MELBOURNE JOURNAL of INTERNATIONAL LAW

INVITATION TO JOIN THE *MELBOURNE JOURNAL OF INTERNATIONAL LAW*

21 July 2020

Dear Melbourne Law School students,

The *Melbourne Journal of International Law* ('*MJIL*') is currently seeking applications from Melbourne Law School students wishing to become General Members of our Editorial Board.

About *MJIL*

MJIL is a student-run law journal published on a biannual basis. *MJIL* is Australia's premier peer-reviewed international law journal and is recognised internationally as a leading publication in the field. Our past contributors have included former Justices of the High Court, former Prime Minister Sir Malcolm Fraser AC CH, Professor Hilary Charlesworth AM, Phillippe Sands QC, Associate Professor Frédéric Mégret, Professor Richard Garnett, Professor James Crawford and Gillian Triggs.

MJIL is run entirely by Melbourne Law School students totalling 60–70. The Journal is led by three Editors, who coordinate the work of approximately 10 Assistant Editors and numerous specialist Editorial and Non-Editorial Executive members. A further 30–40 General Members make up the Committee.

Advantages of being involved with *MJIL*

Being a part of *MJIL* is a fantastic way to become involved in a fulfilling extra-curricular activity, through which you will acquire a range of skills and knowledge useful to your future professional endeavours, whether they be corporate, public, academic or something else entirely.

In addition to gaining familiarity with the *Australian Guide to Legal Citation* (4th ed) ('*AGLC4*'), involvement with *MJIL* also provides you with the opportunity to meet and socialise with a friendly and diverse group of law students through the strong community of current and past members. As a Journal member, you will have the opportunity to attend exclusive *MJIL* events, including evenings conversing with prominent academics (such as Professors Frédéric Mégret and Martti Koskenniemi), sponsorship evenings (where you can converse with human resources representatives and employees from sponsor corporate firms) and the annual Cocktail Night.

Through *MJIL*'s alumni program and events, current members can meet past members who are enjoying successful careers in private legal practice, public service, international organisations, non-government organisations and academia.

General Members also have the opportunity to get take on other roles within the Journal, whether as a part of the Editorial or Non-Editorial Executive board. Such roles include Sponsorship Manager, Events Coordinator, Alumni Coordinator, Submissions Coordinator, Solicitations Coordinator, Production Editor, and Business Manager.

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About the General Member position

General Members form the foundations of *MJIL*'s success. For each article published in the Journal, a team of General Members will work under the guidance of an Assistant Editor to proofread for general sense and conformity with the *AGLC4* and source-check the veracity of the citations.

Responsibilities of General Members include:

- physically locating all the sources in the footnotes that are assigned to you and making digital copies (with all relevant citation information and pinpointed material);
- ensuring that each source cited supports the relevant proposition in the body of the article;
- determining if a sentence requires a source / footnote to support the proposition made;
- checking that all articles (both in-text and footnotes) comply with the *AGLC4*; and
- other tasks as may be required from time-to-time to support the editorial process and operations of *MJIL*.

Who we are looking for

We are looking for people who are enthusiastic about international law and *MJIL*, and who can commit the time to work towards its continued success and strong sense of community.

Desirable characteristics in a General Member include:

- High attention to detail and care in carrying out work.
- Excellent time management and communication skills.
- Interest in proofreading, editing and source-checking.
- High levels of accuracy and reliability.
- Previous editing experience (beneficial but not mandatory)
- Interest in (learning about and engaging with) international law.

All successful applicants must attend a **training session** via Zoom on a Saturday in week three or four of semester (TBC).

How to apply

Applications are open to all Melbourne Law School students (JD and MLM).

To apply, you must submit the following:

- A cover letter, of no longer than one page in length, addressing the following points:
  - Why you are interested in being involved in *MJIL*.
  - What area of international law you are interested in and why.
  - What you could bring to *MJIL*.
  - What year of law school you are currently in and what year you expect/plan to graduate.
- A CV detailing your skills and experiences; and
- A completed practical exercise (both the marked-up article and the footnote table).

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The Practical Exercise and Footnote Table are **available to download** from the *MJIL* Recruitment Webpage.

