
MEDIATION OF INVESTOR-STATE CONFLICTS

INTRODUCTION

Foreign investment has grown into a large and important part of the global economy. To facilitate and promote investment, states have erected an intricate web of treaties guaranteeing legal rights to investors and permitting those investors to bring claims alleging violations of those rights in arbitration proceedings against the state. Investor-state arbitration has exploded along with the burgeoning number of international investment treaties (IITs), and it has come to resemble civil litigation in the time and expense involved in bringing the dispute to a final resolution. As these costs mount for investors and states, commentators have called for the development of a mediation system that could facilitate the settlement of investor-state disputes in less time, with less expense, and with less disruption to investments.

Part I of this Note describes the existing dispute resolution system for investment treaty disputes. Part II explains the mediation process, its growth in commercial contexts,¹ and its place in the investor-state dispute resolution system. Part III presents the benefits of mediation for investors and states, and responds to objections. Part IV assesses options for reform and concludes that interested parties should take the initiative in creating a private mediation infrastructure for investor-state disputes.

I. FOREIGN DIRECT INVESTMENT AND BILATERAL TRADE AGREEMENTS

“Foreign direct investment (FDI) occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) *with the intent to manage that asset*.”² FDI is more than a portfolio of foreign stocks; FDI occurs when a company acquires a foreign business, forms a foreign subsidiary, or otherwise expands its operations into another nation. FDI benefits the home country through domestic returns on foreign investments, and it benefits the host country by infusing it with foreign capital.³ FDI dramatically

¹ The terms “commercial mediation” and “commercial arbitration” will be used in this Note to describe any such process in which both sides of the dispute are private business actors.

² WORLD TRADE ORG., TRADE AND FOREIGN DIRECT INVESTMENT (1996), available at http://www.wto.org/english/news_e/pres96_e/pro57_e.htm. The precise legal meaning of “investment” is defined by treaty. See *infra* note 7 and accompanying text.

³ See R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES 7–8 (2005). FDI is not without its critics — some commentators suggest that FDI exacerbates social inequalities and encourages a harmful race to the bottom among developing nations as they offer fiscal or tax incentives to potential investors. See Kusi Hornberger, *FDI Is a Global Force, but Is It a Force for*

increased in the decades surrounding the turn of the twenty-first century and now produces income of over one trillion dollars annually.⁴

States promote and protect FDI through IITs.⁵ Specifically, IITs establish legal rights for investors that protect the value of foreign assets against the acts or omissions of the host state.⁶ “Investment” can be defined broadly to include physical assets, debts, intellectual property and trade secrets, and contractual benefits that have economic value.⁷ The specific rights provided to investors are set forth in each individual IIT, often a bilateral investment treaty (BIT) between the investor’s home country and the host country.⁸ There are thousands of IITs,⁹ each an independent source of law governing a limited subset of transnational investments. Consequently, there are manifold combinations of rights and privileges depending on where the investor and investment are located. Although IITs are similar in the rights they protect, variations in how the treaties are phrased can have important consequences for investors seeking to enforce these protections.¹⁰ Frequently protected rights include, *inter alia*, fair and equitable treatment for foreign investors; full protection and security by, for example, the host state’s police forces; guarantees that investors will be able to transfer assets out of the host country; and protections against state expropriation of foreign assets.¹¹

Because investors might be distrustful of courts in the host country, IITs provide investors with an alternative method of dispute resolution in the form of investor-state arbitration.¹² Typically, a treaty will

Good?, WORLD BANK BLOGS (Mar. 24, 2011), <http://blogs.worldbank.org/psd/fdi-is-a-global-force-but-is-it-a-force-for-good> (summarizing some criticisms of FDI).

⁴ See UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2013, at 31 (2013).

⁵ See UNITED NATIONS CONFERENCE ON TRADE AND DEV., DISPUTE SETTLEMENT: INVESTOR-STATE 5 (2003).

⁶ See BISHOP ET AL., *supra* note 3, at 8.

⁷ See, e.g., 2012 U.S. Model Bilateral Investment Treaty art. 1 [hereinafter U.S. Model BIT], available at <http://www.state.gov/documents/organization/188371.pdf>. But see *CME Czech Republic BV (The Netherlands) v. Czech Republic*, Final Award on Damages, Separate Opinion ¶ 73, 9 ICSID Rep. 264, 430 (UNCITRAL 2003) (opinion of Ian Brownlie) (emphasizing that bilateral investment treaties do not cover all foreign property present in the host country but only property that can properly be characterized as investment under the treaty).

⁸ Growing in number and importance are regional multilateral investment treaties, of which NAFTA, the European Union, and Mercosur are examples. These agreements create a common set of rights and procedures for investments made within a designated region or group of nations.

⁹ See United Nations Conference on Trade and Dev., *Recent Developments in International Investment Agreements*, IIA MONITOR, no. 2, 2008, at 2.

¹⁰ See W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold*, in LIBER AMICORUM IBRAHIM F.I. SHIHATA 585, 586–89 (Sabine Schlemmer-Schulte & Ko-Yung Tung eds., 2001).

¹¹ See generally BISHOP ET AL., *supra* note 3, at 1007–169.

¹² UNITED NATIONS CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION 3 (2010) [hereinafter INVESTOR-STATE DISPUTES I]; see also Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protec-*

permit arbitration only after some conditions are met: the investor must give notice to the host country that there is a dispute, then parties must abide by a cooling-off period (usually three to six months) during which the investor and the host country are encouraged to negotiate an amicable settlement, either through private channels or with the intervention of a third party.¹³ After this time has elapsed, the investor may initiate an arbitration proceeding organized according to the treaty. Many treaties allow parties to organize an arbitral panel under different sets of arbitration rules and procedures, most commonly those published by the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).¹⁴ In addition to offering a set of arbitration rules, ICSID provides administrative support to cases organized under ICSID rules and at times will assist parties in selecting arbitrators.¹⁵ ICSID has historically been more favored in treaties and in practice, though arbitration under UNCITRAL rules is gaining market share.¹⁶ Typically, each side of the dispute selects one arbitrator; those two arbitrators then agree on a third. Next, the investor and state submit evidence and make arguments to the panel, and receive a final award reflecting the panel's judgment of the parties' respective rights under the applicable treaty.¹⁷ Arbitral awards are enforced either under the New York Convention or through voluntary recognition by the state.¹⁸ Historically, states have respected investor-state arbitra-

tion in Denial of Justice Claims, 45 VA. J. INT'L L. 809, 876 (2005) (noting state waiver of local exhaustion requirements in BITs).

¹³ See, e.g., U.S. Model BIT, *supra* note 7, arts. 23–24. Some IITs do not recommend or mention the possibility of a negotiated settlement, see Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 192 & n.132 (2007), but such negotiations are still legal under the terms of those treaties because a disputant is free to voluntarily dismiss its legal claim.

