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Becoming "Investor-State Mediation"

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BECOMING “INVESTOR-STATE MEDIATION”

Nancy A. Welsh and Andrea K. Schneider*

While the current system of investment treaty arbitration has definitely improved upon the “gunboat diplomacy” used at times to address disputes between states and foreign investors, there are signs that reform is needed. Increasingly, states and investors express concerns regarding the costs associated with the arbitration process; some states are refusing to comply with arbitral awards; other states now hesitate to sign new bilateral investment treaties; and citizens have begun to engage in popular unrest at the prospect of investment treaty arbitration. As a result, both investors and states are advocating for the use of mediation to supplement investor-state arbitration.

INTRODUCTION

Within the last decade, there has been a noticeable surge in the number of investors accessing investment treaty arbitration.¹ Perhaps as a result of this phenomenon, coupled with the heavy costs of investment treaty arbitration and the size of some arbitral awards, both states and investors are now raising multiple concerns. The parties decry the expense, delays, and political challenges associated with relying exclusively on a rights-based arbitral process.² Most seriously, the current investment arbitration system is viable only if states voluntarily comply with, and enforce, the arbitral awards produced by the system—and such compliance cannot be presumed when the awards are adverse to nations’ interests. Indeed, some states have

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¹ See International Centre for Settlement of Investment Disputes, *The ICSID Caseload Statistics* (2011), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (follow “Publications” hyperlink; then follow “ICSID Publications” hyperlink; then follow “The ICSID Caseload - Statistics” hyperlink) (indicating that 39% of ICSID’s arbitration and conciliation proceedings that concluded in the first half of 2011 were settled or otherwise discontinued); see also Jeswald W. Salacuse, *Is There A Better Way? Alternative Methods of Treaty Based Investor-State Dispute Resolution*, 31 *FORDHAM INT’L L.J.* 138, 168 (2007) (describing how “initiation of an arbitration may both favor and discourage negotiated settlements).

² See Tom Stipanowich, *Arbitration: The “New Litigation,”* 2010 *U. ILL. L. REV.* 1 (2010); THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (J. Gaitis, C. von Kann, R. Wachsmuth eds., 2d ed. 2010); Salacuse, *supra* note 1.

begun to threaten to refuse to abide by arbitral awards.³ Such threats are not new, or even unique to international arbitration. In the U.S., the famous case of *Marbury v. Madison*⁴ involved a freshly-minted Supreme Court similarly struggling to establish its legal and political authority while also acknowledging its dependence on the enforcement power wielded by the executive branch of government. Despite the familiarity of the dynamic, however, the seriousness of states' threats to refuse to comply with awards is very real. If unchecked, such threats have the potential to introduce a level of uncertainty that could cause serious retraction in international investment and trade.

The current investor-state arbitration process tends to focus the parties on their legal rights—and the need to resolve ambiguities regarding such legal rights⁵—when the parties' extra-legal interests may be even more important and helpful in fashioning a resolution.⁶ Indeed, some commentators fear that arbitration may marginalize the parties' helpful socio-cultural characteristics and mutual interests that have the potential to sustain a currently-troubled business relationship. As Jeswald Salacuse notes, “[n]either the aim nor the consequence of arbitration is to repair a broken business relationship.”⁷ Particularly noteworthy have been the comments made by Grant Kesler, the Chief Executive Officer of Metalclad, after his company won a 17 million dollar arbitral award against Mexico. In retrospect, and despite being victorious, Kesler said that arbitration had been so dissatisfying that he wished his company had relied upon its “political options” to resolve the dispute.⁸ These comments suggest that losing parties, and some of those who have won, may seek a process with fewer transaction costs that allows them to focus a greater percentage of

³ See United Nations Conference on Trade and Development, UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, U.N. Doc. UNCTAD/DIAE/IA/2009/11 (Aug. 1, 2010) [hereinafter *Investor-State Disputes*], available at http://www.unctad.org/en/docs/diaeia200911_en.pdf; Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007) (surveying empirical research regarding investment arbitration). See also United Nations Conference on Trade and Development, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issues Note (Dec. 2010) (describing withdrawal of Bolivia and Ecuador from ICSID and Ecuador's termination of several bilateral investment treaties), available at http://www.unctad.org/en/docs/webdiaeia20106_en.pdf.

