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Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management

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ARTICLE

BARGAINING IN THE SHADOW OF INVESTOR-STATE MEDIATION: HOW THE THREAT OF MEDIATION WILL IMPROVE PARTIES' CONFLICT MANAGEMENT

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INTRODUCTION

Host nations have long sought foreign direct investment (FDI) to advance their economies and labor forces. Foreign companies, meanwhile, have resorted to numerous processes to protect their investments and resolve disputes with host states. While the foreign investors no longer rely on their own governments (or armies) to come to the rescue, investors are nonetheless often perceived as strong-arming governments—particularly the governments of developing states—to bend to their will.[1]

Achieving a balance between nations' interests in securing needed investment and in protecting their prerogatives of sovereignty has most recently played out in the realm of investor-state dispute settlement (ISDS). The International Centre for Settlement of Investment Disputes (ICSID), the ICSID Convention Arbitration Rules, and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules were all created to reduce tensions, provide certainty to investors, and efficiently resolve any problems.[2] In the last twenty years, however, the resulting arbi-

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1. *See* Nancy A. Welsh & Andrea K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71 (2013) [hereinafter Welsh & Schneider, *Thoughtful Integration*].

2. *See* Susan D. Franck, *Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID R.: FOREIGN INV. L.J. 66, 70 (2014) [hereinafter Franck, *Introductory Guide*]. ICSID was created in 1966 under the World Bank to resolve disputes between investors and states. UNCITRAL is the body under the United Nations tasked with focusing on trade law. UNCITRAL first created arbitration rules passed by the U.N. General

tration system has been perceived as unfair, one-sided, and arbitrary, as well as unduly expensive and time consuming.[3] Recently, countries and investors have responded by promoting and institutionalizing mediation as another option, culminating in the passage of the Singapore Convention.[4]

But perhaps the move to mediation is not quite the fix—or not the *only* fix—this dispute system needs. While mediation would provide a less adversarial forum, we argue that it may not be the only or even the most effective way to maintain investment and investor relations in host nations. In fact, some countries have started to realize that they should initiate internal management of investment relations much earlier in anticipation of the disputes that will predictably and inevitably arise, and these countries have experienced very advantageous results. We argue that these internal processes could and should support what we are calling "stakeholder negotiations"—structured negotiations with relevant stakeholders that include full discussions of interests and relationships, with sufficient process protections for the parties, including legal representation. We also argue that engaging in such stakeholder negotiations could be even more efficient and cost effective than integrating mediation into investment treaty arbitration. Perhaps counterintuitively, we also argue that mediation *should be made mandatory*—not because that will make the occurrence of mediation more likely, but because the *threat* of mandatory mediation will incentivize parties to intervene earlier, negotiate sooner, and negotiate more effectively.

The first section of this article discusses the current system of investor-state arbitration and how issues of access to justice, threats to national sovereignty, and perceptions of inconsistency and arbitrariness have led to a crisis of confidence in which countries and investors now raise many concerns about the arbitration system. As discussed in Section II, this has led to a push for mediation, culminating in changes to treaty provisions and rules as well as ratification of the Singapore Convention. The third section of the article, however, notes that even with this push for mediation, not much of it is occurring. Furthermore, efforts to increase use of mediation have failed to address concerns such as the political costs of settling cases, the lack of coordination between state agencies with different portfolios, and the existence of governmental actors with different jurisdictions and misaligned incentives. The fourth section of the article discusses conflict management tools that could be made more effective by operating "in the shadow" of mediation, particularly in the shadow of mandated mediation. This section addresses the tools and systems that have been designed in certain countries and recommended by the World Bank to better facilitate ongoing relationships and investment. Finally, the article discusses how the threat of

Assembly in 1976, rules updated most recently in 2013. These rules can apply to arbitrations between private parties, between states, and between states and private parties.

3. *See infra* Section I.

4. *See infra* Section II.

mandatory mediation (i.e., being required by ICSID rules to participate in mediation before filing an arbitration claim) could encourage the development of conflict management systems and structured stakeholder negotiations that respond more effectively to investor-state conflicts, particularly if the International Bar Association (IBA) rules provide that the mandate for mediation may be met by the occurrence of stakeholder negotiation that is supported by these other conflict management tools.

I. The Investor-State Arbitration System

Foreign direct investment counts for 1.6 percent of the world economy, and in developing countries, can have a crucial impact on the domestic economy, with net inflows funding 3.4 percent of the gross product of low-income nations in 2018.[5] Countries cannot afford to lose these investments. Yet, in the last decade, investors have used investor-state arbitration to limit, or seek to limit, national policies that countries likely never envisioned as subject to such challenge—e.g., national monetary policies, labor laws, and even consumer and environmental protection laws.[6] How to balance these interests—protecting sovereignty while also promoting investment—is an ongoing puzzle. In 1966, the World Bank's member governments ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and created ICSID.[7] With this creation, bilateral investment treaties (BITs) could refer disputes to ICSID for conciliation[8] or arbitration. Arbitration did not immediately take hold, but by the 1990s, arbitration under ICSID or the rules proposed by UNCITRAL had become quite popular.[9] This method for resolving disputes between states and investors was written into the vast majority of

5. *Foreign Direct Investment, Net Inflows (% of GDP)*, The World Bank, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS (last visited Aug. 2, 2020).

6. *See* Susan Franck et al., *Inside the Arbitrator's Mind*, 66 Emory L.J. 1115, 1124–25 (2017) [hereinafter Franck et al., *Arbitrator's Mind*]; James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, 20 Pepp. Disp. Resol. L.J. 78, 79 (2020).

7. *See* Int'l Ctr. for Settlement of Inv. Disps. [ICSID], *ICSID Convention, Regulations, and Rules*, at 5, ICSID/15 (Apr. 2006), https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf; Andrea K. Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 Mich. J. Int'l L. 697, 714–19 (1999) (outlining a description of the investor arbitration regime).

8. Ironically, it was assumed that member states would prefer to use conciliation rather than arbitration. *See* Claxton, *supra* note 6, at 99; *see also* Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, 2020 J. Disp. Resol. 327, 339 (2020).

9. The number of registered cases in the last five years range from thirty-eight to fifty-six. Int'l Ctr. for Settlement of Inv. Disps. [ICSID], *The ICSID Caseload Statistics (Issue 2020-1)*, at 7 (2020), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf. The numbers of cases by ICSID for specific years are available at the following webpage: *The ICSID Caseload—Statistics*, Int'l Ctr. for Settlement of Inv. Disps. [ICSID], https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

BITs.[10] Proponents of investor-state arbitration provisions argued that having a set dispute-resolution process better maintained relationships and investments by providing remedies to harmed investors.[11] Most importantly, many commentators at the time argued that these arbitration clauses were needed to attract FDI in the first place.[12]

Yet, just as the number of clauses and arbitration cases surged, complaints about the process also started to surface. Critics noted the expense of pursuing arbitration cases, which often prevented smaller investors from seeking remedies or forced smaller countries to settle cases rather than incur the cost of defending their national policies.[13] Others noted political challenges, such as those that occurred when arbitration rulings either cost host governments millions of dollars (which might be paid or not) or thwarted what appeared to be legitimate national priorities regarding fiscal or finan-

10. The OECD surveyed a sample of 1660 BITs in 2012 and found that 93 percent of those treaties had an ISDS clause. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *OECD Working Papers on International Investment 2012/02: Dispute Settlement Provisions in International Investment Agreements: A Large Key Sample Survey*, ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], at 7 (2012). *See also*, Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 429 (2010) (Estimates are that over 3,000 BITs were signed between 1959 and 2009). And close to 3,000 BITs are still in operation. Claxton, *supra* note 6, at 96. *See also* Gary Born, BITS, BATS and Buts: Reflections on International Dispute Resolution, Speech at the University of Pennsylvania 2 (Apr. 16, 2014), https://www.wilmerhale.com/-/media/files/Shared_Content/Editorial/News/Documents/BITs-BATs-and-Buts.pdf (estimating over 2,800 BITs in force in 2013).

11. *See* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 74–75, 81.

12. *See* U.N. CONF. ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION, at 3, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010) ("Host states wishing to attract and promote foreign investment often seek to offer predictability to foreign investors by favouring international arbitration as the means for investors to deal with a dispute."). *But see* U.N. CONF. ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT IN DEVELOPING COUNTRIES, at xi, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009) ("IIAs are part of the policy framework for foreign investment . . . . IIAs alone can never be a sufficient policy instrument to attract FDI [foreign direct investment]."); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 438 (2011) (reporting research suggesting that a nation's entry into a BIT does not tend to influence companies' decisions to invest); Susan Rose-Ackerman & Jennifer L. Tobin, *Do BITs Benefit Developing Countries?*, *in* THE FUTURE OF INVESTMENT ARBITRATION 131, 134–36 (Catherine A. Rogers & Roger P. Alford eds., 2009) (concluding that countries with poor investment environments do not benefit significantly from entering into BITs); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 13–23 (2007) (surveying empirical research regarding investment arbitration).