¹⁴ E.g., U.S. Model BIT, *supra* note 7, art. 24(3); see RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW 209 (2010).

¹⁵ See *ICSID Dispute Settlement Facilities*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&pageName=Disp_settl_facilities (last visited May 10, 2014).

¹⁶ See Katharina Diel-Gligor, *Competing Regimes in International Investment Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT'L ARB. 677, 678–79 (2011).

¹⁷ See ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* arts. 36–49, in ICSID CONVENTION, REGULATIONS AND RULES 7, 22–25 (2006) [hereinafter ICSID CONVENTION]; Franck, *supra* note 13, at 193–94.

¹⁸ See Norbert Horn, *Arbitration and the Protection of Foreign Investment: Concepts and Means*, in ARBITRATING FOREIGN INVESTMENT DISPUTES 29 (Norbert Horn ed., 2004). The New York Convention is an agreement among nations to enforce arbitral awards in domestic courts. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. The ICSID Convention does not provide enforcement procedures, but the failure to recognize an award would damage the confidence investors have in the state and thereby discourage FDI. See Horn, *supra*, at 29.

tion awards, but recently some states have refused to pay the awards. For instance, Argentina has famously refused to honor multimillion-dollar arbitral awards in disputes arising from an economic crisis in which Argentina devalued its currency.¹⁹

Of course, settlement is an option at any point between the genesis of the conflict and the conclusion of arbitration proceedings, and an estimated thirty to forty percent of ICSID arbitrations end through a negotiated settlement — a number that is certainly dwarfed by the number of conflicts that parties resolve before arbitration proceedings are even registered.²⁰ In addition to arbitration, there exist rules and procedures for a voluntary, nonbinding process called conciliation²¹ under both ICSID and UNCITRAL. Conciliation is a process in which an intermediary meets with parties to gather information and, typically, seeks concessions by independently evaluating the relative merits of each party's legal claims. The purpose of conciliation is predictive.²² The ICSID conciliation procedures, which have been used only six times as of early 2014,²³ create a formal and adversarial process that acts as a nonbinding miniarbitration that could involve time and expense comparable to a full arbitration.²⁴ UNCITRAL Concilia-

¹⁹ See Luke Eric Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, NETWORK FOR JUST IN GLOBAL INVESTMENT (June 25, 2009), <http://justinvestment.org/2009/07/argentine-crisis-arbitration-awards-pile-up-but-investors-still-wait-for-a-payout>.

²⁰ Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably?*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II 38, 38–39 (Susan D. Franck & Anna Joubin-Bret eds., 2011) [hereinafter INVESTOR-STATE DISPUTES II]. It is difficult to measure the extent to which settlement negotiations — facilitated or otherwise — occur outside of ICSID because such processes are often kept private. Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 166 (2007). Compared with litigation in the United States, or even international commercial arbitration, the settlement rate for ICSID arbitrations is remarkably small, see TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 257 (Christopher R. Drahozal & Richard W. Naimark eds., 2005), perhaps because international investment law is relatively unsettled.

²¹ Confusion regarding the meaning of the term “conciliation” is abundant. Compare Ucheora Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, 22 NEWS FROM ICSID, no. 2, 2005, at 12, 14 (contrasting definitions of “conciliation” and “mediation”), with Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 14 (2005) (treating these terms as synonymous).

²² Salacuse, *supra* note 20, at 173.

²³ See *List of Concluded Cases*, ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated May 9, 2014) (listing five concluded conciliations); *List of Pending Cases*, ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated May 9, 2014) (listing one pending conciliation).

²⁴ See Onwuamaegbu, *supra* note 21, at 13; Salacuse, *supra* note 20, at 172–74. Interestingly, despite the low incidence of conciliation, governments, investors and their counsel, and arbitrators continue to report that they view conciliation as a useful process. See CLARK, MARTIRE &

tion Rules are more flexible and leave much to the conciliator's discretion, though the rules make clear that evaluating the merits of the dispute and making recommendations for settlement are important aspects of the conciliator's role.²⁵ In addition to conciliation, ICSID offers rules for a formal factfinding process, the focus of which is to prevent rather than settle disputes.²⁶ Parties are free under many IITs to use other processes, including mediation, but there is no data concerning which processes are used or how frequently.

Investor-state arbitration is something of an anomaly in international law because states waive their sovereign immunity and make themselves vulnerable to legal claims by foreign litigants alleging that they violated their international obligations as defined by treaty. That one party is a sovereign state and the other a private economic actor separates investor-state arbitration from commercial arbitration in important ways. Whereas the investor is primarily concerned with the return on investment, the state may be confronted with fundamental questions of sovereignty and the state's proper role in economic affairs.²⁷ The political nature of investor-state disputes implicates third parties — namely, the citizens of the host country whose lives may be impacted by the investment, or the home state that might have a diplomatic or public policy stake in the outcome. As a result, some investor-state arbitrations have involved amicus petitions by interest groups²⁸ or calls for public hearings.²⁹ Additionally, it might not be clear precisely which unit of government is the appropriate authority to handle the

BARTOLOMEO, INC., INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: STAKEHOLDER SURVEY 16 (2004), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=18_1.pdf.

²⁵ See UNCITRAL, UNCITRAL CONCILIATION RULES (1980), available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>; UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION art. 6 (2002), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

²⁶ Onwuamaegbu, *supra* note 21, at 12. The factfinding rules have never been used in a dispute registered with ICSID. *Id.*; see also ICSID, *Fact-Finding (Additional Facility) Rules*, in ICSID ADDITIONAL FACILITY RULES (2006).

²⁷ See Clodfelter, *supra* note 20, at 40.

²⁸ See, e.g., Methanex Corp. v. United States, Decision on Petitions from Third Persons to Intervene as “Amici Curiae” ¶ 47, 7 ICSID Rep. 224, 236–37 (UNCITRAL 2001) (interpreting NAFTA chapter 11). In 2006, ICSID amended its rules to allow amicus briefs. See *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* R. 37(2), in ICSID CONVENTION, *supra* note 17 (“[T]he Tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute.”).

²⁹ See INTERNATIONAL INVESTMENT LAW AND ARBITRATION 192 (Todd Weiler ed., 2005) (describing how the United Parcel Service “call[ed] for open public hearings for its claim” against the government of Canada).

dispute.³⁰ Often, the governmental office charged with handling an investment dispute is not the governmental office whose actions gave rise to the dispute, and a negotiated settlement may require the consent of multiple government agencies or even specific legislation authorizing the settlement.³¹ Some nations have created special governmental offices for resolving these structural tensions, but many more have not.³²

Investor-state arbitration is notoriously unpredictable, partly because IITs are a relatively recent invention.³³ Like the arbitration-based dispute settlement regime established by the World Trade Organization,³⁴ arbitration proceedings conducted pursuant to IITs do not create any formal precedent binding on future arbitrations but result in a de facto system of precedent by which arbitral panels look to prior awards in interpreting the same or similar treaty provisions.³⁵ Unlike international trade arbitration, however, there is a broad range of inconsistencies in arbitral awards on both jurisdictional and substantive issues in treaty interpretation.³⁶ As a result, parties to investment disputes are less able to predict the outcome or value the dispute.³⁷

The incidence of investor-state arbitration has exploded along with the number of IITs. ICSID, for example, administered 195 cases in 2013 alone, which constitutes almost half of all cases administered in ICSID's forty-seven-year history.³⁸ Arbitral awards can reach into the

³⁰ For example, in *Metalclad v. Mexico*, Mexican federal, state, and local authorities had diverging views on how to treat the investor. See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/07/11, Award ¶¶ 28–61 (Aug. 30, 2000), 5 ICSID Rep. 209, 218–23 (2002).

