was ordered to, not only pay its own costs, but also reimburse the claimant's legal costs of up to US\$60 million, accounting for 75 per cent of the total legal fees incurred in these proceedings and EUR 4.2 million in arbitration costs.<sup>23</sup>

Another ongoing issue relating to costs in arbitration is the costs of financial, technical and legal experts alike. Although are useful in some circumstances, their help to an arbitral tribunal can be minimal, counter-effective and unbalanced to their costs. The phrase "riddled with errors," seems to be becoming a stock phrase in reports by experts acting for Respondents to diminish the confidence that tribunals have in the claimants' experts.<sup>24</sup> Further, in some cases claimant experts can mislead the tribunal by presenting to them a pre-determined notion of an appropriate result.

For example, Brent Kaczmarek of Navigant New York was the expert for the claimants in the Yukos case appeared to have made some material errors in his first report.<sup>25</sup> Kaczmarek admitted that his Discounted Cash-Flow ('DCF') valuation was influenced by a pre-determined notion of an appropriate result.<sup>26</sup> He presented a wide

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<sup>20</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1766-1768; Andrew Maclay, 'Yukos- Understanding the Quantum in a US\$50BN Award' (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>21</sup> *Ibid.*

<sup>22</sup> Sherman & Sterling LLP, 'Yukos: Largest Arbitral Award Ever' (Sherman & Sterling LLP, 28 July 2014) <<http://www.shearman.com/en/services/practices/international-arbitration/yukos-arbitral-award>> accessed 18 July 2015.

<sup>23</sup> *Ibid.*

<sup>24</sup> Andrew Maclay, 'Yukos- Understanding the Quantum in a US\$50BN Award' (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>25</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1743-1745; Andrew Maclay, 'Yukos- Understanding the Quantum in a US\$50BN Award' (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>26</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M

range of alternative valuations, as well as a clear lack of methodology for the valuation on the award date.<sup>27</sup> This unreasonably burdened the tribunal to infer such methodology.<sup>28</sup> The radical errors in Kaczmarek’s expert report of US\$40 billion and US\$90 billion, although corrected in his second report, had the effect of losing the Tribunal’s confidence in his expertise to a great extent.<sup>29</sup> The arbitral tribunal found that the claimant’s expert was of little assistance and that his fees were excessive.<sup>30</sup>

A latent problem with investment treaty arbitration is the ambiguity about arbitration costs.<sup>31</sup> The lack of certainty and predictability about total cost of liability, including the expenses of both parties’ lawyers and which party will bear these two expenses, diminishes the effectiveness of investment treaty arbitration.<sup>32</sup> The Yukos case justified the cost liability shifting using the established principle that “an UNCITRAL tribunal... has the unfettered discretion to fix and to decide in what proportion the costs for legal representation and assistance of the parties shall be borne by the Parties”.<sup>33</sup> This award discusses the reasonableness of the claimant’s costs and justifies it being 75 per cent of the total legal costs with the fact that the claimant bore burden of proof.<sup>34</sup> Further, the Tribunal justified the cost liability shifting with “egregious nature of many measures of the Respondent which the Tribunal found

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Schwebel), 1785; Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>27</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1728-1729; Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1745; Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>30</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1883, 1884; Andrew Maclay, ‘Yukos- Understanding the Quantum in a US\$50BN Award’ (Swiss Arbitration Association Seminar, 28 May 2015).

<sup>31</sup> Susan D. Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011) 88(4) *Washington University of Law Review*, 772

<[http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law_lawreview)> accessed 18 July 2015.

<sup>32</sup> *Id.*, 773.

<sup>33</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1871, 1885; UN Doc. A/RES/31/98; 15 ILM 701 (1976), Article 38(e), Article 40(2).

<sup>34</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1881-1882.

were in breach of the Energy Charter Treaty.”<sup>35</sup> However, the contributory negligence of the claimant, which reduced the damages by 25 per cent (a suspiciously clean number), should counter-balance or factor into the cost liability shifting. If the Tribunal’s justification lies within the nature of the breaches, then it should also consider the claimant’s contributory negligence. This exemplifies how tribunals’ discretion in awarding costs can be unpredictable and questionable. Nevertheless, this case provides more justification than other investment arbitrations, which can be even less expressive as to the reasons for their discretion on cost liability shifting.<sup>36</sup>

As shown, damages can be extravagant and unpredictable, legal costs can be extremely high and the cost liability shifting can be unsupported. Although it is possible in investment arbitration to set aside proceedings or annul proceedings, it is generally not possible, unless the arbitral tribunal lacked jurisdiction or in some cases, failed to state any reasons at all.<sup>37</sup> It would not cover circumstances where the damages were excessive or where only the costs were unsupported.<sup>38</sup>

## **1b. Unpredictability**

Investment arbitration holds no doctrine of precedent.<sup>39</sup> While it is a reasonable assumption that arbitral tribunals generally note precedents,<sup>40</sup> they do not necessarily

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<sup>35</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel), 1887.

<sup>36</sup> Susan D. Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011) 88(4) Washington University of Law Review, 773

<[http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law_lawreview)> accessed 18 July 2015; *Ereko B.V. v Republic of Poland*, Partial Award and Dissenting Opinion (19 August 2005) reprinted in ICSID Reports 335(12) (2007), 261 (costs justified in one paragraph: “Claimant has prevailed. Consequently, its costs and those of the Tribunal shall be borne by the Respondent. Upon submission to the Tribunal by each party of its costs, the Tribunal will issue an appropriate Order.”) <<http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>> accessed 18 July 2015.

<sup>37</sup> Convention on the Recognition and Enforcement of Foreign Awards (New York, 1958) (‘The New York Convention’) [1958], signed 10 June 1958 (entered into force 7 June 1959), Article V(1)(d); ICSID Convention, Regulations and Rules (ICSID/15 April 2006), signed 18 March 1965 (entered into force 14 October 1966) Article 52(1)(a); UN Doc. A/RES/31/98; 15 ILM 701 (1976) Article 34.

<sup>38</sup> Susan D. Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011) 88(4) Washington University of Law Review, 774

<[http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1045&context=law_lawreview)> accessed 18 July 2015.

<sup>39</sup> Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ *The 2006 Freshfields Lecture* (2006) *Arbitration International* 23(3), 368 <[11](http://www.lk-</a></p></div><div data-bbox=)

always follow precedent as they are under no obligation to do so. As such the system lacks inherent clarity on the law and investment arbitration can seem contradictory.

A relevant example that will be explored below relates to the incoherency surrounding the interpretation of negotiation and mediation requirements of IITs. Often IITs contain preconditions such as the requirement for litigation, negotiations and consultations, including recourse to mediation, for a specific amount of time before investors are to engage in arbitration with the State. This is generally in order to minimise the amount of cases that proceed to arbitration. There remains confusion over whether pre-arbitration requirements concern jurisdiction and are mandatory or rather, concern admissibility and are merely procedural. There is also confusion surrounding the futility argument, which is the idea that parties need not negotiate, consult or mediate where such action would be futile. The confusion surrounding the law related to such requirements will be highlighted using the following cases: *Abaclat v Argentina* (“Abaclat”),<sup>41</sup> *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey* (“The Tulip Case”)<sup>42</sup> and *Muhammet Cap Sehil Insaat Endustrive Ticaret Ltd. Sti. v Turkmenistan* (“Muhammet v Turkmenistan”).<sup>43</sup>

The Abaclat decision on jurisdiction and admissibility found that the negotiation and 18 months litigation requirement in the BIT were requirements going to the admissibility of the claim and not to the jurisdiction of the tribunal.<sup>44</sup> The Abaclat majority was of the opinion that the requirements related to the implementation of consent to jurisdiction and not to the consent itself. The Tribunal distinguished the consent given to ICSID (by ratification of the ICSID Convention and by signing the BIT) from the circumstances under which a State consents to ICSID arbitration. The

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k.com/data/document/arbitral-precedent-dream-necessity-excuse-freshfields-lecture-2006-arbitration-international.pdf> accessed 21 July 2015.

<sup>40</sup> Id, 368-369; *BP America Production Co. and others v Argentine Republic*, ICSID Case ARB/04/8, Decision on Jurisdiction, 27 July 2006; *Pan American Energy LLC and BP Argentina Exploration Co. v Argentine Republic*, ICSID Case ARB/03/13, Decision on Jurisdiction, 27 July 2006.

<sup>41</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

<sup>42</sup> *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013.

<sup>43</sup> *Muhammet Çap & Sehil İnşaat Endustri Ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent’s Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, 13 February 2015.

<sup>44</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, 564.

key question was “under what circumstances will ICSID arbitration be possible under the terms of Argentina’s consent?” In the dissent of George Abi-Saab, while stating that the ICSID Convention refers to the pre-requisites as a ‘condition to consent,’ he dismisses the majority’s phrase ‘the effective implementation over such consent’ as subjective and confusing by simply stating in writing, “whatever that means.”<sup>45</sup>

The Tulip Case referred to a BIT that provided for consultations and negotiation in good faith, as well as non-binding third party procedures with an aim to finding a mutually agreeable settlement if the above failed. Only after such attempts could the case be brought to ICSID after one year of the dispute arising. This tribunal analysed the same issue of whether pre-requisites related to the jurisdiction of the tribunal or admissibility of the claim. It commenced its analysis with three notable points from the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*,<sup>46</sup> where the ICJ stated that resort to negotiation or other pre-requisites fulfils three distinct functions.<sup>47</sup> The first function is to give notice to the respondent State that a dispute exists while delimiting the scope of the dispute and its subject matter. The second is to encourage the parties to settle their dispute by mutual agreement. The third function is to indicate the limit of consent given by States. The tribunal in the Tulip Case, added a fourth policy function, namely, conferring upon the State an opportunity to address the complaint of a potential claimant before becoming a respondent in an international investment dispute.<sup>48</sup> In contrast to the *Abaclat* majority, the arbitral tribunal in the Tulip Case did not question whether pre-requirements merely related to the circumstances in which parties gave their consent to ICSID or to the consent itself. Rather, the tribunal was of the view that this was a jurisdictional issue due to the requirements’ mandatory nature and policy reasons.

In the *Muhammet v Turkmenistan* Case, there was a disparity in in the English, Russian and Turkish version of the Turkish-Turkmenistan BIT. The English and

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<sup>45</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab, 28 October 2011, 24.

<sup>46</sup> *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, International Court of Justice (ICJ), 1 April 2011.

<sup>47</sup> *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, 61.

<sup>48</sup> *Id.*, 62.

