# The Law, Policy and Practice of a Major Petroleum Exporting Country on Investor-State Dispute Settlement Mechanism: The Experience of Saudi Arabia and Its Significance for the Development of International Investment Law

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## Abstract

Saudi Arabia has experienced quite a big rise in recent years in the number of cases brought against it under the investor-State dispute settlement (ISDS) mechanism by foreign investors mainly in the petroleum sector of the country.[1] Although these cases are relatively recent, the root of the problem dates back to the 1990s when Saudi Arabia joined many other countries in concluding bilateral investment treaties (BITs). Although the old generations of BITs are being replaced by new BITs by Saudi Arabia which seeks to balance investor protection with other international norms such as environmental protection, there is a long way to go for the country to bring its law, policy and practice that can strike a proper balance between investor protection and the incorporation of other societal values in such treaties. As a major oil-producing country, it is in the best interests of Saudi Arabia to review and revise its approach to ISDS not only in line with the current international practice but also in line with its own Vision 2030 so that the country can accomplish its overarching economic objectives and serve as a model for other oil-producing and natural resource-rich countries within the Gulf region and beyond.


[1] In 2019, *DSG Yapi Sanayi Ticaret Anonim Sirketi v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/19/32) and *Qatar Pharma and Ahmed Bin Mohammad Al Haie Al Sulaiti v. Kingdom of Saudi Arabia*; in 2018, *beIN Corporation v. Saudi Arabia*, UNCITRAL, Notice of Arbitration, 1 October 2018; and *HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14); *Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia* (PCA Case No. 2019-24); in 2017, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42); *and Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/43) and *Ed. Züblin AG v. Kingdom of Saudi Arabia* ibid.

## INTRODUCTION

After Saudi Arabia had signed its first bilateral investment treaty (BIT) in 1994, in nearly a decade it only faced one investor-state dispute settlement (ISDS) claim, in 2003.[2] However, in the last four years it has been hit by seven cases.[3] Although these cases are relatively recent, the root of the problem dates back to the 1990s when Saudi Arabia joined many other countries in their approach toward signing BITs. The old stock of existing BITs contains provisions which narrow the sovereign policy space of Saudi Arabia and leaves the door open to various types of claims, including frivolous and non-investment ones. Saudi Arabia has been active in updating and modernising its approach toward BITs and has recently signed modern BITs that seek to balance investor and State interests.

However, despite the signing of such modern BITs, it is important to note two points. First, the risks in the old BITs still exist and these treaties need to be revised or terminated, as has been done by other leading developing countries in the recent past. Secondly, these new BITs come with considerable development about the substantive provisions, but with limited amendments to ISDS clauses. This raises concerns over the challenges that have occurred due to the ISDS system in the old and new BITs. Thus, it may be assumed that the recent increase in the number of ISDS cases against Saudi Arabia and the rise in anti-ISDS sentiment[4] may be the reason that alerted the

[2] Ed. Züblin AG v. Kingdom of Saudi Arabia (ICSID Case No. ARB/03/01)
[3] In 2019, *DSG Yapi Sanayi Ticaret Anonim Sirketi v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/19/32) and *Qatar Pharma and Ahmed Bin Mohammad Al Haie Al Sulaiti v. Kingdom of Saudi Arabia*; in 2018, *beIN Corporation v. Saudi Arabia*, UNCITRAL, Notice of Arbitration, 1 October 2018; and *HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14); *Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia* (PCA Case No. 2019-24); in 2017, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42); *and Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/43) and *Ed. Züblin AG v. Kingdom of Saudi Arabia* ibid.
[4] George III Kahale, 'Rethinking ISDS' (2018) 44 Brook J Int'l L 14

Saudi government and required it to consider different options for reform. This article examines the Saudi approach, as a major oil-producing country, toward ISDS, based on the availability of the relevant cases and BIT texts. It attempts to draw up policy options based on Saudi Arabia's long-standing practices toward foreign investments, international investment arbitration and international organisations. Such analysis can inspire other countries to revise their BITs and enhance the understanding of international law scholars of the roots of the challenges experienced by a major oil producing country and suggest policy options for similar countries. To achieve this goal, this article focuses on two issues; the first examines jurisdictional matters of the most contentious ISDS provisions, while the second looks at proposals and initiatives that have been applied to replace or restrict investment arbitration and, thus, aims to determine which approach is suitable for Saudi Arabia.

## INVESTOR-STATE ARBITRATION CLAUSES IN SAUDI BITs

The scope and choice of the protection provided by BITs have been evolving over the years.[5] From the 1960s to the 1970s, most of the BITs only provided for a direct claim against a host state in the event of expropriation or nationalisation.[6] Later BITs, particularly those signed since the 1990s, have extended the provision of arbitration to cover any breach of the relevant BIT.[7] The approach of those treaties signed since the 1990s has been followed by the majority of the Saudi BITs, which provide for consent to submitting treaty-based claims to arbitration. This section examines the form and scope of the consent to the arbitration clause in the Saudi BITs, followed by an examination of the controversial issues of frivolous claims and the applicability of most-favoured-nation (MFN) in ISDS clauses.

### *Jurisdictional clauses in Saudi BITs*

#### *Overview of the dispute settlement options on the Saudi BITs*

[5] ibid
[6] S Kobrin, 'Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979' (1984) 28(3) *International Studies Quarterly* 329-348
[7] Neumayer and Spess (n **Error! Bookmark not defined.**)

The jurisdictional provisions for arbitration differs in each investment treaty. In the case of Saudi Arabia, it always resolved disputes under international arbitration until 1978, when it exempted disputes "pertaining to oil and pertaining to acts of sovereignty" from the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) either by conciliation or arbitration.[8] This is in stark contrast to the commonly accepted practice where contracting parties agree to settle all disputes by bringing them to arbitration.[9] Determining the jurisdiction of a tribunal in a dispute is of considerable importance since any dispute that falls outside a tribunal's jurisdiction will be open to challenge.[10]

The common feature to be found in most BITs is that only investors can initiate a dispute settlement by firstly attempting to resolve the such dispute amicably through negotiations, then once the cooling-off period has expired, an investor can resort to a local court or arbitration. However, Saudi-Singapore BIT leaves the choice to both parties – State and investor – to raise a dispute by submitting a claim to either the competent court or conciliation or arbitration by ICSID.[11] This can be observed from the reading of Article 9(1) which states that "The party intending to resolve such disputes amicably shall give written notice to the other of its intention".[12]

*Form of consent*

This section aims to clarify the differences between consent clauses in the Saudi BITs. These differences might not be clear to the drafters when drafting such treaties. The variation in the wording of the consent clause in Saudi BITs suggests that the actual meaning was overlooked. Thus, this section seeks to enhance the understanding of the importance of each term in a treaty, as that can either give absolute consent to arbitration or require further agreement.

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[8] ICSID, 'The Contracting States and Measures Taken by Them for the Convention' <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf> accessed 12 July 2020.

[9] JDM Lew, LA Mistelis, and SM Kröll, Comparative International Commercial Arbitration (2003) paras 28–22.

[10] N Gallagher and W Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford International Arbitration Series 2009) 311

[11] Article 9 (2)(b) of Saudi-Singapore BIT (2006)

[12] ibid

Arbitration is a concessional process shaped by the parties' clear intentions to resort to arbitration,[13] unlike national litigation, where the consent of the respondent is not a condition required to establish the jurisdiction of the domestic court.[14] Thus, consent to arbitration by both investors and the host State is an essential requirement for establishing a tribunal's jurisdiction over a dispute.[15] All international tribunals require clear consent by the parties to refer an arbitration claim, either stated in the BITs or any other documents.[16] Such consent can be given through a direct agreement between the parties (either before or after the dispute), or national legislation or investment treaties.[17] Concerning Saudi Arabia, the national law does not include any required consent to arbitration between the government and foreign investors, and therefore this section of the present study will focus on the form of consent in the Saudi BITs. This is in addition to the fact that most of the recent ISDS cases claim jurisdiction based on investment treaties.[18]

In BITs, not all the references to State-investor arbitration are binding, as some BITs only offer a possibility of the host State's consent to arbitration when a dispute has arisen.[19] For example, some BITs provide for the host State's sympathetic consideration of a request to settle a dispute through arbitration. Article 11 of the Netherlands-Kenya BIT states:

> The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to invest shall give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.[20]

In contrast to the majority of Saudi BITs, more recent treaties tend to include express consent to arbitration.[21] For example, the Japan-Singapore Economic Partnership

[13] P Gerald, 'Is Creeping Legalism Infecting Arbitration?' (2003) 58(1) Dispute Resolution Journal
[14] See G Biehler, *Procedures in International Law* (Berlin, Springer 2008) 35
[15] C Schreuer, 'Consent to arbitration', *The Oxford Handbook of International Investment Law* (Oxford University Press 2008).
[16] ibid

[18] Schreuer (n 15)
[19] Schreuer (n 15)
[20] Art 11 of the Netherlands-Kenya BIT 1970
[21] For example, US Model BIT (2004) Art 25(1) and Norway Model BIT (2008) Art 15(3)

Agreement provides that 'each party hereby consents to the submission of investment disputes to international conciliation or arbitration.[22]

It is important to note that the mere reference in a BIT to arbitration, for example under ICSID, does not create jurisdiction over the dispute.[23] According to Broches, each BIT has different wording of its arbitration provisions that refer to submitting a dispute to ICSID, which means that ICSID does not necessarily have jurisdiction over the dispute[24]. Although not all of Broches' examples of express consent appear in Saudi BITs, these do contain similar language. For instance, the Saudi BIT with Turkey states that "the dispute can be submitted" to arbitration, and the most recent Saudi-Japan BIT states that "the disputing investor may submit the investment dispute"[25]. In these cases, Broches argues that such wording does not necessarily involve consent to arbitration if there is no further agreement after the dispute has arisen.[26] This means that an investor cannot bring a claim to an international tribunal based on the BIT alone, as an arbitration agreement is needed to establish consent.[27] The same matter of non-binding consent appears in the rest of the Saudi BITs, with different wording. The majority of Saudi BITs state that "it shall be at the request of the investor be filed for …[arbitration]"[28]. Again, this clause does not constitute a binding offer of consent by the host State. Accordingly, a further specific agreement is required to establish the jurisdiction.[29]

The only express binding consent can be seen in the BIT with India, as it adds a separate clause that clearly emphasises this consent:

> ..the Contracting Party shall agree to the settlement by arbitration and not request the exhaustion of local settlement procedures.[30]

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[22] The Japan-Singapore Economic Partnership Agreement, Art 82(4)
[23] B Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1993) 14(2) *Northwestern Journal of International Law & Business* 368
[24] Aron Broches, 'BITs and Arbitration of Investment Disputes', in Jan Schultz and Albert Van Den Berg (eds), *The Art of Arbitration, Liber Amicorum Pieter Sanders* 63 (IISD 1982).
[25] Art 14.
[26] Broches (n 60)
[27] Schreuer (n 15)
[28] This article appears in the Saudi BITs with Belarus (2009), Czech (2009), Singapore (2006), BLEU (2001), Korea (2002), Malaysia (2000) and Germany (1996).
[29] Broches (n 60)
[30] Art 12(2)

By adding such a clause, the host State is binding itself to consent to arbitration without any separate agreement, and in the event of refusing its consent, that will cause a breach of its obligation under the BIT.

On the other hand, some BITs have unequivocal consent to arbitration.[31] This consent is where the BIT states that the "dispute shall be submitted" or "each Contracting party hereby consents" to arbitration. In these two forms, the consent by both parties is very clear. In other words, such forms do not constitute a mere offer of arbitration from the host State to the investor, which requires further acceptance by the host state; they show that both parties have already agreed to submit a dispute to arbitration. A clear example of consent to arbitration in the BITs can be seen in a UK BIT, as it explicitly indicates the consent to arbitration: "Each contracting party hereby consents to submit to the Centre any dispute …"[32] Such wording expresses clearly the State's consent to arbitration.

However, other wording mentioned in the majority of Saudi BITs shows that the lack of such clear consent still imposes an obligation upon the host State. It is reasonable to claim that based on such wording, the global trend is to accept international arbitration, particularly arbitration by ICSID.[33] Some scholars argue that, even in the absence of binding provisions for a host State to give its consent to arbitration under ICSID, the host State cannot refuse to settle this dispute under ICSID without providing reasonable justification in good faith.[34] Furthermore, it has been argued that such mere promises to resort to arbitration place a moral obligation upon the parties which should be respected.[35] In sum, it would be of great help to dispute resolution if future Saudi BITs could make the intention to consent to arbitration clear, either by requiring further agreement or by clearly including its consent to the arbitration in the text of the investment treaties. By doing so, the certainty and predictability of the treaties would

[31] Such as the BITs with India Art 12, Malaysia Art 11 and Germany Art 11.
[32] Agreement for the Promotion and Protection of Investments, June 19, 1980, Great Britain-Bangladesh, T.S. No. 73. Similar provision can be seen in the Korea-China-Japan Trilateral Investment Treaty 2012, Art 15.
[33] Kishoiyian (n 22) 3
[34] Andrea Steingruber, *Consent in International Arbitration* (Oxford International Arbitration Series 2012) 174
[35] R Dolzer and M Stevens, *Bilateral Investment Treaties* (Brill 1995) 132

be enhanced and the dilemma of interpreting the consent to arbitration's clause would be averted.

*Scope of consent*

The scope of consent is also important, as it determines the kind of disputes that the contracting States intend to be covered by such a clause. This section examines the scope of consent to arbitration clauses in the Saudi BITs. It also highlights the difference between the restricted and broad scope by examining various jurisdiction and arbitration awards.

Countries have the freedom to limit their consent to arbitration either under ICSID or any other form.[36] They can limit the type of dispute that can be submitted to arbitration either by defining what kind of dispute can be submitted or by excluding certain activities from the dispute. For example, China has only permitted disputes over nationalisation and expropriation to be submitted to arbitration.[37] However, in most of the Saudi BITs, there is no such limitation, except in the BIT with China, as shown in the above example.