³¹ See Barton Legum, *The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward a Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch'*, INT'L ARB. Q.L. REV., Summer 2006, at 81, 82–83.

³² For example, in 2006, Peru centralized the management of investment disputes in a single government agency. See Ley No. 28933, Ley que Establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión [Law Establishing the System of Coordination and Response of the State in International Investment Disputes], EL PERUANO, DIARIO OFICIAL, *Normas Legales* 334,635, Dec. 16, 2006 (Peru).

³³ See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521–23 (2005).

³⁴ See generally Recent International Decision, 122 HARV. L. REV. 1993 (2009). For the purposes of this Note, World Trade Organization Dispute Panels are effectively arbitration panels.

³⁵ See Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes — Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1356 (2006) (“Though no formal system of precedent operates, well reasoned awards may inform future tribunals and serve to anchor the parties’ arguments and expectations.” (footnotes omitted)).

³⁶ See Clodfelter, *supra* note 20, at 40–41.

³⁷ *Id.* See generally Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAW. 617 (1985) (explaining system of case valuation based on determining probabilities of various court decisions).

³⁸ ICSID, 2013 ANNUAL REPORT 21 (2013); see also ICSID, THE ICSID CASELOAD — STATISTICS 7 (2014) (charting the dramatic rise in ICSID cases in the twenty-first century). Because the vast majority of ICSID cases were registered in the past fifteen years, a large percentage of them are still pending.

billions of dollars,³⁹ legal fees can reach into the tens of millions of dollars, and some conflicts can take years to arbitrate.⁴⁰ These costs create headaches for the in-house counsel of multinational corporations and are potentially burdensome for developing countries where such costs can represent substantial portions of the state budget. Consequently, various parties and commentators have looked to mediation as a potential alternative to arbitration.

II. MEDIATION AS A DISPUTE RESOLUTION PROCESS

A. *The Mediation Process*

Mediation is negotiation facilitated by a neutral third party.⁴¹ It is a flexible process with dozens of variations, but all forms of mediation rely on the self-determination of the parties in resolving the dispute. That is, the process is voluntary rather than coercive, and parties preserve their control over the outcome.⁴² The mediator guides the process along and facilitates communication between the parties.⁴³ Typically, a mediation begins with an initial conference between the parties and the mediator, where the mediator explains the process and ground rules. This introduction is followed by an initial exchange of information, either in conference or by written submissions. The bulk of the mediation is then spent in a series of joint or private sessions with the mediator, wherein the mediator gathers information, listens to the parties, and asks questions. If the parties reach an agreement, the mediator might assist in clarifying and drafting that agreement.

An important choice that mediators make in structuring the process is the extent to which they will be directive or facilitative with regard to the substance of the dispute.⁴⁴ A mediator taking a more facilitative approach refrains from opining on the merits of either party's position and focuses more on the parties' interests and their relationship; a mediator taking a more directive approach openly evaluates each party's position concerning the parties' rights in the dispute and predicts how those posi-

³⁹ See, e.g., Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) (ordering an award of \$1.7 billion plus interest).

⁴⁰ See Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1275 (2009) ("For example, in *PSEG v. Turkey*, costs and legal fees amounted to \$20,851,636.62, and *UPS v. Canada* took seven years to arbitrate." (footnotes omitted)); Coe, *supra* note 21, at 9–10 (describing Metalclad arbitration, which cost the claimant \$4 million to arbitrate over four years).

⁴¹ BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE* 2–3 (2d ed. 2003).

⁴² See CARRIE MENKEL-MEADOW ET AL., *MEDIATION* 92 (2006).

⁴³ See *id.* at 91.

⁴⁴ See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (surveying different approaches that mediators take).

tions would fare in a court or arbitral forum. Mediators often blend or alternate between styles as appropriate. For instance, a mediator might start out facilitative when parties are first explaining their interests and then transition to evaluative as the parties approach agreement.⁴⁵

B. The Growth of Domestic and International Commercial Mediation

In the United States and the rest of the world, mediation is quickly replacing arbitration and traditional litigation as the dispute resolution process of choice for commercial actors.⁴⁶ Starting in the 1970s, a “corporate-consumer revolution against litigation costs” led in-house counsel to consider alternative dispute resolution (ADR), and especially mediation, for resolving business disputes.⁴⁷ In 1979, a group of corporate counsel founded the Center for Public Resources (CPR),⁴⁸ a non-profit that promotes the use of ADR through educational resources and, increasingly, support for disputants in finding qualified arbitrators and mediators in instances where the parties cannot agree on a suitable neutral.⁴⁹ Another result of corporate ADR’s ascent was the creation of for-profit firms specializing in consulting businesses in ADR and providing mediation and other services.⁵⁰ By the 1980s, mediation in particular was immensely popular among business lawyers.⁵¹

By the 1990s, docket pressures and rising enthusiasm for mediation resulted in federal and state courts adopting compulsory mediation programs whereby parties are required by the court to engage in good-faith efforts at mediation before proceeding further in their litigation.⁵² Court-connected mediation is often evaluative rather than facilitative, focusing on properly valuing the case rather than reconciling the parties’ interests, fostering understanding, or repairing a damaged relationship. Indeed, parties to a dispute are frequently overshadowed by their counsel in court-connected mediation and creative, extralegal solutions are rarely discussed.⁵³

⁴⁵ PICKER, *supra* note 41, at 42.

⁴⁶ See Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 70–73 (2012).

⁴⁷ Ellen Joan Pollock, *The Alternate Route*, AM. LAW., Sept. 1983, at 70.

⁴⁸ CPR has since been rebranded as the International Institute for Conflict Prevention & Resolution. See *CPR Home*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <http://www.cpradr.org> (last visited May 10, 2014).

⁴⁹ See Frank E.A. Sander & James F. Henry, *A Pioneer Looks Back: An ‘Exit’ Interview with CPR’s Jim Henry*, DISP. RESOL. MAG., Fall 2000, at 22.

⁵⁰ See generally Pollock, *supra* note 47 (discussing EnDispute, one such firm).

⁵¹ See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 182–84 (2003).