Russian version provided for notification of the dispute. It also provided for consultations or negotiations, in good faith as far as possible for 6 months prior to arbitration. The Turkish version, in contrast, provided additionally that the investor bring the subject matter of the dispute to the Host State's courts (the Turkmenistan courts), failing a decision within one year. There was also an issue of whether the Turkish version was authentic. The tribunal in this case did not expressly address the question of whether this was a jurisdictional or admissibility issue. Rather, it stated that the real question was whether the BIT established a mandatory obligation to go to local courts and if so then claimants could only address ICSID after such recourse.<sup>49</sup> The tribunal interpreted the BIT differently to another tribunal that ruled on the same BIT just 18 months prior to this tribunal's decision on 13 February 2015.<sup>50</sup> This was justified by virtue of a linguistic expert's new uncovered meaning in the BIT and the tribunal affirmed that despite this, different tribunals conceive similar questions of law and fact differently and the tribunal is under no obligation to follow precedent.<sup>51</sup>

As is visible from this example on the interpretation of litigation, negotiation and consultation requirements of IITs, arbitral decisions lack coherency. While some arbitral tribunals state that there is no need rule of precedent, other tribunals justify departures from previous decisions by slight differences in the wording used. It is imperative, given this lack of precedent, that parties pay close attention to the wording inserted in their IITs so as to ensure their intentions are recognised and implemented. This thesis will discuss this later when it proposes a drafting for such a clause below.

Another point on the incoherency within investment arbitration regarding the interpretation of litigation, negotiation and mediation requirements in IITs is the varying treatment by different arbitral tribunals of the futility argument. In some circumstances, including when a requirement is considered mandatory, the tribunals have alleviated parties from the obligatory requirements due to the fact that any

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<sup>49</sup> *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, at 112.

<sup>50</sup> *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012.

<sup>51</sup> *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, at 275.

adherence to such obligations would have been futile and there would have been little or no chances of success. This is called the futility argument.

The Tribunal in *Abaclat* suggested that the general purpose and aim of the consultation requirement was to allow amicable settlement where such settlement was supported by both parties, thus it could not be imposed where the parties did not have the good will to resort to such amicable solutions and where it would be futile to force the parties to enter into such consultation.<sup>52</sup> It suggested that it would be futile where parties were not willing to amicably settle, as consultations would inevitably fail.<sup>53</sup>

As for the 18 months litigation requirement, the tribunal concluded that the futility argument in this case depended more on whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving the claimants of their interests in submitting the claim to arbitration. The tribunal stated that given the nature of the claims, none of the claimants would have been able to effectively resolve the dispute in the Argentine Courts in light of Argentine Emergency Law.<sup>54</sup> Further, the tribunal outlined the fact that the Argentine Courts do not provide for mass claims and as such, the claimants would have to bring individual claims, which would be burdensome for claimants and would cause substantial delays.<sup>55</sup> Thus, the tribunal found that Argentina was not in a position to adequately address the dispute within the framework of its domestic legal system.<sup>56</sup> It therefore controversially concluded that Argentina's interest in pursuing this local remedy could not justify depriving the claimants of their right to resort to arbitration.<sup>57</sup>

However, in his dissent, Georges Abi-Saab criticises the majority's opinion<sup>58</sup> in stating that the majority again, struck out a clear conventional requirement on the basis of a subjective judgment. He states that any balancing of interests was made at a

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<sup>52</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, 564.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, 585.

<sup>55</sup> *Id.*, 587.

<sup>56</sup> *Id.*, 584.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab, 28 October 2011, 30.

legislative level when writing such requirements into the BIT.<sup>59</sup> It is not open to the tribunal to review this.<sup>60</sup> Georges Abi-Saab accused the majority of ruling *ex aequo et bono* without party agreement.<sup>61</sup> To further prove his point, he then listed other courts to which the claimants could have sought recourse, including the Italian courts.<sup>62</sup> Georges Abi-Saab clarified, specifically, that the majority based their conclusion on “a weighing of the specific interests at stake [rather] than ... the application of futility.”<sup>63</sup> This suggests that the majority exceeded its mandate, rendering the judgment *ultra vires*.<sup>64</sup>

Georges Abi-Saab’s reactions above demonstrate the difficulties in a legal process lacking a doctrine of precedent or codes on the application of relevant law.

Due to the unpredictable nature of arbitration outcomes and the unpredictable nature of each party’s rights, parties should be more inclined to settle. Some commentators suggest that it might be more difficult to settle with such unpredictability over the outcome<sup>65</sup> however, on the contrary, the unpredictable nature of arbitration should actually encourage mediation, as the chances of success are inherently unpredictable.

### **1c. Unaccountability of Foreign Investors**

The current ISDS regime is often viewed as a one-way street due to the fact that arbitration clauses enable foreign investors to file claims against host States, while host States do not enjoy the same right. Therefore, the regime is inadequate to the extent that it ignores one side of the coin. States remain highly accountable for their actions in respect of foreign investors’ investments, while foreign investors are not judged under the regime for their actions in respect of their investments in the host

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<sup>59</sup> Id, 31.

<sup>60</sup> Ibid.

<sup>61</sup> Id, 32.

<sup>62</sup> Id, 33.

<sup>63</sup> Id, 583.

<sup>64</sup> Id, 32.

<sup>65</sup> Arthur W. Rovine (Editor), *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2009* (2010 in Boston by Martinus Nijhoff Publishers), Investor-State Dispute Mediation: The Benefits and Obstacles by Edna Sussman 333.

States. As shown in the Yukos case above,<sup>66</sup> foreign investors are only accountable to the extent that they contribute to the host State's expropriation of their investment.<sup>67</sup> As demonstrated, this accountability is limited to merely discounting a sum equal to the foreign investor's contributory negligence from the damages that they will be paid by the host State in respect of the expropriation. However, foreign investors cannot have damages awarded against them. This is because the treaty does not create obligations for both parties, rather only from the host State to the foreign investor.

As international investment arbitration clauses are inserted into IITs to enforce the obligation of a host-State not to expropriate a foreign investor's investment without adequate compensation, they can do little to address any issues relating to that foreign investor's corporate responsibility within the host State. This particular system therefore does not have the necessary checks and balances to insure fair legal decisions on the matter's totality regarding the foreign investment. Arbitral tribunals are in fact inherently independent to the domestic courts of the host State. The unique nature of international arbitration naturally puts arbitrators in an independent position to render a neutral decision. The fact that both parties appoint an arbitrator and those two arbitrators appoint a chair allows for a neutral and appropriate decision that is not biased to the host State, nor biased to the foreign investor. The problem is not within the arbitrators but within the system. International arbitrators, at the outset, must decide investor-state disputes in a vacuum due to the narrow nature and limited scope of the obligations contained in the IITs. The one-sided legal framework inhibits their ability to condemn foreign investors. They can merely do so in a passive sense through contributory negligence. Even if counterclaims are contemplated in the international investment system, they are rarely of any practical use due to the narrowness of IITs.

Article 46 of the ICSID Convention expressly allows for the filing of "counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties..."<sup>68</sup> The UNCITRAL Rules also provide that

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<sup>66</sup> *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 277, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet).

<sup>67</sup> *Id.*, 1887.

<sup>68</sup> ICSID Convention, Regulations and Rules (ICSID/15 April 2006), signed 18 March 1965 (entered into force 14 October 1966) Article 46.

the respondent may make counterclaims or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.<sup>69</sup>

The objective behind counterclaims is to dispose of all grounds of the dispute arising out of the same subject matter. The main requirements are that the claim is connected to the subject matter and that it falls within the jurisdiction. However, even if there is jurisdiction and the wording of an ISDS clause in the IIT were broad enough to allow counterclaims, it is impossible to render foreign investors accountable for their actions by way of counterclaim if the IIT creates no concrete obligations for investors. Interestingly, the TPP leaked draft contains one article on Corporate Social Responsibility, which provides that the parties “reaffirm” the importance of foreign investors to “voluntarily” incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by the host State.<sup>70</sup> However, the wording within this clause merely states a reaffirmation of the importance to respect the corporate social responsibility endorsed by the host State. Its language does not appear strong enough to impose a positive legal obligation on the foreign investor so as to allow a counterclaim to be made in respect of corporate social responsibility breaches. This exemplifies the incomprehensible reluctance of States to impose in IITs, concrete obligations on foreign investors in respect of their actions relating to the investment.

## **2. Australia’s Tumultuous Relationship with ISDS**

Since Philip Morris Asia filed an arbitration claim against Australia in 2011,<sup>71</sup> alleging that the plain packaging legislation was an expropriation, ISDS has been rather controversial in Australia. In the wake of revelations by Wikileaks Australia’s approach to ISDS continues to be all the more controversial. The leaked investment

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<sup>69</sup> UNCITRAL Arbitration Rules (Revised 2010) (April 2011) Article 21(3) <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>> accessed 26 July 2015.

<sup>70</sup> Wikileaks, ‘Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft), (*WikiLeaks release*, 25 March, 2015) Article II.16 <<https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>> accessed 9 July 2015.

<sup>71</sup> The Australian Government, the Attorney General’s Department, ‘Tobacco plain packaging-investor-state arbitration’, <<http://www.ag.gov.au/tobaccoplainpackaging>> accessed 14 July 2015; written notification of claim and notice of arbitration *Philip Morris Asia v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 (‘the Philip Morris Case’).

chapter of the TPP contains a footnote which could exclude Australia and Australian Investors from being subject to ISDS, as will be further discussed below.<sup>72</sup>

## 2a. History & Current State of Affairs

Historically, with the exception of the Australia New Zealand ('NZ') Free Trade Agreement in 1982 and the Australia United States ('US') Free Trade Agreement in 2003, Australia has historically included ISDS provisions in its trade agreements. One strong basis for this inclusion was the mistrust of foreign countries' judiciary systems (with the exception of the US and NZ's judiciary systems which were considered to be robust).<sup>73</sup> ISDS provisions exist in 21 of Australia's bilateral investment treaties.<sup>74</sup> However, despite its historical support for ISDS in most cases, Australia's view changed when Asia Philip Morris put forward its claim against plain packaging.<sup>75</sup> While making it clear that the Australian Government supports the principle of national treatment, the Gillard Government's trade policy announcement of April 2011 denounced ISDS.<sup>76</sup> It raised two objections to ISDS clauses providing for arbitration.<sup>77</sup> First, it objected on the basis that such clauses can confer greater legal rights on foreign investors than local businesses who do not have access to the clauses and second, on the basis that ISDS jeopardised Australia's ability to determine its own public policy.<sup>78</sup> At this point in time, ISDS represented a viable threat to Australia's ability to promulgate plain packaging legislation,<sup>79</sup> which indeed later was realised in the subsequent filing of the Philip Morris Case, which remains in

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<sup>72</sup> Wikileaks, 'Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft), (*WikiLeaks release*, 25 March, 2015) <<https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>> accessed 9 July 2015.

<sup>73</sup> Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> ADR Reporter, 'Australia and the Backlash Against Investment Arbitration' (2013), 28. <<http://barristers.com.au/wp-content/uploads/2013/05/Australia-and-the-Backlash-Against-Investment-Arbitration.pdf>> accessed 14 July 2015.

