

The Viability of Investment Mediation in the Philippines

Angela Ray T. Abala*

I. INTRODUCTION.....	743
II. BITS AND THE PHILIPPINES	747
A. <i>Investments and Investors</i>	
B. <i>Investment Arbitration Cases Involving the Philippines</i>	
III. CHALLENGES AND CRITICISMS AGAINST INTERNATIONAL INVESTMENT ARBITRATION	754
IV. INVESTMENT MEDIATION AS A POSSIBLE ALTERNATIVE.....	758
A. <i>Mediation as a Possible Alternative to Investment Arbitration</i>	
B. <i>Commencing an Investment Mediation</i>	
V. INVESTMENT MEDIATION IN THE PHILIPPINES.....	765
A. <i>Opt-In Mediation</i>	
B. <i>Mediation During the Cooling-Off Period</i>	
VI. CONCLUSION.....	772

I. INTRODUCTION

Bilateral Investment Treaties (BITs) have become one of the “most remarkable”¹ developments in international investment law. BITs contain obligations that countries mutually agree to in order to promote and protect investments of the nationals and companies of the signatory states in each other’s territory.² Investment protection standards typically included in BITs

* ’20 LL.M., in International Legal Studies, *with distinction*, Georgetown University Law Center; ’14 J.D., *with honors*, Ateneo de Manila University School of Law. The Author is currently a Research Associate at the Singapore International Dispute Resolution Academy.

Cite as 67 ATENEO L.J. 743 (2023).

1. Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC’Y REV. 805, 805 (2008).
2. CRISTINA-ELENA POPA TACHE, INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 81 (2020); Legal Information Institute, *Bilateral Investment*

are non-arbitrariness, non-discrimination, expropriation only with compensation, fair and equitable treatment, and full protection and security.³ BITs also include mechanisms for Investor-State Dispute Settlement (ISDS).⁴ Private investors are given access to binding dispute settlement, including international arbitration, against the sovereign state hosting their investment to challenge the host state's actions that they think are not compliant with its BIT obligations.⁵ States enter into BITs as they see it as a tool that can facilitate foreign direct investment and stimulate economic development.⁶ Signing a BIT shows that a host state is ready "to provide investors with an environment conducive to their investments, giving stability, transparency[,] and predictability."⁷ As of November 2022, the United Nations Conference on Trade and Development (UNCTAD) reports that there are 2,221 BITs in force.⁸

The Philippines is no stranger to this regime of international investment agreements. It has been a party to 39 BITs, with the latest treaties concluded in 2022 being with Israel and the United Arab Emirates.⁹ Out of those 39 BITs, 32 are still in force.¹⁰ The Philippines is also a party to another 17 treaties

Treaty, available at https://www.law.cornell.edu/wex/bilateral_investment_treaty (last accessed Jan. 31, 2023) [<https://perma.cc/KJ8Z-NYKC>] & Thomson Reuters Practical Law, *Bilateral Investment Treaty (BIT)*, available at [https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=(sc.Default)) (last accessed Jan. 31, 2023) [<https://perma.cc/CDP3-KRDK>].

3. KRISTA NADAKAVUKAREN SCHEFER, *INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS* 36 (2d ed. 2016) & Legal Information Institute, *supra* note 2.
4. Yackee, *supra* note 1, at 809.
5. *Id.* & SCHEFER, *supra* note 3, at 1.
6. Yackee, *supra* note 1, at 805-06 & SCHEFER, *supra* note 3, at 34.
7. POPA TACHE, *supra* note 2, at 83.
8. United Nations Conference on Trade and Development: Investment Policy Hub, *International Investment Agreements Navigator: Most Recent IIAs*, available at <https://investmentpolicy.unctad.org/international-investment-agreements> (last accessed Jan. 31, 2023) [<https://perma.cc/48CR-Y4FB>].
9. United Nations Conference on Trade and Development, *International Investment Agreements Navigator: Philippines*, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/166/philippines> (last accessed Jan. 31, 2023) [<https://perma.cc/7HH3-5W5M>].
10. *Id.*

with investment provisions, such as regional investment treaties and free trade agreements, that include similar investment protections and dispute settlement mechanisms found in BITs.¹¹ All but one of the Philippines' treaties with investment provisions are currently in force.¹²

The Philippines is also familiar with the binding ISDS mechanisms that come with signing and ratifying a BIT or other international investment agreement.¹³ The Philippines has been involved in six international investment arbitration cases — five of which have been concluded and one is currently pending¹⁴ — and one investment mediation case.¹⁵

International investment arbitration is the most dominant mechanism to resolve disputes between investors and states.¹⁶ In recent years, however, international investment arbitration has come under close scrutiny.¹⁷ International investment arbitration has been criticized to be too slow a process that costs too much money and frays business relationships.¹⁸ There are likewise difficulties in enforcing investment arbitration awards.¹⁹ Furthermore, the legitimacy of the investment arbitration system has also been questioned.²⁰

11. *Id.*

12. *Id.*

13. *Id.*

14. International Center for Settlement of Investment Disputes, Cases Database, available at <https://icsid.worldbank.org/cases/case-database> (last accessed Jan. 31, 2023) [<https://perma.cc/KRC4-S8CP>].

15. Luke Eric Peterson, *In an Apparent First, Investor and Host-State Agree to Try Mediation Under IBA Rules to Resolve an Investment Treaty Dispute*, INVESTMENT ARB. REPORTER, Apr. 14, 2016, available at <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute> (last accessed Jan. 31, 2023) [<https://perma.cc/Q5LU-HGB6>].

16. Singapore International Dispute Resolution Academy, SIDRA International Dispute Resolution Survey: 2022 Final Report, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html> (last accessed Jan. 31, 2023) [<https://perma.cc/SRF7-LFFM>] [hereinafter SIDRA Survey: 2022 Final Report].

17. TRADCRAFT EXCHANGE, INTERNATIONAL INVESTMENT AGREEMENTS UNDER SCRUTINY (2015).

18. *Id.* at 7-8.

19. *Id.* at 19.

20. *Id.* at 13-14.

To address some of the concerns plaguing investment arbitration, mediation has emerged as a possible alternative to resolve investor-state disputes.²¹ Mediation is seen as a faster and less expensive method that facilitates the preservation of business relationships.²² In fact, mediation, as an alternative to investment arbitration, has been gaining popularity in recent years.²³ Mediation has been explicitly included in newer BITs and free trade agreements.²⁴ The International Centre for Settlement of Investment Disputes (ICSID), the world's leading institution that focuses on investment disputes, developed the first-ever institutional rules for investor-state mediation, which took effect on 1 July 2022.²⁵ The recent Singapore Convention on Mediation,²⁶ formally the United Nations Convention on International Settlement Agreements Resulting from Mediation,²⁷ is also believed to encourage more investors and states to mediate their disputes.²⁸

Given these developments, more states may find themselves in investment mediation proceedings in the coming years. The Philippines has, in fact, been

-
21. UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 38th Session, Possible Reform of Investor-State Dispute Settlement (ISDS), ¶ 38, U.N. Doc. A/CN.9/WG.III/WP.166/Add.1 (July 30, 2019).
 22. *Id.* & Madina Dumanova & Per Neuburger, Beyond Investment Arbitration: Investment Mediation as a 'New Light', available at <https://www.ibanet.org/beyond-investment-arbitration-investment-mediation-new-light> (last accessed Jan. 31, 2023) [<https://perma.cc/UY95-NEAE>].
 23. Dumanova & Neuburger, *supra* note 22.
 24. Investment treaties that have incorporated mediation as a means to deal with disputes between the contracting parties include the EU-Singapore Investment Protection Agreement; Canada-European Union Comprehensive Economic and Trade Agreement; the Dominican Republic-Central American Free Trade Agreement; and the Mainland and Hong Kong Closer Economic Partnership Agreement.
 25. International Center for Settlement of Investment Disputes, Draft ICSID Mediation Rules (Introductory Note), available at <https://icsid.worldbank.org/resources/rules-and-regulations/mediation-rules/introductory-note> (last accessed Jan. 31, 2023) [<https://perma.cc/9NH7-DDAF>].
 26. United Nations Convention on International Settlement Agreements Resulting from Mediation, *opened for signature* Aug. 7, 2019, U.N. Doc. A/73/17.
 27. *Id.*
 28. James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, 20 PEPP. DISP. RESOL. L.J. 78, 88 (2020).