⁵² See *id.* at 185–86. See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION* 43–46, 49–52 (1989).

⁵³ See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 796–97 (2001).

More recently, mediation has been promoted in international commercial disputes, which tend to be complex, high-value cases.⁵⁴ Mediation has long been used to manage conflict arising in international construction projects, but it has been used much less frequently to settle legal disputes in a manner analogous to domestic commercial and court-connected mediation.⁵⁵ There has been a push for the increased use of mediation as a dispute resolution process in international business.⁵⁶ Although ADR services have long been available via the International Chamber of Commerce (ICC), only recently has mediation surpassed arbitration to become by far the most popular dispute resolution process for international commercial disputes.⁵⁷ Like ICSID and UNCITRAL, the ICC publishes rules and procedures for the arbitration of commercial disputes. In 2014, the ICC replaced its ADR Rules with Mediation Rules, reflecting mediation's prominent role in international dispute resolution.⁵⁸ These rules focus on the contractual terms of initiating mediation and selecting a mediator, giving the mediator wide latitude in shaping the process in accordance with the wishes of the parties.⁵⁹ Other institutions, such as the World Bank and the International Finance Corporation, are actively working to promote the use of mediation in resolving international commercial disputes.⁶⁰

Commercial mediation can come about in a variety of ways. Most often, the parties have agreed to mediate through a "med-arb" clause providing that disputes arising from a contract will be mediated and, where that fails, resolved through binding arbitration.⁶¹ In the construction industry, parties to a contract often will agree not only to mediation as a process, but also to a specific mediator who will respond to disputes through the duration of the contract's execution — usually until the completion of a discrete construction project.⁶² Where there is no prior agreement to mediate, disputants may be re-

⁵⁴ Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, DISP. RESOL. J., Feb./Apr. 2011, at 64, 66.

⁵⁵ See Jeswald W. Salacuse, *Mediation in International Business*, in STUDIES IN INTERNATIONAL MEDIATION 213, 218–21 (Jacob Bercovitch ed., 2002).

⁵⁶ See, e.g., S.I. Strong, Essay, *Beyond International Commercial Arbitration?: The Promise of International Commercial Mediation*, 42 WASH. U. J.L. & POL'Y (forthcoming 2014); Thomas W. Wälde, *Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation*, 22 ARB. INT'L 205 (2006).

⁵⁷ See Rafal Morek, *What's 'New' in the New ICC Mediation Rules?*, KLUWER MEDIATION BLOG (Dec. 9, 2013), <http://kluwermediationblog.com/2013/12/09/whats-new-in-the-new-icc-mediation-rules>.

⁵⁸ See generally ICC, ICC MEDIATION RULES (2013).

⁵⁹ See *id.* art. 7; ICC, MEDIATION GUIDANCE NOTES (2013).

⁶⁰ CYRIL CHERN, INTERNATIONAL COMMERCIAL MEDIATION 29 (2008).

⁶¹ Mason, *supra* note 54, at 66. See generally PICKER, *supra* note 41, at 8–9.

⁶² See Salacuse, *supra* note 55, at 218–19.

ferred to mediation through the suggestion of an international organization such as the ICC or the International Centre for Dispute Resolution (ICDR), or sometimes through a court order where the case is pending before a national court.⁶³ Other times, one party will suggest mediation after an arbitration or lawsuit has been initiated.⁶⁴

C. The Dispute-Process Gap in Investor-State Disputes

Professor William Ury has written of three broad approaches to resolving disputes: (1) reconciling parties' underlying interests, (2) determining who is in the right, and (3) determining who is more powerful.⁶⁵ Direct negotiation and facilitative mediation are common methods of interest-based dispute resolution. Examples of rights-based methods include traditional court systems as well as arbitration. Examples of power-based methods of dispute resolution include labor strikes, assertions of managerial authority, and, in the international context, economic sanctions and war.

Interest-based dispute resolution processes are often preferable because they are low-cost options that result in mutually satisfactory outcomes, encourage integrative mutual-gain solutions, and preserve or restore the relationship between parties.⁶⁶ However, not all disputes can be resolved through appeals to interests — sometimes, there is no mutually agreeable resolution available. Dispute systems designers should therefore strive to create a more complete suite of conflict resolution processes that parties to a dispute can tailor to their needs.⁶⁷

The system of investor-state dispute resolution currently lacks a structured, interest-based process. When a dispute arises from an investment in a foreign country, an investor acting pursuant to an IIT has four clear options: arbitration, conciliation, factfinding, or direct negotiation with the host state.⁶⁸ Arbitration is binding and rights-based. Conciliation as it exists under ICSID or UNCITRAL is non-binding but still rights-based. Factfinding is ostensibly neutral on the rights/interests divide but inevitably emphasizes the facts relevant to a

⁶³ See Mason, *supra* note 54, at 66.

⁶⁴ See *id.*

⁶⁵ See generally WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED 3–19 (1988).

⁶⁶ *Id.* at 10–15, 18.

⁶⁷ Cf. generally Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE 65 (A. Leo Levin & Russell R. Wheeler eds., 1979) (introducing the concept of “multidoor courthouse”).

⁶⁸ Diplomatic negotiations between the host and home country are also possible, see M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 19 (2000), but the system of IITs is designed to minimize home state intervention in investment disputes, see Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 330 (1994). Further, there are good reasons that investors may wish to avoid diplomatic protections even when they are available. See UNITED NATIONS CONFERENCE ON TRADE AND DEV., *supra* note 5, at 6–7.

connected rights-based process. While negotiation is an interest-based process, it is also unstructured and prone to failure in particularly complex disputes. There are indications that parties to investor-state disputes would in some instances benefit from a more-structured interest-based process with a problem-solving orientation.⁶⁹

Mediation is such a process insofar as mediators challenge the parties to understand the shortcomings of their positions while exploring the parties' interests in search of a more optimal solution to their problem.⁷⁰ However, mediation is only interest-based to the extent that mediators choose to focus on interests. Once parties are in mediation, the approach taken by the mediator varies tremendously depending on her philosophy and experience as well as the context of the dispute. Some scholars have argued that the form of evaluative mediation popular in both domestic and international commercial disputes undermines the advantages that mediation has over arbitration, as it creates an adversarial, legalistic process without any accompanying procedural rights.⁷¹ This criticism reflects a deep-seated controversy in the mediation field over evaluative methods,⁷² and it may overstate the threat posed by mediators expressing opinions on the merits of the parties' positions because it assumes a false dichotomy rather than a spectrum between facilitative and evaluative approaches. A skilled mediator will judge whether to deploy evaluative techniques based on observations of the identities of the parties, the progress they have made in the mediation, and the position of the mediation process in the context of the broader conflict. Mediation is, after all, a flexible process that can be tailored to the dispute, and the full range of process options are present in commercial mediation. Even if evaluative mediation is more common in the business world, facilitative and even transformative mediation can and does occur.⁷³

There is reason to think that a facilitative approach to mediation would be more beneficial to investor-state disputes because it would

⁶⁹ See Coe, *supra* note 21, at 8–9 (recounting remarks of Metalclad CEO); *id.* at 24 & n.86 (speculating that mediation would have better served Metalclad's interests).