<sup>77</sup> *Ibid.*

<sup>78</sup> Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>79</sup> *Tobacco Plain Packaging Bill 2011* (Cth).

arbitration now.<sup>80</sup> Philip Morris Asia claimed that the Australian Government's plain packaging legislation had breached Australia's obligations under the Hong Kong Australia BIT by expropriating its intellectual property and failing to accord it fair and equitable treatment.<sup>81</sup> This ongoing arbitration has continued the debate on ISDS.

Nevertheless, in September 2013 after the labour party was outvoted and the liberal party came into power, the new government declared that it would consider ISDS provisions on a case-by-case basis.<sup>82</sup> This led to ISDS provisions being included in the Korea Australia Agreement<sup>83</sup> in December 2014 and also with China in an FTA signed in November 2014 (not yet in force).<sup>84</sup> However, such a clause was not inserted in the Japan Australia Agreement signed in July 2014.<sup>85</sup>

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<sup>80</sup> The Australian Government, the Attorney General's Department, 'Tobacco plain packaging-investor-state arbitration', <<http://www.ag.gov.au/tobaccoplainpackaging>> accessed 14 July 2015; written notification of claim and notice of arbitration *Philip Morris Asia v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

<sup>81</sup> *Tobacco Plain Packaging Bill 2011* (Cth); The Australian Government, the Attorney General's Department, 'Tobacco plain packaging- investor-state arbitration', <<http://www.ag.gov.au/tobaccoplainpackaging>> accessed 14 July 2015; written notification of claim and notice of arbitration *Philip Morris Asia v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12; Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>82</sup> Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>83</sup> *Australia-Republic of Korea Free Trade Agreement ('KAFTA')*, signed 8 April 2014 (entered into force 12 December 2014); DFAT, 'Trade and investment topics: Investor-State Dispute Settlement' <<http://dfat.gov.au/trade/topics/Pages/isds.aspx>> accessed 15 July 2015; Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>84</sup> *Australia-China Free Trade Agreement*, signed 17 June 2015; DFAT, 'Trade and investment topics: Investor-State Dispute Settlement' <<http://dfat.gov.au/trade/topics/Pages/isds.aspx>> accessed 15 July 2015; Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>85</sup> *Australia-Japan Economic Partnership Agreement ('EPA')*, signed 8 July 2014, (entered into force 15 January 2015); DFAT, 'About the Japan-Australia Economic Partnership Agreement' <<http://dfat.gov.au/trade/agreements/jaepa/Pages/japan-australia-economic-partnership-agreement.aspx>> accessed 15 July 2015.

In March 2015, Wikileaks released a working document prepared in January 2015 for all 12 nations of the TPP treaty: Advanced Investment Chapter ('the document').<sup>86</sup> Section B of the document contains an ISDS clause.<sup>87</sup> The clause provides for initial consultation and negotiation 6 months before the submission of an arbitration claim is made.<sup>88</sup> Curiously, below the text lies footnote 29, which states that section B does not apply to Australia or an investor of Australia and that notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.<sup>89</sup> It further reads in italics that the deletion of footnote 29 is subject to certain conditions.<sup>90</sup> This could mean that Australia is considering agreeing to the ISDS provisions in the TPP if certain conditions are met.<sup>91</sup> The US, however, are known to be strongly opposed to any ISDS exemptions.

Nevertheless, the draft shows an ongoing caution by the Australian Government in relation to ISDS clauses, which is consistent in light of the ongoing controversy and reactions to the Philip Morris Case, as will be visited below.<sup>92</sup>

## 2b. Reactions and Misunderstandings

This part of the thesis seeks to uncover certain reactions to ISDS in Australia. It seeks also to clarify some misunderstandings regarding ISDS arbitration clauses.

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<sup>86</sup> Wikileaks, 'Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft), (*WikiLeaks release*, 25 March, 2015) <<https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>> accessed 9 July 2015; Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>87</sup> Wikileaks, 'Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft), (*WikiLeaks release*, 25 March, 2015), Section B <<https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>> accessed 9 July 2015.

<sup>88</sup> *Id.*, Art II.17 and Art II.18.

<sup>89</sup> *Id.*, fn.29.

<sup>90</sup> *Ibid.*

<sup>91</sup> Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, 'Australia's Conflicting Approach to ISDS: Where to From Here?' (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>92</sup> The Australian Government, the Attorney General's Department, 'Tobacco plain packaging-investor-state arbitration', <<http://www.ag.gov.au/tobaccoplainpackaging>> accessed 14 July 2015; written notification of claim and notice of arbitration *Philip Morris Asia v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 ('the Philip Morris Case').

One common misconception, forming an objection to ISDS in Australia, is that arbitral tribunals are biased towards foreign investors.<sup>93</sup> Unfortunately, the lack of exposure to international investment disputes has created a misty cloud of fog in the Australian public's mind over the process of investment arbitration.

So as to clear up the fog, this thesis will analyse the available statistics. Recent ICSID statistics show that in the financial year of 2014, 48 per cent of awards declined jurisdiction, 28 per cent of the awards upheld claims in part or in full and 24 per cent of awards dismissed all claims.<sup>94</sup> The ICSID statistics, in fact, show that 72 per cent of cases were decided in the State's favour.<sup>95</sup> This is because when an arbitral tribunal declines jurisdiction, it is in the State's favour, as well as when it dismisses all of the claims due to the fact that it is always the foreign investor who sues the State.

Further, it is important to remember, while on the topic of bias, that arbitrators are subject to rules of disclosure and can be challenged if alleged of being bias.<sup>96</sup> The other arbitrators will decide on this question. Further, the question of challenge goes to the constitution of the arbitral tribunal and therefore goes to its jurisdiction. Even if the other arbitrators erred on rejecting the challenge of bias, such a mistake could be used to set aside the award or to refuse enforcement if bias can be proven after.<sup>97</sup>

Though these concerns are understandable, investment arbitration has its due place in society, providing a peaceful way to resolve international disputes by reference to

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<sup>93</sup> ADR Reporter, 'Australia and the Backlash Against Investment Arbitration' (2013), 29  
<<http://barristers.com.au/wp-content/uploads/2013/05/Australia-and-the-Backlash-Against-Investment-Arbitration.pdf>> accessed 14 July 2015.

<sup>94</sup> ICSID, 'The ICSID Caseload- Statistics' (Issue 2014-2), 28  
<<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf>> accessed 16 July 2015; Charles N. Brower and Sadie Blanchard, 'From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement' (2014) Vol. 55 Harvard International Law Journal Online, 51-52  
<[http://www.harvardilj.org/wp-content/uploads/2014/01/Brower\\_Blanchard\\_to\\_Publish.pdf](http://www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf)> accessed 16 July 2015.

<sup>95</sup> ICSID, 'The ICSID Caseload- Statistics' (Issue 2014-2), 28  
<<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf>> accessed 16 July 2015.

<sup>96</sup> UN Doc. A/RES/31/98; 15 ILM 701 (1976) Article 11 (disclosure), 12-13 (challenge); ICSID Convention, Regulations and Rules (ICSID/15 April 2006), signed 18 March 1965 (entered into force 14 October 1966) Article 14 (criteria for arbitrator), Article 57 and Rule 9 (disqualification).

<sup>97</sup> Convention on the Recognition and Enforcement of Foreign Awards (New York, 1958) ('The New York Convention') [1958], signed 10 June 1958 (entered into force 7 June 1959), Article V(1)(d); ICSID Convention, Regulations and Rules (ICSID/15 April 2006), signed 18 March 1965 (entered into force 14 October 1966) Article 52(1)(a).

legal treaties to which States have agreed upon.<sup>98</sup> Before establishing this system of international legal instruments, foreign investment disputes were resolved by ‘gunboat diplomacy,’ which could endanger lives.<sup>99</sup> For example, when Venezuela defaulted on its sovereign debt in 1902, warships were sent to Venezuela demanding that European citizens be repaid.<sup>100</sup> Some commentators express the opinion that there is no viable substitute to investor-state arbitration.<sup>101</sup> However, it is the position of this paper that mediation is a viable substitute or support to investment arbitration.

Another major concern that Australian commentators have regarding ISDS in light of the Philip Morris Case<sup>102</sup> is that ISDS would erode state sovereignty in key areas of public policy making such as in our ability to legislate for health and environmental protection.<sup>103</sup> The Australian Government has responded to these concerns by using a more cautious approach of including ISDS only on a case-by-case basis. Australia will now only include ISDS clauses where there are adequate safeguards against such risks posed by ISDS provisions. Such safeguards can be included in IITs by way of carve-outs or exceptions to the substantive investment protections granted by those treaties, including indirect limitations to the scope of ISDS protections.<sup>104</sup> Carve outs can exempt the regulation of specific sectors from the definition of expropriation.<sup>105</sup>

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<sup>98</sup> ADR Reporter, ‘Australia and the Backlash Against Investment Arbitration’ (2013), 29 <<http://barristers.com.au/wp-content/uploads/2013/05/Australia-and-the-Backlash-Against-Investment-Arbitration.pdf>> accessed 14 July 2015.

<sup>99</sup> Ibid.

<sup>100</sup> Id, 29, 30 fn17.

<sup>101</sup> Leon Chung, Donald Robertson, Kate Lindeman and Anne Hoffmann, Herbert Smith Freehills LLP, ‘Investor-State Dispute Resolution in Australia: A Changing Landscape for Investors’ (2015) 12(1) Transnational Dispute Management (‘TDM’), 12 <<http://www.transnational-dispute-management.com/article.asp?key=2176>> accessed 21 July 2015.

<sup>102</sup> The Australian Government, the Attorney General’s Department, ‘Tobacco plain packaging-investor-state arbitration’, <<http://www.ag.gov.au/tobaccoplainpackaging>> accessed 14 July 2015; written notification of claim and notice of arbitration *Philip Morris Asia v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 (‘the Philip Morris Case’).

<sup>103</sup> ADR Reporter, ‘Australia and the Backlash Against Investment Arbitration’ (2013), 28 <<http://barristers.com.au/wp-content/uploads/2013/05/Australia-and-the-Backlash-Against-Investment-Arbitration.pdf>> accessed 14 July 2015.

<sup>104</sup> Leon Chung, Donald Robertson, Kate Lindeman and Anne Hoffmann, Herbert Smith Freehills LLP, ‘Investor-State Dispute Resolution in Australia: A Changing Landscape for Investors’ (2015) 12(1) Transnational Dispute Management (‘TDM’), 4 <<http://www.transnational-dispute-management.com/article.asp?key=2176>> accessed 21 July 2015.