Applications are due by 11:59pm on Wednesday, 5 August 2020.
To submit your application, send it to <mjilrecruitment@gmail.com>. We advise that you retain electronic copies of your documents.

Interviews and notification of successful applicants
Once all the submitted practical exercises have been assessed by the Editors, selected candidates will be invited to attend an interview in week two or week three of semester via Zoom. Successful applicants will be notified shortly thereafter.

If you have any questions about the application process or about being a member of the Journal, please do not hesitate to contact the Editors by sending an email to <mjilrecruitment@gmail.com> or reaching out to any of us on Facebook or LinkedIn.

Kind regards,

Betty Choi, Jake Fava and Sophie Ward
2020 Editors

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INSTRUCTIONS FOR COMPLETING THE PRACTICAL EXERCISE

The Practical Exercise involves editing two short extracts about international law. You do not need any prior knowledge of international law to complete the exercise. The exercise is designed to give you a taste of what editing is like and to allow us to see your editing skills at work.

We place significant weight on the quality of the exercise when evaluating your application, so please take the time to do a thorough job. In any event, do not worry if you have trouble with some aspects of the exercise as *MJIL* provides you with thorough training if your application is successful. It is important that you apply a methodical approach to the task — attention to detail is something we value highly at *MJIL*.

Please note that collaboration is strictly prohibited.

The Practical Exercise requires completing the following two tasks:

1. Proofreading
   - Proofread the entire exercise for spelling, grammar and formatting errors.
   - Make sure all footnotes and text comply with the *AGLC4*. Where appropriate, you should cite the relevant *AGLC4* rule. Sections of the *AGLC4* we would like to draw to your attention include:
     - Chapter 1 (footnote position, multiple sources, spans of pinpoint references, introductory signals, subsequent references, quotations, punctuation, spelling)
     - Chapter 4 (general rules for secondary sources);
     - Chapter 5 (journal articles);
     - Chapter 6 (books);
     - Chapter 7 (other secondary sources);
     - Chapter 8 (treaties);
     - Chapter 9 (United Nations materials); and
     - Chapters 10–14 (international materials).
   - If you are unsure about how to cite a particular source, you should check for precedent in previous volumes of *MJIL* and MULR.
2. Footnote and Quote Verification (Source Checking)
   - This task is very important to doing well in the Practical Exercise.
   - There are three separate elements of source checking:
     - 1) Checking whether the source cited by the author provides the relevant support for the proposition in respect of which it is cited;
     - 2) Determining if the proposition made in a sentence would require a footnote to support the proposition; and
     - 3) Checking that the quotations are accurate.
   - To verify the footnoted sources, you must locate the original or most official copy of the source (eg the statute or legislation from an official and legitimate site or database).
   - If you cannot locate a source, make a list of the steps you took to try to locate it.

- If a source does not support the author's proposition, please note this and make the source *AGLC4* compliant anyway.
- There is only one book cited in the practical exercise. It is freely available online.

The *AGLC4*

- If applicants to not possess a hard copy *AGLC4*, it can be found in the Law Library and online in PDF format (https://law.unimelb.edu.au/mulr/aglc/about).

Logistics and process

The Practical Exercise and Footnote Table are **available to download** from the *MJIL* Recruitment Webpage.

All corrections (or suggestions for changes) for in-text issues should be made on a hardcopy of the Practical Exercise in red pen. Please ensure all marks are neat, clear and legible.

The marked-up article should be scanned in colour and compiled into one PDF. Scanning apps (such as Adobe Scan, Office Lens, CamScanner, Tiny Scanner etc) may be used to scan the article with your phone. If there is insufficient space to fit some of your comments on the pages of the Practical Exercise, or you do not have access to a printer and/or scanner, you may type your findings in a separate Word document, referring to the line numbers displayed on the Practical Exercise.

The Footnote Table should be edited in your Word processor, not by hand. Make all edits to the footnotes in the 'Correct Footnote' column **with Tracked Changes on.** All comments made in the document should be typed **with Tracked Changes off.**

Once you have finalised all changes, scan the document (as above) and forward it to <mjilrecruitment@gmail.com> together with your CV and cover letter.