Saudi Arabia has made a notification to ICSID under Article 25(4), which allows the Contracting States to notify the centre concerning a class or classes of disputes that the Contracting State would or would not consider submitting to the Centre's jurisdiction.[38] In accordance with this article, the government of Saudi Arabia made a notification in 1980 as follows:

> [T]he Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the

[36] C Schreuer, *The ICSID Convention: A Commentary* (2001) paras 347–73 on the Scope of Consent
[37] G Smith, 'Chinese bilateral investment treaties: restrictions on international arbitration' (2010) *76*(1) Arbitration 58-69
[38] Article 25(4) of ICSID Convention

Settlement of Investment Disputes whether by way of conciliation or arbitration.[39]

To clearly understand the consequences of such notification, two key points must be discussed. First, the legal effects of 'notification' under ICSID should be clarified. This notification is merely informative and "would not constitute a reservation to the Convention".[40] The notification of intent is designed to "avoid any risk of misunderstanding" [41] and thus does not have "any direct legal consequence".[42] Under Article 32 of the VCLT, notification under ICSID could be used as a supplementary means of interpretation to "elucidate the parties' intent" under the BIT.[43] The wording of a notification does not, therefore, represent consent to arbitration or conciliation under ICSID or conflict with such consent.[44] This leads to the second point, which concerns the importance of the express intention of the contracting parties in investment treaties or arbitration agreements. This cautious approach toward ICSID was not reflected in any of the earlier Saudi BITs. Thus, the Saudi government should consider including similar wording to that of the 1980 Notification in its investment treaties to ensure the effectiveness of its 1980 Notification in future disputes.[45] Additionally, it must be noted that such limitations of the scope of arbitration are only for submitting such disputes to ICSID, leaving the door open to other forms of arbitration such as UNCITRAL .

However, Article 10(2) of the Saudi Arbitration law states that "Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister unless allowed by a special provision of law"[46]. This Article may indicate that

[39] Notification submitted to the Centre on 8 May 1980. See ICSID, 'Designation and Notification' < https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST117> accessed 23 September 2019

[40]ICSID Convention, Regulations, and Rules, Notifications by the Contracting States, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' < http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/basic-en.htm> para 31, accessed 23 September 2022

[41] ibid

[42] J. Willems, 'The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction' (2011) 8(1) S.C.J. INT'L L. & Bus 28

[43] ibid

[44] ibid

[45] See *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Feb. 12, 2007)

[46] Article 10 (2) of the Arbitration Law Royal Decree No. M/34 Dated 24/5/1433H – 16/4/2012

consent to arbitration is not solely under the control of governmental bodies as it needs prior approval by the Prime Minister. It should be noted that the Arabic version of this Act is different and that the authorised translation into English is not accurate or identical to the original Arabic version. The Arabic version of this Article provides that governmental bodies "shall" seek such approval. This may create uncertainty for foreign investors, as some BITs do not create binding consent – as mentioned above – and governmental agencies still need the approval to agree to submit a claim to arbitration.

There is another restriction on the scope of consent, which is imposed by stating that only a dispute that has arisen out of a breach of a substantive right in the treaty can be submitted to arbitration. However, the norm in treaty practice is that it has broad inclusive consent clauses.[47] The majority of Saudi BITs have a liberal approach, by providing that disputes concerning an investment can be referred to arbitration. This approach can be implemented broadly because it is not limited to disputes arising from a breach of substantive rights contained in the BIT. This broad formulation in the majority of Saudi BTs[48] simply refers to:

> Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party in connection with these investments in the territory of the former Contracting Party.

The effect of such formulation is, arguably, whether it can be extended to include contract disputes. In *Salini v Morocco,* it was observed that such broad formulation is not limited to treaty violation alone but can include contract disputes.[49] Another tribunal, an ad hoc one, came to the same conclusion, stating that such formulations "do not necessitate that the Claimant alleges a breach of the BIT itself: it is sufficient that the dispute relates to an investment made under the BIT".[50] Thus, under the current forms of consent to arbitration in the majority of Saudi BITs, an investor can invoke contractual jurisdiction.

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[47] C Schreuer, *The ICSID Convention: A commentary* (2001), para 349
[48] 11 out of the 13 BITs under study
[49] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4
[50] *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No. ARB/97/3, para 55

Indeed, it has been argued that contractual obligation can be covered by this clause.[51] This is because usually BITs do not exclude contracting claims from their scope; on the contrary, the broad language of "dispute concerning investment" is broad enough to include contractual claims.[52] This means that if the treaty drafters tend to exclude contract claims, they would have done so by expressly stating this. In addition, arguably, the tribunal's assumption that contractual obligations are excluded by their nature is refuted by treaty practice.[53] The supporters of this perspective argue that if a state intended to exclude contract claims, it would do so by expressly including that in its treaty. For instance, the Austrian Model BIT refers clearly to disputes arising from breaches of the BIT obligation that cause damage to the investor.[54]

The argument above provides that the usual practice of BITs is not to exclude contract claims, and therefore, it should by nature be within their scope. Such an argument cannot be fully accurate, however, as some States have realised that contract claims may not be covered by the scope of the term "dispute concerning investment" and therefore they specifically provide for the protection of contractual undertakings made by foreign investors I with the State so that remedies can be sought through international arbitration by such investors.[55]

Another example of quite an express restriction of disputes that are submitted to international arbitration is seen in the latest Saudi BIT, the one with Japan, which states that:

> For this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage because of or arising out of, an alleged breach of any right conferred by this

[51] J Risse and N Gremminger, 'The Truth About Investment Arbitration (not only) under TTIP – Four Case Studies' (2015) 33 (3) ASA Bulletin 465–484; W Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18(1) Minnesota Journal of International Law 1-97

[52] Zachary Douglas, *The International Law of Investment Claims* (Cambridge Press 2009) 238

[53] ibid

[54] Article 11 of Austria Model BIT. For another example, see Article 1116 of NAFTA.

[55] C Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in The Road' (2004) 5 The Journal of World Investment 249-255

> Agreement concerning investments of investors of the other Contracting Party.[56]

A similar provision is found in the BIT with Jordan, where a clear definition was added.[57] These two BITs are the only Saudi BITs that limit the investor's possibility of referring purely contractual disputes to an international tribunal. Thus, these two BITs attempt to narrow the scope of dispute and distinguish between contract claims and treaty-based disputes. However, two further clarifications are required in these two BITs. First, the wording of "any right conferred by this Agreement with respect to investments" is broad enough to cover all the rights granted in the BIT and not only selected investment standards such as "national treatment". In contrast to the Saudi BITs with Japan and Jordan, the ASEAN–China Free Trade Area (ACFTA) has narrowed the scope of ISDS to cover only the breach of selected investment standards.[58] This example is even narrower than the latest Saudi BITs and thus more predictable. For instance, the pre-entry violation of the MFN obligation or the violation of the transparency clause is not within the scope of the ISDS clause.

The second clarification relates to the requirement to prove damage and loss. The wording of the provision in the Saudi examples does not require the investor to prove that loss or damage has occurred. It only requires proof of the alleged breach.[59] This ambiguity was clarified in the Japan-Singapore Economic Partnership Agreement (JSEPA): Article 82(4)(a) provides that the loss or damage is "alleged", and therefore needs to be proven.[60] Accordingly, this article suggests combining these provisions in both ACFTA and JSEPA to ensure a predictable and precise scope of consent to arbitration.

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[56] Article 14 of the Saudi-Japan BIT.

[57] Art 15

[58] Article 14(1) of the ACFTA:

> This Article shall apply to investment disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former Party under Article 4 (National Treatment), Article 5 (Most-Favoured-Nation Treatment), Article 7 (Treatment of Investment), Article 8 (Expropriation), Article 9 (Compensation for Losses) and Article 10 (Transfers and Repatriation of Profits), which causes loss or damage to the investor in relation to its investment concerning the management, conduct, operation, or sale or other disposition of an investment.

[59] Article 14 of the Saudi-Japan BIT and Article 15 of the Saudi-Jordan BIT.

[60] Article 82(4)(a) of JSEPA provides that each party consents to arbitration provided that: "less than three years have elapsed since the date the investor knew or ought to have known, whichever is the earlier, of the loss or damage which, it is alleged, has been incurred by the investor".

One might argue that tribunals are well equipped to determine the meaning and scope of arbitration clauses, and thus can fairly easily distinguish between a mere contractual claim and an investment-based claim, as in *SGG v Pakistan.* [61] In this case, the claimant invoked Article 9 of the Swiss-Pakistan BIT, which broadly covered "disputes concerning investments". The tribunal observed that this clause was a pure description "of the factual subject matter of the disputes, [and did] not relate to the legal basis of the claims, or the cause of action asserted in the claims", so therefore contractual claims were not covered.[62] Nevertheless, this article argues that instead of leaving the interpretation to the discretion of the tribunal, it would be better to clearly state in the treaty what the contracting parties intended to include in the scope of ISDS.

*Fork-in-the-Road clause*

A fork-in-the-road clause prevents the commencement of parallel claims in a local court and through arbitration. However, the formulation of the clause is critical to ensure its full and effective application. This section highlights the importance of carefully drafting such clauses.

Under many BITs, an investor can choose to submit a dispute either to a local court or to international arbitration: their choice of one forum is final.[63] This is the so-called "fork-in-the-road" clause, which aims to prevent an investor from initiating other dispute-resolution mechanisms after having already chosen one of the options in the BIT.[64] It also aims to reduce the risk of parallel remedies in local courts and international tribunals. This provision is very important to the host State, as it enables the State to avoid finding itself in a multiple-proceedings scenario which would require

[61] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13
[62] ibid, para 161
[63] A de Luca, 'Collective Actions in ICSID Arbitration: The Argentine Bonds Case.' (2011) 21 Italian YB Int'l L 211
[64] S Miron, 'The last bite of the BIT s—supremacy of EU law versus investment treaty arbitration' European Law Journal (2014) 20(3) 332-345.

it to defend the same claim in different fora.[65] It is also important as a tool to ensure finality and certainty for the disputing parties.[66]

The fork-in-the-road clause has, however, regulated the ratio between local courts and international arbitration differently in different BITs. Some BITs require the exhaustion of local courts before parties can resort to international arbitration.[67] Other BITs only provide for international arbitration and do not mention adjudication by local courts.[68] Still others require merely exhaustion of local courts within a certain time.[69] Other BITs oblige the host State not to request the investor to seek a local court once the investor has decided to choose international arbitration; this is an express waiver of this rule.[70] A typical approach is giving an investor a choice of either international arbitration or local courts, and the first one chosen is final. [71]

The practical application of the clause means that if an investor has brought a dispute before a local court, that investor cannot bring the "same dispute" before international arbitration. The term "same dispute" has various interpretations among tribunals: some of them refer to the same "subject matter of the claims"[72], while others define similarity based on "the same object, parties and cause of action".[73] However, there is a consistent case law that shows that the dispute and the parties should be identical to invoke the fork-in-the-road clause.[74] Thus, only identical disputes that have arisen

[65] W Shen, 'Is This a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives' (2010) 27(4) *Journal of International Arbitration* 379-420.
[66] Miron n(64)
[67] Art 13 Singapore-China BIT 1985 and Art 10(2) of the Switzerland-Uruguay BIT (1988)
[68] Art 8 of Turkey-Switzerland (1988).
[69] Art x(3)(a) Argentina-Spain BIT (1991).
[70] Art 11(4) of Saudi–Czech BIT (2009) "If the investor chooses to file for arbitration, the Contracting Party agrees not to request the exhaustion of local settlement procedures". This article was added for greater clarification of the fork-in-the-road clauses.
[71] C Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.' (2004) 5(2) *J World Investment & Trade* 231
[72] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania,* ICSID Case No. ARB/07/21 (30 July 2009).
[73] *Toto Costuzioni Generali S.P.A. v. Republic of Lebanon. Azurix v Argentina, ICSID Case No. ARB/07/12* (7 June 2012)
[74] C Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.' (2004) 5(2) J World Investment & Trade 231; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, Award, 25 June 2001, 17 ICSID Rev.-F.I.L.J. 395 (2002); K Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: An Overview (2006) OECD Working Papers on International Investment <https://www.oecd.org/investment/internationalinvestmentagreements/40079647.pdf > accessed 10 July 2020.

in the domestic court can invoke the fork-in-the-road clause to preclude the jurisdiction of an international tribunal. The wording of such a provision, at first sight, seems to be effective to prevent parallel claims. However, the tribunals' practice shows that the fork-in-the-road clause is not fulfilling its desired role. Tribunals adopt a restrictive interpretation of the "same dispute".[75] It is thus argued that in practice, the fork-in-the-road clause has only a slight practical impact on the jurisdiction of international tribunals.[76] Indeed, the application of "identical tests" is hard to meet.[77] The submission to the local court of cases that are related but not identical will not preclude submission to an international tribunal. There are numerous examples of the failure to reject the jurisdiction of tribunals based on the fork-in-the-road clause, such as *Enron v. Argentina, Sempra v. Argentina, LG&E v. Argentina, IBM v. Ecuador* and *Pan America v. Argentina.*[78]

The question then arises as to whether Saudi BITs have recognised the importance of including a clear and well-defined fork-in-the-road clause, as this will implement the government's intention to avoid the same claim arising in different fora. The majority of Saudi BITs contain the same fork-in-the-road clause. An example of such a provision is contained in the Saudi- Belarus BIT:

> If the dispute is submitted in accordance with paragraph 2 to the competent Court of the Contracting Party, the investor cannot at the same time seek […] international arbitration.[79]

This formulation indicates that the investor waives the right to submit to international arbitration once that investor has submitted a claim to the local court. However, the addition of the term "cannot at the same time" may indicate that such a prohibition is linked specifically to resorting to two fora at the same time, meaning that after a final court decision, the investor may resubmit the same claim to international arbitration.