<sup>105</sup> *Australia-Republic of Korea Free Trade Agreement (‘KAFTA’)*, signed 8 April 2014, entered into force 12 December 2014, Annex II-B “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations” accompanied by the following guidance: that the stated ‘legitimate public welfare objectives’ are not exhaustive, that regulatory actions to protect public health include regulation, supply and reimbursement with respect to pharmaceuticals, diagnostics, vaccines, medical devices, health-related aids and appliances and blood

Notably, there is an important legal difference between carve-outs and exceptions to substantive investment provisions. The difference lies in the burden of proof. When a State invokes a carve-out, the burden of proof lies on the foreign investor to prove that the carve-out does not apply. On the contrary, if a State invokes an exception then the burden of proof lies on the State to show that the exception applies.<sup>106</sup>

Annex II-M to the Investment Chapter of the leaked draft TTP treaty<sup>107</sup> provides that any measures undertaken by the Australian Government in relation to “the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and the Office of the Gene Technology Regulator” would be subject to specific exemptions from the ISDS provisions under the treaty.<sup>108</sup> Annex II-M, however, is in square brackets, which means it is still under debate.<sup>109</sup>

The specific carve-outs in Annex II-M of the leaked Investment Chapter of the draft TTP Treaty could constitute Australia’s conditions on agreeing to be subject to the ISDS provision if the Australian Government considers that these particular carve-outs adequately safeguard public health. The outcome will lie in the Australian Government’s final decision on what adequately safeguards against the risks posed by this ISDS provision and on the Australian Government’s negotiating power and skill.

As such, commentators’ concerns surrounding ISDS and the looming idea that investment arbitration could create a regulatory chill in the public health sector must be nuanced by the fact that the Australian Government can include exemptions.

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and blood-products and that for Korea, real estate price stabilisation does not constitute direct expropriation; Leon Chung, Donald Robertson, Kate Lindeman and Anne Hoffmann, Herbert Smith Freehills LLP, ‘Investor-State Dispute Resolution in Australia: A Changing Landscape for Investors’ (2015) 12(1) *Transnational Dispute Management* (‘TDM’), 5 <<http://www.transnational-dispute-management.com/article.asp?key=2176>> accessed 21 July 2015.

<sup>106</sup> Karl P. Sauvant, *Yearbook on International Investment Law and Policy 2010-2011* (Oxford University Press 2012), 345-346.

<sup>107</sup> Wikileaks, ‘Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft), (*WikiLeaks release*, 25 March, 2015) <<https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf>> accessed 9 July 2015.

<sup>108</sup> Id, Annex II-M to the Draft Investment Chapter; Edwina Kwan, Herbert Smith Freehills LLP for Herbert Smith Freehills, ‘Australia’s Conflicting Approach to ISDS: Where to From Here?’ (*Kluwer Arbitration blog*, 4 June 2015) <<http://kluwerarbitrationblog.com/blog/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/comment-page-1/>> accessed 14 June 2015.

<sup>109</sup> Ibid.

Nevertheless, even though such exemptions may exclude liability for regulation in certain areas, disputes may remain with investors regarding such regulation. If such disputes remain, mediation can help parties to come to a solution that suits both the State and the concerned foreign investor and which ends the disagreement at hand.

### **3. Mediation's Potential in ISDS**

Mediation has much unexplored potential in ISDS. The potential for the resolution of an investor-state dispute before or during arbitration is high. This thesis demonstrates that mediation can help parties to settle disputes both before and during arbitration.

In fact, 35 per cent of ICSID disputes during the financial year of 2014 were settled or the proceeding was otherwise discontinued.<sup>110</sup> Of these cases, 27 per cent were discontinued at the request of one party, 46 per cent were discontinued at the request of both parties, suggesting an external settlement and 17 per cent eventuated in a settlement agreement which was embodied in an award at the parties' request.<sup>111</sup> Settlement agreements embodied in the award are commonly referred to as consent awards. The involvement of mediation in consent awards will be further discussed later in this thesis when exploring the implementation of mediation in ISDS.

#### **3a. Overcoming Challenges Related to ISDS**

Mediation can serve as a solution to the limited nature of damages available in investment arbitration although mediation is not without its challenges either. The political accountability of the State to its citizens, as well as the company's accountability to its shareholders dissuades such parties from negotiated settlements. Below, this thesis will explore how investment mediation can deal with such issues through the effective choice of an evaluative mediator. It also examines mediation's ability to explore certain interests and outcomes that are unavailable in arbitration.

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<sup>110</sup> ICSID, 'The ICSID Caseload- Statistics' (Issue 2014-2), 13  
<<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf>> accessed 16 July 2015.

<sup>111</sup> Id, 15.

### **3a.i. Exploring Interests**

As discussed, not only can costs and damages scale out of proportion, but also the nature of damages is inherently limited in investment arbitration. A claimant will either be sent home for lack of jurisdiction, be rejected at the merits, often on a technicality related to whether their concern is covered or not under the IIT or will sometimes succeed and be awarded an amount of compensation, which will not always be paid promptly by the host country. In any case, when there is more than money at stake in the dispute, as is so often the reality, the real dispute cannot always end with mere compensation, a rejection of jurisdiction or a rejection on the merits.

The State may have certain legitimate concerns regarding the interests of its citizens that in fact triggered the expropriation. Such interests and concerns cannot be dealt with appropriately in an arbitration award due to the backward-looking nature of awards. It is difficult for an arbitration monetary award to be adequate where the investment is alleged to be expropriated only in part and where part of the investment remains in the host-state. This is because the dispute is ongoing, as is the investment.

Mere compensation or an award against jurisdiction or rejecting the case on the merits will not do anything to further or ameliorate the relationship between the foreign investor and the State. Furthermore, without a future-based discussion on interests, it is not easy to adequately appease nor the concerns of the State, or those of the investor. This hypothetical represents an example of when mediation would be more suitable than arbitration. A negotiated settlement with a third party mediator could allow for more fruitful discussions of the parties' continuing concerns and could increase the chances of reconciling their interests. For example, the solution might be a simple creative solution. There could be a way that the foreign investor could change their investment in order to protect the needs of the host State. This would allow the government to change the protections put in place, to the extent that they unjustifiably affect the investor. Tribunals are unable to grant this in an award.

Alternatively, even in situations where money is the only focus of the negotiation, mediation still proves to be a successful process. Mentioned at the Harvard Executive Program on Negotiation was Duke Energy's negotiated settlement of the litigation

regarding Crystal River 3 ('CR3').<sup>112</sup> Duke Energy was in a difficult position when "a delamination, or crack, occurred in the outer layer of the containment building's concrete wall" because the prior CEO had incorrectly stated that the insurance policy fully covered Duke Energy. A settlement of an additional US\$530 million was obtained from the insurance company, Nuclear Electric Insurance Limited ('NEIL') through mediation along with the US\$305 million that NEIL had already paid.<sup>113</sup> As such, customers would receive a total of US\$835 million in insurance proceeds.<sup>114</sup> Although this was not an investment dispute and did not involve arbitration, it is an example of a fruitful negotiated monetary settlement derived from mediation.

### **3a.ii. Evaluative Mediator**

One issue that is often raised when discussing investor-state mediation is the unease surrounding accountability. This unease could be appeased with the aid of an evaluative mediator. The Duke Energy mediation, discussed directly above, is a fitting example of how an evaluative mediator can appease the tensions when the stakes are high and companies, like States, may wish to avoid accountability.

Jim Rogers, who at the time was the actual chairman, president and CEO of Duke Energy, was in a difficult position in relation to justifying settlement and released a press-statement after the mediation stating: "We believe accepting the mediator's proposal is the overall best interests of our customers and shareholders, and the monies we receive will go directly to customers to reduce their electric bills."<sup>115</sup>

Many governments and companies would rather put a case into the hands of a court or an arbitral tribunal for it to decide, rather than mediating for fear of the accountability issues that a negotiated settlement might bring. This attitude is inefficient and costly.

There are ways to get around accountability issues as has been demonstrated in this short case study on Duke Energy and more governments should explore this.

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<sup>112</sup> Duke Energy, 'Crystal River Nuclear Plant to be Retired; Company Evaluating Sites for Potential New Gas-fueled Generation' (2013 News Releases, 5 February, 2013) < <http://www.duke-energy.com/news/releases/2013020501.asp> > accessed 23 July 2015.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

#### **4. Incorporating Mediation in the TPP and other Australian IITs**

Whether sooner or later, mediation will have a much more prevalent position in the arena of ISDS. With its seat at the negotiation table of the TPP, Australia should propose wording that reflects a strengthened respect of mediation processes. The norm of reciprocity is extremely powerful.<sup>116</sup> One reading of norm of reciprocity would suggest that if the Australian Government put forward a stronger support for mediation in ISDS then other governments would reciprocate this support.

This part of the thesis will analyse drafting techniques for a stronger mediation presence in ISDS and advises the Australian Government to strongly consider its position to influence the rest of the world and shape the future of mediation in ISDS.

##### **4a. Negotiation and Mediation Pre-requisites in IITs**

As explained above, and will be further revisited below, the negotiation and mediation pre-requisites contained in IITs do not secure negotiation or mediation for any amount of time unless the wording is unmistakably clear that the States intend to provide for such attempts at negotiation or mediation before an arbitral tribunal can rule on the merits. This part of the thesis aims to revisit the uncertain nature of pre-arbitration requirements and provide clarity by finally proposing a workable draft clause for the TPP ‘initial negotiation and consultation, including mediation’ clause.

##### **4a.i. Unclear as to Mandatory Nature**

Due to the continuing confusion over the mandatory nature of negotiation and mediation pre-requisites, any such requirements included in the TPP must be clearly worded, evincing definite intention to require mediation with strong language.

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<sup>116</sup> Robert H. Mnookin, ‘In Memoriam: Roger Fisher’ (2013) 126(4), 875, Harvard Law Review, 887 <[http://www.harvardilj.org/wp-content/uploads/2014/01/Brower\\_Blanchard\\_to\\_Publish.pdf](http://www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf)> accessed 23 July 2015; Roger Fisher & Scott Brown, *Getting Together* (first published 1989, Penguin 1989 1<sup>st</sup> edition).

Relevantly, in a relatively recent ICSID case on jurisdiction<sup>117</sup> it was argued in relation to a negotiation pre-requisite that the wording “if” and “shall,” used together, introduced cumulative conditions that must all be satisfied before resort may be had to arbitration.<sup>118</sup> Specifically, article 9(2) of the Switzerland-Uruguay BIT,<sup>119</sup> provides that “if both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter *shall*, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members.”<sup>120</sup> Article 10(1) provides that “Disputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party *shall*, as far as possible, be settled amicably between the parties concerned.”<sup>121</sup> The tribunal accepted the unmistakably mandatory nature of the requirement but opined that the letter from the claimant’s predecessor company complied it with.<sup>122</sup> The tribunal, however, made no statement as to whether the requirement was one related to jurisdiction or admissibility.<sup>123</sup> Nevertheless, in relation to the 18-month litigation requirement,<sup>124</sup> it did say that if the requirement went to admissibility, its compulsory nature would be evident.<sup>125</sup> If, on the other hand, the requirement went to jurisdiction, any failure to meet the procedural pre-requisites could still be cured if they were met before the relevant decision on jurisdiction.<sup>126</sup> In declining to take a definite position on defining the requirements as concerning either jurisdiction or admissibility, the arbitral tribunal noted that the language of the

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<sup>117</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013.