⁷⁰ See CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 304 (1996).

⁷¹ See, e.g., Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 113–16 (2002); Nolan-Haley, *supra* note 46, at 83–85.

⁷² See generally Riskin, *supra* note 44.

⁷³ See, e.g., CHERN, *supra* note 60, at 141–44; ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL* 139–76 (2010) (describing the med-arb process between IBM and Fujitsu); Thomas W. Wälde, *Proactive Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management*, 5 BUS. L. INT'L 99, 103–06 (2004).

focus more on opportunities for long-term mutual gain.⁷⁴ And there is little reason to think that evaluative mediation would add value to the overall investment treaty dispute resolution system because (1) conciliation already exists as a nonbinding evaluative process, (2) parties are frequently able to hire lawyers or other experts who assess fairly and competently the merits of the case, and (3) investment treaty law's inchoate and unpredictable nature undermines any value that could be gained through such methods. Thus, any mediation option that is added to the investor-state dispute resolution schema should lean toward a facilitative, interest-based model.⁷⁵

New processes should be added to the investor-state dispute resolution framework only if they would be useful to disputants and offer value unavailable in existing processes. Investors and states already have access to factfinding and conciliation, and they do not avail themselves of either process. The popularity of mediation in other contexts, however, demonstrates that mediation is a process that disputants find useful. And in fact both states and investors have expressed a desire for a mediation option in investor-state disputes.⁷⁶ This market demand for mediation exists because it is a useful dispute resolution process that is different from current options in important and beneficial ways.

III. THE CASE FOR MEDIATING INVESTOR-STATE DISPUTES

A. *Benefits of Mediation to Investors and States*

1. *Breaking barriers.* — Mediation enlists outside assistance while allowing parties to retain control over the outcome of the dispute. Involving a neutral third party changes the dynamic of the negotiation and can help parties overcome barriers to agreement.⁷⁷ Mediators accomplish this task by, inter alia, setting a tone and atmosphere that are conducive to cooperation and information sharing; identifying and reframing key issues in the dispute; asking questions to discover the parties' underlying interests and expose unsupported assumptions; and introducing effective procedures for generating and evaluating options for settlement.⁷⁸ Mediators can adapt the process and employ ad-

⁷⁴ See Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 113–14 (2013) (noting that “sophisticated users of commercial mediation” prefer interest-based mediation); Wälde, *supra* note 56; Wälde, *supra* note 73, at 103.

⁷⁵ See Welsh & Schneider, *supra* note 74, at 116–17.

⁷⁶ *Id.* at 132.

⁷⁷ See generally Robert H. Mnookin & Lee Ross, *Introduction to BARRIERS TO CONFLICT RESOLUTION* 3 (Kenneth J. Arrow et al. eds., 1999) (describing various strategic, psychological, and structural barriers to agreement).

⁷⁸ See generally CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 211–94 (3d ed. 2003).

vanced knowledge of negotiation and communications theory to counter or defuse “hardball” tactics, deception, power imbalances between the parties, or a genuine impasse in the negotiation.⁷⁹ There is no reason to believe that parties to investor-state disputes are less vulnerable to these barriers than anyone else. Mediation offers these advantages over direct negotiation while still placing control of the result in the hands of the parties; mediators simply remove obstacles that have prevented the parties from reaching an acceptable outcome on their own.

2. *Cost-effectiveness.* — Although commercial arbitration was once promoted as a low-cost alternative to litigation, arbitration has seen a rise in cost over the past few decades.⁸⁰ Investor-state arbitrations especially have become uncommonly expensive, with disputes lasting years and costing millions in legal fees.⁸¹ Delayed resolution of these disputes attracts negative publicity, deters investment, and strains the relationship between the parties. Mediation, by contrast, takes far less time and involves fewer expenses than arbitration.⁸² Increased use of mediation could be the cost-effective solution for which investors and states have been searching.

3. *Relationship-building.* — Mediation is more likely to preserve or even strengthen the relationship between the parties. This relationship-building is especially beneficial for international investors who have illiquid capital in the host country — for example, a manufacturing facility — and who might want to invest further. Especially in the context of investment in public utilities, the business relationship between the investor and the host state is symbiotic and virtually permanent.⁸³ Adversarial arbitration threatens to damage the working relationship between investors and government officials whose cooperation is often necessary to accomplishing the investor’s goals in the host country.⁸⁴ States, too, are incentivized to preserve long-term relationships to the extent that they rely on FDI for economic development.

4. *Confidentiality.* — Although arbitration proceedings are private and awards cannot be published without the consent of the parties,⁸⁵

⁷⁹ For a discussion of mediation tactics in difficult situations, see Karl Mackie, *Breakthrough: Overcoming Deadlocked Negotiations*, in BUTTERWORTHS MEDIATORS ON MEDIATION 106 (Christopher Newmark & Anthony Monaghan eds., 2005).

⁸⁰ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8. Cost reduction is an ancillary concern in investor-state arbitration, the primary benefit of which is that it supplants the distrusted local courts of the host states.

⁸¹ See Salacuse, *supra* note 20, at 142 (“[T]he costs of an investor-State arbitration are usually substantially greater than those in an ordinary commercial dispute”); sources cited *supra* note 40.

⁸² See GARY P. POON, THE CORPORATE COUNSEL’S GUIDE TO MEDIATION 5–6 (2010).

⁸³ See Salacuse, *supra* note 20, at 141.

⁸⁴ See *id.* at 147.

⁸⁵ See ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* art. 48(5), in ICSID CONVENTION, *supra* note 17. But see ICSID, *Rules*

the submissions and awards are often made public as a concession to calls for transparency.⁸⁶ Even where arbitration tribunals are constrained in disclosing information related to the case, there is no general duty of confidentiality relating to arbitration proceedings and the scope of any such duty is at the discretion of the tribunal.⁸⁷ By contrast, the mediation process necessitates broad confidentiality.⁸⁸ Mediation is designed to allow parties to speak candidly and openly about their interests, motivations, and concerns. Confidentiality provides parties the confidence to discuss the matter without prejudicing their positions in subsequent litigation or arbitration. Unlike commercial actors, who have some latitude in keeping secrets even from their shareholders, states are subject to greater demands for public information. In the investor-state context, confidentiality during mediation enables parties to better manage the timing of these inevitable disclosures, some of which might draw backlash from both political and corporate constituencies.

B. Arguments Against Mediation

Despite the advantages that mediation offers investor-state disputants, some commentators insist that, for a variety of reasons, mediation is not worth pursuing in the context of international investment. Although these arguments have been discussed in greater length elsewhere, they are worth recapitulating here.