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[75] M Cheng, 'Establishing a Code of Conduct for a Balanced Relationship between Investment Arbitral Tribunals and National Courts.' (2018) 11(1) *Contemp Asia Arb J* 91
[76] C Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) 370.
[77] L Ke, 2020. 'A Chinese-African Cross-Cultural Perspective on Dispute Settlement and the Belt and Road Initiative: Challenges and Risks Facing Chinese Investors' in J Berlie, (ed) *China's Globalization and the Belt and Road Initiative* (Springer International Publishing 2019).
[78] ibid
[79] Article 11(3) of Saudi- Belarus BIT

Nevertheless, generally, case law concludes that if an investor loses on the merits in a local court, the international tribunal cannot act as a court of appeal.[80] Another tribunal has held that an investor cannot seek an international remedy after a local court decision has been issued unless the investor can prove having suffered a denial“of justice or a "pretence of form to achieve an international” ly unlawful end."[81] An exception to the common format of the fork-in-the-road clause among Saudi BITs can be seen in the BITs with China, Germany, Austria and Switzerland. The last two BITs state in a voluntary way that

> “a dispute may not be submitted to international arbitration if a local court in [the country of] either Contracting Party has rendered its decision on the dispute”.[82]

It can be noted from this clause that it does not explicitly provide that proceeding through local litigation and before a decision being rendered by a local court can prevent an international arbitration claim from being raised. This vague formalisation does not give a solid base to invoke the fork-in-the-road provision, as an investor is not prevented from seeking international arbitration, whilst that investor already has the same case being heard in a national court. This clause can result in two possible scenarios. First, even if a decision has been rendered, the phrase “may not” makes it possible to resort to arbitration as it is not as strong as “shall not” or “must not”. The second scenario is that an investor can resort to arbitration while the case of the local –court is ongoing - the decision is not rendered yet. That means the investor is allowed to resort to arbitration during the litigation procedure, as the prevention factor is associated with a court decision being rendered. This will be problematic because it goes against the objective of the treaty, which is to prevent parallel procedures. It is not only problematic but can be extended to other treaties by applying an MFN clause. As the MFN clause is available in all Saudi BITs, an investor can invoke this vague formalisation to be used in other treaties.

This leads to the question of whether a foreign investor can ‘treaty shop’ between Saudi BITs, to escape the fork-in-the-road provisions. Indeed, this could be done by

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[80] *Mondev Int'l v. U. S.*, ICSID Case No. ARB(AF)/99/2, Award, 126 (11 October 2002), 6 ICSID Rep. 192 (2004).
[81] *Azinian, Davitian, & Baca v Mexico*, ICSID Case No. ARB(AF)/97/2, Award, 99 (1 November 1999), 5 ICSID Rep. 272 (2002).
[82] Article 11(3) of Austria-KSA BIT (2001).

importing dispute settlement provisions into the BITs with China, Germany, Austria and Switzerland, which have no fork-in-the-road clause. Indeed, investors can invoke an MFN clause to override the fork-in-the-road requirement in the applicable BIT. In some cases, tribunals have permitted the use of MFN for a claim to be submitted directly to international arbitration.[83] Therefore, the submission of a claim to a local court by a foreign investor will not prevent that investor from initiating an investment claim under international arbitration, based on the MFN clause. It seems, however, that the Saudi drafters have noticed this shortcoming and have attempted to resolve it, such as in article 4(3) of the BIT with Jordan and Article 3(6) of the BIT with Iraq.

One of the latest Saudi BITs, the Saudi-Japan BIT, has a newer version of the fork-in-the-road clause that has been copied from Japanese investment treaties.

> If the investment dispute is submitted to a competent court of the disputing Party, the disputing investor may not resort to arbitrations outlined in paragraph 4 concurrently for the settlement of the same investment dispute. The final decision on the merits of the aforementioned competent court shall be binding and shall not be appealed by any means, other than what is provided for in the legislation of the Contracting Party.[84]

It provides that if an investor does not submit the dispute to a national court or administrative arbitration, the investor 'may' submit it to international arbitration. Despite the importance of this clause, the word 'may' might be interpreted broadly as it does not explicitly forbid such an act. More precious and clear wording can be seen in the Saudi-Iraq BIT, in which the Arabic version states that an investor is not allowed to pursue an international claim while a domestic court is looking at the same investment dispute.[85]

This provision is important, to ensure the stability of the regime, as the investor's choice is final, which can prevent parallel disputes. Furthermore, the model Draft BIT

[83] *Maffezini v. Spain*, ICSID Case No. ARB/97/97 (25 January 2000)
[84] Art 14(5) Japan-Saudi BIT (2017). Similar provision appears also in the Japan-Vietnam BIT (2007) Art 14.1, Japan-Cambodia BIT (2007)
[85] Art 13(5).

specifies the dispute to be an “investment dispute”, in contrast to the general use of the term “dispute” in the rest of the Saudi BITs. This means that host State consent to ISDS is restricted to only the violation of the BIT substantive standard, and thus contractual disputes will be excluded, as discussed in this article .[86] Once the fork-in-the-road clause has been carefully drafted, it would have considerable importance in the establishment of the jurisdiction of international tribunals and in avoiding duplication of the dispute process.

## THE RISK OF FRIVOLOUS CLAIMS

One of the drawbacks of the current ISDS system in the Saudi BITs is the lack of a filter mechanism to prevent frivolous claims from being pursued to arbitration. This section examines this loophole and proposes a solution to prevent it.

The majority of Saudi BITs neither expressly enforce nor extinguish the local remedies rule, which gives foreign investors a direct path to resort to international arbitration. Some might argue that easy direct access to an international tribunal does not cause a problem for a host State. They may be basing their argument on the well-known worldwide acceptance of such a method to settle investment disputes. However, there is a serious possibility that such a procedure could be abused by foreign investors.[87] One of these serious impacts is associated with frivolous claims,[88] which would cost time and money for the responding State.[89] In addition, these frivolous claims disrupt the proper administration of justice and clog the judicial system.[90] Such an impact on host States and the ISDS system cannot be overlooked.[91] Therefore, it can be argued

[86] See also, Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 373
[87] Chen T, 'Deterring Frivolous Challenges in Investor-State Dispute Settlement.' (2015) 8(1) *Contemp Asia Arb J* 61
[88] A frivolous claim is ‘lacking a legal basis or legal merit’, ‘not reasonably purposeful’ or ‘not serious’. *Black’s Law Dictionary* (8th edn, 2004), at 692
[89] Chen (n 122)
[90] K Polonskaya , 'Frivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims That May Be Curtailed in an Expedient Fashion.' (2017) 17 *Asper Rev Int'l Bus & Trade* L 25
[91] ibid

that certain instruments are necessary for the surveillance of investment disputes before they proceed to an international tribunal. In this way, the frivolous claims might be eliminated, and thus the host state could be protected from spending money on adjudication fees. Thus, such shortcomings can be overcome by adopting different approaches.

In practice, there are several rules adopted to mainly eliminate unmeritorious claims. For example, Article 28(6) in the 2012 US Model BIT provides that "in determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment". [92] This wording echoes that of the Dominican Republic-Central America Free Trade Agreement (CAFTA).[93]

One might argue that there is no need to include such provisions in the treaty text, as ICSID[94] and UNCITRAL[95] already provide rules to prevent manifestly frivolous claims. In response to this, it could be argued that firstly, in the Saudi case at least, an investment claim can be brought before other tribunals than ICSID and UNCITRAL; and secondly, that generally the ICSID and UNCTRAL mechanisms for dismissing frivolous claims have been heavily criticised as being biased[96] and requiring a high threshold to dismiss such a claim.[97] Thus, if investment treaties include the requirement of preliminary questions before proceeding to an international tribunal, this will ensure that all claims will be tested regardless of the type of forum.

Other advocates of including such rules in the BITs may argue that tribunals can at the procedural stage apply a *prima facie* test, to evaluate whether the "facts alleged

[92] Article 28(6) in the 2012 US Model BIT
[93] Article 10.20.4 of the Dominican Republic - Central America Free Trade Agreement ( 5 August 2004).
[94] ICSID, Rule 41(5).
[95] Article 17 of the new UNCITRAL Rules
[96] There could be a financial interest for arbitrators to continue an investment proceeding and deny there is a frivolous claim. For details see Pia Eberhardt & Cecilia Olivet, *Profiting From Injustice* (Brussels: Corporate Europe Observatory and the Transnational Institute, 2012) at 15, online: <https://www.tni.org/files/download/profitingfrominjustice.pdft
[97] K Polonskaya, 'Frivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims That May Be Curtailed in an Expedient Fashion.' (2017) 17 *Asper Rev Int'l Bus & Trade L* 25

may be capable, if proved, of constituting breaches of the BIT,"[98] and once this test is met, the jurisdiction of the tribunal will be rejected. However, the use of a *prima facie* examination has been criticised, as the tribunal's decision is based on the investor's characterization of the alleged facts.[99] This means that there is no input of the State's perspective on the detriment of the outcome of the *prima facie* test. Another criticism that can undermine the efficiency of the *prima facie* test is that it is extremely rare to find cases where the tribunal's jurisdiction has been rejected based on the *prima facie* test.[100]

Therefore, based on the ineffective mechanism of dismissing claims without legal merits based on the institutional investment rules (as in ICSID and UNCETRAL) or a *prima facie* test, it could be argued that depending on the above mechanism would not be effective enough to prevent frivolous claims. A better approach would be to include a filtering mechanism in the investment treaties text, such as the one in the Comprehensive Economic and Trade Agreement (CETA).[101] This agreement states that the respondent State can "file an objection that a claim is manifest without legal merit' or "unfounded as a matter of law".[102] CETA is being seen as a better filtering mechanism for frivolous claims, for two main reasons. First, it differs from ICSID, for example, in the kind of claims submitted as frivolous. ICSID limits the claims to those that "manifestly" lack "legal merit", while CETA extends it to include claims that cannot potentially succeed. Secondly, it allows both parties – the investor and the responding state – to submit their observations on the claim, in contrast to ICSID where only the claimant's observation is taken into consideration.

Including such filtering, instruments not only prevent frivolous claims but also clarifies the allocation of the costs of arbitral proceedings and legal fees. Not all arbitration rules provide for the allocation of the costs of a frivolous claim. For instance, ICSID

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[98] *Noble Energy Inc. and MachalaPower Cia Ltd. v Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para 153

[99] There are other views that do not rely on the claimant's view and require extra examination. For more details, see pp18-19

[100] Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 276

[101] CETA was concluded on 29 February 2016 and entered into force on 21 September 2017 <www.ictsd.org/bridges-news/bridges/news/eu-canada-confirm-cetaprovisional-application-date>

[102] Art 8.32 and Art 8.33 of CETA

allows discretion by the tribunal to decide the burden of the cost, either to be applied to both parties, despite being a frivolous claim,[103] or to allocate the cost in favour of the respondent.[104] Apparently, there are inconsistent approaches toward allocating the cost, especially for frivolous claims. Therefore, the treaty drafter should clarify this point to avoid unexpected results which might increase the financial burden of such claims on respondent States. This issue has been overcome in CAFTA and the 2012 US Model BIT,[105] which have explicitly spelt out that the prevailing party will be awarded reasonable costs and attorneys' fees.[106] Moreover, the above examples adopt a fee-shifting mechanism, which means both investors and the state can bear the cost of arbitral proceedings. In other words, not only could the claim be frivolous, but the responding host state might abuse the arbitration process by submitting a frivolous objection. In this case, CAFTA and the 2012 US Model BIT created balanced mechanisms by shifting the fees to the abusing party. This can force parties to think twice before submitting their frivolous claims or objections.[107] It is argued that such rules would discourage frivolous claims, and are thus a welcome step towards more rapid, efficient and cost-saving procedures.[108]

The above discussion shows that BITs which do not clarify the issue of frivolous claims can lead to a serious dilemma. Hence, two points are worth noting: first, the effectiveness of the above examples awaits to be seen in future tribunals, as it has not yet been invoked. Second, there are fears that such provisions might be abused by the respondent State, which would create an additional layer to the already costly and lengthy arbitration proceedings.[109] Despite these possible criticisms, however, the potential positive impacts outweigh the negative ones. In the case of Saudi Arabia, the financial cost of frivolous claims may not play an essential factor in determining the

[103] *Trans-Global Petroleum, Inc. v Jordan*, ICSID Case No. ARB/7/25; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007), at 346-348.
[104] *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para 8.3.4
[105] The 2012 U.S Model BIT Article 28(6).
[106] Article 10 (20) (6) of CAFTA
[107] Tsai-Fang Chen, 'Deterring Frivolous Challenges in Investor-State Dispute Settlement' (2015) 8 Contemp Asia Arb J 69
[108] M Potestà, and M Sobat, 'Frivolous claims in international adjudication: a study of ICSID Rule 41 (5) and of procedures of other courts and tribunals to dismiss claims summarily'(2012) 3(1) Journal of International Dispute Settlement 166.
[109] Christoph Schreuer et al*, The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 544; *Pac Rim Cayman LLC v El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para 113.

adoption of anti-frivolous provisions. Thus, another important factor that the government can consider is the reputation of the foreign investment claimant in the host State. A load of ISDS cases may give a sign to a potential investor that there is something wrong with the foreign investment regime. Thus, it should highlight the fact that the Saudi government has not published any information regarding investor-State disputes. As seen from the ICSID cases, there is access to ascertain the dispute causes or the arbitration awards. This situation may create a scenario in which foreign investment inflow will be discouraged based on the number of investment cases, even though these cases might be frivolous. This is because an investor would not be able to know whether a case was frivolous or not. In this respect, it can be concluded that the potential benefits of such a clause outweigh its possible drawbacks.

## THE APPLICABILITY OF MFN TO THE DISPUTE SETTLEMENT MECHANISM

Another important aspect of the ISDS clauses is the applicability of a Most-Favoured-Nation (MFN) clause to these provisions. The presence of this clause will lead to the question as to whether the jurisdiction of an international tribunal established under the terms of the basic treaty can be expanded, by integrating into that basic treaty the "most favourable treatment" expressed in the jurisdictional provisions of a third treaty. This section discusses this aspect in Saudi BITs and recommends some solutions.

The application scope of the MFN clause can be divided into two criteria: substantive protection and procedural protection, the latter of which relates to dispute settlement. The use of MFN as an importer of substantive protection from other treaties is widely accepted,[110], particularly in the area of substantive rights.[111] However, the highly controversial issue is whether to apply an MFN clause to procedural rights.[112] In other

[110] *Berschader v Russia*, SCC Case No. 080/2004, Award and Correction, 179 (2006); *MTD v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 100, 197 (2004); *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 54 (1990); *CME v. the 243Czech Republic*, UNCITRAL Arbitration, Final Award, 500 (2003); Guido Santiago Tawil, 'Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration' in Christina Binder et al (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 9, 27

[111] *Berschader v Russian Federation*, SCC Case No. 080/2004, Award of Apr. 21, 2006; Yas Banifatemi, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in investment Arbitration', in Andrea Bjorklund and other (eds*) Investment Treaty Law: Current Issues III* (BIICL 2009) 241.