Some Final Notes

- Please do NOT convert the PDF to a Microsoft Word document (or equivalent). This will disturb the formatting of the piece.
- The numbers on the left of the text in the Practical Exercise are line numbers. They are not an error and have only been inserted for the purpose of assisting you in the assessment task (as explained above) and assisting us in marking the assessment.
- The footnote numbering in the second article extract follows from the footnote numbers in the first article extract. This is not an error and has been done purposely to assist us in marking the assessment.
- The two article extracts have an introduction and abstract missing respectfully. These were intentional omissions and should not be treated as errors.

CASE NOTE

KOREA — IMPORT BANS, TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

MJIL Application Task (Part 1(A)) — Semester 2, 2020*

This case note explores the background, findings and reasonings of the August 2018 Panel Report and April 2019 Appellate Body Report on Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, regarding Korea's imposition and maintenance of import measures on fishery products from Japan after the Fukushima Daiichi Nuclear Power Plant (FDNPP) accident. The landmark case was the first time the World Trade Organisation had dealt with the topic of radionuclides. The ruling also has implications beyond the trade relationship between Korea and Japan, as many countries continue to impose various levels of restrictive measures against imported Japanese food products following the FDNPP incident. This case note delves into the reasoning of the Panel and Appellate Body regarding articles 2.3 and 5.6 of the* Agreement on the Application of Sanitary and Phytosanitary Measures *(*'SPS'*), and explores the extent to which they provide guidance for panels and stakeholders making* SPS*-related cases.*

CONTENTS

I ARTICLE 5.6 — APPROPRIATE LEVEL OF PROTECTION

Article 5.6 of the *SPS* provides:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures [('SPS measures')] to achieve the appropriate level of sanitary or phytosanitary protection [('ALOP')], Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[1]

Clarification as to when a measure is 'more trade-restrictive than required' is provided in a corresponding footnote: 'For the purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure reasonably available, taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.'[2]

Building on the 'necessity test' under the *General Agreement on Tariffs and Trade* art XX(I)(b) (regarding whether a measure was 'necessary to protect

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* The author's identify has been removed. The *Melbourne Journal of International Law* thanks the author for contributing their piece to the *MJIL* application task.

[1] *Marrakesh Agreement Establishing the World Trade Organisation*, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art 14 ('*Agreement on the Application of Sanitary and Phytosanitary Measures*') art 5.6 ('*SPS*').

[2] Ibid.

human, animal or plant life or health')[3] *SPS* art 5.6 requires comparison of the challenged SPS measure with the alternative proposed by the complainant.[4]

Article 5.6 is one of several provisions of the *SPS* that ostensibly guarantees governments their sovereign regulatory space. While the function of this article may seem to be to ensure that SPS measures 'are not more trade-restrictive than required', the actual emphasis is on the qualification found in the latter half of the sentence: 'to achieve [a member's] appropriate level of sanitary or phytosanitary protection'.[5]

In *Australia — Salmon*, the Appellate Body laid out the procedure for determining a violation of art 5.6 of the *SPS*, based on footnote three of the *SPS*.[6] The complainant has the burden of proving three cumulative conditions: that their proposed alternative measure (i) is reasonably available, taking into account technical and economic feasibility; (ii) achieves their ALOP; and (iii) is significantly less restrictive to trade than the contested SPS measure.[7]

Determining a member's ALOP is key to undertaking this analysis. In *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides* ('*Korea — Radionuclides*'),[8] the decisions of the Panel and Appellate Body regarding art 5.6 of the *SPS* turned on their analysis and understanding of Korea's ALOP.

The following section will begin to explore the process by which the Panel accepted Korea's articulation of its ALOP though an examination of the ALOP's conformity with established international standards, and how the Panel interpreted and resolved the relationship between the different elements of the ALOP.