13. *See* Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 782–90 (2011) (reporting regarding the costs of investment treaty arbitration); Catherine Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 357 (2007) (observing that while foreign investors have typically hired major international law firms to represent them in investor-state arbitration, many developing countries have not because of the expense associated with such representation or for political reasons); Franck, *Introductory Guide*, *supra* note 2, at 77–80; SUSAN D. FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION (2019).

cial policy, environmental protection, or other national interests.[14] Throughout the early 2000s, a series of cases caused host countries to revolt by either ignoring the arbitral awards or using them as the basis to withdraw from the entire arbitral system.[15]

The arguments about the usefulness of arbitration processes centered around four different concerns that we outline below: the expense and delay of arbitration; the adversarial nature of the process, which results in investment withdrawal anyway; the contested legitimacy of the system; and, as an end result, governments' pushback on the arbitration system by refusing to comply with arbitral awards or withdrawing from the ICSID system altogether. We explore these briefly in order to understand the advocacy for mediation and to frame the needs of the parties that might be better met through conflict management systems implemented earlier in the dispute and the parties' structured stakeholder negotiation.

Numerous commentators have noted that as the number of cases increased in the 2000s, the practice of international arbitration became increasingly specialized, high end, and expensive. For the average case, the cost incurred by each state has been estimated at $8 million,[16] with up to three years required to reach a disposition.[17] Often, by the time the case reached a resolution, both the country and the investor had moved on to other issues, losing the investment. In some instances, as in the case of Argentina, which had over fifty cases filed against it after its financial crisis, national governments apparently froze and became unable to deal with the disputes.[18]

Even when arbitration resulted in relatively quick resolution, some commentators noted that the adversarial nature of arbitration proceedings made it unlikely that the state and investor would be able to work together

14. *See* Franck et al., *Arbitrator's Mind*, *supra* note 6, at 1124–25; Claxton, *supra* note 6, at 79.

15. Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 76.

16. "[I]t is estimated by the Organisation for Economic Cooperation and Development (OECD) that proceedings cost states an average of $8 million and can exceed $30 million, all of which they have no chance of recovering, whether they win or lose." M.R. Dahlan & Wolf von Kumberg, *Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation*, 17 Pepp. Disp. Resol. L.J. 233, 243 (2017).

17. Wolf von Kumberg, Jeremy Lack & Michael Leathes, *Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come*, 29 ICSID R.: Foreign Inv. L.J. 133, 135 (2014).

18. *See* Jose E. Alvarez, The Public International Law Regime Governing International Investment 248 (2011) ("In response to this crisis, the Argentine authorities took a number of other actions which would ultimately prompt the largest number of investor-State claims directed at a single State in the history of investment treaties. At this writing, Argentina faces some 40 investor-State claims."); Derek A. Soller & Laura R. Zimmerman, *Argentina's Delay in Paying the Suez ICSID Award*, Baker McKenzie (Feb. 26, 2019), https://www.bakermckenzie.com/en/insight/publications/2019/02/argetinas-delay-in-paying (noting that the over fifty cases filed against Argentina are more than against any other country and have resulted in $1.9 billion in awards against it).

in the future. The investor moved on to other investments, the relationship became frayed, and the trust between the investor and the state eroded. Cited in more than one article, the story of *Metalclad v. Mexico* exemplifies these problems. After winning a $17 million award against Mexico, the CEO of Metalclad, Grant Kesler, still bemoaned the process that had ruined his company's relationship with the state.[19]

As cases have proliferated, other concerns with the validity or accuracy of rulings have arisen.[20] For example, there have been inconsistencies in the rulings of arbitral panels. Since an arbitral award is not precedential, each panel can independently determine the law as applied. And while rulings in the vast majority of cases interpret investment laws clearly, in some notable cases, the panels differed from one another significantly—even with the same set of facts.[21] Furthermore, countries have argued in the past twenty years that arbitration panels ignore the national interests of countries and are overprotective of investors and their investments.[22]

All of this led to a crisis in the last decade as countries chose either not to sign arbitration provisions, as in the case of Brazil,[23] or to withdraw from ICSID, as in the cases of Bolivia, Ecuador, and Venezuela.[24] Other countries, like Argentina, never paid the full amount of awards when panels ruled against them.[25] While all these countries are in Latin America (where the Calvo Doctrine[26] is more at play), fears of an entire continent withdraw-

19. Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 79; Dahlan & von Kumberg, *supra* note 16, at 252.

20. *See* Dahlan & von Kumberg, *supra* note 16, at 239–45 (comprehensive summary of concerns regarding investor-state arbitration).

21. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558–81 (2005); Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 80–81.

22. Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 464 (2015).

23. *See* Nancy A. Welsh, Andrea Kupfer Schneider & Kathryn Rimpfel, *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 WASH. U. J.L. & POL'Y 105, 106 (2014).

24. *See* Jose Carlos Bernal Rivera & Mauricio Viscarra Azuga, *Life After ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID*, KLUWER ARB. BLOG (Aug. 12, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid.

25. *Argentina Settles Five Outstanding Investment Treaty Arbitration Claims in Historic Break with Its Anti-Enforcement Stance*, HERBERT SMITH FREEHILLS LLP (Oct. 14, 2013), https://www.lexology.com/library/document.ashx?g=be9ef922-dcff-49a4-8ac2-1bfac72bbf40; *see also* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 81.

26. The Calvo Doctrine is described as follows:

> [T]here are two cardinal principles that constituted the core of Calvo's theory: "First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from 'interference of any sort' . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities. These two concepts of nonintervention and absolute equality of foreigners with nationals are the essence of the Calvo Doctrine."

Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 L. & POL'Y INT'L BUS. 1169, 1171–72

ing from the global investment arbitration regime are influential in encouraging change.

II. The Integration of Mediation into the Investor-State Arbitration System

In light of this crisis of confidence, the push for mediation began in the mid-2000s, culminating in several different initiatives designed to integrate mediation into ISDS. From an institutional perspective, the United Nations Conference on Trade and Development (UNCTAD) was the first to begin to contemplate mediation seriously, exploring its use in a series of white papers.[27] Lawyers and neutrals also started to delve into how mediation could operate. In 2012, the IBA created its Rules for Investor-State Mediation.[28] The International Mediation Institute (IMI) and the American Society of International Law (ASIL) also started to advocate for alternative processes to arbitration that would be more effective.[29]

A. Mediation's Advantages

Mediation proponents' arguments responded to complaints regarding arbitration but also outlined mediation's advantages. Mediation could be less expensive and quicker than arbitration. By focusing on interests and getting the relevant parties to the table, mediation could better protect relationships *and* keep investments in host countries. Mediated settlements would be more legitimate and encourage greater compliance since each

(1995) (quoting Donald R. Shea, The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy 19–20 (1955)).

27. Nancy A. Welsh, *Mandatory Mediation and Its Variations*, *in* U.N. Conf. on Trade & Dev., Investor-State Disputes: Prevention and Alternatives to Arbitrations II, at 108, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (Susan Franck & Anna Joubin-Bret eds., 2011) [hereinafter Investor-State Disputes II]; Andrea Kupfer Schneider, *Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes*, *in* Investor-State Disputes II, at 93; *see generally* Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 Penn St. J.L. & Int'l Affs. 86 (2012) [hereinafter Welsh & Schneider, *Becoming*]; *see, e.g.*, Susan Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 Minn. L. Rev. 161, 180 (2007) (suggesting consideration of mediation for investment treaty conflicts). Susan Franck's research played a major role in encouraging this push and UNCTAD's leadership.

28. Int'l Bar Ass'n [IBA], *IBA Rules for Investor-State Mediation* (adopted Oct. 4, 2012), https://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F; *see also* Frauke Nitschke, *The IBA's Investor-State Mediation Rules and the ICSID Dispute Settlement Framework*, 29 ICSID R.: Foreign Inv. L.J. 112, 112 (2014); Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, 29 ICSID R.: Foreign Inv. L.J. 17, 21–23 (2014); Anna Joubin-Bret, *International Dispatch: Investor-State Disputes*, 20 Disp. Resol. Mag. 37, 39 (2013).