<sup>118</sup> *Id.*, 33.

<sup>119</sup> *Switzerland-Uruguay BIT*, signed 7 October 1988 (entered into force 12 April 1991).

<sup>120</sup> *Id.*, Article 9(2).

<sup>121</sup> *Id.*, Article 10(1).

<sup>122</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013, 139-140.

<sup>123</sup> *Id.*, 142.

<sup>124</sup> *Switzerland-Uruguay BIT*, signed 7 October 1988 (entered into force 12 April 1991), Article 10(2).

<sup>125</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013, 142.

<sup>126</sup> *Id.*, 144, 145 and 147; *Mavrommatis Palestine Concession case*, Judgment No. 2, 30 August 1924, PCIJ, Series A, No. 2, 14-19; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, 87; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. and the Argentine Republic*, Decision on Jurisdiction, 21 December 2012, 135.

relevant treaty provision or the factual circumstances differs from case to case.<sup>127</sup> Further, it reiterated this thesis' point discussed above regarding unpredictability and lack of clarity by acknowledging that this area of investment treaty law remains in the "process of developing a *jurisprudence constante*" but states this is due to the variety of different qualifications on requirements due to the differing wording of clauses.<sup>128</sup>

#### **4a.ii. Proposal for Pre-requisites Clause**

Due to the variety of qualifications given to the pre-requisites and the resulting discrepancies in various arbitral tribunals' reasoning and conclusions, no particular drafting can conclusively predict whether an arbitral tribunal will decide that the pre-requisites are mandatory, non-mandatory or futile. Nor could any particular drafting conclusively predict whether an arbitral tribunal would determine the requirement as either concerning jurisdiction or admissibility. After an in depth study of various case law in relation to pre-requisites to arbitration,<sup>129</sup> this thesis proposes including the following wording in a pre-requisite clause providing for mediation in the TPP:

"If the dispute cannot be settled within six months, it *shall*, as a second step, be submitted to mediation." "If no mediated settlement has been concluded within a further six months, the dispute *shall*, as a third step, proceed to arbitration."

#### **4b. Government Prevention Mechanisms**

Including a pre-requisite clause, such as the proposed draft above, is but one way to avoid the dispute proceeding through to arbitration. There is also a broad range of other methods that can be used not only to bolster mediation in general but also to

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<sup>127</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013, 134.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011; *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013; *Muhammet Çap & Sehil İnşaat Endüstri Ve Ticaret Ltd. Sti. v Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction, 13 February 2015.

avoid, prevent or manage investor-state disputes once they have arisen.<sup>130</sup> These other options are available to governments and include the organisation of dispute prevention policies aimed at preventing issues and conflicts between investors and host States from escalating into formalised disputes.<sup>131</sup> The Australian Government should introduce such policies in its system of governance, alongside an IIT framework that supports mediation. This thesis will discuss the advanced approaches taken by the Governments of Peru and Colombia in order to prevent ISDS.

#### **4b.i. The Australian Government**

Prevention and management of investment treaty arbitration could involve the establishment of cooperation and consultation mechanisms involving host and home States.<sup>132</sup> Such mechanisms could facilitate direct negotiation between investors and States. For example, the establishment of a lead government agency responsible for all ISDS could help to manage and organise the effective settlement of such disputes.

Australia does not yet have one lead government agency responsible for ISDS and should take note from other governments, which have invested in such an agency. Such an agency could be involved in appointing who will represent the State at the mediations, negotiations and who will make early evaluations and fact-finding related to the risks involved in defending the case. Australian investors when faced with a conflict related to a host-State could also utilise these procedures with the support of the Australian Government to proactively plan to eliminate conflicts. Such practices are to be encouraged as they allow host-States and investors to continue their relationship, good governance and simultaneously work to make resolution of a conflict as speedy and less costly as possible through a lead agency.<sup>133</sup>

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<sup>130</sup> The United Nations Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America) edited by Susan D. Franck and Anna Joubin-Bret (Geneva and New York 2011) < [http://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20108_en.pdf) > accessed 23 July 2015.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

#### 4b.ii. Peru and Colombia's Prevention Techniques

This part of the thesis explores Latin America's apprehension towards investor-state arbitration and its developments in the early prevention and management of investor state disputes. Australia could learn from these prevention techniques.

This part of the thesis also shows how Latin American States have ceased to wholly rely on the pre-requisites contained in their IITs and have resorted to prevention and management systems like in the case of Peru and specific implementation measures, allowing the State to be fully prepared to comply, as implemented Colombia.

Latin American States have now been parties to approximately 33 per cent of the total cases registered with ICSID since its founding in 1966.<sup>134</sup> However, the most recent statistics shows a trend moving away from ISDS for Latin American States.<sup>135</sup> The ICSID yearly statistics covering South America, Central America and the Caribbean show that the percentage of cases filed to ICSID by such countries has largely decreased from 49 per cent of cases for the year of 2010, to 31 per cent of cases for the year of 2011, to 26 per cent of cases for the year of 2012, to 28 per cent of cases in 2013 and then right back down to 14 per cent in 2014.<sup>136</sup>

The decreased statistics could be explained by dissatisfaction in the system, leading to more conciliatory steps by the Latin American States. The aim is to find a better solution for both the State and investor, which avoids the burden of arbitration with foreign investors. This arguably increases the potential of both parties coming to acceptable agreements on both ends of the spectrum.<sup>137</sup> For example, Argentina settled in 2014 with Repsol, agreeing on a US\$5 billion payment in sovereign bonds

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<sup>134</sup> ICSID, 'ICSID 2014 Annual Report,' 25  
<[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID\\_AR14\\_ENG.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf)>  
accessed 24 July 2015; ICSID, 'ICSID 2010-2014 Annual Reports' available at  
<<https://icsid.worldbank.org/>> accessed 24 July 2015; ICSID, 'The ICSID Caseload- Statistics' (Issue  
2014-2) 11 <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2014-1%20English.pdf>> accessed 24 July 2015.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Carlos González-Bueno for Carlos González-Bueno & Associates, 'Is the focus of investment state arbitration switching from Latin America? If so to where?' (*Kluwer Arbitration blog*, 8 July 2014)  
<<http://kluwerarbitrationblog.com/blog/2014/07/08/is-the-focus-of-investment-state-arbitration-switching-from-latin-america-if-so-to-where/>> accessed 24 July 2015.

as compensation for the nationalisation of the oil and gas operator YPF.<sup>138</sup> Paraguay also settled an ICSID claim issuing US\$21 million in treasury bonds to French investors.<sup>139</sup> This State initiative has actually been seen as reflecting a higher degree of commitment towards foreign investors as it facilitates amicable negotiation.

Many Latin American States also prefer to include negotiation and mediation requirements in their BITs. Nevertheless, the legal question of requirements is substantially unclear as discussed<sup>140</sup> and tribunals have even held Latin American negotiation and mediation pre-requisites to be void of force and futile. This will be briefly further explored here to reiterate how the pre-requisite mediation clauses may fail without strong diplomatic channels to secure the fulfilment of such a clause.

Revisiting the *Abaclat*<sup>141</sup> majority, the tribunal found that the consultation requirement set forth in Article 8(1) of the BIT could not be considered to be of mandatory nature but merely as an expression of the good will of the parties to try to settle any dispute in an amicable way before proceeding to arbitration.<sup>142</sup> The tribunal held that this conclusion was derived from the wording in article 8(1),<sup>143</sup> “en la medida del posible” or “per quanto possibile” ie “to the extent possible.”<sup>144</sup> As such, the Tribunal considered that article 8(1) of the BIT was not drafted to impose the consultation requirements but rather was drafted to refer to the possibility of them.<sup>145</sup>

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013, 134.

<sup>141</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

<sup>142</sup> Id. 564.

<sup>143</sup> *Argentina-Italy BIT*, signed 22 May 1990, (entered into force 14 October 1993) Article 8(1): Qualsiasi controversia relativa agli investimenti insorta tra una Parte Contraente ed un investitore dell'altra, riguardo problemi regolati dal presente Accordo, sarà per quanto possibile risolta mediante consultazioni amichevoli tra le parti in controversia medesima. English Translation by Stephanie: Any dispute relating to an investment between a contracting party and an investor of the other party, regarding issues covered by this agreement, will be, as far as possible, resolved by way of amicable consultations between the parties in the same dispute.

<sup>144</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, 564.

<sup>145</sup> Ibid.

The tribunal suggested that the general purpose and aim of the consultation requirement was to allow amicable settlement where such settlement was supported by both parties, thus it could not be imposed where the parties did not have the good will to resort to such amicable solutions and that it would be futile to force the parties to enter into such consultation.<sup>146</sup> It suggested in any case that where parties were not willing to amicably settle, any such consultations would be doomed to fail.<sup>147</sup> This decision appears inappropriate. The parties agreed to consultations in the IIT so as to encourage settlement. Stating that they referred to the possibility of consultations rather than consultation to the extent possible (which arguably infers best efforts) is an all too simplistic approach. In any case, appropriate or inappropriate, the arbitral tribunals rarely enforces negotiation requirements and where they do consider such amicable settlement to be of mandatory nature it is generally held to be complied with by an action as small as sending one letter.<sup>148</sup> It is for this reason that governments must also be very wary of ignoring a letter to negotiate sent by the foreign-investor. The fact that governments still ignore such letters shows the need for a proper central agency to deal with such matters and more focus placed on such negotiation.

As such, it is imperative that the Australian Government implement internal prevention and management measures, using the example of Peru and Colombia.

Here, this thesis will discuss Peru's prevention and management techniques. After being on the receiving end of over a dozen ICSID claims since 2003,<sup>149</sup> Peru was forced to design and implement a system to appropriately prevent and deal with investor-State disputes, which avoided lengthy proceedings and costly awards.<sup>150</sup>

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<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (English) 2 July 2013, 3, 58, 95-97.

<sup>149</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration*, (Series on International Investment Policies for Development) (Geneva and New York 2010) 69 <[http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)> accessed 24 July 2015.

<sup>150</sup> UNCTAD, *How to Prevent and Manage Investor State Dispute, Lessons from Peru*, (Investment Advisory Series B, number 10, 2011) 16-17 <[http://unctad.org/en/Docs/webdiaepcb2011d9\\_en.pdf](http://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf)> accessed 24 July 2015.