A Accepting Korea's Articulation of its ALOP

Paragraph 5 of annex A defines ALOP as

> the level of protection *deemed appropriate* by the Member establishing a sanitary or phytosanitary measure to protect human, animal, or plant life or health within its territory.[9]

A note immediately preceding this paragraph states that ALOP is also referred to as 'acceptable level of risk'.[10]

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[3] *General Agreement on Tariffs and Trade*, opened for signature 30 October 1974, 55 UNTS 187 (entered into force 1 January 1948) art XX(b). Also see Rohin Koul, *WTO Agreement on the Application of Sanitary and Phytosanitary Measures: Development, Scope and Emerging Issues* (2019) 6(1) International Journal of Research and Analytical Review 866, 871.

[4] Kamala Dawar & Eval Ronen, 'How 'Necessary'? A Comparison of Legal and Economic Assessments of the GATT Dispute Settlements under Article XX(b), TBT 2.2 and SPS 5.6' (2016) 8(1) *Trade Law and Development* 1, 5, 9–10.

[5] *SPS* (n 1) art 5.6

[6] Appellate Body Report, *Australia - Measures affecting Importation of Salmon*, Doc WT/DS18/AB/R (6 November 1998) [194] ('*Australia - Salmon*').

[7] Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (20 October 1998) [194].

[8] Panel Report, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc WT/DS495/R (22 February 2018) ('*Korea — Radionuclides*'). Appellate Body Report, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc WT/DS495/R (26 April 2019) ('*Korea — Radionuclides*').

[9] *SPS* (n 1) Annex A, para 5 (emphasis).

[10] ibid.

The Appellate Body in prior cases has attempted to delicately balance a state's sovereign right to regulate and its objective duties under international law. In *EC Measures concerning Meat and Meat Products (Hormones)*, the Appellate Body stated: 'The right of a member to define its appropriate level of protection is ... an absolute or unqualified right'.[11] It is the prerogative of members implementing an SPS measure to establish their ALOP and they are given leave to articulate their ALOP in their own terms.[12] However this right is then qualified by the duty to express it with sufficient precision to allow the application of relevant *SPS* provisions.[13]

The Appellate Body in *Korea — Radionuclides* stated that a Panel could establish the ALOP, based on the level of protection reflected in the SPS measure, if a member fails to determine its ALOP with sufficient precision.[14] The Appellate Body has, however, made it clear that a Panel cannot substitute its own ALOP for that articulated by the complainant if expressed with sufficient precision.[15] Nevertheless, a Panel must defer automatically to the member's articulated ALOP. Rather, the Panel should accord weight to a member's articulation of their ALOP while considering it in the context of all relevant evidence and arguments, including the level of protection reflected in the SPS measure[16]. In this way, the *SPS* seeks to ensure there is an objective-means connection between the ALOP and the SPS measure in question.

The Panel's approach suggests that conformity with international standards was an essential element when determining whether Korea's ALOP is sufficiently precise. This approach is in line with the short term goal of the *SPS* to attain international harmonisation of food safety standards.[17] It can also be explained by the fact that the purpose of requiring precision is to allow for the application of relevant *SPS* provisions; it is laid out in *SPS* art 3.2 that measures that 'confirm to international standards shall be presumed to be consistent with the relevant provisions of the *SPS*'.[18]

The Panel dismissed the fact that the limit of 1 millisieverts per year accords with the overall limit of all radionuclides set by CODEX STAN 193–1995.[19] Similarly, the Panel took credence to the two objectives of Korea's ALOP. First,

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11 Appellate Body Report, *EC Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) [173] ('*EC – Hormones*').

12 Appellate Body, *India – Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc WT/DS430/AB/R (4 June 2015) [5.205] ('*India — Agricultural Products*'); Panel Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/R (9 August 2010) [342]; *Australia — Salmon* (n 6) [199].

13 Appellate Body Report, *India — Agricultural Products*, WTO Doc WT/DS430/AB/R (n 12) [5.221].

14 Appellate Body Report, *Korea — Radionuclides*, WTO Doc WT/DS495/AB/R (n 8) [7.159].

15 Appellate Body Report, *Australia — Salmon*, WTO Doc WTO/DS18/AB/R (n 6) [199].

16 Appellate Body Report, *India — Agricultural Products*, WTO Doc WT/DS430/AB/R (n 12) [207]; Appellate Body Report, *Australia — Salmon*, WTO Doc WT/DS18/AB/R (n 6) [5.221].