involved in one out of a handful publicly known investment mediation cases.²⁹ In 2016, the Philippines agreed to mediate an investment dispute it had with French engineering company Systra SA.³⁰ *Systra SA v. Republic of the Philippines*³¹ is believed to be the first publicly known mediation involving a state conducted pursuant to the 2012 International Bar Association (IBA) Rules for Investor-State Mediation.³² While little is publicly known about the *Systra SA* case, it remains to be a concrete example of states like the Philippines have been, and will continue to be, involved in investment mediation proceedings with foreign investors.

Given the rising importance of investment mediation, this Article will look into the viability of investment mediation for investor-state disputes involving the Philippines. In Chapter II, this Article will discuss the current BIT regime of the Philippines and provide a brief overview of the investment arbitration cases the Philippines has been involved. Chapter III will then detail the challenges and criticisms to the dominant investment arbitration system. Next, Chapter IV explains the popularity of mediation to settle disputes between investors and states. Finally, Chapter V will discuss the viability of investment mediation vis-à-vis the current international investment regime of the Philippines.

II. BITS AND THE PHILIPPINES

A. Investments and Investors

BITs are described to be “the most prevalent source of host [S]tate investment protection obligations.”³³ Each one provides the terms and conditions for an investor and investment to qualify for the particular treaty’s protections.³⁴ The

29. UNCTAD, Philippines, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/166/philippines/respondent> (last accessed Jan. 31, 2023) [<https://perma.cc/A38C-XQ87>].

30. Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?*, 37 BERKELEY J. INT’L L. 215, 223 (2019).

31. See Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, J. DISP. RESOL., Volume No. 2020, Issue No. 2, at 338.

32. Hioureas, *supra* note 30, at 223 (citing Peterson, *supra* note 15).

33. SCHEFER, *supra* note 3, at 34.

34. *Id.* at 35.

twin goals of BITs are to provide “protection of the investor and the stimulation of economic activity in the host.”³⁵

Investments and investors are broadly defined in most publicly available Philippine BITs.³⁶ Philippine BITs generally define investments as “any” or “every” kind of asset and include a non-exhaustive list of assets, such as movable and immovable property, shares and stocks, income, and intellectual and industrial property rights.³⁷ Investors must be a national or citizen of the contracting states and can be natural or juridical persons, as defined by the contracting states’ respective laws.³⁸

Most of the publicly available Philippine BITs include the following substantive protections: protection against expropriation, fair and equitable treatment, non-discrimination, full protection and security, national treatment or most-favored-nation treatment, and umbrella clauses.³⁹

All of the Philippine BITs include an investor-state dispute resolution clause.⁴⁰ Majority of the BITs require parties to resolve disputes amicably via

35. *Id.*

36. Natalie Limbasan, *The Philippines, in* INVESTMENT PROTECTION IN SOUTHEAST ASIA: A COUNTRY-BY-COUNTRY GUIDE ON ARBITRATION LAWS AND BILATERAL INVESTMENT TREATIES 252 & 270 (Loretta Malintoppi & Charis Tan eds., 2016) & Donemark J.L. Calimon, et al., *The Philippines: An Analysis of Investment Laws, Treaties and Dispute Resolution Mechanisms, in* FOREIGN INVESTMENT AND INVESTMENT ARBITRATION IN ASIA 227 & 234 (Carlos Esplugues ed., 2019).

37. *Id.*

38. Limbasan, *supra* note 36, at 272 & Calimon, et al., *supra* note 36, at 234.

39. Rahim Moloo & Angelica Agishi, Investment Treaty Arbitration Philippines, available at <https://www.gibsondunn.com/wp-content/uploads/documents/news/Moloo-Agishi-Investment-Treaty-Arbitration-Philippines-GAR-Mar-2015.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/3KVP-P96C>]; Organisation for Economic Co-operation and Development, Fair and Equitable Treatment Standard in International Investment Law (OECD Working Papers on International Investment 2004/03), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/9XGY-SF7X>]; & Organisation for Economic Co-operation and Development, Most-Favoured-Nation Treatment in International Law (OECD Working Papers on International Investment 2004/02), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/M8C9-94BX>].

40. Manuel A.J. Teehankee, *The Philippines’ Readiness for the TPP: Focus on Investor-State Dispute Settlement*, 43 PHIL. J. DEV. 47, 49 (2018).

consultation and negotiation.⁴¹ If the dispute is not settled, parties can resort to the competent court or to international investment arbitration to resolve the same.⁴² Investment arbitration can be done either ad hoc, ad hoc under the United Nations Commission on International Trade Law (UNCITRAL) Rules, or under the ICSID Convention.⁴³ A majority of Philippine BITs allow for ICSID arbitration.⁴⁴

B. Investment Arbitration Cases Involving the Philippines

1. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines

Swiss company SGS Société Générale de Surveillance S.A. (SGS)⁴⁵ commenced an arbitration under the Philippines–Switzerland BIT.⁴⁶ SGS and the Philippines entered into a comprehensive import-supervision services agreement, which required SGS to provide specialized services in improving the customs clearance and control processes of the Philippines.⁴⁷ SGS claimed unpaid sums amounting to approximately \$140 million and alleged that by failing to pay the amounts, the Philippines breached its obligation to accord SGS fair and equitable treatment, expropriated its property, and breached the umbrella clause found in the BIT.⁴⁸ The Philippines argued that the arbitral tribunal had no jurisdiction as there was no investment made in its territory, that the dispute was purely contractual in character, and that the issues in dispute were governed by a dispute resolution clause requiring parties to submit all contractual disputes to the courts of the Philippines.⁴⁹ The tribunal found that it had jurisdiction to hear the dispute as SGS, in fact, made an investment in the Philippines and that the umbrella clause and dispute

41. *Id.* at 50.

42. *Id.* at 60–61.

43. *Id.* at 50.

44. The Philippines–China BIT (1992) and the Philippines–Myanmar BIT (1998) exclude ICSID arbitration.

45. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6, ¶ 3 (2004) [hereinafter *SGS I*].

46. Agreement Between the Swiss Confederation and the Republic of the Philippines Concerning the Promotion and Reciprocal Protection of Investments, Phil.–Switz., Mar. 31, 1997, R.O. (2001) 438 (Switz.).

47. *SGS I*, ¶ 13.

48. *Id.* ¶¶ 15–16.

49. *Id.* ¶ 17.

resolution clause were broad enough for it to hear the claims.⁵⁰ The tribunal, however, found that the contract claim was inadmissible as priority should be given to the forum selection clause found in the agreement.⁵¹ Thus, the tribunal stayed the proceedings.⁵²

The tribunal later rendered a settlement award, embodying the parties' settlement agreement on 11 April 2008.⁵³ The settlement award was not made public.⁵⁴

2. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*

Fraport AG Frankfurt Airport Services Worldwide (Fraport) commenced an ICSID arbitration⁵⁵ under the Philippines–Germany BIT⁵⁶ over a concession agreement to build and operate the Ninoy Aquino International Airport Passenger Terminal 3.⁵⁷ The concession contract was later declared void by the Philippine Supreme Court for violating the Anti-Dummy Law.⁵⁸ By doing so, Fraport claimed that the Philippine government had expropriated its investment and violated the fair and equitable treatment clause found under the Philippines–Germany BIT.⁵⁹ The arbitral tribunal agreed with the Philippines that there was a circumvention of the Anti-Dummy Law⁶⁰ and found that it lacked jurisdiction over the subject matter of the case.⁶¹

50. *Id.*

51. *Id.* ¶¶ 155, 169, & 170.