The Government of Peru enacted a law and set up a sophisticated information system to inform all provincial and municipal authorities as well as State agencies of the international commitments undertaken by the central government in IITs or independent contracts.<sup>151</sup> The system also allows such sub-national levels of government to inform the central government about difficulties or problems with foreign investors and seeks their involvement.<sup>152</sup> The system is available for stakeholders and sub-national levels of government through a website put in place and operated by the Ministry of Economy on their homepage,<sup>153</sup> which aims to increase State involvement and determine appropriate action at the earliest stage of the dispute.<sup>154</sup> The system, thus also serves as a gateway for the foreign investor to open negotiations with central authorities and signal its problem or potential claim.<sup>155</sup>

In December 2006, Peru enacted law No. 28933, establishing the “coordination and response system of the State on investment-related disputes”.<sup>156</sup> The purpose of the law is to optimise the defence of the State, centralise information and set up an alert mechanism, warning of the possibly emerging investment dispute.<sup>157</sup>

The Colombian Ministry of Commerce, on the other hand, launched a programme, with the support of the United States Agency for international Development, aiming at preparing the State to deal with the ISDS.<sup>158</sup> Such action has included releasing a primer on Colombia’s investment obligations in 2009 with the aim of raising awareness among public officials of Colombia’s commitments under international investment treaties.<sup>159</sup> It has been since revised twice and the last version was released

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<sup>151</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration*, (Series on International Investment Policies for Development) (Geneva and New York 2010) 68 <[http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)> accessed 24 July 2015.

<sup>152</sup> *Ibid.*, 69.

<sup>153</sup> Peru Ministry of Economy and Finance, ‘Investor Relations’ <[www.mef.gob.pe/investor](http://www.mef.gob.pe/investor)> accessed 24 July 2015.

<sup>154</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration*, (Series on International Investment Policies for Development) (Geneva and New York 2010) 69 <[http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)> accessed 24 July 2015.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*; Peruvian Law No. 28933. Establishing the System of Coordination and Response of the State in International Investment Disputes.

<sup>157</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration*, (Series on International Investment Policies for Development) (Geneva and New York 2010) 69 <[http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)> accessed 24 July 2015.

<sup>158</sup> *Ibid.*, 78.

<sup>159</sup> Mariano Gomezperalta and Jordan Dansby, ‘Confronting investor-State Disputes: The Colombia Story’, (*Robert Wray* (‘RW’) *Political Risk Newsletter* X(1) May 2014) 2,

in 2013.<sup>160</sup> The biggest movement in this area was aimed at Colombia's central government being able to work with other agencies on an institutional document strengthening the State's investment dispute prevention strategy (CONPES 3684).<sup>161</sup>

In 2013, after much cooperation and interest from the various national agencies, Colombia published Decree 1939, implementing rules for national institutions which are in charge of defending international investment disputes in Colombia.<sup>162</sup> Decree 1939 grants the lead agency the authority to collect and produce evidence from all of the relevant sources within the Colombian Government.<sup>163</sup> The lead agency is in charge of constituting the core of Colombia's institutional arrangements to implement its ISDS commitments and ensure the defence of the State in investor-State arbitration, while handling all of the issues related to the investor's interaction with the State in the context of investment disputes, including the receipt of notifications about emerging disputes, consultations and management of the arbitration.<sup>164</sup> Further, the lead agency is given clear authority to collect and produce evidence from all relevant sources within the Colombian Government.<sup>165</sup> This type of clear authority could clarify who will sit at mediations, consultations or negotiated settlements.

Avoiding arbitration with foreign investors appears now to be at the very heart of Latin American States' policies and as a consequence of identifying a lead agency, public officials are empowered to conduct discussions with investors, thus avoiding conflict and encouraging the resort to mediation, consultation and negotiation.<sup>166</sup>

Latin America's development of prevention and management techniques in respect of investment disputes explain the significant reduction in the number of ICSID cases

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<<http://www.robertwraypllc.com/wp-content/uploads/2014/05/RWPLLC-RW-POLITICAL-RISK-NEWSLETTER-VOLUME-X-ISSUE-1-English.pdf>> accessed 24 July 2015.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration*, (Series on International Investment Policies for Development) (Geneva and New York 2010) 78

<[http://unctad.org/en/docs/diaeia200911\\_en.pdf](http://unctad.org/en/docs/diaeia200911_en.pdf)> accessed 24 July 2015.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

involving Latin American parties.<sup>167</sup> States cannot and should not solely rely on negotiation, conciliation, mediation or litigation requirements stipulated within the IITs to avoid arbitration. Rather, States need to support these procedural requirements to negotiate with a governmental agency in charge of ISDS, created to advance the diplomatic channels between foreign investors, other sub-national State bodies and the central government itself. The examples of Peru and Colombia have been used to demonstrate such initiatives in preventing and managing the Investor-State disputes.

#### **4c. Implementation of Mediation Within the TPP**

As discussed, the TPP is currently being negotiating by twelve countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, The United States of America and Vietnam), which together represent around 40 per cent of world gross domestic product ('GDP').<sup>168</sup> It is imperative that due thought go into every article of the TPP, most particularly in the ISDS clause, as it will be the enforcement clause of the TPP. The TPP has the potential to forge stronger economic links between economies in the Asia-Pacific region based on common rules for trading and this thesis acknowledges that it is in Australia's interests to be involved.<sup>169</sup> The Obama Administration has labelled the TPP as the cornerstone for its economic policy in the Asia-Pacific.<sup>170</sup> As the TPP's focus is centred on the Asia-Pacific area, its ISDS clause should reflect practices in the region.

It is no secret that our Asian counterparts often use a hybrid system of dispute settlement, running arbitration alongside mediation, so why not include a variation of this in the TPP ISDS clause? A closer look into such processes is certainly necessary.

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<sup>167</sup> ICSID, 'ICSID 2014 Annual Report,' 25  
<[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID\\_AR14\\_ENG.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR14_ENG.pdf)> accessed 24 July 2015; ICSID, 'ICSID 2010-2014 Annual Reports' available at <<https://icsid.worldbank.org/>> accessed 24 July 2015; ICSID, 'The ICSID Caseload- Statistics' (Issue 2014-2) 11 <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2014-1%20English.pdf>> accessed 24 July 2015.

<sup>168</sup> DFAT, 'Trans-Pacific Partnership Agreement' <<http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>> accessed 24 July 2015.

<sup>169</sup> Ibid.

<sup>170</sup> Office of the United States Trade Representative, 'Overview of TPP' <<https://ustr.gov/tpp/overview-of-the-TPP>> accessed 24 July 2015.

Hybrid dispute settlement systems refer to the combination of mediation and arbitration, known as Arb-Med-Arb or Arb-Med. Such processes, typically used in Asia, sometimes allow the practitioner to serve as both arbitrator and mediator. For example, in Arb-Med-Arb, the arbitrator (much like the judges in the Chinese domestic court system) has a view to encourage settlement.<sup>171</sup> If the mediation bears no fruit and the parties are not able to agree on a resolution, the same arbitrator who became a mediator could revert back to his or her position as an arbitrator to render a final and binding award. However, if the mediation is fruitful, the arbitrator could equally resume his position as arbitrator and put forward the settlement agreement as a consent award. This process will be discussed in more detail later further below. This form of hybrid dispute resolution process has been practised in Asia, notably in China and Japan.<sup>172</sup> Mediation is well known for its flexibility, openness to exploring options and increased party autonomy. Binding arbitration, on the other hand, is well known for the finality it provides to disputes, and independent nature to the host-State's courts. Nevertheless, it is also, as explored above, infamous for its costs, unpredictability, length and limited damages. Both arbitration and mediation, however, have their drawbacks. Mediation, based on mutual agreement of parties alone can be hard to achieve, especially in the initial stages. Arbitration, on the other hand, may render parties less in control of the proceedings. Arb-Med-Arb, allows parties the possibility of arbitration, which may facilitate mediation if it is deemed necessary and if parties consent. Further, having had the opportunity for hearings (arbitration) followed by an attempt at settlement (mediation), the chances of settlement may be higher as the prospects of success might become more realistic once the arbitration has commenced. This type of process aims at increasing party control over the process, particularly in the mediation stage when parties can clearly set out their interests and values. This hybrid process offers more party autonomy than a sole arbitration process could. Further, even if the mediation is unsuccessful, parties need not reconstitute a new arbitral tribunal by allowing the once-arbitrator/turned-mediator to revert back with his or her knowledge of the pleadings in

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<sup>171</sup> May Tai and Damien McDonald for Herbert Smith Freehills, Dispute Resolution, 'Judicial Mediation in China Explained' (*ADR Notes* 30 July 2012) <<http://hsfnotes.com/adr/2012/07/30/judicial-mediation-in-mainland-china-explained/>> accessed 24 July 2015.

<sup>172</sup> Gabrielle Kaufmann-Kohler and Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) *Journal of international Arbitration*, 479-492 <<http://www.arbitration-icca.org/media/0/12319139722760/00951635.pdf>> accessed 24 July 2015.

the first instance, to finally decide the case. It has been suggested by arbitrators and scholars that the combination of mediation and arbitration complements the advantages of both proceedings, and reconciles the drawbacks of both, resulting in a fair, efficient and cost-effective process for resolving disputes.<sup>173</sup>

Combinations where the arbitrator also serves as mediator can be quite helpful to resolving disputes. The arbitrator already knows the case well and can avoid parties paying extra costs and can avoid delays. In such circumstances, the tribunal's services may be used with much more flexibility, which may allow the arbitrator to apply more appropriate and relevant measures to resolve the dispute as a mediator.

Nevertheless, these processes may compromise the confidential nature of the mediation. Further, the impartiality of the mediator/arbitrator is impossible to ascertain. A person who mediates and then, if the mediation fails, re-assumes the role of arbitrator may be perceived as taking into account what has been conveyed to him or her informally and confidentially in the mediation process, especially during "caucuses". As a result, parties might be inhibited in their discussions with the mediator if they believe that there is a possibility that the mediation will not be successful and the mediator might become an arbitrator again at a later stage and take into account any private information the party may reveal in seeking settlement. This would render the advantages of such a process relatively counter-effective.

Nevertheless, the Australian Government, in its negotiations of the TPP, should bear in mind the importance of combination Arb-Med-Arb methods in the Asian legal culture. In the Chinese legal context, caucusing may not be as much of a risk as it seems.<sup>174</sup> The critics seem to raise doubts as to the abilities of mediators/arbitrators in performing their role, rather than regarding the process itself. It might just be a matter of experience and training. Asian culture seems to hold a natural inclination towards mediation processes. If it is possible in Asia, then perhaps with the appropriate amount of training and experience, more countries could develop and increase the exploration and practice of combined processes involving both mediation and arbitration by the same neutral person. Arbitrators could learn to ensure that their

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

judgement is not affected by knowledge or evidence gained during the course of the mediation. As such, in a similar fashion, well-trained arbitrators/mediators should have the ability to remain impartial. Despite doubts as to the impartiality of arbitrators who have served as mediators, Chinese scholars and renown commentators have claimed that the trust built between arbitrators and the parties through mediation could actually facilitate a more acceptable arbitral award for parties.<sup>175</sup> The Chinese arbitration law overtly provides that the arbitral tribunal *may* carry out mediation prior to rendering an arbitral award and *if* the parties request mediation, the arbitral tribunal *must* carry out the mediation proceedings.<sup>176</sup> Many Chinese scholars and legal commentators insist that the mediator is the most ideal person to arbitrate the case and deliver a fair and acceptable arbitral award, after a failed mediation. Given the prevalence of such practice of mixing arbitration with mediation, in Asia, it is important to develop a realistic and accurate perception of such practices. The drafting of the TPP ISDS clause should reflect this perception. All the while the TPP ISDS clause should avoid any pitfalls that the hybrid may have from an Australian perspective, whilst still obtaining the advantages of mediation.