⁴ See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁵ See Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably?*, in *Mandatory Mediation and Its Variations and Dispute System Design in Investor-State Arbitration*, in *INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II*, 38-42 (Susan Franck and Anna Joubin-Bret, eds., 2011) [hereinafter *INVESTOR-STATE DISPUTES II*] (citing to legal questions regarding the arbitrability of disputes arising under most-favored-nation clauses, the types of activities that qualify as investments, and the elements of claims for violation of the fair and equitable treatment standard or the national treatment standard).

⁶ See Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747 (2010) (suggesting that mediation is most appropriate to craft customized implementation of judicially-determined legal entitlements).

⁷ Salacuse, *supra* note 1, at 155.

⁸ See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, n. 266 (2007) [hereinafter *Integrating Investment Treaty*]; see 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, 8-9 (2005); Salacuse, *supra* note 1, at 147.

their resources on problem-solving and the development of satisfactory solutions rather than formalized, principled fighting.

Responding to these concerns, Professors Jack Coe,⁹ Jeswald Salacuse,¹⁰ and Susan Franck¹¹ have urged consideration of procedures and systems that could reduce the likelihood that investor-state disputes will arise, or once they have arisen, could channel such disputes into forums that encourage communication and the development of consensual solutions. Such forums include mandatory negotiation, conciliation, early neutral evaluation, ombudspersons, and mediation. Some states have begun to put such procedures into place, generally focusing on those that require communication before the submission of a dispute to arbitration and thus fostering early information exchange and negotiation.¹² Investors, states, and interested international bodies and scholars have also begun to develop rules to encourage the use of mediation.¹³ Some stakeholders have even proposed that mediation should not just be encouraged but made mandatory, at least to some degree.¹⁴

Importantly, not all stakeholders embrace these developments. Some stakeholders have criticized the mediation process as unnecessary at best and, at worst, a threat to the useful work being done by arbitration.¹⁵ Some commentators have suggested that mediation simply cannot be exported into the investment treaty context, with its unique political and legal issues.¹⁶ Further, these commentators urge that if the sophisticated parties involved in investor-state disputes cannot reach resolution on their own, mediation will not be able to produce it.¹⁷

Once again, this dynamic is not new. A couple of decades ago, when mediation proponents first urged the integration of mediation into civil litigation, many judges and litigators resisted the call. They confused “mediation” with “meditation” and therapy, labeled mediation a “fad,” and insisted that it was an unprincipled, emotion-laden process. Some of these criticisms persist. Interestingly,

⁹ See Coe, *supra* note 8.

¹⁰ See Salacuse, *supra* note 1.

¹¹ See *Integrating Investment Treaty*, *supra* note 8.

¹² See *Investor-State Disputes*, *supra* note 3, at 49, 68.

¹³ INVESTOR-STATE DISPUTES II, *supra* note 5; INTERNATIONAL BAR ASSOCIATION, MEDIATION COMMITTEE, STATE MEDIATION SUBCOMMITTEE, IBA RULES FOR INVESTOR-STATE MEDIATION (ANN JOUBIN-BRET & BARTON LEGUM, CO-CHAIRS) available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/Default.aspx.

¹⁴ See *id.*; see also Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004); see Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2005).

¹⁵ See United Nations Conference on Trade and Development, W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, in *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, 22-7, U.N. Doc. UNCTAD/WEB/DIAE/LA/2010/8 (Mar. 29, 2010), available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf; see generally, Coe, *supra* note 8, at 17-18 (describing the weaknesses of conciliation that arise out of its dependence upon the parties' voluntary and good faith use of the process).