52. *Id.* ¶ 175.

53. See International Center for Settlement of Investment Disputes, Case Details: SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/6> (last accessed Jan. 31, 2023) [<https://perma.cc/R5FJ-7URP>].

54. *Id.*

55. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, Award, ICSID Case No. ARB/03/25, ¶ 2 (2007) [hereinafter *Fraport I*].

56. Agreement on the Promotion and Reciprocal Protection of Investments, Phil.–Ger., Apr. 18, 1997, 2108 U.N.T.S. 19.

57. *Fraport I*, *supra* note 55, ¶ 2.

58. *Id.* ¶¶ 101–02.

59. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, Decision on Annulment, ICSID Case No. ARB/03/25, ¶ 31 (2010).

60. *Id.* ¶ 27.

61. *Fraport I*, *supra* note 55, ¶ 401.

Fraport referred the case to an ad hoc annulment committee.⁶² The annulment committee found that the Arbitral Tribunal seriously departed from a fundamental rule of procedure and denied Fraport the right to be heard when it disregarded a Philippine special prosecutor's resolution which was submitted after the close of the proceedings.⁶³ The resolution stated that Fraport did not breach the Anti-Dummy Law.⁶⁴

Fraport then commenced a second arbitration that concerned the same concession agreement and put forward the same claims of unlawful expropriation and violation of fair and equitable treatment standards.⁶⁵ The second arbitral tribunal reached the same conclusion as the first, finding that it had no jurisdiction as Fraport violated the Anti-Dummy Law.⁶⁶

3. *Baggerwerken de Cloedt en Zoon NV v. Republic of the Philippines*

Baggerwerken de Cloedt en Zoon NV (BDC), a Belgian company, entered into a contract with the Philippines for the dredging and rehabilitation of Laguna Lake.⁶⁷ The contract was subsequently cancelled and BDC commenced arbitration proceedings under the Philippines–Belgium–Luxembourg Union BIT.⁶⁸ The arbitral tribunal rendered its award on 23 January 2017.⁶⁹ The award was not made public.⁷⁰ It had been reported, however, that the tribunal ordered the Philippine government to compensate BDC approximately \$16 million plus interest.⁷¹

62. *Id.* ¶ 4.

63. *Fraport Annulment*, ¶¶ 211 & 218.

64. *Id.* ¶¶ 246-47.

65. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Award, ICSID Case No. ARB/11/12, ¶ 14 (2014).

66. *Id.* ¶¶ 467-68.

67. Sam Lutrell, *ISDS in the Asia-Pacific: A Regional Snapshot*, INT'L. TRADE & BUS. L. REV. 21, 40 (2016).

68. Agreement on the Reciprocal Promotion and Protection of Investments, Phil.-Belux, Jan. 14, 1998, 2239 U.N.T.S. 77.

69. Lutrell, *supra* note 67, at 40.

70. *Id.*

71. *On the Wires: Philippines Liable for BIT Breach; Investor that Won Emergency Orders vs. Ukraine Does Not Fare as Well in Final Result; Iranians Pursue Bahrain over Bank Closure*, INVESTMENT ARB. REPORTER, Feb. 12, 2017, available at <https://www.iareporter.com/articles/on-the-wires-philippines-liable-for-bit->

4. *Prime Energy Resources Development B.V. (Formerly Shell Philippines Exploration B.V.) v. Republic of the Philippines*

Shell Philippines Exploration B.V. (SPEX)⁷² commenced arbitration proceedings under the Philippines–Netherlands BIT⁷³ in relation to a tax dispute.⁷⁴ SPEX, together with other energy companies, operated the Malampaya Deepwater Gas-to-Power Project, a natural gas project in the West Philippine Sea.⁷⁵ The Philippine Commission on Audit ruled that SPEX had underpaid its income taxes.⁷⁶ On the other hand, SPEX contended that, as per the service contract it had with the Philippine government, the proceeds of the project were split 60–40 between the Philippines and the investor, and that income taxes paid by the contractors already formed part of the 60% share of the Philippines.⁷⁷ In 2022, SPEX was acquired by another company and

breach-investor-that-won-emergency-orders-vs-ukraine-does-not-fare-as-well-in-final-result-iranians-pursue-bahrain-over-bank-closure (last accessed Jan. 31, 2023) [<https://perma.cc/L95L-AR3E>] & *DOF Reviews ₱800-M Fine for Scrapping Lake Dredging*, PHIL. STAR, Feb. 4, 2017, available at <https://www.philstar.com/headlines/2017/02/04/1668940/dof-reviews-p800-m-fine-scrapping-lake-dredging> (last accessed Jan. 31, 2023) [<https://perma.cc/ER25-WM8D>].

72. Danessa Rivera, *Shell Files Tax Case for International Arbitration*, PHIL. STAR, July 24, 2016, available at <https://www.philstar.com/business/2016/07/24/1605878/shell-files-tax-case-international-arbitration> (last accessed Jan. 31, 2023) [<https://perma.cc/6HR3-H3XA>].

73. Agreement for the Promotion and Protection of Investments, Phil.–Neth., Feb. 27, 1985, 1488 U.N.T.S. 303.

74. *Id.* & *Shell Files Investment Treaty Claim Against the Philippines*, INVESTMENT ARB. REPORTER, July 20, 2016, available at <https://www.iareporter.com/articles/shell-files-investment-treaty-claim-against-the-philippines> (last accessed Jan. 31, 2023) [<https://perma.cc/HAU7-LXG8>].

75. Calimon, et al., *supra* note 36, at 248.

76. *Shell Files Investment Treaty Claim Against the Philippines*, *supra* note 74.

77. *Id.*

was renamed as Prime Energy Resources Development B.V.⁷⁸ The case is still pending as of writing.⁷⁹

5. *Chevron Overseas Finance GmbH v. Republic of the Philippines*

Chevron Overseas Finance GmbH (Chevron) brought a claim against the Philippines under the Philippines-Switzerland BIT.⁸⁰ Chevron was part of the consortium of energy companies working on the Malampaya Project.⁸¹ The arbitration, which was commenced under the 1976 UNCITRAL Arbitration Rules,⁸² related to fiscal matters.⁸³ The case has since been concluded, with Chevron having withdrawn its claim after selling its interest in the gas field.⁸⁴

78. *Razon-Led Prime Infrastructure Takes Over Ownership of Malampaya Operator*, GMA NEWS, Nov. 1, 2022, available at <https://www.gmanetwork.com/news/money/companies/850033/razon-led-prime-infrastructure-takes-over-ownership-of-malampaya-operator/story> (last accessed Jan. 31, 2023) [<https://perma.cc/DU95-P9SQ>].

79. See International Center for Settlement of Investment Disputes, Case Details: Prime Energy Resources Development B.V. (formerly Shell Philippines Exploration B.V.) v. Republic of the Philippines, available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/16/22> (last accessed Jan. 31, 2023) [<https://perma.cc/F7LW-D453>].

80. Permanent Court of Arbitration, Case Information: Chevron Overseas Finance GmbH v. The Republic of the Philippines, available at <https://pca-cpa.org/en/cases/223> (last accessed Jan. 31, 2023) [<https://perma.cc/DLD9-ATT3>].