#### **4c.i. A Suitable Arb-Med-Arb Combination**

This part of the thesis specifically addresses certain mediation and arbitration combinations available in Asian-based international dispute settlement centres. Each will be analytically evaluated using an Australian perspective, in order to come to an acceptable wording for an ISDS clause for the TPP, which also accommodates the Asian culture of mediation, whilst remaining palatable to other legal cultures.

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<sup>175</sup> Id, 486; Arbitration Law of the People’s Republic of China, promulgated by the Standing Committee of the National People’s Congress on August 31, 1994, and effective as of September 1, 1995, Article 51, Article 52 and Article 51 provide that “[t]he arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly. If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect.” Article 52 also provides that “[a] written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission and then served on both parties. The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof. If the written conciliation statement is repudiated by a party before he signs for receipt thereof, the arbitral tribunal shall promptly make an arbitral award.”

<sup>176</sup> Ibid.

The CIETAC Arbitration Rules provide for conciliation within the arbitration to be undertaken by the arbitrator where both parties wish to conciliate or have given prior consent.<sup>177</sup> Notably, Article 47(3) of the CIETAC Arbitration Rules provide that “during the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal considers that further conciliation efforts will be futile.”<sup>178</sup> The fact that the arbitrator is also the conciliator legitimises any decision on whether those efforts would be futile or not. Further, this decision is forward-looking and coming from an involved perspective rather than retrospective and coming from a removed perspective. It is arguably a more effective way of going about deciding whether conciliation efforts are futile

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<sup>177</sup> China International Economic and Trade Arbitration Commission (‘CIETAC’) Arbitration Rules, revised and adopted by the China Council for the Promotion of international Trade/ China Chamber of international Commerce on November 4, 2014, effective as at 1 January 2015, Article 47 providing: “1. Where both parties wish to conciliate, or where one party wishes to conciliate and the other party’s consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings. The parties may also settle their dispute by themselves. 2. With the consents of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate. 3. During the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal considers that further conciliation efforts will be futile. 4. The parties shall sign a settlement agreement where they have reached settlement through conciliation by the arbitral tribunal or by themselves. 5. Where the parties have reached a settlement agreement through conciliation by the arbitral tribunal or by themselves, they may withdraw their claim or counterclaim, or request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement. 6. Where the parties request for a conciliation statement, the conciliation statement shall clearly set forth the claims of the parties and the terms of the settlement agreement. It shall be signed by the arbitrators, sealed by CIETAC, and served upon both parties. 7. Where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award. 8. Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consents of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate. 9. Where conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings. 10. Where the parties have reached a settlement agreement by themselves through negotiation or conciliation before the commencement of an arbitration, either party may, based on an arbitration agreement concluded between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement. Unless otherwise agreed by the parties, the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course. The specific procedure and time period for rendering the award shall not be subject to other provisions of these Rules.” <[http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf)> accessed 25 July 2015.

<sup>178</sup> Ibid.

than having removed arbitrators decide after the fact on whether pre-requisites to arbitration, such as conciliation and mediation, would be futile in the abstract.

Article 47(7) of the CIETAC Arbitration Rules states that “where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award.” Allowing the arbitrator, if the mediation fails, to render an award thereby completes the final option of the general arb-med-arb hybrid.

Interestingly, article 47(10) of the CIETAC Arbitration Rules also provides that “where the parties have reached a settlement agreement by themselves through negotiation or conciliation before the commencement of an arbitration, either party may... request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement.” It further states that “unless otherwise agreed the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course.” Notably, the specific procedure and time period for rendering the award shall not be subject to the other provisions of the CIETAC Arbitration Rules. This is an admirably bold article as it encourages the early settlement of disputes, while allowing such a settlement to be granted the enforcement protection that is conferred on arbitral awards. This is done through the request to constitute an arbitral tribunal to put the settlement in the form of an award.

Article 47 of the CIETAC Arbitration Rules highlights the importance of negotiated settlements in Asian legal cultures. Another example can be found in the Japan Commercial Arbitration Association (‘JCAA’) Commercial Arbitration Rules, which address mediation as an independent simultaneous process to arbitration (rule 54) or, if parties agree, as an involved component where the arbitrator also serves as mediator (rule 55).<sup>179</sup> Rule 54(1) allows the parties, at any time during the course of the arbitral

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<sup>179</sup> Japan Commercial Arbitration Association (‘JCAA’) Commercial Arbitration Rules, as amended and effective on 1 February, 2014, Rule 54, Rule 55 as follows:

*“Rule 54. Mediation*

- 1. The Parties, at any time during the course of the arbitral proceedings, may agree in writing to refer the dispute to mediation proceedings under the International Commercial Mediation Rules of the JCAA (the “ICMR”). No arbitrator assigned to the dispute shall be appointed as mediator, except if appointed under Rule 55.1.*
- 2. If the Parties enter into an agreement under Rule 54.1, the arbitral tribunal, at the request of either Party, shall stay the arbitral proceedings.*

proceedings, to agree in writing to refer the dispute to mediation proceedings under the International Commercial Mediation Rules of the JCAA (the ‘ICMR’). Under rule 54, no arbitrator assigned to the dispute shall be appointed as mediator, except if appointed under rule 55. Rule 54(3) provides that all offers, admissions or other statements by the parties or recommendations by the separate mediator, made during the course of mediation proceedings shall be inadmissible as evidence in the arbitral proceedings unless the parties otherwise agree. If the parties wish for the arbitrator to become the mediator then this is possible under rule 55 where parties consent in writing to such a procedure. Under this procedure, however, the arbitrator serving as a mediator cannot consult separately with any of the parties orally or in writing (sometimes referred to as ‘caucusing’) unless the parties agree to this in writing and if they do, the arbitrator shall disclose all consultations that have taken place, without releasing their content. Notably, within the part on costs of rule 55, the mediation hours shall be calculated in the arbitrator’s remuneration as arbitration hours.

The JCAA Rules address the fear of bias by disallowing caucusing unless the parties agree it upon. Further, the rules relating to mediation are centred upon the principle of consent. Such consent can be given at any time during the arbitration. Charging more arbitration hours is likely to further increase the arbitrator’s costs. Nevertheless, the

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*3. All offers, admissions, or other statements by the Parties, or recommendations by the mediator, made during the course of the mediation proceedings shall be inadmissible as evidence in the arbitral proceedings unless otherwise agreed by the Parties.*

*4. If the mediation proceedings are terminated under Rule 10.2(3), 10.2(4), or 10.2(5) of the ICMR, the arbitral tribunal, at the request of either Party, shall resume the arbitral proceedings.*

*Rule 55. Special Rules for the ICMR if an Arbitrator serves as Mediator*

*1. Notwithstanding Rule 54.1, the Parties may agree in writing to appoint an arbitrator assigned to the same dispute as a mediator, and refer the dispute to mediation proceedings under the ICMR. If the Parties do so, the Parties shall not challenge the arbitrator based on the fact that the arbitrator is serving or has served as a mediator.*

*2. Notwithstanding Rule 9.5 of the ICMR, an arbitrator who serves as mediator in regard to the same dispute shall not consult separately with any of the Parties orally or in writing, without the agreement of the Parties in writing. The arbitrator shall disclose to all other Parties, in each instance, the fact that such consultation has taken place, excluding the contents thereof.*

*3. The Parties shall submit to the JCAA a copy of the agreement under Rule 55.1, when they refer the dispute to mediation proceedings under Rule 55.1.*

*4. The mediator’s remuneration under Rule 55 and the administrative fee for the mediation proceedings shall be calculated as follows:*

*(1) the administrative fee for the mediation proceedings are not required to be paid;  
and*

*(2) the Mediation Hours shall be deemed to be the arbitrator’s Arbitration Hours in calculating the arbitrator’s remuneration.*

*5. The ICMR, except Chapter II, and the Mediation Cost Regulation shall apply to the mediation under Rule 55.”* <[http://www.jcaa.or.jp/e/arbitration/docs/Arbitration\\_Rules\\_2014e.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf)> accessed 25 July 2015.

parties would save on owing no alternative mediation administrative costs or separate mediator costs. Therefore, this could be a cost-worthy solution.

The Singapore International Arbitration Centre ('SIAC') and the Singapore International Mediation Centre ('SIMC') offer the tiered dispute resolution mechanism (the 'Arb-Med-Arb Protocol').<sup>180</sup> If parties are able to settle their disputes through mediation, their mediated settlement may also be recorded as a consent award. The SIAC website<sup>181</sup> states that consent awards are general accepted as arbitral awards and, subject to local legislation and/or requirements, are generally enforceable in approximately 150 countries under the New York Convention.

Within the Singapore model, in order for the AMA Protocol to apply, parties must first agree that the dispute shall be settled in the course of the mediation at the SIMC and shall then file a notice of arbitration with the Registrar of SIAC in accordance with the arbitration rules applicable to the arbitration proceedings.<sup>182</sup>

The SIAC website also provides a draft arbitration clause.<sup>183</sup> As is visible by references to the *existence* and *validity* of the *contract*, the draft clause appears to be written with international commercial arbitration in mind however the clause could be adapted for IITs as the SIAC-SIMC rules equally are available to ISDS.

The SIMC administered mediation phase is a separate step that only comes into the process after the tribunal has been constituted and after the exchange of the Notice of

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<sup>180</sup> Singapore International Mediation Centre ('SIMC'), 'SIAC-SIMC Arb-Med-Arb Protocol' ('AMA Protocol') <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>> accessed 25 July 2015.

<sup>181</sup> Singapore International Arbitration Centre ('SIAC'), 'The Singapore Arb-Med-Arb Clause' <<http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause>> accessed 25 July 2015.

<sup>182</sup> Singapore International Mediation Centre ('SIMC'), 'SIAC-SIMC Arb-Med-Arb Protocol' 1-2 ('AMA Protocol') <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>> accessed 25 July 2015.

<sup>183</sup> Singapore International Arbitration Centre ('SIAC'), 'The Singapore Arb-Med-Arb Clause' *Draft arbitration clause: "All disputes, controversies or differences ("Dispute") arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force. The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms."*

<<http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause>> accessed 25 July 2015.