17 William J. Davey, 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?', in Daniel L.M. Kennedy and James D. Southwick (ed), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (CUP, 2002) 550.

18 *SPS* (n 1) art 3.2.

19 Appellate Body Report, *Korea — Radionuclides*, WTO Doc WT/DS495/AB/R (n 8) [7.165]–[7.171].

the Panel accepted Korea's argument that they were adhering to the 'as low as reasonably achievable' principle which experts explained was a suitable principle to use to decide what concentration of radionuclides in food is acceptable.[20] The Panel also acknowledged that Korea's aim of keeping radiation levels to those that 'exist in the ordinary environment', based on the reasoning that Korea's formulation of 'ordinary environment' (defined by Korea as the situation in the absence of additional radiation from a major nuclear accident)[21] reflects established principles of radiological protection in food.[22]

The reasoning of the Panel shows that it is willing to look beyond the precise wording of a member's articulation to consider the actual substance of the *SPS* measure in order to establish if a member's ALOP is sufficiently precise and acceptable for scrutiny under the *SPS*. However, this is limited to the extent that the member can provide scientific evidence for the level of risk it is willing to accept.[23]

[20] Ibid [7.166] [7.167] [7.171].
[21] Ibid [7.169].
[22] Ibid [7.170], [7.171].
[23] Ibid annex A, para 5.

EASIER SAID THAN DONE: ACKNOWLEDGING THE AMBIGUITIES AND PRACTICAL DIFFICULTIES OF THE SINGAPORE CONVENTION

MJIL APPLICATION TASK (PART 1(B)) — SEMESTER 2, 2020*

CONTENTS

I INTRODUCTION

As the international commercial community continuously seeks cheaper, more efficient and more cooperative forms of dispute resolution, it is little wonder that mediation has become an increasingly popular alternative in cross-border disputes. However, internationally trading corporations have never been able to overcome their reflex to turn to arbitration and cross-border litigation.[24] Following the findings of several surveys that commercial parties would still avoid using mediation if an internationally binding enforcement mechanism existed for cross-border or international mediated settlement agreements ('iMSAs'),[25] the United Nations Commission on International Trade Law ('UNCITRAL') drafted what

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* The author's identity has been removed. The *Melbourne Journal of International Law* ('*MJIL*') thanks the author for contributing their piece to the *MJIL* application task.

24 See Queen Elizabeth University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (Survey, 2015) 5 <http://www.arbitration.qmul.ac.uk/research/2015/>.

25 International Mediation Institution, 'The Singapore Report: shaping the future of dispute resolution and improving access to justice' (Global Pound Conference Series 2016-17, December 2017) 77–8 <https://www.imimediation.org/research/gpc/series-data-and-reports/> ('Global Pound Conference Series Report'); David Weiss and Michael Griffith, 'Report on International Mediation and Enforcement Mechanism' (Survey Report, International Mediation Association, 2017) 14–6 <https://www.imimediation.org/research/surveys/survey-enforceability-mediated-settlement/> Similar surveys and research have been conducted assessing business attitudes towards international mediation arbitration and other dispute resolution mechanisms, see, eg, S I Strong, 'Realising Rationality: An Empirical Assessment of International Commercial Mediation' (2016) 73(4) *Washington and Lee Law Review* 1973 ('Realising Rationality'); SI Strong, 'Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation' (Research Paper No 2014-28, School of Law, University of Missouri, 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302> ('Use and Perception of International Commercial Mediation').

would become the *United States Convention on International Settlement Agreements Resulting from Mediation* ('*Singapore Convention*').[26]

The *Singapore Convention* is the first international enforcement mechanism for iMSAs, intentionaly designed to adapt to the varying processes and forms of mediation within each jurisdiction. Its brevity, flexibility, simplicity and familiarity with the *Convention on the Recognition and Enforcement of Foreign Arbitral Award* (*'New York Convention'*)[27] make it an attractive instrument that seeks to leverage the success of its arbitration counterpart. However, this article argues that this design may lead to its potential downfall, as it creates much ambiguity in the scope and operation of the Convention when business stakeholders seek clarity and certainty in enforcement of iMSAs.