29. For example, the authors participated in a panel on international investment law, specifically investment treaties and dispute resolution, at the 2010 Biennial Conference of the American Society of International Law and the International Economic Law Interest Group, which was held in partnership with the *Minnesota Journal of International Law* and the American Society of International Law-Midwest (ASIL-Midwest) in November 2010.

party's consent was needed to reach settlement. Ultimately, the process option of mediation would keep countries in the ISDS system.[30]

Mediation provides additional advantages to the parties. If parties are not caught up in the adversarial system, they are more likely to learn about each other's real interests and build trust.[31] Mediation can bring more stakeholders to the table, regardless of formal standing, and these stakeholders can end up being essential to implementing the settlements that are reached.[32] The settlements themselves can be more creative, more tailored to the needs of the parties, and more flexible than monetary payments.[33] And, by virtue of consent, increased flexibility, and the effects of experiencing a procedurally fair process in which they have a voice,[34] the parties are more likely to comply with the agreements they have reached.[35]

B. Incorporating Mediation into ISDS

The push for the use of investor-state mediation has continued, with notable successes. At this time, mediation is incorporated into the dispute-settlement provisions of an increasing number of international investment treaties, including both BITs and multilateral investment treaties.[36] Indeed, it is reported that 24 percent of BITs now include such a provision,[37] while many model BITs also encourage the use of mediation or conciliation.[38]

30. *See* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 82–83.

31. Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 82.

32. *See* Mariana Hernandez Crespo Gonstead, *A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design ("SDSD") to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551, 595–602 (2016) (describing community stakeholders' midstream and downstream participation in resolving investment-related disagreements or conflicts); *see also* Chris Carlson, *Convening*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 169 (Lawrence Susskind et al. eds., 1999) (discussing identifying stakeholders as part of the convening function); BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 261–67 (1989); BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE 225 (2000).

33. *See* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 130. *But see* Guillermo J. Garcia Sanchez, *The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration*, 18 NEV. L.J. 489, 499–503 (2018) (urging that arbitral panels generally order the payment of pecuniary damages but that the panels can and should be more creative and fashion equitable remedies).

34. Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 95–102.

35. *Id.* at 83.

36. *See* Fan, *supra* note 8, at 328; CATHERINE KESSEDJIAN ET AL., MEDIATION IN FUTURE INVESTOR-STATE DISPUTE SETTLEMENT 3 (Mar. 2020), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf (written for the Academic Forum on ISDS Concept Paper 2020/16) (referencing a report from UNCTAD regarding treaties signed in 2018 that include mediation in their language).

37. Fan, *supra* note 8, at 331.

38. *Id.* at 332–33; *see also* Chunlei Zhao, *Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About Being in the Right Place at the Right Time*, 17 CHINESE J. INT'L L. 111, 124–25 (2018) (describing the China Model BIT, which provides for negotiation that includes mediation).

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership specifically references conciliation and mediation as processes that will meet parties' obligation to initially seek to resolve their dispute through consultation or negotiation before pursuing arbitration.[39] The Canada-European Union Comprehensive Economic and Trade Agreement of 2016 provides for the use of mediation to resolve investor-state disputes and even incorporates a code of conduct for mediators and procedural rules.[40] In 2016, the Energy Charter Conference adopted the *Guide on Investment Mediation* as well as a *Model Instrument on Management of Investment Disputes*.[41]

Moreover, the creation of a cadre of mediators in this context is also moving forward. The IMI Investor-State Mediation Task Force developed and released competency criteria for investor-state mediators in 2016.[42] ICSID, the Energy Charter Secretariat, and the Centre for Effective Dispute Resolution began collaborating on the provision of trainings for investor-state mediators in Washington D.C., Paris, and Hong Kong.[43] The American Bar Association's Dispute Resolution Section offered a special program on investor-state mediation, including a simulation, to introduce domestic neutrals to the process.[44]

In addition, beginning in 2018, ICSID began working on mediation rules—the first rules specifically designed by an institution providing a forum for investor-state disputes.[45] Under these rules, which are anticipated to be submitted for approval in 2021, the ICSID Secretariat would be permitted to administer any mediation proceeding that involves an investment and a state regardless of either the state's status as a member of ICSID or the investor's nationality.[46] Meanwhile, in 2019, the Singapore International Mediation Centre (SIMC) and the China Council for the Promotion of International Trade (CCPIT) signed a memorandum of understanding to jointly develop mediation rules, a case-management protocol, and enforcement

39. Fan, *supra* note 8, at 335.

40. *Id.* at 336.

41. *Id.* at 339; *see also* ISDS Mediation Working Grp., Unlocking Value Through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes 6 (June 16, 2020), https://imimediation.org/download/104/investor-state-mediation-task-force/60233/mwg-isds-2020-unlocking-value-through-stakeholder-engagement.pdf.

42. Inv.-State Mediation Task Force, Int'l Mediation Inst., IMI Competency Criteria for Investor-State Mediators (Sept. 19, 2016), https://imimediation.org/download/104/investor-state-mediation-task-force/1472/investor-state-mediation-competency-criteria.pdf.

43. ISDS Mediation Working Grp., *supra* note 41, at 7.

44. *See* A Window into the Future: Adding Mediation to the Process Choices in Global Investment Disputes, Introduction to the Topic & Case Studies, Program at the ABA Section of Dispute Resolution 15th Annual Spring Conference (Apr. 6, 2013).

45. Fan, *supra* note 8, at 339–40 (ICSID Mediation Rules and Additional Facility Rules of Procedure for Mediation Proceedings).

46. *See* Frauke Nitschke, *A Preview of ICSID's New Investor-State Mediation Rules*, Kluwer Mediation Blog (Jan. 10, 2020), http://mediationblog.kluwerarbitration.com/2020/01/10/a-preview-of-icsids-new-investor-state-mediation-rules.

procedures, and also to establish a panel of mediators from the jurisdictions involved with China's Belt and Road Initiative (BRI) to resolve disputes arising out of BRI projects.[47] UNCITRAL has also developed a framework for mediation and is pursuing reforms.[48]

There has been one more major development. Persuaded by mediation proponents that investors needed assurances regarding the enforceability of mediated settlement agreements, the United Nations General Assembly adopted the Singapore Convention in 2019. The convention provides for domestic courts' use of summary proceedings for the enforcement of mediated settlement agreements in the context of international commercial and investor-state matters.[49] Such proceedings are modeled after those established pursuant to the Federal Arbitration Act and the New York Convention for judicial recognition and enforcement of arbitral awards. At this time, fifty-three states have signed the Singapore Convention, and six have already ratified it.[50]

III. Lack of Actual Investor-State Mediation

Despite all the efforts just described—to incorporate use of mediation into treaties and rules, to identify and train mediators, to provide for the expedited enforcement of mediated settlement agreements, and to educate states and investors regarding mediation through various presentations, trainings, and simulations[51]—there is sparse evidence that the process is

47. *See Memorandum Signed to Develop Mediation Rules for Disputes over China BRI Projects*, Jones Day (Feb. 2019), https://www.jonesday.com/en/insights/2019/02/memorandum-signed-to-develop-mediation (discussing mediation component of China International Commercial Court).

48. *See* United Nations Comm'n on Int'l Trade L. [UNCITRAL], *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018*, https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation; Working Group III (Investor-State Dispute Settlement Reform), U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.166 (July 30, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.166.

49. *See* Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, *in* Mediation in International Commercial and Investment Disputes 360, 360–88 (Catharine Titi & Katia Fach Gomez eds., 2019); *see also* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 Wash. U. J.L. & Pol'y 11, 33–38 (2014) (outlining what a new convention would need to include to promote enforcement); Centre for Int'l L., Nat'l Univ. Sing., Report: Survey on Obstacles to Settlement of Investor-State Disputes (2017).

50. Pitamber Yadav, Singapore Mediation Convention Information Digest, https://www.singaporemediationconvention.org (last visited Mar. 11, 2021); Press Release, United Nations Commission on International Trade Law, Ghana Signs the United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Press Release UNIS/L/300 (July 27, 2020), https://unis.unvienna.org/unis/en/pressrels/2020/unisl230.html.

51. *See, e.g.*, Franck, *Introductory Guide*, *supra* note 2, at 66 (overview of mediation and simulation); Susan D. Franck & Anna Joubin-Bret, *Investor-State Mediation: A Simulation*, 29 ICSID Rev. 90 (2014) (outlining a simulation meant to teach stakeholders how mediation would work in the investor-state context).

actually being used in the investor-state context.[52] Commentators have described utilization of investor-state mediation as "uncommon"[53] and "quite limited,"[54] and the ISDS Mediation Working Group recently acknowledged that "[i]nvestor-[s]tate [m]ediation is new and its effectiveness has not yet been systematically tested."[55]

A. An Example of Mediation

Only one example of investor-state mediation has received explicit coverage in the media and academic sources. In 2016, the International Chamber of Commerce (ICC)[56] administered "one of the only known mediations initiated under a bilateral investment treaty,"[57] involving a French company and the Philippines. The mediation, which lasted two and a half years, occurred after the investor proposed an opt-in mediation to the Philippines. The investor filed its request for mediation pursuant to article 3 of the ICC Mediation Rules of 2014 and the IBA Rules for Investor-State Mediation of 2012.