Arbitration and Response to the Notice of Arbitration.<sup>184</sup> The mediation shall be completed within 8 weeks from the Mediation Commencement Date, unless the Registrar of SIAC, in consultation with SIMC, extends this time.<sup>185</sup> If the dispute cannot be settled by mediation prior to the expiration of the time, SIMC would promptly inform the registrar of SIAC.<sup>186</sup> If the mediation does not bear any fruit then the arbitration would recommence, upon such notification.<sup>187</sup> Alternatively, in the event of a settlement of the dispute, SIAC shall refer the settlement agreement to the tribunal, which may render a consent award on the terms agreed to by the parties.<sup>188</sup>

Although the CIETAC, JCAA and SIAC Arbitration Rules are unique in their own right, one common thread is that they all provide for some form of mediation within the process of arbitration. They also all provide the possibility for a consent award to be put forward by the arbitrator, subsequent to a party agreement. Although they differ in whether the arbitrator serves as a mediator, much can be learnt from the different choices of drafting and different levels of sensitivity regarding the issue.

#### **4c.i.a. Consent Awards**

Since consent awards are prevalent in the Asian legal culture, governments negotiating the TPP should consider an ISDS clause that allows the arbitrator to conclude consent awards upon agreement. This thesis presents due research as to the enforceability of consent awards in order to ascertain their practical relevance.

The International Council for international Arbitration ('ICCA') defines arbitration as "a method of dispute settlement in which the parties agree to submit their dispute to a third person who will render a final and binding decision in place of the courts."<sup>189</sup> It

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<sup>184</sup> Singapore International Mediation Centre ('SIMC'), 'SIAC-SIMC Arb-Med-Arb Protocol' 4-5 <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>> accessed 25 July 2015.

<sup>185</sup> Id, 6.

<sup>186</sup> Id, 7.

<sup>187</sup> Id, 8.

<sup>188</sup> Id, 9.

<sup>189</sup> International Council for Commercial Arbitration ('ICCA'), 'ICCA's Guide to the Interpretation of the New York Convention 1958: A Handbook for Judges' (2011) 16-17 <[http://www.arbitration-icca.org/media/1/13890217974630/judges\\_guide\\_english\\_composite\\_final\\_jan2014.pdf](http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf)> accessed 25 July 2015; Yaroslau Kryvoi and Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (*Brooklyn Journal of International Law*, forthcoming, 2015) 24

is without any doubt that not all dispute resolution methods qualify as arbitration. The New York Convention notably does not cover mediation or expert determination as unaccompanied processes.<sup>190</sup> Although there has been no notable decision refusing to enforce or setting aside a consent award, some argue that a consent award reached in mediation is a trick of legal fiction as the arbitrator is not, in some circumstances, presented with a current dispute and there is nothing to resolve but the limited task of granting the settlement a form of arbitral award.<sup>191</sup> This argumentation might apply to CIETAC's bold article 47(10), which as above allows parties who settle before coming to arbitration to ask CIETAC to constitute the arbitral tribunal to decide on a consent award.<sup>192</sup> Thus, as admirable as it might be, the provision could bear difficulties at the enforcement stage if a party decided to renounce on its negotiated settlement. Article I(1) of the New York Convention provides that it applies to "the recognition and enforcement of arbitral awards" and article I(2) states that arbitral awards shall include "not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted."<sup>193</sup> This suggests that mediated settlements reached before the commencement of arbitral proceedings should not be enforceable where a mediated or other settlement is reached before the initiation of the arbitration procedure.<sup>194</sup>

Admittedly, consent awards are not the most ideal means of ensuring the enforcement of mediated settlements of disputes that have not yet been submitted to arbitration. Rather, there needs to be a special mechanism to enforce such settlement agreements. Although the United Nations Commission on International Trade Law has discussed the possibility of this, no such special mechanism exists yet.<sup>195</sup>

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<[http://adresources.com/docs/adr/2-4-](http://adresources.com/docs/adr/2-4-341/Consent%20Awards%20in%20International%20Arbitration.pdf)

341/Consent%20Awards%20in%20International%20Arbitration.pdf> accessed 25 July 2015.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> China International Economic and Trade Arbitration Commission ('CIETAC') Arbitration Rules, revised and adopted by the China Council for the Promotion of international Trade/ China Chamber of international Commerce on November 4, 2014, effective as at 1 January 2015

<[http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf)> accessed 25 July 2015.

<sup>193</sup> Convention on the Recognition and Enforcement of Foreign Awards (New York, 1958) ('The New York Convention') [1958], signed 10 June 1958 (entered into force 7 June 1959), Article I.

<sup>194</sup> Yaroslau Kryvoi and Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (*Brooklyn Journal of International Law, forthcoming*, 2015) 26

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341/Consent%20Awards%20in%20International%20Arbitration.pdf> accessed 25 July 2015.

<sup>195</sup> Id, 25; United Nations Commission on International Trade Law, "Planned and Possible Future Work- Part III. Proposal by the United States: Future Work for Working Group II" (Forty-Seventh

As such, when drafting the ISDS clause, one must be mindful of the need to constitute the arbitral tribunal to which the parties submit before the mediation achieves a settlement in order for the enforcement of any such consent award to be guaranteed.

#### **4c.i.b. The Arbitrator Serving as Mediator**

Each model proposed in SIAC, JCAA and CIETAC respectively differentiate from each other on a scale of conservatism in the approach of combining arbitration with mediation. It seems China has the boldest process, having stuck to its historic roots of mediation<sup>196</sup> despite international hesitations against its arbitrators serving as mediators and against the enforcement of negotiated settlements being concluded before the constitution of the arbitral tribunal and being subsequently submitted to arbitration to be rendered as consent awards.<sup>197</sup> In contrast, although the JCAA allows the arbitrator to serve as a mediator where parties agree, the JCAA does not allow for caucusing unless parties agree in writing.<sup>198</sup> SIAC is even more internationalised, evidenced by the strict separation of the arbitration and mediation processes and distinct centres. Under the SIAC-SIMC AMA Protocol, the arbitrator(s) and mediator(s) are separately and independently appointed by SIAC and SIMC respectively, under the applicable arbitration rules and mediation rules of each Centre.<sup>199</sup> Unless parties otherwise agree, the arbitrator(s) and the mediator(s) will generally be different persons.<sup>200</sup> As such, SIAC appears to be the most conservative centre in this aspect. This process could be palatable to an Australian legal culture.

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<sup>196</sup> Gabrielle Kaufmann-Kohler and Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China" (2008) 25(4) *Journal of International Arbitration*, 480-483 on Confucianism and mediation, 485-486 on the historical development of mediation within arbitration proceedings in China <<http://www.arbitration-icca.org/media/0/12319139722760/00951635.pdf>> accessed 24 July 2015.

<sup>197</sup> China International Economic and Trade Arbitration Commission ('CIETAC') Arbitration Rules, revised and adopted by the China Council for the Promotion of International Trade/ China Chamber of International Commerce on November 4, 2014, effective as at 1 January 2015, Article 47(1), Article 47(10) <[http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf)> accessed 25 July 2015.

<sup>198</sup> Japan Commercial Arbitration Association ('JCAA') Commercial Arbitration Rules, as amended and effective on 1 February, 2014, Rule 54(1), Rule 55(2) <[http://www.jcaa.or.jp/e/arbitration/docs/Arbitration\\_Rules\\_2014e.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf)> accessed 25 July 2015.

<sup>199</sup> SIAC FAQs- Singapore International Mediation Centre' ('SIMC'), *Q: Will the mediator be the same person as the arbitrator?* <<http://simc.com.sg/resources/faqs/#arbitrator>> accessed 25 July 2015.

<sup>200</sup> *Ibid.*

#### **4c.ii. Proposal for TPP**

“The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the dispute through mediation. Any settlement reached in the course of mediation *shall* be referred to the appointed arbitral tribunal and be made as a consent award on agreed terms”

#### **Conclusion**

Throughout this thesis, I aimed to show my readers a realistic perspective on mediation’s potential for increased involvement in ISDS. This thesis was written with the motivation that the Australian Government would seriously consider mediation’s potential in ISDS. With an Australian perspective, I analysed overseas approaches.

This thesis first demonstrated the downsides to arbitration in order to alert the reader to the real issues involved in the investment treaty regime, such as the costs, damages, unpredictability of outcomes and the unaccountability of investors, due to their lack of treaty obligations stipulated within IITs. This thesis explored ISDS from both an international and domestic historical perspective and illustrated its development. I wanted to illuminate my audience by clarifying what I perceive to be the mistaken conceptions in the Australian media, as well as nuancing these views with statistics.

I deployed cases to find the most appropriate wording for pre-requisite clauses and embarked on an intensive study of Asian combination practices of mixing arbitration with mediation, in order to test whether mediation during arbitration would be palatable to an Australian audience. The results suggest that the procedures provided by SIAC, particularly, the procedure of allowing arbitration followed by mediation at separate centres and by separate individuals, was an adequate procedure, which still reflected the Asian culture of mediation. I believe that, since the TPP focuses on the Asian Pacific region, mediation should be a necessary component of any ISDS clause.

More concretely, I suggested a three-step process to facilitate settlement. First, using definitive words such as *if* and *shall*, the TPP should include an amicable settlement

phase. In this phase, parties can maximise their chances of settlement through diplomatic channels and central agencies created for handling such disputes. Second, if amicable settlement is impossible between the State and the investor six months after parties became aware of the dispute, I suggest the help of a third party mediator. Parties would need to mediate for six months before commencing arbitration. As a third step, parties must agree to attempt in good faith to resolve the dispute through further mediation during the stage of arbitration. There are many ways to go about this last step. One conservative way is through SIAC and SIMC, as above. This thesis further suggests that Australia open its mind up to arbitrators serving as mediators.

My hypothesis that mediation bears great potential in ISDS is based upon the need to explore interests in ISDS and the need to save costs, time and resources. I believe that there is strength in my hypothesis. My hypothesis can be best realised in a world that bases importance on seeking the true resolution of disputes. One where parties are able to put grudges, emotions and money to one side to explore all of the issues at stake in order to work together or end the relationship on agreeable terms. My hypothesis accepts that there will be occasions where mediation is not the most suitable option. As I stated, investment arbitration has its place in ISDS, often when parties no longer see eye to eye with each other; the State has fully expropriated the investor of their investment; and there is nothing left to gain or lose but money. Mediation is not easy. In some circumstances it may be a quick flight to hell and back. However, when the parties walk out, they retain their pride, honour and prestige. The only lost negotiation, therefore, is no negotiation at all.

Considering the fact that negotiations usually produce efficient business, this thesis represents a small step towards greater and more in depth Australian research on advancing our ISDS tactics through negotiation and an even bigger step on the long road to a more efficient world, where parties can negotiate successfully. The TPP represents a new opportunity for Australia, a new dawn. Australia has a unique opportunity in the coming years to leave its international legal footprint in stone through embracing the Asian legal culture of mediation in arbitration. If the Australian Government decides to accept this 50-page invitation to become a pioneer in the field of mediation among the Western States, it could lead by example.

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