81. Malampaya Deep Water Gas-to-Power, Malampaya Marks 10th Year, available at <https://malampaya.com/malampaya-marks-10th-year> (last accessed Jan. 31, 2023) [<https://perma.cc/ZMG8-4CH9>].

82. See generally United Nations Commission on International Trade Law, International Commercial Arbitration, available at <https://uncitral.un.org/en/texts/arbitration> (last accessed Jan. 31, 2023) [<https://perma.cc/ZAM2-FPYU>].

83. Permanent Court of Arbitration, *supra* note 80.

84. See *id.* Jarrod Hepburn, *Philippines Arbitration Round-Up: Chevron Files BIT Claim, as We Review Seven Other Arbitrations Against the State and Its Instrumentalities*, INVESTMENT ARB. REPORTER, Oct. 4, 2019, available at <https://www.iareporter.com/articles/philippines-arbitration-round-up-chevron-files-bit-claim-as-we-review-seven-other-arbitrations-against-the-state-and-its-instrumentalities> (last accessed Jan. 31, 2023) [<https://perma.cc/SE5Q-3GDS>]; & Damien Charlotin, *Arbitration Against Philippines Concludes After Investor Sells Stake*

III. CHALLENGES AND CRITICISMS AGAINST INTERNATIONAL INVESTMENT ARBITRATION

International investment arbitration is still the most dominant method to resolve disputes between states and foreign investors.⁸⁵ In 2019 and 2021, the Singapore International Dispute Resolution Academy (SIDRA) conducted an international dispute resolution survey, which examined how and why businesses and lawyers make decisions about resolving cross-border disputes.⁸⁶ Respondents to the survey, made up of corporate executives, in-house counsel, and legal counsel, were asked about their use of cross-border dispute mechanisms.⁸⁷ In 2019, SIDRA found that 82% of respondents chose institutional arbitration and 52% of them chose ad hoc arbitration to settle their investor-state disputes.⁸⁸ In comparison, later in 2021, 86% of respondents chose institutional arbitration, while 71% chose ad hoc arbitration.⁸⁹ SIDRA observed that this is “unsurprising given the prevalence of arbitration clauses in treaties and contracts, which results in a mandatory obligation to participate in arbitration should one party submit the dispute to a tribunal.”⁹⁰

Despite its popularity, international investment arbitration now faces several criticisms. Investment arbitration is viewed as a time-consuming and expensive process that frays business relationships.⁹¹ Questions about the

in Offshore Gas Field, INVESTMENT ARB. REPORTER, Jan. 26, 2021, available at <https://www.iareporter.com/articles/arbitration-against-philippines-concludes-after-investor-sells-stake-in-offshore-gas-field> (last accessed Jan. 31, 2023) [<https://perma.cc/7NDS-HLH5>].

85. Susan D. Franck, *Using Investor-State Mediation Rules to Promote Conflict Management*, 29 ICSID REV. 66, 67 (2014).

86. SIDRA Survey: 2022 Final Report, *supra* note 16, at 1.

87. Singapore International Dispute Resolution Academy, SIDRA Survey: 2020 Final Report, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> (last accessed Jan. 31, 2023) [<https://perma.cc/8MH9-26J8>] & *Id.*

88. *Id.* at 16.

89. SIDRA Survey: 2022 Final Report, *supra* note 16, at 64.

90. *Id.*

91. Andrea Kupfer Schneider & Nancy A. Welsh, *Bargaining in the Shadow of Investor-State Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management*, 17 U. ST. THOMAS L.J. 373, 377 (2021).

legitimacy of the investment arbitration system have been raised, resulting in difficulties in enforcing arbitral awards or states leaving the ICSID system.⁹²

A study published in 2021 shows that the median party costs incurred by respondent states in participating in an ISDS proceeding is \$2.6 million.⁹³ Investors, on the other hand, spend around \$3.8 million for party costs.⁹⁴ Party costs cover fees and expenses for legal counsel, witnesses and experts, costs of travel to the hearing venue, translations, and other related costs.⁹⁵ The median tribunal costs, which consists of fees and expenses of the arbitral tribunal and any administrative costs paid to the arbitral institution for the management and administration of the proceedings, is \$740,000.⁹⁶ Paying such huge sums of money to defend itself in an arbitration has potentially damaging financial impacts for states.⁹⁷ Funding that could have gone to state development projects end up being diverted to pay for legal representation and experts.⁹⁸ This can also be financially damaging to investors.⁹⁹ Such high costs may also prevent small and medium enterprises from pursuing available legal remedies under BITs.¹⁰⁰

The duration and cost of proceedings are inextricably linked.¹⁰¹ Lengthy arbitrations would likely rack up higher legal fees.¹⁰² The average length of

92. *Id.*

93. MATTHEW HODGSON, ET AL., *EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION 4* (2021).

94. *Id.*

95. *Id.* at 9.

96. *Id.* at 12.

97. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017) – Part I, ¶ 37, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017).

98. *Id.* ¶ 40.

99. *Id.*

100. *Id.* ¶ 41.

101. *Id.* ¶ 44.

102. *Id.* ¶ 38.

ICSID proceedings is three years and seven months per case.¹⁰³ The median length of UNCITRAL proceedings is three months and nine years.¹⁰⁴

Given the adversarial and win-lose nature of arbitration, it also tends to fray business relationships.¹⁰⁵ By the time the case has been resolved, it is possible that both the state and investor have already moved on from the investment.¹⁰⁶ It may erode trust and deter states and investors from ever working together again.¹⁰⁷

The legitimacy of investment arbitration has also been questioned.¹⁰⁸ There have been several inconsistent arbitral awards.¹⁰⁹ While there is no rule of *stare decisis* in international law, some arbitral tribunals have rendered awards with different rulings, even though the cases were based on the same set of facts.¹¹⁰ This inconsistent application of international investment law has led to difficulties in predicting standards.¹¹¹ Questions about the propriety of having private arbitrators decide matters of public interest have also been raised.¹¹² The diversity of the pool of arbitrators and the practice of double-hatting, where a lawyer acts either as counsel, arbitrator, or expert in different

103. José Manuel Álvarez Zárata, et al., *Duration of Investor-State Dispute Settlement Proceedings*, 21 J. OF WORLD INVESTMENT & TRADE 300, 310 (2020).

104. HODGSON, ET AL., *supra* note 93, at 32.

105. Schneider & Welsh, *supra* note 91, at 377.

106. *Id.*

107. *Id.* at 377-78.

108. *Id.* at 377.

109. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017) – Part II, ¶ 37, U.N. Doc. A/CN.9/930/Rev.1 (Feb. 26, 2018).

110. Schneider & Welsh, *supra* note 91, at 378.

111. Franck, *supra* note 85, at 71.

112. Munir Maniruzzaman, *A Rethink of Investor-State Dispute Settlement*, KLUWER ARBITRATION BLOG, May 30, 2013, available at <http://arbitrationblog.kluwerarbitration.com/2013/05/30/a-rethink-of-investor-state-dispute-settlement> (last accessed Jan. 31, 2023) [<https://perma.cc/K945-5QJF>].

investment arbitration proceedings, are also seen as problematic by some stakeholders.¹¹³

All these criticisms have led some states to ignore arbitral awards, withdraw from BITs or the ICSID Convention, or refuse to sign new BITs altogether.¹¹⁴

As for the Philippines, there have been no reports that it has ignored any of the investment arbitration awards rendered against it.¹¹⁵ The Philippines has been “cautious.”¹¹⁶ After participating in the abovementioned cases, the Philippines has found the process to be extraordinarily expensive.¹¹⁷ As such, in many ASEAN treaties, the Philippines now requires a written agreement between the disputing parties before any claim can be submitted to ICSID, in an effort to prevent disputes from going straight to arbitration.¹¹⁸ In addition, the Philippines seems to now “steer[] away from ICSID[, and] [i]nstead, it recommends either the adoption of the UNCITRAL Rules, the creation of a ‘Multilateral Investment Court System’, [] or a regional ‘ASEAN investment tribunal.’”¹¹⁹

113. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session (Vienna, 29 October – 2 November 2018), ¶¶ 70 & 92, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

114. Schneider & Welsh, *supra* note 91, at 378 & Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 76 (2013).

115. See Patricia Lourdes Viray, *Duterte Has No Authority to ‘Set Aside’ Arbitral Award — Carpio*, PHIL. STAR, available at <https://www.philstar.com/headlines/2019/09/13/1951503/duterte-has-no-authority-set-aside-arbitral-award-carpio> (last accessed Jan. 31, 2023) [<https://perma.cc/5CQ6-FQ7A>].