1. *Mediation does not result in precedent or “jurisprudential growth.”* — Some critics of mediation and ADR in general have disfavored these approaches in part because they do not result in legal precedent and therefore do not expand the jurisprudential foundation on which future decisions can rely.⁸⁹ Widespread use of mediation would decelerate the accumulation of reasoned arbitral awards, which form the basis of a nascent international law of investment. Arbitra-

of Procedure for Arbitration Proceedings (Arbitration Rules) Rule 48(4), in ICSID CONVENTION, supra note 17 (requiring publication of excerpts of panel’s reasoning).

⁸⁶ See INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 29, at 196–97. In 2013, UNCITRAL issued transparency rules that require publication of key submissions and the award. See UNCITRAL, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 3 (2014).

⁸⁷ See Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 133–34 (2003); see, e.g., *Giovanna a Beccara v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3 ¶¶ 70–73 (Confidentiality Order), 25–27 (Jan. 27, 2010) (finding no general duty of confidentiality binding on the parties).

⁸⁸ See Klaus Reichert, *Confidentiality in International Mediation*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 60, 62. U.S. law often provides legal protections enforcing confidentiality during mediation, but courts may require disclosure under certain circumstances. See generally Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. DISP. RESOL. 239 (2002).

⁸⁹ See *Coe, supra* note 21, at 25.

tors look to prior decisions, and a prolonged absence of consensus on important issues of investment treaty interpretation threatens to perpetuate the current inconsistency of arbitral decisions. Fewer awards create fewer data points from which parties can extrapolate predictions in valuing their case, making it difficult to know when to settle.

This criticism overestimates the precedential value of arbitral awards and misunderstands mediation as a substitute for arbitration. Investment arbitration outcomes are particularly weak in predictive value because panels are frequently interpreting different treaties.⁹⁰ Further, mediation would not be a replacement for arbitration as a process for resolving investor-state disputes. Not all cases should settle, especially in high-stakes disputes where the alternative to a legal victory means bankruptcy or the abdication of public duties, or where opposing but equally reasonable legal interpretations make it impossible to value the case. And these are the disputes most valuable as precedent-setting arbitral decisions. Mediation would supplement the existing dispute-resolution structure, allowing those cases that should settle to do so while allowing other disputes to proceed to arbitration.

Mediation will not halt jurisprudential growth, but it will increase value for both investors and states. The set of disputes that would be mediated would include both the types of disputes that are currently arbitrated and those that are currently settled without mediation. No doubt some of those settlements are the result of one party caving into the other party's demands rather than going through a time-consuming and expensive arbitration process. Some number of these unhappy "amicable" resolutions would benefit from the availability of mediation.

2. *Unique characteristics of state actors make mediation inappropriate or ineffective.* — Commentators have argued that states subject to investment claims operate under conditions that make mediation impracticable or undesirable. States, especially developing states, operate through large and inefficient bureaucracies. It can take months for the appropriate governmental departments to become aware of an investment dispute, and multiple agencies with different perspectives and personalities may disagree on how to handle such a dispute. Investors' incentives to preserve a relationship through mediation may be attenuated when the agency with which the investor wants to form a long-term relationship is not the agency responsible for handling the investment dispute.⁹¹

⁹⁰ Precedent would increase in importance in the unlikely event that the current investment regime is supplanted by a global treaty with a single dispute-resolution process. See generally W. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, in *ARBITRATING FOREIGN INVESTMENT DISPUTES*, *supra* note 18, at 51.

⁹¹ See Lucy Reed, *Synopsis of Closing Remarks*, in *INVESTOR-STATE DISPUTES II*, *supra* note 20, at 30.

States also operate under different incentives than investors. They have national security, macroeconomic, and other public policy concerns and answer to a far broader constituency than do multinational corporations. Particularly in developing countries with a history of Western imperialism,⁹² states are subject to political pressures that discourage settlements that might cast the current regime as weak or corrupt.⁹³ Regimes have used arbitration panels as scapegoats to absolve themselves of responsibility for unpopular outcomes favoring foreign investors,⁹⁴ and mediation would not serve this purpose because parties ultimately determine the outcome of their dispute.

Although these state characteristics certainly complicate investor-state mediation, they do not preclude mediation as an effective dispute-resolution process. The complexity of state bureaucracies can be overcome, either by centralizing state negotiating authority⁹⁵ or by using a multiparty mediation process involving the investor, multiple state agencies, and — conceivably — additional stakeholders such as citizen interest groups or representatives of a political coalition. Political pressures do not prevent states from mediating disputes in other contexts. For example, mediation has been used in disputes concerning environmental conflicts involving multiple stakeholder groups with broadly ranging perspectives on conservation, development, and waste management.⁹⁶ Even in lawsuits involving important public policies, the U.S. government has from time to time used mediation in an effort to achieve an amicable settlement.⁹⁷

3. *Mediation is unnecessary.* — Some have argued that mediation has no place in investor-state conflicts because it does not enable disputants to do anything they are not perfectly capable of doing on their own.⁹⁸ Multinational corporations and states are both able to secure

⁹² See SORNARAJAH, *supra* note 68, at 17–18.

⁹³ In some countries, government officials responsible for negotiating an agreement may be held personally liable under anticorruption laws for monetary settlements that allegedly enrich the decisionmaker at the expense of the nation. See Welsh & Schneider, *supra* note 74, at 87 n.53 (noting indictment of one official involved in settlement). Especially in countries without an independent judiciary, such prosecutions may be used by a victorious political opposition to threaten even public officials who acted in good faith. As a consequence of these profound principal-agent tensions deterring public officials from negotiating or mediating disputes, states opt instead to arbitrate their disputes to avoid taking responsibility — and liability — for the outcome.

⁹⁴ See Salacuse, *supra* note 20, at 149–50.

⁹⁵ See *supra* note 32.

⁹⁶ See MOORE, *supra* note 78, at 29–31.

⁹⁷ For a recent example, see Keith Laing, *DOJ, Airlines Agree to Mediation*, THE HILL (Oct. 30, 2013, 10:08 AM), <http://thehill.com/blogs/transportation-report/aviation/188643-doj-airlines-agree-to-mediation> (discussing agreement to mediate in antitrust case against airline merger). That lawsuit ended in settlement shortly thereafter. See James B. Stewart, *Baffling About-Face in American-US Airways Merger*, N.Y. TIMES, Nov. 15, 2013, <http://www.nytimes.com/2013/11/16/business/baffling-about-face-in-american-us-airways-merger.html>.

⁹⁸ See Salacuse, *supra* note 20, at 158.

first-rate negotiators, as well as various experts in international law and in the subject matter of the dispute. On the state side, the office with authority to settle the dispute is often staffed by professionals in the field of diplomacy, who have experience and skill in the sensitive reconciliation of competing interests. One might think that with so many resources and so much expertise, parties to a typical investment treaty dispute would not require the assistance of a third party. Indeed, the vast majority of such disputes settle amicably with no apparent use of mediation, conciliation, or other third-party involvement.⁹⁹ That conciliation is so rarely used could be an indication that parties to these disputes are able to negotiate a settlement by themselves.