¹⁶ See Lucy Reed, *Synopsis of Closing Remarks*, in INVESTOR-STATE DISPUTES II, *supra* note 5, at 30-2.

¹⁷ But see Salacuse, *supra* note 1, at 166 (estimates of negotiated settlements in ICSID run as high as 30%); see also Coe, *supra* note 8.

these critics have been joined by others who suggest that mediation represents nothing more than the unprincipled bargaining of the marketplace.

At this time, however, mediation is an integral part of civil litigation in federal and state courts in the U.S. Mediation settles many cases, and parties generally perceive it to be as fair and satisfactory as adjudicative processes. One of the authors of this Essay has urged that mediation is likely to be able to offer greater procedural fairness than lawyers' bilateral negotiations. Business leaders express a preference for mediation, in comparison to either arbitration or litigation. The Federal Rules of Civil Procedure, meanwhile, are filled with directives requiring lawyers to negotiate with each other before approaching the court with requests for assistance in resolving litigation-related disputes. Though these provisions do not necessarily invoke mediation, they evidence the courts' embrace of consensual processes, like mediation, as a condition precedent or valuable supplement to adjudicative procedures.

The story of the evolution of court-connected mediation in the U.S. has been told elsewhere. But the current framing of the mediation debate in the investor-state context, including the discussion of mediation's potential value, suffers from a lack of understanding regarding the variety of structures, goals and interventions that can characterize the process—and the need, therefore, to be explicit about the structure, goals and interventions most appropriate in the investor-state context. Such lack of understanding is entirely understandable. The term “mediation” is used quite loosely to describe a wide variety of practices. Such inconsistency can be frustrating and confusing. But, once again, this dynamic is not new. The practices that characterize “mediation” vary in the same way that the practices of “courts” and “lawyers” and “arbitrators” vary from state to state, and even from context to context.

Rather than relying on the label of “mediation,” therefore, states need to be certain they are clear regarding the goals and essential practices that should characterize investor-state mediation in their investment treaties. Similarly, the investors that are urging states to use mediation and participating in the development of rules to implement the process need to be transparent regarding their goals for the process. Mediation providers and individual mediators, meanwhile, should be ready to educate states and investors regarding their mediation options, how these options vary, why the variations matter, and how mediation can be customized to make it responsive to parties' needs. This Essay is meant to ease the beginning of a thoughtful and deliberative process involving all of the actors just referenced, by highlighting the “broad-brush” distinctions between arbitration and mediation, and then noting the permeability of those distinctions due to the different models of arbitration and mediation that exist. Ultimately, through their choices, the leading actors in the investment treaty context will be instrumental in developing the process that is “becoming investor-state mediation.”

I. DISTINGUISHING MEDIATION FROM ARBITRATION

It is a truism that mediation and arbitration are different. Mediation is presumptively interest-based. Arbitration is presumptively rights-based. Mediation is focused on facilitating the *parties'* communication, negotiation and decision-making.

Arbitration is focused on enabling the *arbitrator's* decision-making. Mediation looks like a meeting. Arbitration looks like a hearing.

But closer examination reveals that mediation is *clearly* different from arbitration in only one key respect—the neutral's degree of control over the outcome.¹⁸ In mediation, the neutral (or mediator) assists the parties with their communications and negotiation. She cannot impose a solution. If there is a binding resolution reached in mediation, it will be the result of the parties' voluntary agreement.¹⁹ In contrast, at least in *binding* arbitration, decision-making power vests in arbitrators alone. They have the authority to decide outcomes for parties and issue binding awards. Indeed, in the U.S. domestic context, arbitral awards often appear *more* binding than those issued by many courts. And, in the international context, there is no question that arbitration awards are easier to enforce than court judgments or negotiated agreements.²⁰

In common law countries, meanwhile, arbitration *tends* to have a different “look” than mediation. Arbitration mimics a formal judicial hearing. The process can feature opening statements, direct and cross examination of witnesses, determinations regarding the admissibility of documents into evidence, and even closing arguments. While the arbitrators may interrupt the parties' presentations to ask questions, the parties present their cases in sequential order. If lawyers are involved, the parties tend to testify only in response to the lawyers' or the arbitrators' questions. The process is structured to ensure that the *arbitrator* has the information needed to make her decision, which will be binding upon the parties.²¹