The ICC encountered many challenges in administering the mediation, particularly in bringing the Philippines to the table. For example, it took the state two months to respond to the request to mediate and ultimately agree to participate. During those two months, the ICC "had to identify the appropriate contact person within the state, to engage them in communication,

52. *See* Shu Shang, *Implementing Investor-State Mediation in China's Next Generation Investment Treaties*, *in* CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 504, 515 (Julien Chaisse ed., 2019) ("[W]e must also recognize that, as a whole, the investor-state mediation mechanism is not often invoked by parties, whatever the reasons offered to explain such a phenomenon.").

53. Claxton, *supra* note 6, at 99; *see also* James M. Claxton & Carlos J. Valderama, Promoting Investor-State Mediation at the Source by Remodeling Outcome Accountability (manuscript) (on file with author) (arguing for prioritizing mediation, but also arguing for the centralization of the management of investor claims, shared responsibility for settlement, and incentives making it more likely that state agents will enter into settlements).

54. Roberto Echandi & Priyanka Kher, *Can International Investor-State Disputes Be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. 41, 41 (2014).

55. ISDS MEDIATION WORKING GRP., *supra* note 41, at 10.

56. The International Chamber of Commerce's rules do not explicitly promote the use of mediation over arbitration, but the ICC provides sample clauses for parties to insert to encourage mediation in Belt and Road disputes. Int'l Chamber of Com. [ICC], *Guidance Notes on Resolving Belt and Road Disputes Using Mediation and Arbitration*, at 3, https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf. For example, ICC sample clause D was created for use by parties who wish to provide for mediation followed by arbitration if no settlement is reached (creating obligatory mediation), and clause A or B is for the preservation of the right to mediate before arbitration. *Id.*

57. Alina Leoveanu & Andrija Erac, *ICC Mediation: Paving the Way Forward*, *in* MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES 81, 97 (Catharine Titi & Katia Fach Gomez eds., 2019) (citing Luke Peterson, *In an Apparent First, Investor and Host-State Agree to Mediation Under IBA Rules to Resolve an Investment Treaty Dispute*, Inv. Arb. Rep. (Apr. 14, 2016)); *see also* Zhao, *supra* note 38, at 119 n.34; Fan, *supra* note 8, at 338 (revealing that the dispute was *Systra SA v. Republic of the Philippines, Inc.* and arose out of the state's failure to pay for services and work in connection with infrastructure projects).

and ensure that they would provide an answer to the request for mediation," which further required coaching the state representatives regarding the mediation process, its rules, and the procedure involved.[58] Another challenge was presented by a general election that occurred during the mediation, resulting in a change of administration and therefore a change in the state representatives at the mediation.

Unfortunately, the mediation did not result in settlement. According to Alina Leoveanu and Andrija Erac, the process was nonetheless cost effective and helpful: "[T]he parties achieved significant progress in their negotiations and the mediation proceedings helped them to reestablish communication, potentially leaving the door open for future business opportunities."[59] More generally, commentators have noted that even when parties do not settle in mediation, the process itself forces communication that would not otherwise occur, encourages continued communication, and can narrow the issues in dispute.[60]

B. Other Mediations in the ISDS Context

Beyond this single case, there is some indication that mediations of some sort are being used in other cases involving disputes between investors and states. In *Olyana Holdings v. Rwanda*, for example, the parties participated in a company-state local mediation, presumably occurring before the case was submitted to arbitration.[61] It appears that the parties did not reach a resolution. In *Pan African Burkina v. Burkina Faso*, the parties engaged in parallel mediation and arbitration.[62] The investors sought arbitration because the mediation did not produce a settlement. Another ICC mediation successfully resulted in settlement of a very large dispute between Odebrecht-Tecnimont-Estrella Consortium and the Dominican Republic and its state-owned electricity company, Corporación de Empresas Eléctricas Estatales (CDEEE), arising out of the construction of a 752-megawatt thermoelectric-generation plant at Punta Catalina.[63] However, it

58. Leoveanu & Erac, *supra* note 57, at 98.

59. *Id.* Leoveanu and Erac also note that the mediation was cost efficient, with a cost of $40,000 for a dispute involving $2.5 million at issue. *Id.*

60. *See* Mark Baker & Cara Dowling, *Interest in Investor-State Mediation Is Growing*, 8 INT'L ARB. REP. 22, 23 (June 2017); Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?*, 37 BERKELEY J. INT'L L. 215, 224 (2019).

61. *See* KESSEDJIAN ET AL., *supra* note 36, at 10.

62. *See id.*; *see also* Emma Farge, *Timis Companies Seek $385 Million from Burkina Faso in Mining Dispute*, REUTERS (Dec. 6, 2016), https://es.reuters.com/article/idUSKBN13V0VL (reporting on request for mediation with Arbitration, Mediation and Conciliation Centre of Ouagadougou).

63. *See* FOLEY HOAG, *Foley Hoag Helps Dominican Republic and State-Owned Entity CDEEE Reach Agreement in ICC Mediation Concerning Central Termoeléctrica Punta Catalina Project* (Mar. 20, 2020), https://foleyhoag.com/news-and-events/news/2020/march/foley-hoag-helps-dominican-republic-and-state-owned-entity-cdeee-reach-agreement-in-icc-mediation-con

is not clear that any of these three mediations were formal investor-state mediations occurring pursuant to investment treaties.

Despite the extraordinarily small number of success stories—and, really, the difficulty in finding stories of any kind—about actual investor-state mediations, some quantitative data indicate mediation's occasional use.[64] In 2019, the Singapore Ministry of Law commissioned the Singapore International Dispute Resolution Academy (SIDRA) to conduct an international dispute-resolution survey.[65] The researchers specifically asked the respondents, all corporate users or outside legal counsel, about their use of dispute-resolution processes for cross-border disputes.[66] Of course, this more general question included mediation of investor-state matters. Although almost half of the respondents indicated that they had been involved in an investor-state or multilateral investment dispute between 2016 and 2018,[67] only 21 percent indicated that they had used ad hoc or institutional mediation in the investor-state context.[68] These responses provide some additional evidence of the use of investor-state mediation, but the numbers continue to be quite small.

After reporting that the top four factors influencing its survey respondents' choice of an investor-state dispute-resolution process were enforceability, political sensitivity, impartiality, and transparency,[69] SIDRA observed that users' responses indicated the need for reforms and expressed optimism about mediation's future as one of these reform measures: "Despite the dominance of arbitration in this field, users indicated an openness to selecting other dispute settlement mechanisms in investor-state matters such as litigation and mediation."[70] SIDRA noted, however, a discrepancy between client users and legal users, with client users dramatically more

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cerning-central-termoelectrica-punta-catalina-project; *The Dominican Government and the Odebrecht-Tecnimont-Estrella Consortium Reach Agreement to Settle All Existing Disputes and Guarantee Completion and Final Delivery of the Coal-Fired Central Termoeléctrica Punta Catalina Project (CTPC)*, BUSINESSWIRE (Mar. 17, 2020, 4:23 PM), https://www.businesswire.com/news/home/20200317005791/en.

64. It has been reported that the ECT cases have used mediation or conciliation and that the ECT has published data regarding these cases. However, we have been unable to locate these data. KESSEDJIAN ET AL., *supra* note 36, at 8.

65. *See* SING. INT'L DISP. RESOL. ACAD., SING. MGMT. UNIV. SCH. L., SIDRA INTERNATIONAL DISPUTE RESOLUTION SURVEY: 2020 FINAL REPORT vi (2020), https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html [hereinafter SIDRA].

66. *Id.* at 1. Of the 304 respondents, 64 percent (or 194) were lawyers or legal advisors, and 36 percent (or 110) were corporate executives or in-house counsel. *Id.* at 3.

67. *Id.* at 16.

68. *Id.* Respondents reported that they used ad hoc mediation (14 percent) more frequently than institutional mediation (7 percent). The authors of the report suggest that "[t]his may reflect the fact that mediation occurs on an ad hoc basis within the framework of institutional arbitration." *Id.* at 17. Client users also were much more likely than legal users to report choosing to use ad hoc or institutional mediation. *Id.*

69. *Id.* at 20.