116. Calimon, et al., *supra* note 36, at 244.

117. *Id.*

118. *Id.*

119. *Id.*

IV. INVESTMENT MEDIATION AS A POSSIBLE ALTERNATIVE

A. Mediation as a Possible Alternative to Investment Arbitration

Because of the criticisms levied against the current investment arbitration system, mediation is well-positioned to become one of the complementary alternatives to resolve investor-state disputes.¹²⁰

Mediation is defined as “a consensual process in which parties negotiate their dispute directly with one another, with the help of a third party (the mediator).”¹²¹ It is a less formal process compared to litigation and arbitration.¹²² There are many forms of mediation, such as evaluative and facilitative mediation.¹²³ But,

at its core, mediation involves using a third-party neutral to assist parties in coming to a mutually agreeable solution. Mediators do not decide cases for the parties. They are neither judges nor arbitrators. Rather, mediators work with the parties, evaluating, facilitating[,] and moving along the discussion about the matter in dispute and how best to resolve the conflict.¹²⁴

Mediation has several advantages, the most cited of which is that it is a cheaper and faster option than arbitration.¹²⁵ As mediation is less pleading-intensive and involves lower institutional or third-party neutral costs, it can produce less costs overall.¹²⁶ This also means that mediation proceedings are shorter.¹²⁷ ICSID mediation data shows that all but one of the concluded investment mediations were done in under two years.¹²⁸ The time and money

120. Catherine Titi, *Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism*, in *MEDIATION IN INT’L COM. & INVESTMENT DISPUTES* 25, 33-34 (Catharine Titi & Katia Fach Gomez eds., 2019).

121. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *BACKGROUND PAPER ON INVESTMENT MEDIATION I* (2021).

122. *Id.*

123. *Id.*

124. Franck, *supra* note 85, at 71.

125. Titi, *supra* note 120, at 22.

126. *Id.* & Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 16 (2005).

127. Titi, *supra* note 120, at 23.

128. *Id.*

that a mediation can save may help parties focus on other business or developmental projects.¹²⁹

Parties who opt to mediate their dispute are also in a better position to preserve their business relationships.¹³⁰ Mediation is not an adversarial process where one party wins and the other loses.¹³¹ Mediation is an opportunity for parties to share not just their positions, but their interests as well.¹³² It then becomes an opportunity to build trust or, at the very least, reduce distrust.¹³³ Information sharing may also prove beneficial for the parties involved, especially since “[b]uilding an investment relationship typically requires a significant commitment of capital and other resources, and mediation can help the disputing parties preserve the economic relationship.”¹³⁴

Mediation also enables parties to control the outcome.¹³⁵ Unlike arbitration and litigation, mediators, whether evaluative or facilitative mediators (which distinction is explained below), do not have the power to impose a ruling on the parties involved.¹³⁶ The parties themselves can explore creative settlements that are more tailored to their needs and objectives.¹³⁷ The ability to control the outcome does away with the difficulty of predicting outcomes in investment arbitration, may lower political costs, and promotes other face-saving measures.¹³⁸ Mediation may enable parties to re-evaluate their options and think about their business reputation, as well as what the possible outcome might be should their dispute continue through arbitration.¹³⁹ Mediated settlement agreements may also encourage greater compliance as the parties consensually agree to reach a settlement.¹⁴⁰

129. Franck, *supra* note 85, at 78.

130. Titi, *supra* note 120, at 23.

131. *Id.*

132. *Id.*

133. Welsh & Schneider, *supra* note 114, at 77.

134. Titi, *supra* note 120, at 23.

135. *Id.* at 22 & Schneider & Welsh, *supra* note 91, at 380.

136. *Id.*

137. *Id.*

138. Franck, *supra* note 85, at 72.

139. *Id.* at 75.

140. Schneider & Welsh, *supra* note 91, at 379.

The UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), mandated with identifying concerns regarding ISDS and to consider reforms,¹⁴¹ has acknowledged the advantages of mediation and is well aware of the benefits and challenges of mediating investment disputes.¹⁴² In its report on the work of its 39th session,¹⁴³ the Working Group considered mediation, along with other alternative dispute resolution methods, and noted the advantages of mediation detailed above.¹⁴⁴ The Working Group has repeatedly pointed out that mediation offers flexibility and autonomy to the parties, which enables parties to better preserve and improve their business relationships, protect foreign investments, avert disputes, and possibly avoid conflict escalation.¹⁴⁵

B. Commencing an Investment Mediation

Investment mediation can be resorted to whenever parties deem it suitable.¹⁴⁶ It is not limited to only after a dispute has crystallized.¹⁴⁷ Rather, investment mediation can be commenced anytime throughout the investment life cycle.¹⁴⁸ It can even run in parallel to an arbitration or litigation proceeding.¹⁴⁹

Under the ICSID Mediation Rules,¹⁵⁰ parties that have a prior agreement to mediate under the Rules can institute a mediation by filing a request with the ICSID Secretary-General and paying the necessary lodging fee.¹⁵¹ Should

141. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 November–1 December 2017) – Part I, ¶ 19, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017).

142. *Id.* ¶ 26.

143. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Ninth Session (Vienna, 5–9 October 2020), U.N. Doc. A/CN.9/1044 (Nov. 10, 2020).

144. *Id.* ¶ 19.

145. *Id.* ¶ 27.

146. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 121, at 4.

147. *Id.*

148. *Id.*

149. *Id.*

150. International Centre for Settlement of Investment Disputes, Mediation Rules (2022) [hereinafter ICSID Mediation Rules].

151. *Id.* ch. II, rule 5 (1).

the parties have no prior agreement to mediate, any party wishing to institute a mediation under the ICSID Mediation Rules can still file a request with the Secretary-General and pay the lodging fee.¹⁵² The Request should include an offer to the other party to mediate and to request that the Secretary-General invite the other party to advise whether it accepts the offer to mediate.¹⁵³

Parties can also opt to make use of the IBA Rules for Investor-State Mediation before or after a difference or dispute arises.¹⁵⁴ If the parties agree to mediate under the IBA Rules beforehand, the mediation is deemed to have commenced once a party sends a written request to mediate to the other party and the mediation institution that the parties have agreed upon will administer the mediation, if any.¹⁵⁵ If the parties do not agree to mediate before the difference or dispute arose, the mediation is deemed to have commenced on the date on which the parties agreed to mediate under the IBA Rules.¹⁵⁶

Parties can opt to appoint one mediator or two co-mediators.¹⁵⁷ It is also up to the parties to decide whether they want their mediators to have subject-matter or process-related expertise.¹⁵⁸ Whether parties opt for a sole mediator or co-mediator, it is important that the mediator be impartial and independent.¹⁵⁹

The parties are also generally given free rein to decide on the process design of the mediation.¹⁶⁰ Parties can opt for a facilitative type of mediation or an evaluative one.¹⁶¹ Facilitative mediation zeroes in on the interests of the parties.¹⁶² A facilitative mediator helps parties to conduct an integrative, interest-based negotiation instead of distributive, positional-based

152. *Id.* ch. II, rule 6 (1).