[112] N Junngam, 'An MFN Clause and Bit Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference.' (2010) 15(2) *UCLA J Int'l L Foreign Aff* 399.

words, whether foreign investors can override a condition on instituting arbitration in their BITs by importing a less restrictive dispute clause in other BITs by invoking the MFN clause. This practice may result in uncertainty and be contrary to a state's intention when negotiating its BITs. More fundamentally, the question is whether this use of MFN is contrary to its traditional purpose.

Most of the old generation of the Saudi BITs include an MFN clause in their traditional format that does not allow dispute settlements to be excluded from its scope. Even in the recent BIT with Japan, which is a shift from typical BITs, dispute settlements are not excluded from the MFN scope. Such an absence of an important clause can cause many issues that the Saudi drafters did not foresee. Therefore, allowing no exceptions to procedural issues (ISDS) within the scope of the MFN can result in uncertainty about the outcome of the treaties. However, this issue has been overcome by both the BIT with Jordan and the one with Iraq.[113] As it has excluded procedures for the resolution of investment disputes from the scope of MFN, it has also excluded substantive obligations.

There are inconsistent tribunal awards on whether MFN clauses be applied to dispute settlement procedures. The most famous decision in favour of applying MFN to a procedural matter is *Emilio Agustín Maffezini v The Kingdom of Spain*[114] (*Maffezini*).[115] This tribunal states that "dispute settlement arrangements are inextricably related to the protection of foreign investors".[116] The *Maffezini* tribunal adopted a broad interpretation to decide on the scope of the MFN clause. In contrast, a more restrictive approach emerged in *The Plama Consortium Ltd v Republic of Bulgaria.*[117] In that case, the ability to import more favourable dispute settlement provisions through MFN was denied. This issue of "borrowing" the most favourable dispute settlement provision does not apply only to overriding domestic courts in favour of arbitration. It could have more complicated and unpredictable scenarios, such as expanding the

[113] Agreement Between Japan and The Kingdom of Saudi Arabia For the Promotion and Protection of Investment (signed on 17 April 2019, not enforced)
[114] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7
[115] (ICSID) *Case* No. ARs/97/7. Decisions by other tribunals who adopted the same approach as *Maffezini* are: *Gas Natural v Argentina* ICSID Case No. ARB/03/10, Decision on Jurisdiction (June 17, 2005); *National Grid v Argentina.* June 20, 2006. (UNCITRAL)
[116] ICSID Case No. ARB/97/7, Decision on Jurisdiction, [ *45* (Jan. *25,* 2000), 5 ICSID REP. 396 (2002)
[117] (ICSID) Case No. ARB/03/24

types of disputes that could be submitted to arbitration or broadening the scope of a tribunal's jurisdiction of the subject matter. These issues have been previously disputed,[118] yet the tribunals refused to apply MFN in those matters. However, as there is a lack of hierarchy among international tribunal decisions and they have no *stare decisis* obligation, a host State may prefer not to rely on those decisions being applied in future disputes. More importantly, although the *Plama* decision adopted a restrictive approach contrary to the *Maffezini* broad one, *Plama* left open the *possibility* of the *Maffezini* approach in "exceptional cases".[119]

Therefore, Saudi Arabia should take a serious step towards clarifying the scope of the MFN clause, as to whether it includes dispute settlement. To address this issue, two aspects can be considered. First, regarding the old generation of Saudi BITs that contain a broad MFN clause, there are two options. One is to leave its BITs as they are and hope that the Saudi authority, when a dispute arises, can convince a tribunal with evidence that this type of broad clause was not its intention when drafting the BIT.[120] Despite the uncertainty surrounding this option, however, intentionalism is a commonly acknowledged style of interpreting treaties.[121] This approach can be implemented by examining the *travaux préparatoires,* or the negotiating history.[122] Alternatively, Saudi Arabia can re-negotiate the bulk of the old generation of BITs to expressly clarify its intention. This option can be achieved through amendments or by issuing a joint diplomatic notice.

However, in the new generation of BITs, such as in the Japan one, there is a more straightforward solution: renegotiating each new BIT under Article 20 of the Saudi-Japan BIT, which states that both parties can require the treaty provisions to be amended within five years of its enforcement.[123] Lastly, for ongoing and future treaties,

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[118] *Berschader v Russian Federation*, SCC Case No. 080/2004, Award of Apr. 21, 2006; *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009)
[119] *Plama*
[120] Locknie Hsu, 'MFN and Dispute Settlement - When the Twain Meet' (2006) 7(1), *J. World Investment & Trade* 36
[121] Myres S MacDougal, Harold D Lasswell & James C Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press 1994) 82-83
[122] R Gardiner, *Treaty Interpretation* (2nd edn, Oxford Press 2015) 112-113
[123] Article 20 of the Saudi-Japan BIT

the Saudi authority should ensure that the scope of MFN is expressly clarified, either by including or excluding dispute settlement provisions.

## Initiatives to Solve Investment Disputes Before Resorting to Arbitration

The previous sections highlighted the gaps and loopholes in some of the investor-State arbitration provisions in the Saudi BITs as part of the effort to enhance predictability and certainty, as well as to maintain state control over the process. Focusing on this effort, this section argues that States can avoid or diminish the role of arbitration in favour of other means of dispute resolution. It discusses alternative ways of resolving investment disputes before they reach the arbitration stage, either by exhausting local court procedures or through amicable settlement.

Holding a host State liable for a violation of an investment treaty would prompt the State to reassert efficient control over investment dispute resolution by setting up a government agency responsible for identifying, detecting and managing risk-growing operations in which its government agencies and officials may participate.[124]This section is not suggesting that ISDS should be abandoned. This is because such an approach has not proven sustainable for any given country, except perhaps for Brazil.[125] This comes from the wide acceptance of arbitration as a method for resolving investment disputes.[126] It can be argued that careful drafting of substantive rights and obligations can enhance the predictability of the outcome of investment disputes, clarify the parties' intentions of concluding treaties and avoid frivolous claims. However, amendments to the dispute settlement provisions in Saudi BITs are still needed. Holding Saudi Arabia liable for investment treaty breaches, as seen in the sudden increase in ISDS cases in the last three years,[127] would prompt the State to

[124] Mavluda Sattorova, 'Between Reform, Reticence and Resistance' in Andreas Kulick (ed) *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 64
[125] C Titi, 'Who's Afraid of Reform? Beware the Risk of Fragmentation' (2018) 112 AJIL Unbound 232-236
[126] Chester Brown & Kate Miles, 'Introduction: Evolution in Investment Treaty Law and Arbitration' in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration (*Cambridge Press 2011) 3-11
[127] In 2019, *DSG Yapi Sanayi Ticaret Anonim Sirketi v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/19/32) and *Qatar Pharma and Ahmed Bin Mohammad Al Haie Al Sulaiti v. Kingdom of Saudi Arabia*; in 2018, *beIN Corporation v. Saudi Arabia*, UNCITRAL, Notice of Arbitration, 1 October 2018; and *HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14);

reassert effective control over investment dispute settlements. Accordingly, this section highlights possible reforms to current ISDS provisions. Investor-State arbitration has been featured as a risky, costly and time-consuming process which usually destroys whatever business relationship remains between the host State and the aggrieved investor.[128] Although a rational investor would prefer a different settlement mechanism, such an investor might find no other reliable cost-effective remedy alternative to arbitration.[129] Therefore, this section investigates possible solutions that could enhance alternative dispute resolution (ADR) as a substitute for arbitration.[130]

*Exhaustion of local remedies*

The requirement of exhaustion of local remedies (ELR) is a principle of customary international law that usually appears in many BITs and could appear as a jurisdictional condition before resorting to international arbitration or as an option among dispute settlement mechanisms in the BIT. The obligatory power of such a clause depends on its formulation in the BIT text. Generally, both ICSID and non-ICSID tribunals have held that, unless ELR is expressly required, such a requirement is waived.[131] In *Lanco International v. Argentina* it was held that "there is no need to exhaust domestic procedures before initiating ICSID arbitration unless otherwise stipulated".[132] For a long while, the requirement of ELR has not been used effectively, particularly in Saudi BITs. This article aims to highlight the effective use of ELR, not as a replacement for investor-state arbitration (ISA) but as a mechanism to reduce what could be a large number of investment claims before international arbitration.

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*Khadamat Integrated Solutions Private Limited (India) v. The Kingdom of Saudi Arabia* (PCA Case No. 2019-24); in 2017, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42); and *Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/43). The first ICSID was in 2003, *Ed. Züblin AG v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/03/01)

[128] Salacuse (n 128) 138

[129] ibid

[130] The ADR concept in the domestic context differs from the international investment domain, as arbitration for international investment disputes has become a standard form of dispute resolution, and international adjudication has an extremely limited scope, so the term "ADR" can refer to those dispute resolution mechanisms that stand as alternatives to both international arbitration and adjudication in domestic courts. See Salacuse (n128) 157

[131] M Brauch, 'Exhaustion of Local Remedies in International Investment Law' 2017 IISD <https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law> accessed 25 March 2019

[132] *Lanco International Inc v the Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, para. 37 (8 December 1998)

The increasing number of ISA and the legitimacy crisis associated with it has made countries cautious about it. Saudi Arabia, in particular, has witnessed a dramatic increase in ISDS claims in the last three years.[133] Thus, this section discusses the practice of countries toward this issue and highlights the possibility of introducing local remedies to the investment sphere.

While some countries have abandoned ISDS entirely, others keep the way to ISDS easily accessible. The requirement for the exhaustion of local remedies can play a middle solution between these two approaches, which are either too restricted or very wide, thus affecting the objectives of the treaty either to provide foreign investors with desirable protection or to create a balanced treaty that, in addition to providing such protection, ensures government regulatory space. The first approach may discourage foreign investors, and there is no successful example of countries that have abided by ISA, apart from Brazil. For instance, India has adopted a model BIT since 2015, where ELR is required for four years before resorting to arbitration, but so far only two countries have signed this treaty: Belarus in 2018 and Kyrgyzstan in 2019.[134] The second approach has an open door to directly resort to ISA, which was one of the causes of the backlash against the investment regime. Therefore, the suggested middle solution is to keep the option of the resort to ISA but allow this only after local remedies have been sought and proved unsuccessful.

To eliminate the increasing number of ISDS which have been seen as undermining the policy space of host States, some other approaches are worth studying. These approaches can be seen in the requirement for the exhaustion of local remedies, either administrative or judicial or both, before an investor can initiate ISDS. The requirement of ELR has been implemented differently by various investment treaties, such as the following three approaches.

The first approach was adopted by the Southern African Development Community (SADC), which required local remedies to be sought as a first step towards solving investment disputes which have not been amicably settled. This approach has a

[133] See (n 2).
[134] Investment Policy Hub, International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 7 June 2020

distinguishing feature: it allows the investor to waive the requirement of ELR by demonstrating that "there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or […] the legal remedies provide no reasonable possibility of such relief in a reasonable period of time".[135] This approach seems to be a win-win one, as the host state can secure its sovereignty over the dispute, while the investor would not be cautious or worried about the possible abuse of such rules or insufficiently long judicial process of the host State; the investor will still enjoy ISDS availability once local remedies have proved to be inadequate and within a sensible time to deal with the dispute. This approach also indicates that the investor does not have to wait for the period allowed if that investor can prove that there will not be any reasonable remedy under local jurisdiction.

The second approach provides only for the required duration for the pursuit of local remedies. In contrast to the previous approach, the investor is obliged to finish the required period and cannot argue about the reasonability of the local remedies. Some BITs state that once the stipulated period from the date of the first referral to the domestic court has expired, such conditions will disappear, and the investor is allowed to initiate the ISDS claim. These periods for the exhaustion of local remedies vary between BITs: for example 3 months,[136] 6 months,[137] 18 months[138], 2 years[139] and (the longest period) 5 years.[140] The requirement of such periods can ensure certainty for foreign investors that they will not be subject to a long judicial process. However, some other BITs require the exhaustion of local remedies without stipulating a specific period.[141] While the 3-, 6- and 18-month time limits might be very short for dealing with an investment dispute, the latter option of an unlimited period is too long and may

[135] The Southern African Development Community (SADC) Model Bilateral Investment Treaty Template (2012) Article 28 para 4, available at < http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> A similar provision is seen in the IISD Model International Agreement on Investment for Sustainable Development, art. 45, paras. B and C, and The East African Community (EAC) Model Investment Treaty, adopted in February 2016
[136] Protocol to the Agreement between the Belgium–Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, Bel.-Lux-China, (June 6, 2006), art. 8
[137] The 1992 Jordan-Romania BIT art. 8, paras. 3-4. The 1990 Argentina-United Kingdom BIT; The 2010 Egypt-Switzerland BIT, art. 12, paras. 2-3.
[138] The 1983 BLEU-Rwanda BIT art. 10, paras. 3-4
[139] The 1975 France-Morocco BIT (terminated in 1999), art. 10
[140] Indian 2015 Model BIT, art 15
[141] The 2010 Malta-Serbia BIT. The 2013 Netherlands-UAE BIT

render international arbitration unavailable. Foreign investors can bypass such a requirement once the tribunal acknowledges that the local remedies are ineffective or cannot resolve the dispute within the time limit provided.[142] These approaches may seem to provide the host State with confidence to address claims before the investor resorts to international arbitration. However, providing a certain time limit for local remedies to resolve a dispute might not be practical. This is because some disputes may require a longer time than is provided under the relevant BIT, which would render ELR insufficient.

The third approach is to only allow certain disputes to resort to international arbitration directly, while others require the exhaustion of local remedies. For an instant, the UAE-Poland BIT (1993) requires disputes concerning expropriation, compensation and transfer to be submitted to arbitration directly. Any other disputes should first exhaust local remedies.[143] This approach might be practical to some extent but does not distinguish between direct and indirect expropriation, which creates a real dilemma in international investment law.