70. *Id.* at 16.

likely than legal users to express attraction to mediation.[71] SIDRA speculated that this discrepancy might be the result of client users' greater interest in "maintain[ing] business relationships with host states" and "avoid[ing] lengthy and expensive arbitration proceedings, compared with [l]egal [u]sers' familiarity and level of comfort with arbitration and their lack thereof in relation to mediation."[72]

To address the current paucity of information regarding the use of investor-state mediation, one commentator has called upon dispute-resolution institutions to begin publishing data regarding their administration of investor-state mediation, anonymized as necessary,[73] and reporting, to the extent possible, on successful mediations.[74] Despite these and other calls[75] and required publication of a register for each arbitration and conciliation proceeding, ICSID's proposed Additional Facility Rules provide for only voluntary publication of the fact of mediation, the parties, and the mediators.[76]

C. Obstacles to Increased Use of Mediation

There may be an opening for greater use of investor-state mediation. There certainly are treaty provisions and rules to facilitate its use, and more rules are on the way. It is reported that mediation has surpassed arbitration to "become by far the most popular dispute-resolution process for international commercial disputes."[77] Some predict that mediation will be "at the

71. SIDRA, *supra* note 65, at 26 ("[ ] 80% of Client Users ranked 'ability to use mediation' as 'extremely useful' or 'useful' while only 48% of Legal Users thought 'ability to use mediation' would be 'extremely useful' or 'useful.'").

72. *Id.*

73. *See* Claxton, *supra* note 6, at 93.

74. *Id.* at 98.

75. *See* Note, *Mediation of Investor-State Conflicts*, 127 HARV. L. REV. 2543, 2547 (2014) (noting the lack of data regarding the use of mediation or other processes to achieve amicable resolution).

76. *See* Int'l Ctr. for Settlement of Inv. Disps. [ICSID], *Proposals for Amendment of the ICSID Rule*s, Regulation 3 at 228 (Working Paper No. 4, Feb. 2020); *see also* ANA UBILAVA & LUKE NOTTAGE, ICSID'S NEW MEDIATION RULES: A SMALL BUT POSITIVE STEP FORWARD 3, https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava_Notage_10.17.2018.pdf. The EU-Singapore FTA provides that "[m]utually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a Party has designated as confidential. . . . [A]ll steps of the mediation procedure, including any advice that may be given or solution that may be proposed, are confidential. However, each Party may disclose to the public the fact that mediation is taking place." 2019 O.J. (L 294) 15.5.6, 15.7.3. "The confidentiality obligation described in Article 10(2) shall not extend to: a) the fact that the parties have agreed to mediate or a settlement resulted from the mediation unless the parties agree otherwise in writing; b) the terms of a settlement or partial settlement, unless and to extent that the parties otherwise agreed in writing[.]" IBA, *supra* note 28, at art. 10.3.

77. Note, *Mediation of Investor-State Conflicts*, *supra* note 75, at 2551 (citing 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) (stating that over 90 percent of ICC cases filed since 2001 have resorted to mediation).

very center" of BRI dispute resolution.[78] Discussions within UNCITRAL indicate "an appetite, from both investors and States, for prevention of disputes among them."[79]

However, it is also important to acknowledge the existence of many obstacles to the increased incidence of investor-state mediation. First, without success stories or reliable data regarding the use of mediation, it will be difficult to increase many investors' and states' awareness and understanding of the process.[80] Second, if mediations occur only after disputes have clearly crystallized, the process may take on some of the elements of a confrontational process rather than a consensual one.[81] Third, in many states, there is not yet a formal legal framework to support mediation and mediated settlements.[82] Fourth, and relatedly, there is often a lack of coordination among the various governmental actors that need to be involved—local versus national, investment-focused versus regulatory—and there is also a lack of alignment in terms of incentives.[83] Fifth, and probably most important of all, state actors are likely to shy away from a process that has the potential to reveal their direct responsibility for negotiating settlements that may be unpopular. If citizens are unhappy with these agreements, they are likely to accuse the officials of weakness at best and corruption at worst.[84] State actors may see it as better to blame results on a panel of arbitrators.[85]

These obstacles have led a number of commentators to urge that mediation be made mandatory rather than voluntary—or at least that certain ele-

78. Peter H. Corne & Matthew S. Erie, *China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention*, OPINIO JURIS (Aug. 28, 2019), http://opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention.

79. KESSEDJIAN ET AL., *supra* note 36, at 2.

80. There may be a need to use success stories from other, related contexts—e.g., non-investor-state mediations or facilitations that nonetheless involve disputes between governments and private actors over major infrastructure projects or the results of regulatory actions. *See* Lester Levy, *Case Study 4: Sequenced Regulatory and Insurance Negotiations*, ENV'T ADR, https://environmentaladr.com/case-studies/sequenced-regulatory-and-insurance-negotiations (last visited Oct. 22, 2020) (case study of a Superfund dispute); *see also* ENERGY ADR F., USING ADR TO RESOLVE ENERGY INDUSTRY DISPUTES: THE BETTER WAY 14–18 (Oct. 2006) (giving case study examples of energy-sector mediations). Further exploration of this possibility is beyond the scope of this paper.

81. ISDS MEDIATION WORKING GRP., *supra* note 41, at 8; *see also* von Kumberg et al., *supra* note 17, at 133 (observing that as parties focus their attention on a court or tribunal, they tend to stop communicating cooperatively).

82. ISDS MEDIATION WORKING GRP., *supra* note 41, at 8.

83. *See* Note, *Mediation of Investor-State Conflicts*, *supra* note 75, at 2548 (regarding coordination required among government agencies and their different incentives).

84. *Id.* at 2558; von Kumberg et al., *supra* note 17, at 134 (acknowledging state actors' "transparency and personal liability concerns").

85. *See, e.g.*, So. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt (H.K. v. Egypt), ICSID Case No. ARB/84/3 (1992) (The Egyptian Prime Minister chose to proceed with arbitration rather than agree to a negotiated settlement of $10 million. The arbitral panel later issued an award of $32.6 million against Egypt.); Dahlan & von Kumberg, *supra* note 16, at 253.

ments of mediation be made mandatory—before a dispute can be submitted to arbitration. We will return to these proposals for mandatory mediation later. At this point, we will consider the other mechanisms that exist to enable investors and states to resolve their disputes earlier, more quickly, and less expensively, as well as confidentially and in a manner that is tailored to the parties' and key stakeholders' needs.

IV. Other Conflict Management Tools

In the last decade, the push for mediation and the frustration with arbitration have fueled innovation in conflict management overall. The desire to intervene earlier, protect relationships, and keep investments has promoted individual countries' design of creative structures. In this section of the article, we outline some of those structures and suggest how normalizing these innovations and using them to support structured stakeholder negotiation could actually meet the needs of investors and countries as well as, or even better than, mediation.

A. Examples of Innovative Structures

The World Bank has, for years, been studying how to keep FDI in countries and reduce the likelihood of investment withdrawal. More recently, it has highlighted individual countries' efforts and has piloted several projects to learn how countries can better manage disputes with investors.

South Korea, for example, has long been hailed as a country at the vanguard of recognizing the importance of conflict management. In 1999, the country established its Foreign Investment Ombudsman System (FIOS), which was strengthened with additional powers in 2012. FIOS was created to address and resolve foreign investors' grievances by providing what has been termed "aftercare" services. These are services that countries can offer to investors after they have made their initial FDI and are designed to keep investors satisfied and maintaining, or even expanding, their investments. In South Korea, for example, FIOS resolved 269 cases in 2018,[86] involving issues ranging from labor relations to immigration to investment incentives. Most importantly, because investors are aware of the office and the office itself is empowered to act on behalf of the government, disputes involving these issues are resolved quickly, efficiently, and early, without the need to proceed to a legal filing.

Noting the success of South Korea's FIOS, the World Bank began to create a tool called the Systemic Investment Response Mechanism (SIRM), which could operate under several models, depending on the model that a country chooses to adopt. In each case, the SIRM is designed to intervene

86. World Bank Grp. [WBG], *Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses*, at 74 (2019) [hereinafter WBG II].

early in disputes and help resolve them. It would do this by identifying patterns of government conduct that are problematic and measuring the affected investment (i.e., the likely losses if disputes continued) to demonstrate to the government the need for intervention and to help government agencies reduce the likelihood of repeated violations.[87]

The SIRM pilot process is multilayered, with research and diagnostics to help each country customize its approach to conflict management. While there are different possible models for a SIRM, the World Bank recommends establishing a lead agency to coordinate a country's response to investor-state disputes. This could be a new independent lead agency (like South Korea's FIOS), an existing investment-promotion agency (IPA) that already includes an aftercare unit and would add conflict management responsibilities, or an IPA without an aftercare unit that would work with an aftercare entity located elsewhere in the government structure.[88] In all cases, SIRMs are designed to track and monitor disputes, filter and prioritize grievances, and then prompt the lead agency to engage in interagency problem solving. And, to build political capital over time, the World Bank recommends that a SIRM track investment retained in dollars to demonstrate the SIRM's value to the government.[89] This valuation has already started with the pilot projects initiated by the World Bank. For example, in three projects verified to have been retained as a result of the efforts of a newly established SIRM, $200 million in investments were retained, $20 million was reinvested, and $10 million in cost savings was realized.[90] These numbers are, frankly, extraordinary demonstrations of the cost effectiveness of conflict prevention and conflict management tools.