In contrast, mediation in common law countries is a much less-obviously structured affair. The process often, but not always, begins with pre-mediation submissions and telephonic conferences with the mediator. On the day of the mediation, the parties meet in a conference room; the process generally begins with an orientation by the mediator and opening statements by each side. The mediators and parties may then stay together throughout the process or separate into different rooms, with the mediator “shuttling” among them. If the parties have separated and reach resolution, they may reconvene for a joint meeting to confirm the terms of the settlement. The process is structured to ensure that the *parties* have the information they need to allow them to reach a decision that they can accept and will implement.

¹⁸ See Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008).

¹⁹ Of course, case law suggests that this ideal is not always met. See Nancy A. Welsh, *The Thinning Vision of Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 17–19 (2001) [hereinafter *Thinning Vision*]; see also Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, J. DISP. RESOL. 179 (2002); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

²⁰ *But see* Edna Sussman, *The New York Convention Through a Mediation Prism*, DISP. RESOL. MAG., Summer 2009 (referencing other nations' approaches for enforcing judicially-brokered agreements).

²¹ See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (4th ed. 2009).

It is easy, however, to overstate these differences between mediation and arbitration. When “mediation” is the name that has been given to parties’ meetings with judges or to disputants’ meetings with village or community elders, conceptual distinctions between mediation and arbitration may be quite difficult to discern. Similarly, when judicial hearings look more like meetings—as they do in civil law and inquisitorial systems—the arbitration procedures modeled after this model of civil litigation may be quite difficult to differentiate from mediation in terms of outcome control, formality, and procedural structure. And even in the U.S., which has a common law tradition, lawyers and parties often are willing to grant substantial deference to a mediator’s reactions and opinions. This is likely to be especially true if the lawyers and parties have selected the mediator for his substantive knowledge, relevant mediation experience, status, facility in managing the process, perceived even-handedness, and general temperament. In other words, even in common law countries, a mediator may represent a “respected elder” within the relevant legal and business communities²²—and though the mediator does not have the authority to impose a solution, his assessments and suggestions have the potential to be extremely influential.²³

Finally, as noted *supra*, mediation is generally described as an interest-based process while arbitration is described as rights-based. Reality, however, presents a more nuanced picture. First, in some industry contexts, *arbitration* can be explicitly interest-based rather than rights-based.²⁴ Second, different models of mediation vary substantially in the intensity of their focus on interests. This Essay turns next to these mediation variations.

II. THE CONFOUND OF MEDIATION VARIATIONS

The strength of the distinction between arbitration and mediation in terms of their focus is likely to depend upon the geographic and industry context, the mediators who tend to be used in that context, and the particular model of mediation that these mediators use.²⁵ Mediation certainly offers the opportunity for explicit

²² Christopher Honeyman & Sandra Cheldelin, *Have Gavel Will Travel: Dispute Resolution’s Innocents Abroad*, 19 CONFLICT RESOL. Q. 363 (2002); *see also* Salacuse, *supra* note 1.

²³ *See* Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators*, 8 DISP. RESOL. ALERT 1 (2008); Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOT. J. 393 (2007); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? ‘The Problem’ in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 874 (2008) [hereinafter *Court-Oriented Mediation*] (citing research studies showing that lawyers prefer mediators who are litigators with relevant substantive expertise who will provide their opinions regarding the merits of the parties’ cases as well as a suggested settlement range and that cases are significantly more likely to settle in mediation if the parties select their own mediator).