153. *Id.* ch. II, rule 6 (2).

154. International Bar Association, Rules for Investor-State Mediation, art. 1 (1) (2012) [hereinafter IBA Mediation Rules].

155. *Id.* art. 2 (1).

156. *Id.* art. 2 (1) (b).

157. ICSID Mediation Rules, *supra* note 150, rule 12 (1) & *id.* arts. 4 (1) & 6 (1).

158. ICSID Mediation Rules, *supra* note 150, rule 20 (4).

159. *Id.* rule 12 (1) & IBA Mediation Rules, *supra* note 154, art. 3 (1).

160. ICSID Mediation Rules, *supra* note 150, rule 3 (2).

161. Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 187 (2007).

162. *Id.* at 193.

bargaining.¹⁶³ Evaluative mediators, on the other hand, look at the underlying substantive law of the dispute and are expected to make recommendations and predict arbitration or court outcomes.¹⁶⁴ The conduct of the mediation itself can be in person, virtual, or a mix of both, depending on what the parties agree upon.¹⁶⁵

As mediation is a flexible process, parties can create rules suited for a particular dispute which will best serve their interests.¹⁶⁶

Even when the mediation does not result in a settlement agreement, it can still prove to be beneficial as it forces the parties to communicate, encourages continued open lines of communication, and narrows the issues in dispute.¹⁶⁷

Mediation, however, also has its fair share of disadvantages.¹⁶⁸ For one, not all disputes are suitable for mediation.¹⁶⁹ Sometimes parties' relationships are beyond repair and bringing them to mediation might prove to be unproductive.¹⁷⁰ Given that mediation is primarily a voluntary process, making a party comply with the outcome may be difficult.¹⁷¹ There is still no formal legal framework in many states to support mediation and mediated settlement agreements.¹⁷²

163. Nadja Marie Alexander, *The Mediation Metamodel: Understanding Practice*, 26 CONFLICT RESOL. Q. 97, 114 (2008).

164. Roberts, *supra* note 161, at 195.

165. World Intellectual Property Organization, *Mediation: Frequently Asked Questions*, available at <https://www.wipo.int/amc/en/mediation/guide/index.html> (last accessed Jan. 31, 2023) [<https://perma.cc/4SY3-LZ49>].

166. ICSID Mediation Rules, *supra* note 150, rule 3 (2).

167. Schneider & Welsh, *supra* note 91, at 384; Mark Baker & Cara Dowling, *Interest in Investor-State Mediation Is Growing*, 8 INT'L. ARB. REP. 22, 23 (2017); & Hioureas, *supra* note 30, at 225.

168. Schneider & Welsh, *supra* note 91, at 397.

169. *Id.*

170. *Id.* at 398 (citing Jack J. Coe, Jr., *Concurrent Co-Mediation: Towards a More Collaborative Centre of Gravity in Investor-State Dispute Resolution*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 78 (Catharine Titi & Katia Fach Gomez eds., 2019)).

171. *Id.*

172. *Id.* at 387.

To encourage party participation and encourage open discussion, mediation is generally a confidential process.¹⁷³ As public interest is involved in an investment mediation, civil society stakeholders may be concerned with the lack of transparency in the process.¹⁷⁴

Another obstacle to investment mediation relates to the lack of coordination among government agencies that need to be involved in the process.¹⁷⁵ Government bureaucracy may delay the proceedings, as it takes time to get the appropriate government ministries or departments give investment disputes the proper attention.¹⁷⁶ In addition, state officials may be reluctant to mediate their investment disputes as they may not want to be directly responsible for negotiating settlement agreements and be accused of bowing down to foreign private interests.¹⁷⁷ They may also fear political backlash that may lead to accusations of corruption against them.¹⁷⁸

Despite these constraints, mediation can still be a useful complementary tool that parties should consider.¹⁷⁹ Admittedly, while mediation is not the only solution that can address the criticisms against investment arbitration, it can still “be part of an overall coordinated set of strategies that include not only various refinements to prevailing arbitration regimes and improved precision in the way substantive treaty protections are delimited.”¹⁸⁰ A study conducted in 2016 shows that roughly one out of three investment arbitration cases end in a settlement.¹⁸¹ The availability of investment mediation may lead

173. Franck, *supra* note 85, at 77.

174. *Id.* at 88.

175. Schneider & Welsh, *supra* note 91, at 387.

176. Hioureas, *supra* note 30, at 217 (citing S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL’Y 11 (2014)).

177. Claxton, *supra* note 28, at 80.

178. Schneider & Welsh, *supra* note 91, at 387 & Seraphina Chew, et al., Report: Survey on Obstacles to Settlement of Investor-State Disputes 12-13 (NUS Ctr. for Int’l L. Working Paper 18/01, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247492 (last accessed Jan. 31, 2023) [<https://perma.cc/9QSW-48TZ>].

179. Titi, *supra* note 120, at 25.

180. Coe, Jr., *supra* note 170, at 78.

181. *Id.* & Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT’L DISP. SETTLEMENT 117, 129 (2016).

to higher settlement rates, a cheaper process altogether, and greater satisfaction with the system.¹⁸²

Interest in investment mediation continues to grow.¹⁸³ In 2021, SIDRA found that institutional mediation (24%) came behind arbitration (institutional arbitration — 86% and ad hoc arbitration — 71%) as the second choice in resolving investor-state disputes.¹⁸⁴ This is a significant change from the 2019 SIDRA international dispute resolution survey results, which showed that international and local courts came behind arbitration.¹⁸⁵

Mediation is one of the options continuously being explored by the UNCITRAL Working Group III.¹⁸⁶ In its 45th session,¹⁸⁷ the Working Group discussed draft provisions on mediation, draft guidelines on investment mediation, and its draft legislative guide on investment dispute prevention and mitigation.¹⁸⁸ More and more international agreements, such as the Argentina-Japan BIT,¹⁸⁹ EU-Canada Comprehensive Economic and Trade Agreement,¹⁹⁰ and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership,¹⁹¹ have incorporated mediation into their dispute

182. Coe, Jr., *supra* note 180, at 78.

183. Dumanova & Neuburger, *supra* note 22.

184. SIDRA Survey: 2022 Final Report, *supra* note 16, at 64-65.

185. SIDRA Survey: 2020 Final Report, *supra* note 16, at 16-17.

186. UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform, available at https://uncitral.un.org/en/working_groups/3/investor-state (last accessed Jan. 31, 2023) [<https://perma.cc/9JHJ-S9YT>].

187. United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Fifth Session (New York, 27-31 March 2023, U.N. Doc. A/CN.9/11131 (Apr. 14, 2023)).

188. United Nations Commission on International Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Guidelines on Investment Mediation, U.N. Doc. A/CN.9/WG.III/WP.227 (Jan. 17, 2023).

189. Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, Dec. 1, 2018.