II MAY THE [EN]FORCE BE WITH YOU: BIRTH OF THE *SINGAPORE CONVENTION*

1 *Carrot Without a Stick: Mediation's Benefits and Enforcement Woes*

The core characteristics of cross-border commercial mediation are no different to that of any other variety of mediation. It is a formal and inflexible process, whereby negotiations between two disputing parties are facilitated by a trusted neutral 3rd person to help them voluntarily reach a mutually agreeable resolution.[28] The last few decades have seen mediation evolve into a far more popular form of dispute resolution, as evidenced by the widespread inclusion of standalone mediation clauses, 'step-clauses' and innovative hybrid provisions in transnational commercial contracts.[29]

Both push and pull factors have contributed to this trend. Growing frustrations with the excessive costs and delays of the usual dispute resolution mechanisms, notably court adjudication and arbitration have pushed businesses to seek alternatives such as mediation.[30] Compounding these problems is the increasing procedural formalities of these dispute resolution mechanisms, as well as the

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[26] Strong, 'Use and Perception of International Commercial Mediation' (n 25) 1985; *United Nations Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019 (not yet in force); The treaty text is currently available in an annex to a United Nations General Assembly resolution: *United Nations Convention on International Settlement Agreements Resulting from Mediation*, GA Res 73/198, 73rd sess, Agenda item 80, Doc A/RES/73/198 (20 December 2018) annex ('United Nations Convention on International Settlement Agreements Resulting from Mediation').

[27] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, on 10 June 1958*, opened for signature 10 June 1958, 330 UTNS 38 (entered into force 7 June 1959) ('*New York Convention*').

[28] 'What is Mediation?' *IMI* (Web Page) <https://www.imimediation.org/resources/background/what-is-mediation/>.

[29] See Chang-Fa Lo, 'Desirability of a New International Legal Framework for Cross-border Enforcement of Certain Mediated Settlement Agreements' (2014) 7(1) *Contemp. Asia Arb. J.* 127–8.

[30] Queen Mary University of London (n 24) 7, 24; S I Strong, 'Realising Rationality' (n 25) 1982–3.

unfamiliarity and weariness of resolving a dispute in a foreign jurisdiction when disputing with a foreign company in their home state.[31]

Correspondingly, the relative benefits of mediation over other forms of dispute resolution have increasingly pulled businesses towards its use. Mediation is generally cheaper and less time-efficient compared to arbitration and litigation,[32] making it a business-friendly form of dispute resolution that can improve access to justice for companies struggling to finance adjudicative alternatives. Just as important is the level of party autonomy and flexibility provided by the process; the disputing parties can collaboratively work through their issues with the mediator's assistance, voluntarily arriving at at a mutually agreed settlement tailored for their business relationship.[33] Discussions remain under the protection of mediation's universally understood principle of confidentiality[34], encouraging candid and frank discussions that bolster the chance of reaching a settlement. Mediation, therefore, helps destroy business relationships both for and beyond the disputed transaction.[35]

Despite the benefits of mediation, arbitration remains the most commonly used and preferred from of dispute resolution for cross-border commercial disputes by a significant margin.[36] Correspondingly, mediation is underutilised by the international business community, perceived as a supplementary (and potentially inferior) dispute resolution process.[37] One of the main reasons for this perception lies in a very important difference between arbitration and mediation: the ease of enforcing arbitral awards.[38] With an established network of treaties and a body of case law in most jurisdictions, commercial parties can be assured of the recognition and enforcement of foreign arbitral awards in domestic courts.[39] This provides the necessary predictability and security to keep commercial parties away from mediation.

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31 Bruce Love, 'New UN Singapore Convention Drives Shift to Mediation of Trade Dispute', *Financial Times* (online, 5 August 2019) <https://www.nytimes.com/video/opinion/100000002847155/verbatim-what-is-a-photocopier.html?playlistId=video/opdocs-season-3>.

32 Bruce Love, 'New UN Singapore Convention Drives Shift to Mediation of Trade Dispute', *Financial Times* (online, 5 August 2019) <https://www.ft.com/content/6e1df030-9e6f-11e9-9c06-a4640c9feebb>.