On the other hand, some scholars argue that reintroducing ELR could add another layer of long and costly procedures, in addition to the unguaranteed independence of the local court, which might be biased in favour of the host state.[144] Scheurer argues that "[the] reintroduction of a requirement to exhaust local remedies would be a retrograde step."[145] He holds the view that the time limit for ELR is too short to result in a meaningful outcome, particularly if the courts in the host state are notoriously slow.[146] Accordingly, the re-introduction of the ELR requirement will serve no purpose but delay arbitration.[147]

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[142] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*)*; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26 and *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24
[143] Article 17 of the UAE-Poland BIT (1993)
[144] M Cheng, 'Establishing a Code of Conduct for a Balanced Relationship between Investment Arbitral Tribunals and National Courts' (2018) 11 Contemp. Asia Arb. J. 91
[145] Christoph Schreuer, 'Do We Need Investment Arbitration? Reform of Investor-State Dispute Settlement: In Search of a Roadmap' TDM 1, 10 (2014).
[146] C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration.' (2005) 4(1) Law & Prac Int'l Cts & Tribunals 1
[147] ibid

While these views can be seen as reasonable from a practical point of view, the recent backlash against ISDS cannot be overlooked. There is growing discontent with the ISDS regime, which indicates the need to change the system for it to continue.[148] Thus, it is argued that States will not accept the automatic bypassing of their domestic courts in favour of international arbitration.[149] A possible solution between these two views is to look at the reasons for preferring international arbitration over the local courts: the presumed bias of those courts and the need to depoliticise the dispute.[150] If the local courts are capable of handling the investment dispute effectively, then the argument for bypassing the local courts will lose its moral force.[151] An example can be seen in the *Philip Morris* case, in which the company challenged the Australian government's decision on plain packaging legislation.[152] The fact that the claimant resorted to the Australian court to challenge legislation[153] illustrates the impact of the foreign investor's trust in resorting to the local court.[154] Therefore, it can be argued that to decide effectively whether to include a compulsory ELR requirement in investment treaties, a closer look at the host State's judicial system is essential. In a host State with a particularly slow legal system, such as India,[155] it would not be practical or realistic to think that countries will accept signing BITs with an ELR requirement.[156] Another example that demonstrates this view can be seen in the UAE–Nigeria BIT (2016), where the investment made in UAE required local remedies to be sought at the court of competent jurisdiction within 6 months before resorting to ICSID,[157] whereas for investments made in Nigeria this was not a requirement. It can be seen

[148] D Wong, 'From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration' (2017) 35 Sing L Rev 145
[149] ibid
[150] W Koeth, 'Can the Investment Court System (ICS) Save TTIP and CETA?' European Institute of Public Administration, EIPA Working Paper 2016. <http://publications.eipa.eu/en/details/&tid=1860 > accessed 16 June 2020
[151] Wong (n 147) 132
[152] *JT International SA v Commonwealth of Australia,* [2012] HCA 43, 250 CLR 1.
[153] Wong (n 147) 133
[154] The exhaustion of local remedies can be necessary to establish that a host state has committed a breach of treaty. See T Voon and A Mitchell, 'Time to quit? Assessing international investment claims against plain tobacco packaging in Australia' (2011) 14(3) Journal of International Economic Law 520-521.
[155] J Hepburn and R Kabra, 'India's new model investment treaty: fit for purpose?' (2017) 1(2) Indian Law Review 95-114.
[156] Since 2015, India has only signed its Model with Belarus and Kyrgyzstan (see n 11), Also, it signed a BIT with Brazil with only a dispute prevention procedure and State-to-State dispute settlement. See Articles 14 and 19.2 of India- Brazil BIT (2020).
[157] Article 10 (2) of the UAE-Nigeria BIT (2016)

here – among other factors – that as the UAE has a better and more advanced judicial system it was very confident in imposing such rules.

*Consultation and Negotiation*

Consultation refers to a situation where an investor must resort to consultation to try to resolve an investment dispute with the host state; only if that effort is unsuccessful will the investor be allowed to resort to international arbitration.[158] Despite the practical differences between the terms 'negotiation' and 'consultation',[159] they are frequently used interchangeably.[160] The main difference is that consultations are dispute avoidance mechanisms commenced before an actual dispute arises, whereas, negotiations commence after a dispute has arisen.[161] A controversy has persisted over the legal nature and the effectives of consultations and negotiations in IIAs.[162] In most BITs, consultation and negotiations requirements have often become a mere technicality. States may wish to promote consultations and negotiations as a mandatory step before resorting to arbitration by setting out some procedural details. For instance, the parties concerned may specify the timing of consultations, the location for it and the timing of holding the consultation and the relevant authorised agency to conduct such amicable settlement.[163]

All of the BITs concluded by Saudi Arabia stipulate that disputes shall be settled as much as possible through consultation. Saudi BITs have the option of consultation for a period of six months before resorting to arbitration. This is a fairly common feature among many investment treaties worldwide.[164] It is a mandatory first step towards

[158] K Qinjiang, 'Is There a Way in the Labyrinth of Treaty Norms Leading to the Applicable Rule: Investor-State Investment Settlement under the China-Korea FTA, China-Japan-Korea BIT and China-Korea BIT' (2016) 29 Columbia Journal of Asian L 178
[159] C Fombad, 'Consultation and Negotiation in the Pacific Settlement of International Disputes' (1989) 1 African Journal of International & Comparative Law 707
[160] B Cheng, 'Dispute Settlement in Bilateral Air Transport Agreements' in C Cheng (ed) *Studies in International Air Law* ( Brill 2017)
[161] ibid
[162] ibid
[163] UNCTAD, ' UNCTAD Series on Issues in International Investment Agreements II' (UN 2014) < https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf> accessed 19 October 2022
[164] C Tams, 'Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?' (2014) 15 Journal of World Investment and Trade 603.

resolving any dispute, and some Saudi BITs state that the dispute "should be amicably settled as far as possible".[165] This requirement can be fulfilled by a mere amicable attempt, as the time framework requirement is not restricted. Saudi BITs state that if the dispute cannot be settled amicably within six months, the investor can pursue an arbitration claim, meaning that an investor has no obligation to wait for the entire cooling-off-period of six months, and the rules are unclear as to whether a decision of the amicable settlement body needs to be issued before the end of the cooling-off-period.

The above method adopted by the old generation of the Saudi BITs was also emulated in the most recent treaties with Japan[166] and Jordan.[167] Accordingly, this format raises two issues: firstly, whether consultation as an alternative to arbitration has mandatory power; and secondly, whether non-compliance with the amicable settlement requirement affects the jurisdiction of the arbitration. The overarching reason for highlighting these issues is to create a dispute prevention mechanism to avoid arbitration. Here it is important to note that answering the above concerns has no consistency in arbitral practice. Some tribunals find that amicable settlement 'constitutes a fundamental requirement that [the] Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules". [168] In contrast, other tribunals treat "consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature"[169] Therefore, what is needed is to empower the consultation mechanism and clarify its mandatory features to eliminate the number of disputes that reach the stage of investment arbitration. This shortcoming has been recognised by treaties such as the US model BIT 2012, which requires a minimum of 90 days to pass before resorting to arbitration.[170] Similarly, CETA provides that an investor may not submit a claim to arbitration before allowing

[165] Article 9 of the Saudi-BLUE BIT (2001).
[166] Article 14 of the Saudi- Japan BIT
[167] Article 15 (4) of the Saudi-Jordan BIT
[168] *Murphy Exploration and Production Company International v. the Republic of Ecuador;* ICSID Arbitral Tribunal, Case No. ARB/08/4, at para. 194
[169] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Arbitral Tribunal, Case No. ARB/01 /13, Decision on Jurisdiction of 6 August 2003, para. 184. For more discussion see A Reinisch, 'From Rediscovered Waiting Periods to Ever More Activist Annulment Committees – ICSID Arbitration in 2010' [2011 11] 11 Global Community YILJ 933-956.
[170] Article 24 of the US Model BIT.

> at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent[171]

This mandatory period gives both investor and host State better provisions for an amicable settlement, due to their sensitive and complex relationship, which amounts to the interdependence between them, and where the amount of disputed money is large.[172] On the one hand, the reputation of a host State as a friendly environment towards a foreign investor might be doubted, particularly from the perspective of the investor's home State.[173] On the other hand, the investor may wish to continue a good relationship with the host State for future investment. Thus, such compulsory time for conciliation or negotiation can play an important role to prevent arbitration and satisfy both parties. To strengthen this option, the contracting parties can add two clauses to the mandatory negotiation.

The first one is the option to extend the negotiation period by mutual agreement. This approach is adopted by the Morocco-Nigeria BIT.[174] The second one is that negotiations may be conducted before or even after the investor has begun arbitration. This latter option offers wide scope for both parties to reconsider an amicable settlement mechanism even after initiating an arbitration claim[175]. This option obtains its strength from the scenario where the investor or host State may realise or explore some issues that were not clear until they became involved in the process of arbitration.[176]

Despite the importance of such negotiation, however, it does not always have a positive outcome. Some factors halt the process of negotiation. Among these factors are the appointment by the parties of dysfunctional or incompetent negotiators, unrealistic expectations of the parties, and political or psychological factors that tend

[171] Article X.22(1) Consolidated CETA Text (n 1)
[172] Salacuse (n128) 157137
[173] Salacuse (n 128) 146
[174] Article 26 (2)(b)
[175] However, some scholars argue that such an option might not always encourage negotiation depending on the circumstances. See Salacuse (n 128) 167.
[176] See example of a host state that became more flexible with negotiation after the investor raised a claim in arbitration. J Salacuse, *The Global Negotiator: Making, Managing and Mending Deals around The World in the Twenty-First Century* (St. Martin's Press 2015) 239-247

to lead to parties overestimating their chance of winning in any eventual litigation.[177] One possible solution to overcoming these barriers is by having a skilful, well-intentioned third party who can provide a neutral assessment of their dispute.[178]

*Investment Mediation*

The popularity of arbitration as a primary mechanism for investment dispute settlement is a controversial topic. This concern results from several factors: for example, the cost of the arbitration process is high,[179] some states refuse to comply with the award,[180] or the outcome of the arbitral award is not always satisfactory even for the winning party.[181] As a consequence, some investors, countries and scholars advocate using mediation to complement investor-State arbitration.[182] Traditionally, international business has resorted to arbitration after the failure of negotiations, without seeking the help of a mediator.[183] This approach has been adopted for various reasons, such as a lack of awareness of mediation services; the control of the dispute usually being given to lawyers whose professional inclination is towards litigation; and the belief that mediation only delays arbitration, as it is a stalling tactic.[184] However, the last decade has witnessed an increase in the mediation provision as a means of amicable dispute resolution.[185] More express mention of amicable dispute settlement, like mediation, has been included in recent IIAs.[186] In Islam, mediation -known as *Wassata* - is a

[177] Salacuse (n 128) 169
[178] ibid
[179] Susan D. Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 Wash UL Rev 769, 782-90
[180] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12; *Franz Sedelmayer v Russian Federation,* Ad Hoc Award of 7 July 1998.
[181] N Welsh and A Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration (2013) 18 Harv Negot L Rev 80
[182] Ibid. Salacuse (n 128); F Susan, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 Wash UL Rev 769, 782-90
[183] J Salacuse,' Mediation in International Business', in J Bercovitch (ed) *Studies in International Mediation* (Palgrave Macmillan 2002) 213, 222
[184] ibid
[185] ICSID, 'Overview of Investment Treaty Clauses on Mediation' July 2021 < https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf > assessed 5 October 2022
186 ibdi

common method of solving disputes,[187] hence, the Saudi IIAs lack any reference to such a method. Accordingly, the next section highlights the importance of introducing mediation to resolve investment disputes. It deals with firstly, the benefits of mediation; secondly, the current example of applying mediation to investment treaties; and thirdly, the effectiveness of mediation in Saudi culture and its legal system.

*Has mediation become a more attractive mechanism than arbitration for solving investment disputes?*

The literature has discussed mediation as an effective option for State-investor disputes.[188] For the integration of mediation into the Saudi investment system, this article highlights the distinguishing features of mediation that can be effective and attractive to Saudi policymakers. We have categorised the benefits of mediation into two groups: one about procedures and the other concerning the outcome. The mediation procedures appear to be more effective than arbitration, as explained below. The outcome of mediation is another desirable feature that considers several aspects, not only the award of damages.