²⁴ “Interest arbitration” is used in the labor context. *See* RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, *LABOR RELATIONS IN THE PUBLIC SECTOR* 264-265 (3d ed. 2001); CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 400-401 (2d ed. 2011);

²⁵ Other scholars have used different taxonomies to distinguish among different mediator behaviors. *See e.g.*, Salacuse, *supra* note 1, at 160 (distinguishing the following “basic areas that mediators seek to address in their efforts to facilitate a negotiated agreement between the parties: a) process, b) communications, and c) substance); Jacob Bercovitch & Scott Sigmund Gartner, *Is There Method in the Madness of Mediation?: Some Lessons for Mediators from Quantitative Studies of Mediation*, in

consideration of the parties' extra-legal interests. Indeed, some courts in the U.S. describe mediation as follows:

Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.²⁶

In some models of mediation, therefore, the mediator focuses primarily on drawing out the disputing parties and understanding their values and underlying interests, helping them to communicate fully, respectfully, and productively with each other, asking them questions to help them be thoughtful, and fostering their ability to develop their own customized and interest-based solutions.²⁷ These models tend to be called "facilitative," "elicitive," "understanding-focused," "therapeutic," "humanistic," "narrative," "insightful," "transformative" and focus on facilitating the development of understanding and "integrative [or interest-based] solutions."²⁸ Public policy facilitation and other public dialogue processes also tend to fit in this category.²⁹ Such models encourage the parties to play a central role if they wish,

INTERNATIONAL CONFLICT MEDIATION: NEW APPROACHES AND FINDINGS 19, 36-37 (Jacob Bercovitch & Scott Sigmund Gartner, eds., 2009) (identifying "three fundamental mediator strategies along a continuum ranging from low to high intervention. . . (a) communication-facilitation; (b) procedural strategies; and (c) directive strategies" and reporting that international mediators, with significant resources and high status and using directive strategies, are most likely to achieve settlements in high-intensity disputes, while regional mediators, with cultural similarity and using procedural strategies, are most likely to achieve settlements in low-intensity conflicts); Goldberg & Shaw, *supra* note 23; Nadja Alexander, *The Mediation Meta Model: Understanding Practice Around the World*, 26 CONFLICT RESOL. Q. 97 (2008) (proposing the following categories of mediation: settlement mediation, facilitative mediation, transformative mediation, expert advisory mediation, wise counsel mediation, and tradition-based mediation); John Wood, *Mediation Styles: Subjective Description of Mediators*, 21 CONFLICT RESOL. Q. 437 (2004) (describing various styles as counselor, negotiator, facilitator and democrat).

²⁶ S.D.N.Y. & N.D.N.Y. C.P.L.R. 83.8 (applying exclusively to the Southern District).

²⁷ *Court-Oriented Mediation*, *supra* note 23; *Thinning Vision*, *supra* note 19.

²⁸ See, e.g., CARRIE J. MENKEL-MEADOW ET AL., *supra* note 24. See also LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (4th ed. 2009).

²⁹ See also Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented By Community Conflicts Over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295 (2002). See Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, J. DISP. RESOL. 269, 290 (2009) (explaining that processes for resolving conflict in policy-making vary along several dimensions, including the participants, their

though they also may choose to defer to their lawyers. Not surprisingly, these models tend to value communication among the parties, reflective listening, and the use of joint sessions for as long as they are productive.

Particularly in complex matters, whether they are commercial, environmental, or court-connected, mediators using these models are likely to engage in substantial “pre-mediation” work. They are likely to review legal documents, require pre-mediation submissions from the parties, and confer with the lawyers (and even the parties) beforehand to learn about the dynamics of the dispute and the interests of the parties that will be relevant in customizing the process.³⁰ In some matters, such as disputes over land development or environmental issues, mediators may even help the parties determine other non-party stakeholders who should somehow be involved in the mediation due to the significance of their interests, their ability to offer helpful expertise or resources for resolution, or their potential to scuttle any deals that are reached. Mediators using these models may also use caucuses (or *ex parte* meetings) primarily to supplement or assist the productivity of parties’ joint negotiations. In such caucuses, the mediators may provide parties with the opportunity to “cool off” or express themselves on sensitive topics, offer an empathetic ear, help parties consider how they can participate or negotiate more effectively in the joint session, encourage parties to discuss the weaknesses of their position, or help parties consider the consequences of the solution that appears to be the most likely candidate for settlement. Joint sessions also remain important to facilitate the parties’ communication and negotiation.