This argument misunderstands the competitive advantage of mediation as a dispute-resolution process. The primary benefit of mediation is not the involvement of a third-party expert in dispute resolution who can consult and coach the parties as to the proper methods of negotiation. Rather, the very involvement of a third party alters the dynamic of the negotiation in ways that can benefit even experts in negotiation who are behaving fairly and reasonably in the course of the negotiation. For example, mediators caucus with parties individually to gather information the parties might not be willing to share in each other's presence; they can help parties overcome emotional barriers to agreement stemming from a history of distrust and mistreatment; and they can offer an unbiased perspective that helps parties reevaluate their expectations and positions.¹⁰⁰ Mediation adds value as a process even where the parties are sophisticated and have access to ample negotiation resources. And mediation offers benefits that conciliation, insofar as it is an adversarial and rights-based process, cannot.

IV. CREATING INSTITUTIONS FOR MEDIATION

For over a decade, stakeholders and commentators have pushed mediation as an alternative process to be used in international investment disputes.¹⁰¹ Despite this apparent market demand, the interna-

⁹⁹ See W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, in INVESTOR-STATE DISPUTES II, *supra* note 20, at 22–23 (noting that the vast majority of investor-state conflicts are resolved without resort to arbitration).

¹⁰⁰ See MOORE, *supra* note 78, at 369–77 (caucusing), 167–83 (emotions), 43–55 (roles of mediators, including variations on mediator as trusted advisor).

¹⁰¹ See, e.g., Julie 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*, 19 LOY. L.A. INT'L & COMP. L.J. 1 (1996); N.D. Rubins, *Use of Mediation for Investment Disputes*, OIL, GAS & ENERGY L. INTELLIGENCE, March 2003; Wälde, *supra* note 73, at 99–103; Jean E. Kalicki, *Mediation of Investor-State Disputes: Revisiting the Prospects*, KLUWER ARB. BLOG (June 14, 2013), <http://kluwerarbitrationblog.com/blog/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects>; *Mediation Is the Key for Future*

tional investment regime still lacks an infrastructure for the effective mediation of investor-state disputes. This Part assesses options for promoting more widespread use of the process and recommends the creation of a private, distributed network of mediation resources.

A. Renegotiate IITs to compel or suggest mediation

The most direct way to incorporate mediation into investor-state dispute resolution is to write the process directly into the IITs themselves.¹⁰² This change could be as simple as mentioning the possibility of mediation in the context of the cooling-off period, or as complex as creating a system of compulsory mediation. Professors Nancy Welsh and Andrea Schneider, for instance, have suggested that the dispute resolution clauses of IITs be rewritten to include a default mediation option analogous to court-connected mediation.¹⁰³ That is, before initiating arbitration, parties would be required to make a good-faith attempt at mediation, or to at least meet to discuss the possibility of mediation. This option would certainly increase the incidence of mediation, and thereby increase the number of voluntary settlements made without the need for expensive arbitration.¹⁰⁴ Nor would implementing such change be particularly difficult: treaties can be renegotiated at a bilateral or multilateral level, and because many BITs have sunset provisions, the changes could be incorporated within five to ten years.¹⁰⁵

Compulsory mediation has been criticized as antithetical to the mediation process, which is defined by voluntariness.¹⁰⁶ Such concerns are attenuated, however, as the compulsory element becomes less violative of the parties' self-determination: compelling a conference in which parties discuss the possibility of mediation is benign, whereas forcing parties to complete the mediation process would be harmful.¹⁰⁷ Another concern about court-connected mediation is that it had the effect of debasing mediation in the United States through its intensive involvement of lawyers, evaluative focus on the merits of the dispute, and use to pressure parties to settle rather than move forward to tri-

Investment, FDIINTELLIGENCE (Feb. 4, 2002, 12:00 AM), <http://www.fdiintelligence.com/Archive/Mediation-is-the-key-for-future-investment>.

¹⁰² See Jack J. Coe, Jr., *Should Mediation of Investment Disputes Be Encouraged, and, If So, by Whom and How?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 339, 350 (Arthur W. Rovine ed., 2010).

¹⁰³ See generally Welsh & Schneider, *supra* note 74.

¹⁰⁴ See *id.* at 129–30.

¹⁰⁵ See Franck, *supra* note 13, at 219–22. *But see* Welsh & Schneider, *supra* note 74, at 86 (noting concerns with burden of renegotiating thousands of treaties).

¹⁰⁶ Welsh & Schneider, *supra* note 74, at 128–29.

¹⁰⁷ See *id.*

al.¹⁰⁸ Indeed, it is possible that compulsory mediation is responsible for reorienting mediation in the United States toward litigation because it forced thousands of lawyers into a process they were unfamiliar with and perhaps skeptical of. Under these conditions, it is not surprising that lawyers would remake the mediation process in the image of litigation. Granted, it is not at all certain that investor-state mediation would suffer the same fate (assuming, *arguendo*, that the evaluative shift in American mediation was a negative change). International investment law is a far narrower field than civil litigation generally. Consequently, it would be far easier to educate lawyers on the purposes and prospects of the process and to control the quality of the mediators.

B. Reform ICSID procedures to incorporate and promote mediation

A seemingly simple but far-reaching alternative would be simply to reform ICSID's procedures to include a mediation process to which parties could be referred. ICSID could add mediation procedures to its current suite of dispute resolution processes (arbitration, conciliation, factfinding), then either informally suggest to registrants of a dispute that they consider mediation as an option or reform the arbitration procedures to require either a consultation regarding mediation, or that disputants make a good-faith attempt at mediation before proceeding to arbitration. ICSID recently started informally promoting its conciliation procedures, but although the number of conciliations registered increased, the total number of conciliations remains negligible. Because ICSID has not had any success with its current alternatives to arbitration, its leadership and staff might — misguidedly — be convinced that mediation would prove similarly unpopular if implemented.¹⁰⁹ As the above analysis makes clear, however, mediation offers value to parties that ICSID's current alternatives do not. If ICSID were to build a viable mediation platform, it would likely be more successful than the conciliation or factfinding facilities.

The primary obstacle to this reform option, which may prove insurmountable, is the inertia of the ICSID system. The ICSID Rules and Regulations can be amended by a two-thirds majority vote of its Advisory Council, comprising one representative for each of 159 signatories to the ICSID Convention.¹¹⁰ The rules have been amended only a handful of times since ICSID's inception in 1966, most recently in

¹⁰⁸ See generally Nolan-Haley, *supra* note 46.

¹⁰⁹ See Onwuamaegbu, *supra* note 21, at 13–14 (discussing adding mediation to ICSID facilities).