Procedural advantages of the procedure of mediation

*Greater speed and lower cost of mediation*

187 Said Bouheraoua, 'Foundation of mediation in Islamic Law and Its Contemporary Application'in Tan Yeak Hui and Asghar Ali Mohamed (eds) Mediation/conciliation in Malaysia: the Law and Practice (LexisNexis 2010). Shafi Fazaluddin, Conciliation in the Qurʾan: The Qurʾanic Ethics of Conflict Resolution (De Gruyter 2022)

188 Nancy A Welsh and Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harv Negot L Rev 71. See generally Investor-State Disputes: Prevention and Alternatives to Arbitration, UNCTAD (2010) <http://unctad.org/en/docs/diaeia200911_en.pdf> accessed 14 June 2020; S Hindelang, 'Part II: Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law' (September 22, 2014); European Parliament, Directorate-General for External Policies, Policy Department, Study, 2014 <https://ssrn.com/abstract=2525063> accessed 14 June 2020

A Joubin-Bret and B Legum, 'A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules' ICSID Review (2014) 29(1) 17-24; J Claxton Investor-State Disputes: No Pressure, No Diamonds?' (2020) 20 Pepp Disp Resol L J 78

One of the growing criticisms of investor-State arbitration is that it is significantly time-consuming and high cost. Mediation, arguably, can overcome these issues as it can be quicker and less expensive if the parties settle.[189] The length and cost of investment arbitration have been widely discussed in the literature. A recent study shows that an investment arbitration lasts four years on average,[190] and the average costs are approximately $3.4 million for respondents and $4.2 million for claimants.[191] In contrast, mediation is quicker as its procedure is informal and flexible, and it is a cost-effective tool as it is much cheaper than arbitration.[192]

For instance, one of the ongoing Saudi ICSID cases, *MAKAE Europe SARL v. Kingdom of Saudi Arabia*,[193] has been in progress since November 2017 without yet concluding until the time of writing this article, whereas cases that were settled or discontinued took much less time: for example, 6 months in *Züblin* case and 16 months in *HOCHTIEF* case.[194] This is another clue suggesting that an amicable solution is faster and, arguably, preferable for the Saudi government. Indeed, it has been argued that the Saudi government's practice towards dispute settlement indicates that the government's preference is to settle its disputes amicably and in private.[195] This preference extends also to investors who see arbitration as a long and expensive mechanism, even as the winning party, because the outcome is not always satisfactory.[196] A former CEO of Metalclad, Grant Kesler, complained that the arbitration process was "too slow, too costly, and too indeterminate . . . [and] . .. he

[189] L Riskin and J Westbrook, *Dispute Resolution and Lawyers* (West Group 1987)
[190] S Chew, L Reed and J C Thomas, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' NUS Centre for International Law Working Paper 18/01 (September 2018) <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf> accessed 18 June 2020
[191] M Hodgson, 'Damages and Costs in Investment Treaty Arbitration Revisited' Global Arb Rev (14 December 2017) <https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty- arbitration-revisited> accessed 14 June 2020.
[192] J Brett and Z Barsness and S Goldberg, 'The effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers' (1996) 12 Negot J 259, 263
[193] *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42). As at May 2020, this case was still disputing jurisdiction as a preliminary question. See case details at ICSID <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/42> accessed 14 June 2020
[194] See (n 2).
[195] Abdulrahman Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge 2016) 111
[196] For instance, in the *Metalclad* case, the award was 80% less than expected. *Metalclad Corp v. United Mexican States*, ARB(AF)/97/1, Award, T 131 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

wished he had merely entrusted his company's fate to informal mechanisms."[197] Thus, the fast process and low cost of mediation are particularly advantageous,[198] as they make it more attractive compared to arbitration.

*Preserving the relationship between parties*

Another factor that differentiates mediation from arbitration is a twofold one: the parties engage in the procedure more, and the relationship between them is maintained.

The basic purpose of the mediator is to assist the parties in overcoming the barriers to agreement.[199] This means greater engagement by the parties in the mediation procedure, as it opens up a channel of communication between them to participate directly in the negotiation and explore possible solutions acceptable to them.[200] Furthermore, the parties have complete autonomy over the dispute, enabling them to select and control the substantive decision-making norms.[201]

Such flexibility extends to enabling other parties to participate who may not have been allowed to do so in the arbitration process.[202]

However, the success of this feature of mediation cannot be guaranteed, as several impediments exist. For instance, communication between the parties may entail the challenge of cultural and language differences.[203] These challenges could be met by a skilled mediator who could reduce such differences, enhancing mutual understanding and developing trust between the parties, by listening carefully, asking

[197] Jack J Jr Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005) 12 U C Davis J Int'l L & Pol'y 7
[198] Claxton (n 188) 84
[199] Salacuse (n 128) 159
[200] AB Alexandra, 'The power of mediation to resolve international commercial disputes and repair business relationships' (2005) 60(2) Dispute Resolution J 60.
[201] W Guiguo and H Xiaoli, 'Mediation and International Investment: A Chinese Perspective' (2012) 65 Me L Rev 253
[202] Welsh and A Schneider (n 181) 82-83.
[203] ibid. See more at J Salacuse, *Making Global Deals: What Every Executive Should Know About Negotiating Abroad* (Times Books 1992) 58-70

parties to justify their assumption of the legal outcome, and challenging unrealistic expectations.[204]

Another advantage of the mediation procedure is that its informal atmosphere and non-binding feature encourage parties to be flexible and respectful in their negotiations,[205] and thus maintain a good relationship between them. Thus, despite disputes, foreign investors often prefer to remain in the host State's market.[206] The 2020 ICSID Caseload Statistics demonstrate that 35% of the Arbitration Proceedings under the ICSID Convention and Additional Facility Rules were settled or otherwise discontinued.[207] This is a relatively high number that cannot be ignored and demonstrates the preferable option of ISDS to settlement. Resorting to arbitration is more likely to result in worsening the relationship, as neither its aim nor outcome seeks to bridge the gap of a broken business relationship,[208] whereas mediation – and its promise of a flexible solution focusing on the long-term gains of the parties – helps to maintain their relationship, which could be in the interests of both parties.[209] The importance of keeping a good relationship and attempting to solve a dispute amicably is the nature of investment agreements that last for many years and involve large capital. In addition, what appears to make mediation a better mechanism for maintaining a good relationship is the wide space for engagement, in addition to the flexibility of the outcome, as mediation seeks an interest-based solution, not merely a monetary compensation remedy.[210]

*Advantages of mediation concerning the outcome*

[204] Welsh and A Schneider (n 181) 114
[205] T Dress, 'International Commercial Mediation and Conciliation' (1988) 10(3) Loy LA Int'l & Comp LJ 573
[206] M Marshall, 'Investor-State Dispute Settlement Reconceptualized: Regulation of Disputes, Standards and Mediation' (2017) 17 Pepp Disp Resol LJ 251
[207] The ICSID Caseload – Statistics (Issue 2020-1) <https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf> accessed 20 June 2020.
[208] Salacuse (n 128) 155
[209] Welsh and Schneider (n 188)
[210] Rafal Morek, 'Investor-State Mediation: New IBA Rules' Kluwer Blog (November 2012) <http://mediationblog.kluwerarbitration.com/2012/11/09/investor-state-mediation-new-iba-rules/> accessed 13 May 2019.

Mediation is unlike other dispute resolution mechanisms, as the third party does not impose a decision, but rather facilitates the parties' drawing up of their solution.[211] In mediation, a neutral third party assists both parties to reach an agreement that each of them considers acceptable. It can be either facilitative, where the mediator focuses on assisting the parties in defining the issues, or evaluative, in which the mediator assesses the legal merits of a case.[212] When an agreed solution is reached, the parties can decide to formalise it in a binding contract.[213]

Mediation tends to have high settlement rates and higher user satisfaction than the forms of adversarial dispute resolution,[214] and such satisfaction may result from the active and direct engagement of the parties and less tension during the procedure. Unlike judges and arbitrators, the ultimate decision-maker is not a mediator; rather, the mediator works with the parties to find a mutually acceptable solution.[215] Also unlike judges and arbitrators, mediators do not need to be jurisprudential, as their role is to persuade both parties to focus on their genuine interests rather than on their legal or contractual entitlement.[216] Thus, mediation is a win-win settlement, unlike the winning or losing situation in arbitration, as it transforms a legal dispute into a restricted relationship.[217]

As it is a win-win settlement, the outcome of the mediation would have a positive rather than negative impact on the reputation of both parties. Indeed, some host states may prefer to end the arbitration by settlement for fear of affecting their reputation and undermining their credibility of being an investor-friendly environment. As a respondent, the host State would not like a public judgement against it as a state in breach of its international law obligations , and any compensation awarded to the investor for the host State's wrongdoing would badly affect its reputation.[218] Thus,

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[211] W Stromberg, 'Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes' (2007) 40 Loy LA L Rev 1337, 1398.
[212] D Collins, 'Alternative Dispute Settlement for Stakeholders in International Investment Law' J Int'l Econ Law (2012) 15(2) 673-700.
[213] ibid
[214] Claxton (n 188) 83, 84
[215] Guiguo and Xiaoli (n 201)
[216] Alan Redfern *&* Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 1999) 1-53.
[217] I Ruvolo, 'Appellate Mediation - "Settling" the Last Frontier of ADR' (2005) 42 San Diego L Rev 177, 218
[218] E Hafner-Burton, Z Steinert-Threlkeld and D Victor, 'Predictability Versus Flexibility Secrecy in International Investment Arbitration' (2016) 68 World Pol 419.

a mediated settlement can also avoid such damage to the reputation of States, and businesses too, that could otherwise result from lengthy and public arbitration proceedings.[219] A satisfactory outcome is the foreign investor's desire and may be the most attractive factor that determines the choice of a certain dispute mechanism. As discussed above, and based on the large number of preferences to settle disputes amicably, either after arbitration or before,[220] mediation would be an effective mechanism for State-investor disputes. Indeed, it has been argued that mediation seems to be a better way to resolve cross-border commercial disputes because the mediator's role is part of a negotiated and evolutionary process that depends on the desires and needs of both parties.[221]

However, mediation cannot work sufficiently well unless certain factors are satisfied: for instance, increasing the level of awareness of mediation,[222] the availability of skilled mediators[223] and the cooperation between parties.[224] It can be argued that if these factors are met in countries with Islamic law jurisdiction, investment mediation can achieve great success. This can be due to various reasons; for instance, mediation and amicable settlement have profound roots in Islamic law and culture,[225] and also they are widely used in commercial and securities disputes (as will be discussed below). Given these reasons, Saudi Arabia can be a good environment for investment mediation. However, although most Saudi cases are settled and there has been no arbitration award since the Aramco case,[226] its BITs and its domestic legislation lack any reference to mediation.

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[219] Claxton (n 188) 84

[220] Although it is hard to indicate the number of disputes settled amicably before reaching formal arbitration, It seems plausible that settlements tend to be more likely in the earlier stages of the disagreement. See S Constain, 'Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape' (2014) 29(1) ICSID Rev/FILJ 34

[221] ibid

[222] Mediation has been seen as not a well-known practice for business: see C Titi and K Gómez, *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019)

[223] Negin Fatahi 'The History Of Mediation in the Middle East and its Prospects for the Future' (23 January 2018) < http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/?doing_wp_cron=1593006909.6919078826904296875000> accessed 24 June 2020.

[224] S Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?' (2007) 2(22) ICSID Rev/FILJ 237–241

[225] E Alsheikh, 'Distinctions between the Concepts Mediation, Conciliation, Sulh and Arbitration in Shari'ah Law' (2011) 25 *Arab LQ* 318; Doron Pely, *Muslim/Arab Mediation and Conflict Resolution: Understanding Sulha* (Routledge 2016)

[226] *Saudi Arabia v. Aramco* (1958) 27 ILR 117

The question, then, is to what extent the successes of mediation in international commercial disputes can be successfully replicated in investment disputes. During the negotiation of the ICSID Convention, some negotiators perceived that conciliation is an effective tool for settling investment disputes, and this is supported by the literature, which argues in favour of impartial conciliation that would help to settle the dispute.[227] However, in practice the use of mediation/conciliation in investor-State disputes has not been as widely used as arbitration.[228]

The above discussion demonstrates that a mediation outcome is more likely to satisfy both parties, as it can strengthen the aim of investment treaties, which is to enhance prosperity and boost the global economy. This advantage is built upon the previously discussed flexibility and effectiveness of procedures, yet, as it is relatively new in the investment sphere and it has been facing challenges.

*What are the challenges facing investment mediation?*

Despite the advantages of mediation, some commentators argue that it is not suitable for the context of international investment disputes, for various reasons. This section examines some of the most discussed drawbacks of investment mediation.

It has been argued that a typical weakness of conciliation/mediation is that its voluntary nature means it might be hard to compel a party to comply with its outcome.[229] Also, it is not certain to yield an outcome and thus may be seen as a waste of time and resources.[230] These two disadvantages have been cited widely in most of the literature; however, in fact, they are not unique to mediation, as arbitration has been

[227] Jack J Jr Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005) 12(1) U C Davis J Int'l L & Pol'y; J Barker, 'International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans' (1996) 19(1) Loy LA Int'l & Comp LJ 1); U Onwuamaegbu, "The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience" (2005) 22(2) News from ICSID < https://www.transnational-dispute-management.com/article.asp?key=964> accessed 9 May 2019.
[228] See N Welsh and A Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation LR 71-144
[229] Jack J. Coe, 'Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch', 12 (2005) UC Davis Journal of International Law and Policy 17; Titi and Gómez (n 24)
[230] Eileen Carroll & Karl Mackie*, International Mediation-The Art of Business Diplomacy* (2nd edn, Kluwer 2000)

facing the same issues. Moreover, they do not present a serious impediment that would undermine the adoption of investment mediation.

Thus, as a response to the above two disadvantages, it can be argued that, firstly, the voluntary nature of complying with the mediation outcome also applies to an arbitration outcome. This is because there are difficulties and limitations in enforcing arbitral awards as well.[231] In the majority of commercial arbitration awards, parties abide by the awards, [232] whereas the situation with arbitral awards against a State is different and the State is always reluctant to appear before a tribunal.[233]

One might argue that the difficulty of compliance also extends to the mediation process. To this end, it can be argued that mandatory or quasi-mandatory mediation and the detailed structure of the mediation procedure in investment treaties can overcome this issue, as discussed below.

Second, it is true that mediation may not achieve an outcome; arbitration, on the other hand, may yield an outcome but not a satisfactory one, or only one that is not worth the resources used in the procedure, as discussed above. However, this possible drawback in mediation can be overcome by a 'med-arb' clause, which provides that if mediation fails to solve a dispute, it will be resolved through binding arbitration. Moreover, if mediation does not yield an outcome, the parties can decide to resort to arbitration. This would result in making the disputed issues narrower in focus, and the framework of future negotiations would be structured.[234]

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[231] J Kuipers, 'Too Big to Nail: How Investor-State Arbitration Lacks An Appropriate Execution Mechanism for the Largest Awards' (2016) 39 B C Int'l& Comp L Rev 417; S Strong, 'Enforcement of Arbitral Awards against Foreign States or State Agencies' (2006) 26 Nw J Int'l L & Bus 335 and G K Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform' (2008) 25 Ariz J Int'l &Comp L 665

[232] A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell 2004)

[233] Charles E Aduaka, 'The Enforcement Mechanism under the International Centre for Settlement of Investment Dispute (ICSID) Arbitration Award: Issues and Challenges' (2013) 20 JL Pol'y & Globalization 138-139

[234] J Barker, 'International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans' (1996) 19(1) Loy LA Int'l & Comp LJ 1

The compliance issue facing mediation leads the argument onto a more important topic: enforcement. The enforcement of mediation can be a critical issue that plays a part in the perceived unpopularity of investment mediation. It has been argued that as long as the mediated agreement has no mechanism to transform it into an award, the enforcement of the mediated contract would be more difficult to achieve than an award by judgement.[235] However, using this issue to undermine the benefits of mediation for State-investor disputes does not seem to be a sufficiently strong argument. In other words, the difficulty of enforcement mediation should not prevent the use of mediation as a dispute settlement mechanism in investment claims. This view is based on various possible justifications. This issue exists, as discussed above, within ICSID awards, and more acutely with non-ICSID awards. Moreover, most ICSID awards have not needed enforcement as the parties were voluntarily satisfied with the award.[236] Thus, the comparison in this respect may undervalue investment mediation and move the focus away from developing investment mediation to be more effective and to fulfil the majority of today's international investment practices.