There are also mediation models that are described as “evaluative,” “directive,” and focused on facilitating distributive outcomes. Again, mediators are likely to engage in substantial pre-mediation work. In this second set of models, though, the mediators and lawyers play the central roles, and the focus is usually on law-related issues.³¹ The understanding of who should be involved in the mediation is likely to be limited by the lawyers’ perceptual map,³² thus tending to exclude stakeholders who do not have legally-cognizable interests or legal standing. Initial presentations by the lawyers are likely to focus on legal issues, followed by legal and litigation-oriented analysis and the mediator’s provision of indirect or direct advice to the parties and their lawyers to help them be realistic regarding their options in civil litigation or administrative adjudication and to guide them toward a resolution generally consistent with those options. Notice that the focus of, and remedy

authority and power to influence policy decisions, and the process for communication and decision-making). See also THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al., eds., 1999); BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE 225 (2000).

³⁰ See *Court-Oriented Mediation*, *supra* note 23; ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY: FINAL REPORT APRIL 2006 - FEBRUARY 2008 (2008) [hereinafter FINAL REPORT APRIL 2006 - FEBRUARY 2008]; GARY FRIEDMAN AND JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2009).

³¹ Note, though, that this issue orientation is not inevitable. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003-2004); *Court-Oriented Mediation*, *supra* note 23.

³² See *id.*

produced by, this set of models of mediation begins to sound much like what is applicable to conciliation or even non-binding arbitration.³³

Despite mediation's reputation for a preoccupation with parties' interests, much non-family court-connected mediation in the U.S. actually focuses primarily on legal and litigation analysis. There likely are multiple reasons for this: the mediation is occurring in the shadow of the courthouse; the lawyers generally select the mediators; the mediators tend to be lawyers themselves, with relevant substantive expertise; the lawyers tend to dominate the discussion in mediation; the parties may be unable or unwilling to engage in the sort of disclosure and discussion likely to lead to integrative solutions;³⁴ and the parties may prefer to focus on the law as a means to reach resolution.³⁵

Interestingly, though, there are indications that sophisticated mediation users prefer mediators and mediation sessions that can uncover and use the parties' extra-legal interests *as well as* engage the lawyers and parties in a discussion of the relevant law and litigation realities. Mediation has the capacity to house both functions, without one dominating or marginalizing the other. Available research in the U.S. generally suggests that the most effective court-connected mediators are those who can combine elements of all of the mediation models described *supra*, with mediators thoroughly preparing themselves and facilitating the preparation of the disputants and their lawyers, seeking to understand important interests and develop trust, listening carefully and effectively, asking parties to explore or justify their assumptions and predictions regarding legal outcomes, carefully challenging unrealistic assumptions and helping parties to be more realistic, offering face-saving strategies, and assisting disputants and lawyers to develop responsive, realistic solutions.³⁶ In other words, the presumptively interest-based process of mediation is most likely to be helpful when it includes *both* legal analysis and probing for interests. Note, however, that the process still presumes that no agreement will occur without the parties' voluntary assent. Note further that this inclusive model of mediation requires both clear differentiation from other available processes, and legal and procedural protection of the time commitment required for its operation.³⁷

³³ See Salacuse, *supra* note 1 (equating conciliation and non-binding arbitration). Sometimes, the definition of conciliation seems as contested as that of mediation. See Coe, *supra* note 8; CHRISTIAN BUHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 273 (1st ed. 1996).

³⁴ See Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427 (2009) [hereinafter *You've Got*].

³⁵ See *id.* (describing why so much mediation is focused on analysis of law and litigation); *Thinning Vision*, *supra* note 19; Robert Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 55 (2002).