33 Edna Sussman, 'The Reasons for Mediation's Bright Future' (2008) 1(1) *New York Dispute Resolution Lawyer* 57, 59–60.

34 Jan O'Neill, 'The New Singapore Convention: some practical issues to consider now', *Thomson Reuters* (Blog Post, 18 September 2019) <http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-some-practical-issues-to-consider-now/>.

35 Sussman (n 33) 59.

36 See, eg, Queen Mary University of London (n 24) 5; CIArb Singapore, 'Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions', *Singapore Academy of Law* (Survey Report, 1 January 2016) <www.ciarb.org.sg/singapore-academy-of-law-study-on-governing-law-jurisdiction-choices-in-cross-border-transaction/> 2.

37 Lo (n 29) 112.

38 S.I. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 *Washington University Journal of Law & Policy* 11, 27–8 ('The Promise of International Commercial Mediation').

39 See, eg, *New York Convention* (n 27); *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965 (enter into force 15 October 1966).

In contrast, cross-border mediation has always lacked a universal enforcement mechanism, forcing the global legal framework of MSA enforcement to develop in a 'frustratingly patchy' trend.[40] This lack of certainty has seemingly prompted the international business community to sideline mediation over more universally enforceable alternatives, such as arbitration.[41] The most notable international instrument for cross-border mediation enforcement, the *2002 Model Law*,[42] drew much criticism from commentators for lacking the credibility of a convention and failed to gain traction as a result:[43] only 83 states in a total of 116 jurisdictions have modelled domestic laws on the *2002 Model Law*.[44] A more recent European Commission directive has been viewed more favourably by commentators but is regionally locked to the European Union.[45]

The lack an effective international mediation framework has meant that the extent of each jurisdiction's cultural acceptance of mediation largely dictates the extent of their legal infrastructure. The great disparity in attitudes towards mediation correlates not only with the inconsistent sophistication of legal frameworks for the enforcement of iMSA's across each state, but also with the great variety in legal instruments and processes used to enforce iMSA agreements.[46]

With no iMSA enforcement instrument existing prior to the *New York Convention*, a variety of unsatisfactory enforcement workarounds were developed. These paradoxically rely on the very enforcement mechanisms mediation was designed to avoid, thereby unravelling some of the benefits of mediation. States lacking any laws of enforcement restrain commercial parties to enforcing iMSAs via under domestic contract law,[47] which is costly and exposes the enforcing party to the myriad of typical defences against contract enforcement claims.[48] States with some form of enforcement mechanism do allow a corporate party to seek a

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40 Jan O'Neill, 'The New Singapore Convention: Will It be the New York Convention for Mediation?', *Thomson Reuters Dispute Resolution Blog* (Blog Post, 19 November 2018) <http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/> ('*The New York Convention for Mediation*').

41 See Queen Mary University of London (n 24) 5–6; Strong, 'The Promise of International Commercial Mediation' (n 38) 28.

42 *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Fifth Session: Report of the Sixth Committee*, UN GAOR, 57th sess, Agenda Item 155, 6th Comm, UN Doc A/57/562 (1 November 2002) annex.

43 Edna Sussman, 'A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements' [2015] (6) *Transnational Dispute Management* 1, 2 ('A Path Forward').

44 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006', *United Nations Commission on International Trade Law* (Web Page) https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

45 See generally *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* [2008] OJ L 136/3.

46 See for a summary of different legal instruments and processes used to enforce iMSAs *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation: Note by the Secretariat*, UN GAOR, 62nd sess, UN Doc A/CN9/WGII/WP187 (27 November 2014) 6–8 [20]–[30] ('*WGII Secretariat Note – 62nd sess*').

47 Ibid 6 [21].

48 Edna Sussman, 'The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements' [2018] (3) *ICC Dispute Resolution Bulletin* 42, 46 ('Promoting Enforcement and Recognition').

court order to enforce an iMSA, but procedures vary greatly between jurisdictions, from a simple administrative registration of the iMSA to requiring a court judgment in their favour.[49] Aside from the expense and trouble, no international instrument protects the domestic court order from further recognition or enforcement overseas,[50] making it an unattractive option for internationally trading corporations.