If the development of this strong instrument is to be fostered, an issue that needs further exploration is whether and how a mediation agreement can be enforced. The enforceability factor cannot be ignored, and mediation cannot be strengthened and become effective without an effective enforcement mechanism. The issue of an enforcement conciliation agreement has been briefly covered by the ICSID Convention, which states that

> If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award[237]

Despite the small number of ICSID conciliation cases compared to arbitration, such a clause is still important to enhance the predictability of the former. Once awareness has increased among States and investors to replace arbitration with mediation, this enforcement clause would probably have a positive effect on the position of mediation

[235] C Schreuer*, The ICSID Convention – A Commentary* (Cambridge University Press 2001) 1143
[236] E Baldwin, M Kantor & M Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) J Int'l Arb 4-5
[237] Rule 34 (2) of ICSID Convention

under ICSID. However, the question is whether non-ICSID mediation contains such a mechanism.

Several States have attempted to resolve this issue. Some have expanded the scope of the New York Convention[238] to cover mediation agreements, while others have incorporated the enforcement mechanism into their domestic law. Even though the New York Convention covers only international arbitration, some countries, such as Singapore and USA (New Jersey), have successfully extended the enforcement power of this Convention to mediation agreements.[239] These two authorities have also introduced into their domestic law another remedy for the issue of enforcement mediation agreements. The International Arbitration, Mediation and Conciliation Act of New Jersey[240] extends the definition of 'arbitration' to include "arbitration, mediation, conciliation, and other types of dispute resolution as an alternative to international litigation".[241] Singapore has done the same, as it has developed an innovative protocol that offers both arbitration and mediation, and both of these have the power of enforcement. [242]

These examples have expanded the scope of the New York Convention and incorporated it into their local laws to encourage parties to resort to mediation. Allowing mediation agreements to be enforced as arbitral awards under the New York Convention may be an effective means of enforcement, especially in the global arena.[243] This indicates the impact of government policies that aim to encourage investors to replace arbitration with a mediation settlement. Governments can do this by creating a solid basis for mediation through the enactment of laws and regulations, thus empowering the mediation settlements.

Finding a balance between the advantages and drawbacks of mediation/conciliation is desirable. Despite the advantages discussed above, however, there is still more to

[238] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[239] Karen DeSoto, 'International Enforcement of Mediated Settlements: A Problem and a Solution' (2018) 21 Int'l trade & Bus L Rev 311
[240] New Jersey International Arbitration, Mediation, and Conciliation Act (2016)
[241] Bobette Wolski, 'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research' (2014) 7(1) Contemporary Asia Arbitration Journal 87, 89.
[242] See more at the Singapore International Arbitration Centre, <http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause> accessed 1 August 2019
[243] DeSoto (n 205) 318

be done. For example, the awareness of such a mechanism needs to be enhanced to yield possible success. In addition, by providing clear and predictable mediation guidelines, trust in such a mechanism and acceptance of it – which are essential factors of success – can also be enhanced.[244] In practice, there is a potential trend by governments, multilateral agencies and institutions towards adopting mediation clauses more systematically in foreign investment law. For example, CETA and the International Bar Association (IBA) have adopted investor-State mediation rules. These examples can contribute to enhancing the acceptance of investment mediation as a recognised mechanism to solve investment disputes.

However, some articles of the IBA Investor-State Mediation Rules[245] conflict with the Islamic law 'Sharia'. Article 4(2) of the IBA Rules of Evidence in International Arbitration states that "Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative". It has been argued that this Article is in direct conflict with witness testimony rules in Islamic jurisprudence because self-interested testimony is not allowed, as own employees' testimony is considered untrustworthy.[246] According to Sharia "[a] witness must not have any bias from relationship to the parties or interest in the suit".[247] Further studies by Islamic and legal scholars are needed to investigate further the IBA Rules compliance with sharia, which will be of particular importance in the enforcement of the IBA settlement agreement in Saudi Arabia.

*How investor-state mediation can be successfully implemented*

Against the background of a sharp increase in investor-State disputes worldwide and particularly in relation to Saudi Arabia, serious consideration should be given to

[244] Legum B, Joubin-Bret A and Manassyan I, "Rules for Investor-State Mediation: Draft Prepared by the International Bar Association State Mediation Subcommittee" in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013) 267

[245] The IBA Rules for Investor-State Mediation were adopted by a resolution of the IBA Council on 04 October 2012.

[246] William Kirtley, 'Do The IBA Rules on the Taking of Evidence in International Arbitration Conflict with Islamic Sharia?' (30 November 2014) International Arbitration < https://www.international-arbitration-attorney.com/international-arbitration-conflict/ > accessed 8 October 2021

[247] Frank E. Vogel, *Islamic Law and Legal Systems: Studies of Saudi Arabia* (Brill 2000) 147

adopting a system of mediation/conciliation. Indeed, there has been an increasing awareness of mediation during the past decade[248], although in the Middle East such awareness does not yet seem to have fully evolved. This emerging trend of favouring mediation is due to various reasons, as discussed above, and most importantly, because the outcome of mediation is based on the parties' interests, rather than relying strictly on legal remedies.[249]

Thus, this section will cover the practice of some States and international institutions regarding the enhancement of the role of mediation in investment disputes. There have been various references to mediation in recent investment treaties, but they differ considerably about the precise meaning and the binding effect of such rules.

*A simple reference to investor-state mediation*

Concerning a mere reference to non-binding investor-State mediation, the Trans-Pacific Partnership Agreement (TPP) is a good example. It states that

> In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation or mediation.[250]

It shows that mediation was integrated within the consultation and negotiation clause voluntarily. Such drafting would, however, be unlikely to add any legal value to mediation as an emerging mechanism for investment dispute settlement.

Another example is with slightly more elaborate and detailed provisions in CETA.[251] It provides some detailed provisions such as time limits, availability of mediation and appointment of a mediator.[252] Correspondingly, a Code of Conduct for Mediators is

[248] C Zhao, 'Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time' (2018) 17(1) Chinese Journal of International Law 111-135
[249] ibid
[250] Article 9.18 of the Trans-Pacific Partnership Agreement, signed on 4 February 2016 (not in force).
[251] CETA (n 101)
[252] Article 8.20 of CETA

provided in an Annex to the Agreement.[253] Accordingly, this type of Code of Conduct could help in assessing the impartiality and independence of the mediators. However, although such a code has been seen as an innovative step forward from the existing ethical codes, it has been criticized for its efficiency.[254] The most notable shortcoming of the mediation measures under CETA are as follows. Firstly, mediation resolution has to be reached before the expiry of 60 days from the day the meditator is appointed,[255] and no expanded period is available, in contrast to consultation, which can be expanded by mutual agreement[256]. Secondly, the expiry of the mediation period is not a condition to be sought before the claim is brought to arbitration, in contrast to consultation, which has stronger provisions that require the expiry of this period before an international tribunal can have jurisdiction over the dispute[257]. Further, the strongest point for consultation is that a valid claim to arbitration should not be amended from the original request for consultation[258]. These provisions show that CETA – despite criticism[259] – has a profound impact on strengthening investor-State consultation rather than on mediation.

*A comprehensive reference to investor-state mediation*

Recent EU trade and investment agreements have elaborated and extended provisions on investor-State mediation, such as the agreements with Singapore and Vietnam.[260] These consist of three sections: procedural matters, Implementation of a Mutually Agreed Solution, and general rules that include time limits and tasks. Under

[253] Annex 29-B
[254]For more details, see D Horodyski, 'Code of Conduct for Arbitrators in CETA: A Step Forward in Investment Arbitration?' (2015) 11(2) Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellońskiego (Scientific Notebooks of the Doctoral Society of the Jagiellonian University, Kraków, Poland) Nauki Społeczne (Social Sciences) 7-20.
[255] Art 8.20(4) of CETA
[256] Art 19.1 of CETA
[257] Art 8.22 (b) of CETA
[258] CETA Art 8.22(1): 'An investor may only submit a claim pursuant to Article 8.23 if the investor: [.. .](d) has fulfilled the requirements related to the request for consultations; (e) does not identify a measure in its claim that was not identified in its request for consultations'.
[259] E Sardinha, 'Towards a new horizon in investor-state dispute settlement? Reflections on the investment tribunal system in the comprehensive economic trade agreement (CETA)' [2017] 54 Canadian Yearbook of International Law 311-365.
[260] EU-Vietnam FTA (agreed text as of January 2016), Chapter 8 - Chapter II Section 3 Annex I; EU-Singapore Trade and Investment Agreements (signed 15 October 2018) (not in force), Annex 9-E. Chapter 15.

these treaties, mediation is a structured process and voluntary. The emphasis is on party autonomy and freedom for both mediators and parties on specific procedural matters. Two issues that deserve particular attention are of rejecting mediation or withdrawing. In respect of rejecting the initiation of the mediation, this cannot be freely exercised. It states "The Party to which such request is addressed shall give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt"[261]. Such party should carefully consider the mediation request and reply within a time limit with either acceptance or refusal. However, the question is, what will happen if this time framework expires and no reply has been received from the other party? Will the party who initiated this procedure lose their right? Can they re-submit a request for mediation? As mediation is not compulsory (the same as for consultation)[262] there will be no legal consequences for such failure.

Moreover, in contrast to other treaties,[263] a party cannot withdraw from the mediation process once it has started. The party needs to go through the mediation process until the end, before being able to reject the mutual agreement

> [b]y a written declaration [...] after exploring mutually agreed solutions under the mediation procedure and after having considered any advice and proposed solutions by the mediator, on the date of that declaration.[264]

Such provisions may give the mediation more power and be more predictable, as parties will take it seriously. Instead of wasting time initiating a mediation, the other party can withdraw at any time before reaching a final decision.

However, either of these mediation approaches will face a serious issue of enforcement, which might render the mediation useless if the decision resulting from it has no power. Accordingly, the following section will discuss this issue.

[261] Annex 6, art. 2 of the EU -Singapore FTA 2018
[262] Art 14.3 EU-SIngapore
[263] Art 8(20)(5) of CETA allows the termination of the mediation by either disputing party.
[264] Proposal for a Council decision (EC) COM (2018) on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of one part, and the Republic of Singapore of the other part. 2018/0095(NLE)

*Investment-mediation under Saudi law*

In the classical Islamic tradition, *Sulh* means an amicable dispute settlement or conciliation.[265] Although *Sulh* is generally conducted informally, the law permits institutionalized *Sulh* to speed up the resolution process and ensure the enforceability of any settlement agreement by the disputing parties.[266]

Since the concept of mediation is recognized under Islamic jurisprudence and thus can be seen as an important factor in encouraging the Saudi practice of mediation. Mediation is a very important component of Saudi legal culture because the first responsibility of the judge is to mediate between the parties before starting the trial.[267] Equally, the Saudi government has established specialised committees – not judicial bodies – under various ministries, including the Ministry of Commerce and Investment and the Ministry of Labour, to which disputes are referred, and mediation is an important component of their tasks.[268] Among these special commissions are the Committee for Banking Disputes[269] and the Committee for Financial Disputes and Violations. [270]

However, currently, there is no specialised commission to deal with the mediation of investment disputes.[271] Although all Saudi BITs provide for amicable settlement as a mechanism to solve investment disputes, there is no established mechanism for assessing or guiding the procedure of mediation. Similarly, the Foreign Investment Act 2000 has included such provisions as the following:

> Disputes arising between the foreign investor and his Saudi partners about his investments licensed in accordance with this Law shall, as far as possible, be

[265] A Othman, 'And Amicable Settlement Is Best: Sulh and Dispute Resolution in Islamic Law' (2007) 21(1) Arab Law Quarterly 65.
[266] A Sa'odah and Hak Abdul Nora, 'Sulh "Mediation" in the State of Selangor: An Analysis of Legal Provision and Its Application' IIUM Law Journal (2010) 118 (2) 213-237.
[267] Jami FE, Ahmari H, Zahedian M. 'Jurisprudential and legal study of mediation and its impact on Iran-Saudi Arabia relations' (2020) 4(1) Habibia Islamicus 111. M Kamrava, 'Mediation and Saudi Foreign Policy' (2013) 57(1) Orbis 152-170
[268] ibid
[269] Royal Decree no. (729/8) 10/07/1407 Hijri 11/ 03/1987
[270] Royal Decree no. (M/51) 13/08/1433 Hijri 3/07/2003
[271] An example of such a centre is the Egyptian Investors' Dispute Settlement Center. It was founded in 2009 and its main role is to solve investment disputes by mediation. See General Authority for Investment < https://www.gafi.gov.eg/Arabic/Howcanwehelp/Pages/Investors-Disputes-Settlement-Center.aspx> accessed

settled amicably. Failing such a settlement, the dispute shall be settled according to relevant laws.[272]

Its Implementation Regulation has no further elaboration regarding the means of the amicable settlement. [273] However, in 2018 the Saudi Center for Commercial Arbitration (SCCA) issued the Arbitration and Mediation Rules, which mainly concern commercial disputes.[274] Apart from this, at the domestic level the Saudi legal system lacks any mediation rules for investor-State disputes.

However, at the regional level, the Organisation of Islamic Cooperation (OIC) agreement includes a conciliation provision under Article 17 as a way to settle investment disputes. The conciliation clause has been interpreted as an alternative to arbitration, where the investor has the choice between these two mechanisms.[275] However, as with other investment treaties, conciliation or mediation has never been proven to be used extensively.[276] Arguably because it lacks any enforcement mechanism.