³⁶ See *Court-Oriented Mediation*, *supra* note 23; Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004) [hereinafter *Stepping Back*]; FINAL REPORT APRIL 2006 - FEBRUARY 2008, *supra* note 30, at 12-13, 17; Kenneth Kressel, *The Strategic Style in Mediation*, 21 CONFLICT RESOL. Q. 251 (2007); Cheryl Picard, *Exploring Integrative Framework for Understanding Mediation* 21 CONFLICT RESOL. Q. 295 (2004) (arguing for a vision of mediation that integrates various theories).

³⁷ See *You've Got*, *supra* note 34 (calling for mediation to be accompanied by other processes, in order to permit mediation to operate as an inclusive process).

In the investment treaty context, it will presumably be important for the parties to maintain or improve ongoing relationships, collaborate on the implementation of any agreement, and acknowledge volatile political situations to enable representatives (and their constituencies) to embrace effective solutions, even if they are not the preferred solutions. All of these factors suggest the value of the last model of mediation described *supra*, one that is presumptively-facilitative and preceded by careful preparation, but supplemented as necessary with more evaluative interventions, and involving the consideration of both legal issues and extra-legal interests. Such a process might facilitate the parties' "mutual consideration"³⁸ of each other's perspectives and underlying needs as well as their legal analysis. In other words, it will be important for the mediator to offer a procedurally just process *and* to facilitate the parties' ability to engage in a procedurally just process *with each other*. Investors and states will need sufficient opportunity to speak and be heard, but also to *listen* to each other, reflect upon what was said, *demonstrate* that they have listened to each other—and also make meaningful movement toward resolution.³⁹

It is essential, though, to consider mediation in context, and this requires a brief discussion of the other procedures available to investors and states. Generally, three such procedures come to mind—negotiation, conciliation, and arbitration. The mediation model described *supra* offers something new in comparison to these procedures—a third party's assistance in facilitating the parties' communication, information-sharing and negotiation and an explicit opportunity to identify and focus on the discussion of interests. A few states, however, have expanded the usual list of options available in the investor-state context by establishing new structures and procedures designed to encourage early communication and information-sharing between states and investors, thus identifying difficulties before they escalate into disputes or resolving such disputes very early on. Examples include Peru's coordination and response system, including its Special Commission; China's domestic administrative review process; and Colombia's establishment of a lead agency model.⁴⁰ Interestingly, the state officials leading these efforts have the *potential* to serve a "quasi-mediator" function, meeting many of the needs that would otherwise fall to third party mediators using the model of mediation described *supra*. Trust, however, is the key. If investors perceive these quasi-mediators as biased against them—as insufficiently benevolent, insufficiently even-handed, or insufficiently open-minded—then investors are unlikely to perceive their procedures as fair.⁴¹ Mediation involving an outside mediator is likely to be perceived as more procedurally just—or fairer—and thus preferable. At the very least, then, the easy availability of a corps of outside, independent and trusted mediators, as an alternative to the state's judicial or administrative officials, has the potential to incentivize the state to make its own processes equally even-handed, in order to attract foreign investors.

³⁸ Welsh, *Stepping Back*, *supra* note 36.

³⁹ See *id.*; but see Rebecca Hollander-Blumoff, *Just Negotiation*, 88 *WASH. U. L. REV.* 381 (2010).

⁴⁰ See *Investor-State Disputes*, *supra* note 3, at 49, 68.

⁴¹ See Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 *ARIZ. L. REV.* 395 (2010).

III. CONCLUSION

A procedure called “mediation” is likely to be useful in the investor-state context, but mediation’s value will depend upon the particular model that is integrated, and whether it responds to the parties’ needs and complements the other available processes in this dispute resolution system. Thus, key actors must devote some time and attention to identifying the key goals and essential practices that should characterize the process that “becomes investor-state mediation.” Once the desired goals and essential practices are identified, much more work remains to be done—e.g., developing relevant rules and supportive organizational structures, identifying an appropriate pool of mediators, etc. Being clear regarding the goal, however, is the first step.