Commercial parties have also made use of innovative hybrid provisions (such as med–arb, arb–med and arb–med–arb) that run mediation sequential, or even parallel, to arbitration. If an iMSA is reached, it is then enforceable as an arbitral award; if not reached, arbitral proceedings will commence or continue. Reliance on an established and familiar enforcement framework is, however, both the advantage and downfall of such provisions. Naturally, running two procedures for the enforcement of the one iMSA only increases the costs and time depleted for disputing parties. It would also be challenging to find both a mediator and several arbitral tribunal panellists that both parties agree upon. Using the same person for both proceedings, whilst common, raises questions of bias and confidentiality breach; the panellist's involvement in mediation proceedings may be perceived to influence (or actually influence) their arbitral decision, drawing conclusions from information discussed under mediation confidentiality rules. Most concerning is the uncertainty of the scope of enforcement under the New York Convention, which enforces arbitral awards arising out of *differences* between persons.[51] It is unclear if the requirement of 'differences' applies to arbitral awards against iMSAs, as disputes are effectively resolved by the mediation before the arbitral award is handed down. Some jurisdictions have expressly legislated the need for a 'dispute',[52] thereby ruling out the enforcement of iMSAs via arbitration.

These measures are all undertaken despite the anecdotal evidence that most commercial parties do not breach iMSA terms[53] Voluntarily arriving at a workable outcome by consensus provides little incentive for either party to contravene the agreed terms,[54] the effects of which 'are even more pronounced in cross-border situations'.[55] This suggests that mediation is not necessarily facing an ex post issue of enforcement but rather an ex ante issue regarding the perception of enforcement.[56] Disputing parties often perceive the throat of a prisoners' dilemma:

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49 *WGII Secretariat Note – 62nd sess* (n 46) 6–7 [22]–[25].

50 Sussman, 'A Path Forward' (n 43) 46.

51 *New York Convention* (n 27) art 1(1) (emphasis altered).

52 See, eg, *Arbitration Act 1996* (UK) s 6.

53 Frederico Antich, 'Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework: Some Reflections from Within the EU and Beyond' (2017) 5 *Yearbook on International Arbitration* 325, 326; Lucy Reed, 'Ultima Thule: Prospects for International Commercial Mediation' (Working Paper 19/03, NUS Centre for International Law, January 2019) 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339788>.

54 Alexander Oddy, 'Is the Enforceability of Mediated Settlements Holding Back Commercial Dispute Resolution?', *International Mediation Institute* (Web Page, 21 April 2017) <https://www.imimediation.org/2017/04/21/is-the-enforceability-of-mediated-settlements-holding-back-commercial-dispute-resolution/>.

55 Dorcas Quek Anderson , Nadja Alexander and Anna Howard, 'UNCITRAL and the Enforceability of iMSAs: The Debate Heats Up – Part 3', *Kluwer Mediation Blog* (Blog Post, 22 September 2016) <http://mediationblog.kluwerarbitration.com/2016/09/22/uncitral-and-the-enforceability-of-imsas-the-debate-heats-up-part-3/?doing_wp_cron=1594813117.6046059131622314453125>..

56 Andreas Hacke '"New York Convention II" to Come?' [2015] (2) *Dispute Resolution* 10, 11.

companies may incur the cost and time of mediation, only for their opposition to renege on an iMSA due to an inability to perform or to otherwise unconscionably profit from the agreement, forcing the first party to return back to other forms of enforcement originally avoided.[57] It is clear that commercial parties have thus sought to include some sort of established enforcement mechanism for their peace of mind. Furthermore, it is arguably the safety net of an international enforcement mechanism for mediation, rather than an actual need to enforce iMSAs against reneging commercial parties, that explains the responses of commercial parties in the aforementioned surveys, specifically that they would be more likely to use mediation if a uniform international enforcement mechanism existed.[58]

[57] Veronika Vanisova, 'Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the Light of the Singapore Convention' (Working Paper 2019/II/5, Faculty of Law, Charles University in Prague, 27 June 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413560>; Timothy Schnabel, 'The Singapore Convention of Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 1, 3–4.

[58] See (n 2).