¹¹⁰ Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REV. — FOREIGN INVESTMENT L.J. 55, 55–57 (2007); *List of Contracting States and Other Signatories of the Convention*, ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last updated Apr. 11, 2014).

2006.¹¹¹ These amendments have been minor, and future changes are likely to be similarly modest. The value of ICSID's arbitration facility lies in the simplicity and consistency of its procedures, and ICSID's leadership is certainly aware that disputants have other options — namely, UNCITRAL arbitration. An unpopular reform inserting mediation into the arbitration procedures could hasten the end of ICSID's supremacy in the investment arbitration field. If ICSID changes its rules at all, it would likely be a more modest inclusion of mediation as a discrete process that parties could opt into voluntarily.

Another complication with this option is that a mediation process built into ICSID would necessarily only be activated once a dispute rises to the level of a registered ICSID dispute. Mediation is more likely to be effective, however, when it is used earlier in the lifecycle of a dispute.¹¹² For a dispute to be registered with ICSID, it will have reached a measure of seriousness that hinders amicable settlement. If mediation is to be employed sooner in a conflict rather than later, the infrastructure would do better to support informal mechanisms rather than require the grave formality of ICSID registration.

C. Create a support network for private, voluntary mediation

A third option would have various groups interested in mediation promote the process independently, as with domestic commercial mediation. General counsel of multinational corporations could create an international version of CPR that would promote alternatives to arbitration through educational initiatives, support for disputants in locating and agreeing on qualified mediators, pledges to use mediation, and so forth. International organizations like the ICC and ICDR could join these efforts. ADR firms that currently offer mediation services to international commercial actors could develop and market services tailored for investor-state mediation.¹¹³ Investors whose investments are contracted directly with the host state — as with, for example, a public power plant — could introduce mediation clauses into their contracts supplementing existing remedies under the applicable IIT. Investors whose investments are not partnered with the host state could offer to mediate the dispute before proceeding to arbitration.¹¹⁴

¹¹¹ See ICSID CONVENTION, *supra* note 17; Parra, *supra* note 110, at 55–57.

¹¹² See Salacuse, *supra* note 20, at 181–82.

¹¹³ JAMS International, for instance, offers services for global commercial clients in a wide variety of contexts. See JAMS INT'L, JAMS INTERNATIONAL FACT SHEET (2014), available at <http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Fact-Sheet.pdf>.

¹¹⁴ This strategy is unlikely to be successful in many cases because (1) adverse parties to a dispute are likely to distrust the recommendations of the other party both with regard to the offer to mediate and the suggestion of a particular mediator, and (2) such an offer could simply echo throughout an unresponsive bureaucracy until the cooling-off period has lapsed. States could re-

This dispersed private approach has the advantage of not requiring consensus or the expenditure of political capital to get started, though it would result in a less extensive program of mediation than a compulsory one, and it might result in a disjointed array of mediation services with varying levels of success. This organic, bottom-up process has already started, as the ICC and other international organizations are already pushing for increased use of mediation. Other organizations have begun the process of certifying mediators for quality and experience,¹¹⁵ laying the groundwork for more specialized certification and the creation of a roster of qualified investor-state mediators from which disputants could draw as needed through mutual agreement.¹¹⁶ When parties are aware of mediation and have the resources to initiate the process, mediation will become more common.

Another advantage of this decentralized approach is that it would be more likely to create a mediation infrastructure that is proportionate and responsive to the demand for mediation. As mentioned above, most investor-state disputes settle amicably, and it may be that the number of arbitrations that could be successfully mediated is relatively small. If that is true, a compulsory mediation program would be wasteful and cause unnecessary delays in reaching an arbitral award. A private mediation infrastructure built by interested parties would grow in proportion to the resources made available for the task — which in turn would be proportionate to the perceived value of having such a mediation infrastructure. Further, a market-driven infrastructure (unlike the politically driven options explained above) is more likely to provide parties the resources they need when they need them rather than only after registration of a dispute with, for example, ICSID.

To the extent that corporate counsel take the initiative in developing these institutions and resources, as they did with domestic commercial mediation, the mediation system that results might be distrusted as illegitimate or biased against states. Unlike commercial litigation, where corporations find themselves as plaintiffs and defendants in different cases, in investor-state disputes the corporate investors

duce both of these threats by centralizing management of investment disputes in a single agency with an institutional commitment to ADR.

¹¹⁵ See Wolf von Kumberg, *Making Mediation Mainstream: An Application for Investment Treaty Disputes*, in *INVESTOR-STATE DISPUTES II*, *supra* note 20, at 71, 75–76 (describing the International Mediation Institute’s certification program).

¹¹⁶ Where parties are unable to reach an agreement on the mediator, they could seek help from a neutral organization. For instance, parties mediating through CPR receive assistance in selecting mediators based on the parties’ expressed preferences. Where that fails, parties submit rankings to CPR, which appoints the mediator with the lowest combined score. See INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, *MEDIATION PROCEDURE* 4 (1998).

and states are fixed as claimants and defendants, respectively.¹¹⁷ A system of investor-state mediation created only by claimants could lack procedural legitimacy. Dispute systems design principles urge that a process design involve input from all important stakeholders.¹¹⁸ Corporate counsel should therefore include state representatives in the design of such mediation systems and institutions.

Given the obstacles and uncertain benefits related to treaty reform or creating an additional ICSID facility, the best course of action is for corporate counsel, state representatives, and other interested parties to lend their support to the creation of a private network of resources for investor-state mediation. This approach is the least costly and the most likely to result in the kind of mediation that would actually benefit parties to investment treaty disputes. Importantly, states have crucial roles to play in enabling and encouraging the use of mediation, both in fostering international institutions that support mediation and in making internal reforms that would allow each state to participate effectively in a mediated negotiation. Indeed, all of the above reform options presuppose that states will coordinate their response to investor-state conflicts and appoint negotiators to represent the state's interests in mediation. Multinational corporations, for their part, can lobby for the sorts of legal reforms — whether domestic or treaty-based — that would shape such coordination within a state.

CONCLUSION

Increased dissatisfaction with investor-state arbitration reveals the need for an ADR process that is quicker, less expensive, and less destructive of relationships between investors and host states. Mediation can accomplish these goals and lead more investor-state disputes to an amicable settlement. Although there are several top-down reforms that can be made to promote mediation, there are also bottom-up solutions for creating the requisite support infrastructure for investor-state mediation that can be constructed by interested parties who have the initiative to extend mediation into this field. Parties — particularly corporate counsel and state representatives — need not wait for far-reaching reforms at ICSID or in IITs before attempting to mediate more of these disputes.

¹¹⁷ Under IITs, states can initiate arbitration against investors, but this almost never happens because (1) states rely on their local courts to prosecute such claims, and (2) IITs impose few enforceable obligations on investors. Salacuse, *supra* note 20, at 145.

¹¹⁸ See NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 132–35 (2013) (advocating collaborative approach to process design).