Nevertheless, it is important to note that the Kingdom of Saudi Arabia signed the first-ever international agreement on settlement agreements emanating from mediation – the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) – on 7 August 2019. Although this Convention was designed for commercial matters, it may include mediated investment agreements in the future, as happened with the New York Convention. The main purpose of the New York Convention is to facilitate the enforcement of arbitral awards between private parties in commercial disputes,[277] yet nowadays it covers investment disputes as well. This assumption can be supported in two ways. First, it has been argued that the

[272] Article 13 (2) of the Foreign Investment Act 2000
[273] Implementation Regulation of the Foreign Investment Act 2000, No 2/74 dated 12/5/1435H (28 March 2014)
[274] See the SCCA website <https://www.sadr.org/awareness-publications?lang=en>
[275] *HeSham Talaat M. Al-Warraq v. The Republic of Indonesia*, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims 21106 (2012) para 79
[276] Martin Svatoš, 'Investment Mediation: Sci-Fi or Prediction',Kluwer Mediation Blog 20 October 2016 < http://mediationblog.kluwerarbitration.com/2016/10/20/investment-mediation-sci-fi-or-prediction/> accessed 18 July 2020
[277] Van den Berg AJ, 'The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation' (1981) 36(1) Kluwer Law and Taxation 248-250; O Gerlich 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' (2015) *26*(1) *American Review of International Arbitration* 47-99.

scope of the Singapore Convention can be extended to at least those investment disputes of a commercial nature.[278] Second, although the Singapore Convention text does not define 'commercial', the working group intended to leave the definition broad and consistent with the revised model law for mediation, which provides that "commercial" covers investments.[279] Nevertheless, the signing of such a convention elaborates the Saudi policies of favouring amicable settlement and highlights the importance of this kind of settlement.

Considering the Sharia tradition of favouring mediation and also the Saudi practice of favouring amicable settlement, these can be seen in two ICSID cases that arose with German investors, *Ed. Züblin*[280] and *HOCHTIEF Infrastructure GmbH*. [281] The former case was the first ICSID one against Saudi Arabia, in 2003, and the claim arose from the construction of university facilities in Saudi Arabia by the investor.[282] A tribunal was not constituted and six months after the claim had been initiated, a settlement was agreed upon by the parties and the proceeding was discontinued at the request of the Claimant, based on ICSID Arbitration rule 44:

> If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If an objection is made, the proceeding shall continue.[283]

In the second of the two cases, a German investor owned 55% of the shareholdings in a joint venture that was awarded a contract to upgrade, redesign and expand two

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[278] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 Pepp Disp Resol LJ 1, 22–23 (2019).
[279] G.A. Res. 73/199 (Dec. 20, 2018). See further, Claxton (n 188) 87
[280] *Ed. Züblin AG v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/03/1)
[281] *HOCHTIEF Infrastructure GmbH v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/18/14)
[282] International Centre for Settlement of Investment Disputes <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/123/ed-z-blin-v-saudi-arabia > accessed 18 July 2022
[283] Rule 44 of ICSID Convention

terminals of the King Khalid Airport in Riyadh.[284] The claims resulted from the cancellation of an agreement by the government to expand the Riyadh airport and the subsequent reassignment of the project to another joint venture.[285] Accordingly the claimant invoked the Saudi Arabia-Germany BIT (1996) and initiated a claim under ICSID on 3 May 2018.

Fifteen months after the case had been registered, it was discontinued, based on the parties' request according to ICSID Arbitration Rule 43(1):

> If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.[286]

By September 2018, both arbitrators had been appointed. However, no third arbitrator had been appointed; thus, the tribunal had not been constituted, resulting in the Secretary-General receiving the requested order for the discontinuance.[287] Eleven months after appointing both arbitrators, the parties filed a request for the discontinuance of the proceeding.

The above-mentioned examples, it could be argued, indicate the Saudi approach towards settling investment disputes amicably, and accordingly, it might be of interest to the Saudi government to consider mediation investment as an alternative to ISDS. If the Saudi government adopts mediation settlement either in a compulsory or voluntary form, it would be a milestone development in the country's foreign investment law. It would be beneficial for both the State and investor as the aim of both parties is not only to resolve the dispute but also to guarantee that the investment project concerned continues to operate. Indeed, mediation even has the potential to enhance business relationships, if the investor and host State use this method to

[284] International Centre for Settlement of Investment Disputes, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/14> accessed 18 July 2022
[285] ibid
[286] ibid
[287] International Centre for Settlement of Investment Disputes, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/14> accessed 18 July 2020

communicate important data, including their most important concern, and to build trust, or at least decrease distrust, between themselves.[288]

The discussion of investment mediation leads to the topical topic of Third-party Funding (TPF). As the practice of TPF for mediation has been developing,[289] it is interesting to see whether such practice will find its place in Saudi Arabia. This will raise the question of TPF compliance with Sharia. There are no explicit regulatory restrictions in Saudi Arabia that prevent TPF from entering its commercial market. However, scholarly work is needed to explore Islamic jurisprudence to find out whether TPF complies with Sharia. In Sharia, there are similar arrangements/contracts to TPF[290] such as Ju'alah contract[291] and Mudarabah contract.[292] In addition, the insurance associated with TPF arrangement will face the question of sharia complaint too. It is to be seen whether TPF will find its place in Saudi Arabia.

*Investment mediation: myth and reality*

Some have criticized investment mediation as being unsatisfactory as it would add another procedure to an already fragile investment arbitration system, and they claim that the negotiation and conciliation mechanisms that already exist are rarely used.[293] These objections reveal the importance of designing a systematic mediation process that can overcome the uncertainties of the current practice of negotiation and

[288] N Welsh and A Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration1' (2013) 18(2) Harvard Negotiation Law Review 77
[289] N Alexander, 'Ten Trends in International Commercial Mediation' (2019) 31 Singapore Academy of Law Journal 446
[290] A Alzir and F AlQarni 'Third Party Funding in Arbitration An Islamic and Legal View' Islamic Univerity Journal for Islamic Studies 193(2)
[291] Ju"alah "is an agreement on the benefits of something that allegedly will be obtained". A Jafar and M Wasim, 'The Legal Status of Ju'alah Contract in Islamic Commercial Law & Its Applications in Modern Islamic Finance Industry' (2021) Al-Irfan 31
[292] Mudarabah means
[293] See e.g., Thomas Carbonneau, *Carbonneau's Arbitration In a Nutshell*, (3rd edn Thomson West 2012) 362-368; *Kakani v. Oracle Corp.*, 2007 WL 1793774, 154 Lab. Cas. P 35, 310 (N.D.Cal., June 19, 2007)

conciliation. Once such an approach is adopted, the trustworthiness and function of mediation as a primary mechanism for investor-State disputes would increase. This can be achieved by the integration of certain mandatory aspects: identifying a pool of mediators with the credibility, knowledge, trustworthiness, skills and experience that are not already available to the parties.[294]

Another obstacle to applying mediation in the investor-State context is the matter of sovereignty. Critics argue that the successful example of mediation in the commercial context cannot possibly extend to investor-State disputes because of the complexity of economic policy issues, national security issues, and the prospect of domestic political accountability.[295] For instance, a settlement offer in the *Egyptian Pyramids* case[296] was turned down by the Egyptian president himself because of political pressure.[297] Further, it has been argued that although the State is obliged to adhere to an adverse arbitral award due to the treaty obligation, the voluntary settlement by the State that recognizes the committing of a mistake and the loss of a significant amount to the investor has the potential to be a much harder political choice.[298] However, although this criticism raises a valuable point, it should be noted that the state is not obliged to reach a mediated agreement until it is satisfied with the value appropriateness and the consequences of such an agreement.[299]

To conclude, although the introduction of investment mediation is a challenging task and it might be hard to compete with the well-established investment arbitration, it is essential to note that mediation and conciliation in investor-State disputes are well in line with the aim and purpose of investment treaties to promote investment and recognize the importance of liberalization of investment. This is because, as argued, a mediation mechanism can help to maintain a good relationship between both parties. Additionally, the current practice of countries to settle investment disputes may affect their approach towards favouring certain mechanisms. As noted, Saudi Arabia seems

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[294] N Welsh, A Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harv Negot L Rev 85
[295] L Reed, 'Synopsis of Closing Remarks' in Susan D. Franck and Anna Joubin-Bret (eds) Investor–*State Disputes: Prevention and Alternatives to Arbitration II* (UNCTAD Series 2011)
[296] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/
[297] See A Asouzu*, International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge Press 2001) 315-17; Welsh (n 294) 86; Salacuse (n 128) 168
[298] Welsh (n 294) 86
[299] ibid

to welcome an amicable settlement, and the latest Saudi-Jordan BIT has expressly included, for the first time in its history, the option of conciliation in accordance with the ICSID Convention and under the Additional Facility Rules of ICSID.[300] This amendment indicates the recognition and acknowledgement by Saudi legislators of the importance of amicable settlement under such provisions. Against this background, the applicability of investment mediation in Saudi Arabia in particular would be more ambitious.

Nevertheless, mediation would be unlikely to succeed unless it becomes mandatory. The compulsory aspect would ensure its success, or at least speed it up, as if it is voluntary, it would need a great deal of time in which to build up its reputation. An example of this is the Arab Investment Court, which although it was established in 1985, only came into operation in 2003, [301] and has rarely been used; indeed, some people may not even be aware of its existence. Such a requirement seems to be favoured by investors too. A recent survey shows that 67% of investors prefer a mandatory requirement to go through mediation before commencing arbitration.[302]

## CONCLUSION

The increasing number of ISDS claims against Saudi Arabia is a new phenomenon that cannot be ignored, in Saudi Arabia and the Gulf region, It comes in line with two main events: the opening of the country's economy to foreign investment as one of the main goals of 2030 Vision (the transition plan) and the increasing number of ISDS worldwide, associated with a backlash against investment treaties in general and the ISDS mechanism in particular.

This article demonstrates the risk of the existing stock of BITs, which opens the door wide to all types of investor-state claims, including contractual disputes and claims

[300] Article 15 (4)(a) and (b) of the Saudi – Jordan BIT
[301] W Hamida, "The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court" (2014) 6(1) Int'l J. Arab Arb 4
[302] A survey conducted by the School of International Arbitration at Queen Mary University of London and Pinsent Masons LLP, 'International Arbitration Survey – Driving Efficiency in International Construction Disputes' (2019) <http://www.arbitration.qmul.ac.uk/research/2019/#d.en.690506> accessed 19 June 2020

arising from non-direct foreign investments (portfolio investments). Moreover, there is an absence of any filtering mechanism whereby parties can mutually agree that a claim should not proceed any further. Consequently, these factors, inter alia, can threaten Saudi Arabia with a large number of investor-state disputes, resulting in time-consuming cases, high costs, and possible reputational damage. These consequences would be precluded if such BITs were drafted carefully. Saudi Arabia is not alone in this dilemma; it is a worldwide issue that questions the legitimacy of investment treaties. Saudi Arabian BITs are similar to the majority of BITs, which were signed to attract foreign investment,[303] but without careful analysis of the substantive provisions and dispute resolution provisions.

However, as a result of the backlash against investment treaties, many countries have begun to revise and modernize their old stock of investment treaties,[304] whereas Saudi Arabia's focus has been to sign new modern BITs rather than resolve the main problem associated with the current BITs. Except for the BIT with India,[305] none of the Saudi BITs have been terminated or renegotiated.[306] In contrast, during the last four years, Saudi Arabia has signed two new modern BITs with Iraq (2019) and Jordan (2017), in addition to the BIT with Japan that entered into force in 2017. The BIT with Japan is the first modern BIT in the history of Saudi Arabia and creates a dramatic shift from the old pile of BITs. The most important development among these newly signed BITs is the exclusion of a dispute settlement mechanism from the scope of the MFN clause, which blocks the importing of ISDS provisions from its old BITs. Nevertheless, in practice, the effectiveness of this clause is limited, as none of the three modern Saudi BITs includes any innovative provisions about ISDS. There are

[303] S Rose-Ackerman and J Tobin, 'Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties' Yale Law & Economics Research Paper (2005) 299.
[304] S Subedi, *International Investment Law: Reconciling Policy and Principle* (Bloomsbury Publishing 2020); N Ridi, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified UK* (Oxford University Press 2016); M Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International BV 2010).
[305] This termination comes from the Indian side: see A Ross, 'India Termination of BITs to begin' Global Arbitration Review (22 March 2017) < https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin> accessed 2 July 2020.
[306] See examples of countries which amended their BITs; also see FTA, World Investment Report 2017 – Investment and the Digital Economy (UNCTAD/WIR/2017) <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1782> 134, accessed 1 July 2020.

no administrative or judicial review requirements, prevention procedures, or mediation options. This may render the clause partially ineffective about the previously signed BITs, as, in both situations, arbitration is in practice the first step toward solving an investment dispute.

Finally, this article has sought to demonstrate alternative dispute resolution and examine the effectiveness of the requirements of ELR and ADR with a particular focus on mediation. By weighing up the advantages and disadvantages of mediation in the investment sphere, this article concludes that there is potential for successful investment mediation in relation to the cases concerning Saudi Arabia. This comes in line with the Saudi approach towards the amicable settlement of investment disputes, which is also compatible with the teaching and spirit of Sharia Law. However, mediation is unlikely to be a successful mechanism for solving investor-state disputes unless certain conditions are met, such as enhancing awareness of the effectiveness of mediation, the availability of pools of skilled mediators and the drafting of mediation clauses in a way that ensures predictability and certainty.

As a major oil-producing country, it would be in the best interests of Saudi Arabia to review and revise its approach to ISDS not only in line with the current international practice but also in line with its own Vision 2030 so that the country can achieve it overarching economic objectives and serve as a model for other oil-producing and natural resource-rich countries within the Gulf region and beyond., Saudi Arabia is well placed to transit from a ‘rule taker’ to a ‘rule shaker’ and finally to a ‘rule maker’ when it comes to international investment law in general and the resolution of investment disputes in particular. By doing so, Saudi Arabia will be making a significant contribution to the development of international investment law and aligning its foreign investment policy closely with its overall economic objectives outlined in its Vision 2030.