Two last findings from the World Bank study are worth noting. First, the number of cases involving the use of SIRMs is remarkable as compared to the number of mediations. During the pilot phase alone, the World Bank tracked the use of SIRMs in thirty-nine cases. This number contrasts quite dramatically with the single-digit number of investor-state mediations that have occurred within the past decade, as described in Section III.[91] Second, the study's identification of the underlying causes of the disputes is striking. Of the thirty-nine cases tracked during the pilot programs, twenty-three were the result of sudden or arbitrary regulatory changes, encompassing contradictory government actions, lack of transparency, and abuse of authority.[92] Such government actions often occur at the subnational level or

87. *Id.* at 43.
88. *Id.* at 50.
89. *Id.* at 55–56.
90. *Id.* at 58–59.
91. In addition, even the number of conciliations is small compared to the number of cases using SIRMs. The total number of cases registered since the creation of ICSID in 1966 under the ICSID conciliation or additional facility conciliation rules is twelve. ICSID, *The ICSID Caseload Statistics (Issue 2020-1)*, *supra* note 9, at 8.
92. WBG II, *supra* note 86, at 58.

through specialized agencies at the national level.[93] Therefore, one of the primary roles of the lead agency under the pilot SIRMs was to coordinate with other agencies to solve government-caused problems. To do so effectively, the lead agency needs political clout and power to bring the relevant parties to the table and effectuate negotiations. Indeed, as the World Bank notes, "[T]he SIRM entails the establishment of a small yet very well-trained team in investment law and negotiation skills to deal with peer agencies."[94]

Similar to the World Bank and the states that are adopting new conflict management tools, many global corporations are also keenly interested in the prevention and improved management of disputes.[95] In the corporate context, just as in the public context, negotiation skills are an essential part of the picture, and it is to these skills that we turn next as we examine the elements of structured stakeholder negotiations.

B. What Is Stakeholder Negotiation?

We use the term "stakeholder negotiation" in this article to comprise several components essential to the success and legitimacy of negotiation in the investor-state context, in both the short term and long term. Again, given the concerns regarding arbitration—perceived illegitimacy, unjustified constraints on national prerogatives, lack of implementation, lost investment, and ruined relationships—any alternative process must reduce the likelihood of these problems without creating new ones.

Stakeholder negotiation, by definition, starts with the stakeholders. We define stakeholders broadly, to include relevant parties at the national and local levels, investors, and lawyers. Investor-state arbitration has been dominated by lawyers at the national level, long after investors have determined

93. *Id.* at 59.

94. *Id.* at 65. It is worth noting here as well the establishment of organizations to assist investor-state negotiations. *See, e.g.*, Baker & Dowling, *supra* note 60, at 22 ("The Secretariat of the Energy Community (an international organization dealing with energy policy, established by treaty, which brings together the European Union and countries from the South East Europe and Black Sea regions) has recently established a Dispute Resolution and Negotiation Centre. The Centre focuses on negotiating and mediating investor-state energy disputes. The Secretariat stated that institutional mediation has an important role to play in the resolution of investment disputes at an early stage."); *see also* Karl Sauvant, *The Case for an Advisory Centre on International Investment Law*, KLUWER ARB. BLOG (Oct. 17, 2019), http://ccsi.columbia.edu/files/2019/10/KPS-The-case-for-an-Advisory-Centre-on-International-Kluwer-Arbitation-Blog.pdf.

95. *See, e.g.*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 23 (2014) (regarding conflict coaching); von Kumberg et al., *supra* note 17, at 133, 137–41 (observing that "[o]n the user side, global companies, many of which are members of the Corporate Counsel International Arbitration Group (CCIAG), are looking for ways to engage in conflict avoidance and better dispute prevention and management processes" and listing concepts and skills that parties and lawyers should be taught or reminded of, including model checklists and submissions, with focus on preparing for mediation, but just as relevant to preparing for structured negotiation).

the relationship is too broken to repair. In contrast, stakeholder negotiation must include more parties, the right parties, and sooner. Investors, such as local managers and the executives who negotiated the original investment, should be represented. At the national level, governments will want to include the representative of the IPA or whichever national agency was responsible (and likely rewarded) for bringing in the investment. Stakeholder negotiation also will require the participation of the municipal or subnational agency responsible for the allegedly offending law or regulation. This law or regulation could well have been encouraged by public needs for funding, local taxes, and protection of the environment and public health, so organizations that had pushed for the law or regulation should also be included.[96]

Moreover, a local environmental dispute, for example, could require the participation of an even larger group of stakeholders: the regional environmental regulator, the mayor of the town where the investment is located, the leaders of an affected indigenous community, any local or national environmental groups, the national government agency in charge of investment attraction, the investor company (both the local manager on site and the international executive with the power to change or affect policies), and the lawyers for each entity. As we outline who is at this table, it should be clear that this is a much larger table than is typically used in investment arbitration disputes. The point is that all affected parties—those who have interests at stake and those who need to be part of any implementation plan, not just those who can meet the requirements of "standing"—should be at the table participating together.

Also, while it might seem intuitive under the World Bank's conception of SIRMs as discussed above, we want to be clear that the primary role of the lead agency or ombuds or other SIRM model must be to serve as convenor and get all the needed players to the table to work through the dispute before it escalates.[97] Leaving out some piece of this puzzle will result in resolutions that are perceived as illegitimate, politically fraught, and ultimately likely to fail. For a municipality to roll back a law, political cover must be given. Even the absence at the table of the IPA (which perhaps is seen as an ally of the investor) will result in ongoing disputes, particularly if

96. *See* Mariana Hernandez Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 110 (2008) (using commercial arbitration with oil companies in the Amazon River Basin as an example of environmental harm caused by a lack of civic oversight in arbitration); *see also* Guillermo J. Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 SETON HALL L. REV. (forthcoming 2021) (noting that indigenous groups are often "treated as externalities" in arbitration).

97. The agency would be behaving in a "quasi-mediator" way by encouraging early communication and the sharing of information between investors and states, much like Peru's coordination and response system, China's domestic administrative review process, or Colombia's lead agency model. Welsh & Schneider, *Becoming*, *supra* note 27, at 96.

the IPA made promises it should not have. By learning where conflict typically emerges, both national and municipal agencies can better communicate all along the path of recruiting, establishing, expanding, and maintaining FDI.

What happens once the right parties are at the table in stakeholder negotiation? Stakeholder negotiation must ensure that the parties' interests and relationships are discussed, highlighted, and addressed. Discussion inevitably will include consideration of legal claims and defenses, but it cannot be limited to these topics. Much like mediation, in which participants are looking for integrative and tailored solutions that will be adhered to, stakeholder negotiation can produce negotiated settlements that reflect the same customized approach. To accomplish such settlements, information must be shared openly, creative solutions talked through, and trust developed, particularly where state regulations or misunderstandings regarding an investor's intent exist as part of the dispute.

With more robust participation by all stakeholders, more information can be shared and trust can be built among the parties. Realistic and implementable solutions should be the result. Over time, the early relationships between investors and IPAs may grow stronger, and similarly strong relationships may develop between investors and the municipalities in which they operate. In fact, one of the primary goals of IPAs and SIRMs should be to make the investor-state relationship more sustainable. Much as a successful marriage is strengthened by learning to engage in conflict productively, in a manner that enables the partners to learn about each other, long-term investments will be strengthened by dispute systems that provide for broad participation and consequent resilience and legitimacy.[98]

C. The Feasibility of Stakeholder Negotiation

We certainly are not the first to observe that negotiation can, does, and should resolve many investor-state disputes. But mediation proponents have criticized negotiation as inevitably "unstructured and prone to failure in particularly complex disputes," while maintaining that, in contrast, mediation offers both "a more-structured interest-based process with a problem-solving orientation"[99] and a changed dynamic due to the third party's presence and ability to caucus privately with the parties.[100] Mediation proponents

98. Professor Mariana Hernandez Crespo Gonstead has drawn this parallel between marriage partners and investment/development partners in her presentations and articles. *See, e.g.*, Mariana Hernandez Crespo Gonstead, *A New Dance on the Global Stage: Introducing a Cultural Value-Based Toolbox to Optimize Problem-Solving, Innovation, and Growth*, 34 OHIO ST. J. ON DISP. RESOL. 675, 694–95, 703, 715, 744 (2019).