190. Comprehensive Economic and Trade Agreement, Can.-E.U., Oct. 30, 2016, T.S. No. 4/2017.

191. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, 57 I.L.M. 1.

resolution clauses.¹⁹² The EU-Vietnam Free Trade Agreement¹⁹³ even includes a full annex on mediation.¹⁹⁴ Investment mediation procedural rules, such as the IBA Rules for Investor-State Mediation¹⁹⁵ and the ICSID Mediation Rules,¹⁹⁶ are also now widely available. The entry into force of the Singapore Convention on Mediation¹⁹⁷ is hoped to encourage more investors and states to mediate their disputes as it is meant to make recognition and enforcement of international mediated settlement agreements a more seamless process.¹⁹⁸

V. INVESTMENT MEDIATION IN THE PHILIPPINES

With the growing popularity of investment mediation, it is important to determine whether it is a viable mechanism to resolve investor-state disputes governed by Philippine BITs. None of the Philippine BITs or treaties with investment provisions explicitly mention mediation as a method of resolving disputes with foreign investors.¹⁹⁹ Investment mediation, however, can still be utilized through: (1) opt-in mediation, or (2) making use of the cooling-off period provided in most, if not all, BITs and treaties with investment provisions of the Philippines currently in force.²⁰⁰

A. Opt-In Mediation

Parties that do not have a prior agreement to mediate before a dispute can still choose to institute mediation proceedings.²⁰¹ Parties are free to opt in

192. See generally INTERNATIONAL CENTRE FOR SETTLEMENT DISPUTE, OVERVIEW OF INVESTMENT TREATY CLAUSES ON MEDIATION (2021).

193. Agreement Between the European Union and the Socialist Republic of Vietnam on Free Trade and Investment Protection, E.U.-Vietnam, June 30, 2019, O.J. (L 186) 1.

194. See Free Trade Agreement, E.U.-Viet. annex 15-A, June 30, 2019, 63 O.J. (L 183) (E.U.).

195. IBA Mediation Rules, *supra* note 154.

196. ICSID Mediation Rules, *supra* note 150.

197. United Nations Convention on International Settlement Agreements Resulting from Mediation, *adopted* Dec. 20, 2018, 3369 U.N.T.S. 154.

198. Hioureas, *supra* note 30, at 222.

199. *But see id.* at 217.

200. Stephen W. Schill & Geraldo Vidigal, *Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis*, 18 L. & PRAC. INT'L COURTS & TRIB. 314, 322 (2019).

201. *Id.*

mediation to resolve their investor-state dispute.²⁰² It must be noted that the Philippines has already been involved in at least one publicly known investment mediation case, where the investor offered opt-in mediation to the Philippine government.²⁰³

In 2016, it was reported that the Philippines agreed to mediate a dispute brought against it by Systra SA, a French engineering and consulting company, under the Philippines-France BIT.²⁰⁴ This dispute concerned supposed long overdue invoices for infrastructure work and services performed by Systra.²⁰⁵ It is the first mediation under a BIT administered by the International Chamber of Commerce (ICC) and is the first publicly known case that utilized the IBA Rules for Investor-State Mediation.²⁰⁶

The dispute resolution clause of the Philippines-France BIT states —

Any investment dispute between a Contracting Party and a national or company of the other Contracting Party shall be settled amicably between the two parties concerned.

If such a dispute cannot be settled within six months from the time at which it was raised by either party to the dispute, the Contracting Party that is a party to the dispute consents to any national or company of a party to the dispute to its submission for conciliation or arbitration by the [ICSID], established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965 (ICSID Convention).²⁰⁷

Only arbitration is explicitly identified as the dispute resolution mechanism available to the parties.²⁰⁸ Systra, however, proposed an opt-in mediation to the Philippine Government instead.²⁰⁹ The request for mediation

202. *Id.*

203. Hioureas, *supra* note 30, at 223.

204. Peterson, *supra* note 15.

205. *Id.*

206. Alina Leoveanu & Andrija Erac, *ICC Mediation: Paving the Way Forward, International Commercial and Investment Disputes*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 97 (Catharine Titi & Katia Fach Gomez eds., 2019).

207. Agreement on the Reciprocal Promotion and Protection of Investments, Phil.-Fr., art. 8, Sept. 13, 1994, 1977 U.N.T.S. 435.

208. Hioureas, *supra* note 30, at 223.

209. *Id.*

was filed under Article 3 of the ICC Mediation Rules of 2014,²¹⁰ whereby a mediation can be commenced even without prior agreement by sending a written request to the ICC.²¹¹ The mediation lasted two years but did not result in a mediated settlement agreement.²¹² Nevertheless, according to Alina Leoveanu and Andrija Erac, the parties were able to achieve

significant progress in their negotiations and the mediation proceedings helped them to reestablish communication, potentially leaving the door open for future business opportunities. Furthermore, despite its significant duration, the mediation was still cost efficient for the parties. For an amount in dispute of around [\$2.5 million], the total cost of the proceedings fixed by the [ICC] was [\$40,000 (\$13,000) in administrative costs and the remaining amount for the Mediator's fees and expenses).²¹³

Leoveanu and Erac noted that “the biggest challenge throughout the mediation was ensuring the government’s participation.”²¹⁴ The ICC had to identify the proper government agency, “engage them in communication, and [make sure that the government would respond] to the request for mediation.”²¹⁵ It took two months from the time the request for mediation was filed and from the Philippine’s agreement to participate.²¹⁶

*Systra SA v. Republic of the Philippines*²¹⁷ clearly shows that even if mediation is not explicitly included as one of the dispute settlement mechanisms under a BIT, investment mediation can still be resorted to. Apart from the ICC Mediation Rules,²¹⁸ other rules have been put in place to allow for opt-in mediation.²¹⁹ For instance, the new ICSID Mediation Rules²²⁰ allow parties to institute a mediation anent having no prior written agreement

210. International Chamber of Commerce, Mediation Rules (Including Amended and Restated Rules, effective January 1, 2014), ICC Publication No. 186 (2014) [hereinafter ICC Mediation Rules].

211. Leoveanu & Erac, *supra* note 206, at 97.

212. *Id.* at 98.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Hioureas, *supra* note 30, at 223.

218. ICC Mediation Rules, *supra* note 210.

219. Schill & Vidigal, *supra* note 200.

220. ICSID Mediation Rules, *supra* note 150.

to mediate by simply filing a request with the ICSID Secretary-General.²²¹ As such, the Philippines can continue to accept proposals from investors for opt-in investment mediation or offer opt-in mediation to investors.²²²

B. Mediation During the Cooling-Off Period

Cooling-off periods are usually incorporated in BITs and international investment agreements.²²³ They are meant “to encourage negotiation before parties can initiate formal arbitration procedures.”²²⁴ These periods are about three to six months and are set between the filing of a dispute and the actual commencement of arbitration procedures.²²⁵ Accordingly, “[c]ooling-off periods can thus be a vessel which may contain mediation [or] conciliation[,] or cooling-off periods can stand next those mechanisms.”²²⁶

Most of the Philippine BITs contain a cooling-off period, where the disputing parties are encouraged to settle their dispute amicably through consultation and negotiation.²²⁷ For instance, the Philippines-Portugal BIT states that “[a]ny dispute which may arise between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall be settled amicably through negotiations.”²²⁸

If the dispute cannot be settled through negotiations within six months from the date of request for settlement, the investor may proceed to submit the dispute to the competent court of

221. *Id.* ch. II, rule 6 (1).

222. *Id.*

223. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1540 (2005).

224. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION* xxv (2010).

225. *Id.*

226. Catherine Kessedjian, et al., *Mediation in Future Investor-State Dispute Settlement*, J. INT'L DISP. SETTLEMENT (forthcoming) (manuscript at 1 & 4) (online).