99. Note, *Mediation of Investor-State Conflicts*, *supra* note 75, at 2553.

100. *Id.* at 2559; *see also* Zhao, *supra* note 38, at 116 (arguing that because negotiation is less structured, its "procedural predictability is lower" and thus more likely to be affected by power asymmetries); Dahlan & von Kumberg, *supra* note 16, at 255 (mediator in better position to identify impediments to settlement).

also have taken note of states' internal reforms. They have maintained not that these internal reforms could set the stage for more effective negotiation by the parties, but that these reforms should enable greater coordination by the states and better preparation for mediation.[101]

So, is it realistic to think that states, investors, and their lawyers could engage in these sorts of structured negotiations without the assistance of a third party? The current frequency of settlement certainly suggests that parties and their lawyers are already negotiating many, many settlements.[102] A hefty percentage of US lawyers appear to be effective integrative negotiators,[103] and many lawyers-to-be in the United States (i.e., law students) are both being introduced to negotiation in their required doctrinal courses through simulations and discussion[104] and developing their negotiation skills by electing to take courses focused entirely on negotiation.[105]

Apparently inspired by the theories underlying mediation but disappointed by its implementation, US lawyers have also created new approaches to legal practice that involve many features similar to those of stakeholder negotiation. These different approaches go by a variety of names: collaborative law,[106] cooperative law,[107] integrative law,[108] preven-

101. Note, *Mediation of Investor-State Conflicts*, *supra* note 75, at 2564.

102. *See* Echandi & Kher, *supra* note 54, at 51–52.

103. Catherine H. Tinsley, Jack J. Cambria & Andrea Kupfer Schneider, *Reputations in Negotiation*, *in* THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 203, 208–09 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); Gerald Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 8–9 (1996) ("Even when complaints are filed in court, approximately ninety percent will be resolved by negotiation without the need for full trial on the merits."); Andrea Kupfer Schneider, *Shattering Negotiation Myths*, 7 HARV. NEGOT. L. REV. 143, 167 (2002) ("[ ] 91% of lawyers seen as effective took a problem-solving approach to negotiation.").

104. *See* John Lande, *Lessons from Teaching Students to Negotiate Like a Lawyer*, 15 J. CARDOZO CONFLICT RESOL. 1, 38 n.69 (2013) (explaining that incorporating practical negotiation skills into interest-specific doctrinal courses may encourage students to utilize legal analysis while practicing dispute-resolution skills, as was the case with Professor Lande's Family Dispute Resolution course); *see also* Praveen Kosuri et al., *You Too Can Create a Simulation Exercise (or Even a Course)*, 9 TENN. J. BUS. L. 101, 101–04 (2009) (explaining Professor Daniel Jaffe's Contract Drafting course, which includes negotiation simulations, then explaining Professor Jeff Leslie's Transactional Law course, which includes both substantial law elements and skills-based curriculum on negotiation).

105. *See* Karen Tokarz & Rebecca Hollander-Blumoff, *New Directions in Negotiation and ADR: Introduction*, 39 WASH. U. J. L. & POL'Y 1, 2 (2012) (noting that courses on negotiation are present in almost every law school in the U.S., a shift from years past). For example, first-year students at Texas A&M University School of Law take an intensive ADR Survey course, which includes mock negotiations, among other ADR simulations.

106. Nat'l Conf. of Comm'rs on Unif. State L., *Uniform Collaborative Law Rules and Uniform Collaborative Law Act*, 48 FAM. L.Q. 55, 60 (2014) (published by the American Bar Association).

107. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 281 (2004).

108. Ken Haldenstein, *Integrative Law: Law as a Healing Profession*, 40 WESTCHESTER B.J. 35, 35 (2015).

tive law,[109] structured negotiation,[110] and planned early negotiation.[111] Indeed, Julie Macfarlane has suggested that we are on the verge of the age of the "New Lawyer."[112] For our purposes, what is important is that these approaches tend to involve clients directly, elicit and respond to the clients' underlying interests as well as their legal claims and defenses, and encourage creative and accountable problem solving. The goals of mediation are being brought to these structured, inclusive negotiations.

There is also preliminary empirical evidence from domestic practice in a few states in the United States that some civil litigators are engaging, formally or informally, in a form of stakeholder negotiation that includes their clients in the negotiation of settlements.[113] The analysis of one data set, involving litigants in three different US state courts who settled their lawsuits through either negotiation or mediation, indicates that clients respond quite favorably when they are included in their lawyers' negotiations.[114] Further, and significantly for this article, this particular data set indicates that when clients accompany their lawyers to negotiation, they find the negotiation process to be fairer than mediation (also attended by both the clients and their lawyers), to produce more satisfactory results than mediation, and to provide a greater sense of personal control over the outcome than is true for mediation.[115]

Just as states and corporations appear eager to be more effective in problem solving, many lawyers appear eager to do the same. If that is the case, there might be just as much—or even more—value in focusing on developing lawyers' skills and capacities as negotiators (and as negotiation coaches for their clients) as in focusing on developing and training panels

109. Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997).

110. LAINEY FEINGOLD, STRUCTURED NEGOTIATION: A WINNING ALTERNATIVE TO LAWSUITS 1–3 (2016).

111. John Lande, *Family Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, 37 FAM. ADVOC., no. 3, Winter 2015, at 12, 13.

112. JULIE MACFARLANE, THE NEW LAWYER: HOW CLIENTS ARE TRANSFORMING THE PRACTICE OF LAW (2d ed. 2017).

113. *See* John Barkai & Elizabeth Kent, *Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts*, 29 OHIO ST. J. ON DISP. RESOL. 85, 108–10 (2014); John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 20–44 (2014) (providing a case study of fourteen cases, roughly a quarter of which included negotiations with clients present; several of the cases involved collaborative law); Donna Shestowsky & Nancy A. Welsh, *Behold the Dark Horse: An Empirical Comparison of Court-Connected Mediation and Negotiation* (manuscript on file with authors).

114. Shestowsky & Welsh, *supra* note 113, at 28; *see also* Donna Shestowsky, *The Psychology of Procedural Preferences: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 674 (2014).

115. Shestowsky & Welsh, *supra* note 113, at 29 (also observing that the presence of lawyer-clients in the dataset may be partially responsible for certain differences in client perceptions of mediation compared to negotiation with the clients present).

of mediators.[116] Lawyers should be ready to identify and convene all relevant parties, probe for their own clients' and others' key interests, listen reflectively, and help with effective, creative problem solving. The increasing diversity among lawyers engaged in investor-state dispute resolution should also help in interest identification and problem solving by providing a more inclusive range of backgrounds and perspectives at the table.[117]

D. A New Idea for the Investor-State Context

This article has already noted and praised the World Bank's work in supporting the development and operation of SIRMs. The World Bank is also recognizing the importance of negotiation in this context. However, the tenor of the World Bank's recommendations regarding negotiation is quite different from that of the stakeholder negotiations we describe here. The World Bank frames the SIRMs' role in negotiation hierarchically and dualistically. In its view, negotiation, or what the World Bank calls interagency problem solving,[118] first starts with the lead agency talking to the "offending" agency (its words) to get that agency to collaborate.[119] The World Bank envisions negotiation as occurring primarily between the lead agency and an agency that has promulgated an illegal regulation, and it is important to note the assumption that it is a state agency's illegal regulation that is the triggering cause of many investor-state disputes. According to the World Bank, the lead agency's role is to help the offending agency "rethink its

116. *See* von Kumberg et al., *supra* note 17, at 137–41 (listing concepts and skills that parties and lawyers should be taught or reminded of, including model checklists and submissions, with focus on preparing for mediation); *see also* Sauvant, *supra* note 94.

117. Examples of international law firms focusing on increasing the diversity of their lawyers include the law firms participating in the Move the Needle Fund. MOVE THE NEEDLE FUND, https://www.mtnfund2025.com. Various international firms have also undertaken individual efforts. *See, e.g.*, *White and Case Ranked Most Diverse Among Top 50 US Law Firms*, WHITE & CASE (June 18, 2020), https://www.whitecase.com/firm/awards-rankings/ranking/white-case-ranked-most-diverse-among-top-50-us-law-firms; Ben Edwards, *Freshfields Sets Out Five-Year Global Diversity and Inclusion Targets*, GLOB. LEGAL POST (Mar. 8, 2021), https://www.globallegalpost.com/big-stories/freshfields-sets-out-five-year-global-diversity-and-inclusion-targets-1214 4451; Varsha Patel, Freshfields to Factor in Diversity When Building Disputes Teams, LAW.COM INT'L (Nov. 19, 2020, 6:47 AM), https://www.law.com/international-edition/2020/11/19/freshfields-to-factor-in-racial-diversity-when-building-disputes-teams/?slreturn=20210208225717. The need to increase the diversity of arbitrators selected for investor-state matters has also received substantial attention. *See, e.g.*, Int'l Council for Com. Arb., *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf; Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil & Emilia Onyema, *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410, 410–40 (2020) (focusing on lack of diversity among investor-state arbitrators and proposing reforms); *see also* Welsh & Schneider, *Thoughtful Integration, supra* note 1, at 140–41 (co-mediation as means to increase diversity and inclusivity of mediators for disputes between investors and host states); Gonstead, supra note 98, at 726–27 (value of co-mediation to permit inclusion of different cultural values).