227. Franck, *supra* note 223, at 1541.

228. Agreement for the Promotion and Protection of Investments, Phil.-Port., art. 9 (1), Nov. 8, 2002, D.R. 116, Series I-A of 20-05-2003, 313.

the contracting party, to ICSID, through conciliation or arbitration, or to an ad hoc tribunal under the UNCITRAL Arbitration Rules.²²⁹

Majority of the Philippine BITs are similarly worded. The Philippines–Australia BIT even requires parties to “use their best efforts to resolve the dispute by amicable consultations and negotiations.”²³⁰

The ASEAN free trade agreements with China²³¹ and South Korea²³² also include identical provisions, requiring the parties to an investment dispute to, as far as possible, resolve their disputes through consultations and negotiations.²³³ If the dispute has not been resolved within six months, the dispute may be submitted to the competent court or to arbitration.²³⁴

The ASEAN Comprehensive Investment Agreement (2009) goes further by requiring that

[i]n the event of an investment dispute, the disputing parties shall initially seek to resolve the dispute through consultation and negotiation, *which may include the use of non-binding, third party procedures*. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Member State.²³⁵

If the investment dispute has not been resolved within 180 days of the receipt by a disputing Member State of a request for consultations, the disputing investor may submit a claim to the competent courts or administrative tribunals, to ICSID, to an ad hoc Arbitral Tribunal under the UNCITRAL Arbitration Rules, to the Regional Centre for Arbitration in

229. *Id.* art. 9 (2).

230. Agreement for the Promotion and Protection of Investments, Phil.–Austl., art. 13 (1), Jan. 25, 1995, 1945 U.N.T.S. 144.

231. Agreement on Investment of the Framework Agreement on Comprehensive Economic Co–Operation Between the Association of Southeast Asian Nations and the People’s Republic of China, arts. 14 (3)–(4), *signed* Aug. 15, 2009.

232. Agreement on Investment of the Framework Agreement on Comprehensive Economic Co–Operation Between the Association of Southeast Asian Nations and the Republic of Korea, art. 18 (4)–(5), *signed* June 2, 2009.

233. *Id.*

234. *Id.*

235. ASEAN Comprehensive Investment Agreement, art. 31 (1), *signed* Feb. 6, 2009 (emphasis supplied).

Kuala Lumpur or any other regional center for arbitration in ASEAN; or, if the disputing parties agree, to any other arbitration institute.²³⁶

The ASEAN–Australia–New Zealand (AANZ) Free Trade Agreement²³⁷ also refers to a non-binding, third party procedure that can be resorted to²³⁸

In the event of an investment dispute referred to in Article 18.1 (Scope and Definitions), the disputing parties shall as far as possible resolve the dispute through consultation, with a view towards reaching an amicable settlement. Such consultations, *which may include the use of non-binding, third party procedures*, shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.²³⁹

Mediation, as earlier defined, is a non-binding third party procedure which can be effectively utilized under the ASEAN Comprehensive Investment Agreement and AANZ Free Trade Agreement.²⁴⁰

Considering that “no one likes disputes and any amicable dispute resolution is preferred over a more adversarial method,” cooling-off periods can be used to facilitate continuous communication with investors.²⁴¹ Thus, mediation can potentially be used within the cooling-off period found in Philippine BITs and other treaties that include investment provisions.

It seems that only the Philippines–United Kingdom and Philippines–Netherlands BITs are the only Agreements that do not contain a cooling-off period.²⁴² The Philippines–United Kingdom BIT states that

[t]he Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for

236. *Id.* arts. 32 & 33.

237. Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, signed Feb. 27, 2009, 2672 U.N.T.S. 3 [hereinafter AANZ Free Trade Agreement].

238. *Id.*

239. *Id.* ch. 11, § B, art. 19 (emphasis supplied).

240. ASEAN Comprehensive Investment Agreement, *supra* note 235 & AANZ Free Trade Agreement, *supra* note 237.

241. Kessedjian, et. al, *supra* note 226, at 39.

242. Agreement for the Promotion and Protection of Investments, Phil.–U.K., art. X (1), Dec. 3, 1980, 1218 U.N.T.S. 61.

conciliation or arbitration, to [ICSID] any dispute that may arise in connection with the investment.²⁴³

The Philippines–Netherlands BIT is similarly worded, except that it does not have an explicit reference to companies of the other contracting party.²⁴⁴ Neither agreement provides for a cooling-off period and refers investor–state disputes to conciliation or arbitration under ICSID.²⁴⁵ There are key differences between mediation and conciliation at ICSID.²⁴⁶ Notably, mediation is a more informal process than conciliation.²⁴⁷ Conciliation commissions have the authority to issue formal orders or decisions.²⁴⁸ Mediators do not have the same authority.²⁴⁹ Some other differences are —

- (1) The disputing parties need not be linked to an ICSID Convention Member State in ICSID Mediation;
- (2) A request for conciliation under the ICSID conciliation Rules may only be submitted once the disputing parties have consented to ICSID conciliation;
- (3) A request for mediation may be submitted even without a prior written agreement to mediate and instead contain an offer to the other party to mediate the disputed issues;
- (4) Parties cannot unilaterally withdraw from a conciliation once consent has been given. But parties can withdraw from the mediation process at any time;
- (5) Mediators in ICSID mediation can only assist parties in reaching a mutually acceptable resolution of all or part of the issues in dispute, while conciliation commissions have a broader mandate and must clarify the issues in dispute.²⁵⁰

243. *Id.*

244. Agreement for the Promotion and Protection of Investments, Phil.–Neth., *supra* note 73, art. 9 (1).

245. *Id.* & See also ICSID Mediation Rules.

246. International Centre for Settlement of Investment Disputes, Key Differences Between Mediation and Conciliation at ICSID, *available at* <https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation> (last accessed Jan. 31, 2023) [<https://perma.cc/MG5B-NCBE>].

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

The absence of a cooling-off period or the exclusion of mediation in the dispute resolution clauses of the Philippines-United Kingdom and Philippines-Netherlands BITs does not preclude disputing parties from mediating their disputes. Disputing parties can very well decide to opt-in mediation, similar to the *Systra SA v. Republic of the Philippines* case.²⁵¹ Besides, mediation is possible throughout the life cycle of the dispute and can even be held in parallel to arbitration or litigation proceedings.²⁵²

It must be noted that the usual three-to-six-month cooling-off period is considered short to commence and conclude an investment mediation.²⁵³ As illustrated by the *Systra SA v. Republic of the Philippines* mediation, a “substantial amount of time” is required for governments to trace the source of the breach and coordinate with the responsible agencies and officials.²⁵⁴ Given the advantages of mediation, the Philippine government may want to consider including mediation in its investment treaties. This will indicate a strong and clear policy basis that the Philippines is willing to engage in a neutral, third-party amicable settlement procedure.

VI. CONCLUSION

Considering the growing discontent with international investment arbitration, investment mediation is a complementary option that investors and states can choose in order to resolve their disputes. Mediation may help parties avoid pursuing more adversarial arbitration or litigation processes, reduce the cost and length of the proceedings, narrow issues, and preserve business relationships between investors and states.²⁵⁵ The benefits of investment mediation are especially important as investment relationships are not usually limited to one-off projects.²⁵⁶ Investment relationships require significant commitments from both investors and states. Mediation can help investors and states resolve their disputes, or at the very least, minimize them.

251. Hioureas, *supra* note 30, at 223.

252. ICSID Mediation Rules, *supra* note 150.

253. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 224, at xxv (2010).

254. *Id.* at 38 (citing Barton Legum, *The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward A Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch,'* MEALEY'S INT'L ARB. REP., Volume No. 21, Issue No. 4, at 72).

255. Titi, *supra* note 120, at 22.

256. Dumanova & Neuburger, *supra* note 22.

As the Philippines is becoming cautious and is concerned that investment arbitration tends to be expensive, it should consider investment mediation especially since it is a viable dispute settlement option under Philippine BITs and its other treaties with investment agreements. While mediation is not explicitly included as one of the dispute settlement mechanisms under Philippine BITs and its other treaties with investment agreements, investment mediation can still be resorted to through: (1) opt-in mediation, or (2) by choosing to mediate disputes during the cooling-off period before an arbitration is commenced. Including investment mediation in its toolbox may enable the Philippines to push for more responsive solutions that are more suitable to its needs and objectives.