118. WBG II, *supra* note 86, at 53.

119. *Id.*

behavior and conduct"[120] in light of the rule of law as established through investment treaties and other domestic legislation. This part of the negotiation is not really a negotiation between all stakeholders. The successful examples of SIRMs provided by the pilot projects rely on directive models of influence, e.g., peer pressure, power-based negotiation, rule-based negotiation, and even early neutral evaluation.[121]

More specifically, peer pressure has worked when agencies already had a collaborative network involving regular meetings. In these meetings, the lead agency exerted enough pressure on the offending agency to cause it to comply.[122] Examples of power-based negotiation have involved use of the prime minister's office and the lead-agency head's position at the cabinet level of the government. When the offending agency was faced with the threat of a dispute going to the prime minister, the "mere expectation of being directly exposed to the disciplinary power of the highest authority of the government became a lubricant for collaboration."[123] Rule-based negotiations, per the World Bank, are ones in which the threat of arbitration and liability is used to bring the offending agency in line.[124] The World Bank has also recommended early neutral evaluation by the lead agency, where it is done quickly, confidentially, and inexpensively.[125]

All the negotiation strategies outlined by the World Bank to be used by the lead agency assume a hierarchical, power-based context. Especially in a hierarchical culture, the lead agency might be able to use power-based strategies to negotiate quick resolutions with local or national offending agencies. But that will not always be case. When power-based strategies are not culturally appropriate or seem likely to backfire or fail to reach the other stakeholders needed to produce a sustainable result, stakeholder negotiation would be available and preferred. Meanwhile, some of the other strategies recommended by the World Bank—e.g., peer pressure, reality testing regarding the likelihood and potential effects of being involved in arbitration—would likely be part of any negotiation, stakeholder negotiation included. The benefit of stakeholder negotiation is that it also involves much more.

V. Mediation's Shadow . . . or Mediation as Threat

As noted above, various commentators have urged that states, treaties, and international dispute-resolution organizations respond to the apparent dearth of voluntary use of investor-state mediation by requiring mediation before disputes may be submitted to arbitration, or at least encouraging par-

120. *Id.*
121. *Id.* at 54.
122. *Id.*
123. *Id.*
124. WBG II, *supra* note 86, at 54.
125. *Id.*

ties to use investor-state mediation by offering financial incentives or requiring parties to participate in instruction regarding mediation.[126] There are ample examples of these strategies' use in domestic courts around the world.[127] A 2019 survey of investors, conducted by Queen Mary University of London, even showed that 64 percent of respondents strongly or somewhat favored requiring mediation before parties could commence arbitration proceedings[128] (although follow-up interviews with investors also revealed substantial concerns about making investor-state mediation mandatory).[129]

A. More than Mediation

However, mediation is *not* the only dispute-resolution mechanism that would enable parties to resolve their disputes earlier, more quickly, less expensively, and in a manner tailored to their needs and those of key stakeholders. Mediation is only a means to reach those ends. It is not an end in and of itself. And as demonstrated above, mediation's uptake has been quite slow. Meanwhile, as further discussed, there are other procedural innovations, such as ombuds, lead agencies, SIRMs, and new approaches to legal practice and legal negotiations, that states, corporations, and lawyers are adopting voluntarily and more quickly than mediation. These innovations do not require the parties to resort to an outside third party. Instead, these innovations require the parties to take responsibility for some of what they might otherwise expect the outside third party to handle.

Recently, Jack Coe has written that

> [m]ediation is not a stand-alone solution to all that ails the current system. Rather, it should be part of an overall coordinated set of strategies that include not only various refinements to prevailing arbitration regimes and improved precision in the way substantive treaty protections are delimited, but also more pervasive use of host-state systems for detecting and managing inchoate disputes.[130]

126. Claxton, *supra* note 6, at 89–91; Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 125–26.

127. Claxton, *supra* note 6, at 87–89; *see* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 88.

128. *See also* von Kumberg et al., *supra* note 17, at 136 (indicating that investors are also inserting mediation into their contracts with states and "increasingly considering whether, as a condition of entering into a State investment project, they should insist on a dispute resolution clause that refers disputes to a private dispute resolution institution more inclined to actively help them manage any conflicts proactively, efficiently and effectively (most privately run international arbitration providers now offer mediation services)").

129. *See* KESSEDJIAN ET AL., *supra* note 36, at 10–11.

130. Jack J. Coe, Jr., *Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution*, *in* MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES 61, 78 (Catharine Titi & Katia Fach Gomez eds., 2019).

We agree. We further agree with Professor Coe that we need to notice that, despite the many and complicated difficulties involved in reaching settlements of investor-state disputes, "somehow, roughly one out of three investor-state cases already settle."[131] The parties and their lawyers are accomplishing this on their own.

Finally, we agree with Professor Coe that the primary challenge today is in convening the parties—bringing the state, the investor, and other key stakeholders to the table to begin the negotiation process. And we agree that meeting this challenge requires "attitudinal changes, reflected in new standard operating procedures, among states in particular," with the hope that "these new habits will generate and reinforce new best practices and new expectations that will in turn encourage the mastery of new, quite powerful, techniques."[132]

B. The Threat of Mediation as Catalyst

The shadow—or more malevolently, the threat—of mediation may be quite useful in jumpstarting the convening process. Indeed, the shadow (or threat) of mediation may even be more useful than the occurrence of mediation itself. The threat of an arbitration hearing can focus parties' thinking and encourage them to make productive use of mediation. Similarly, the threat of mediation has the potential to focus parties' thinking and enable them and their lawyers to change their attitudes, operating procedures, expectations, and habits. This is because parties know that the mediator will ensure that all the right parties are in the room and that those parties communicate with each other, discuss their underlying interests as well as their legal claims and defenses, and problem-solve to try to arrive at mutually beneficial solutions that hold all parties accountable. Ultimately, the shadow (or threat) of mandatory investor-state mediation could effectively establish new international norms for how parties can and should use the cooling-off periods that are already so common in BITs.[133]

Therefore, we urge that in its rules, ICSID mandate mediation before parties may file for arbitration, *but we further urge that the mandated procedure not be limited to mediation alone*. Instead, ICSID should permit its mandate to be met through use of other procedures, particularly stakeholder

131. *Id.* at 78; *see also* Note, *Mediation of Investor-State Conflicts*, *supra* note 75, at 2546 (observing that an estimated 30 to 40 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"); KESSEDJIAN ET AL., *supra* note 36, at 8–9 ("[ ] 23% of all known cases (from 1987 to 2018) have settled and 10% have been discontinued . . . .").

132. Coe, *supra* note 130, at 78; *see also* von Kumberg et al., *supra* note 17, at 135 (providing many reasons for delays in resolving investor-state disputes, some of which are related to convening issues).

133. *See* von Kumberg et al., *supra* note 17, at 135–36 (noting the current lack of international norms for how parties can and should make productive use of the cooling-off period).

negotiation that includes the essential elements we have identified here. ICSID could also specifically mandate the use of *either* mediation or stakeholder negotiation, or it could mandate mediation but provide for an opt-out if the parties can make a sufficient showing that they have engaged in stakeholder negotiation.[134]

How will ICSID know that the state and investor have undertaken stakeholder negotiation in good faith, with sufficient intent to work together and try to reach settlement? In some sense, ICSID cannot know. But the question of good faith is not new,[135] and it is just as likely to arise with mediation as with stakeholder negotiation. Domestic US experience may be instructive on this point. In determining whether parties have participated in mandated mediation in good faith, US courts have focused on their compliance with certain objective requirements, such as whether the parties have submitted pre-mediation briefs as required, attended the procedure as required, and ensured that those in attendance had the required authority.[136] For stakeholder negotiation, ICSID could similarly determine whether the parties exchanged pre-negotiation information (including information regarding their interests and the identities of other stakeholders needed to develop and implement an agreement), attended the negotiation along with their lawyers, and ensured that those representing the state or a corporate investor at the negotiation had settlement authority.

The idea that a variety of tools could satisfy a condition precedent is not new. Certain treaties and side instruments already anticipate that more than one consensual procedure would be satisfactory. For example, side instruments to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, particularly those between New Zealand on one hand and Brunei, Malaysia, and Vietnam on the other, mandate negotiation before the state will consent to arbitration and also provide that mediation may be used to meet the negotiation requirement.[137] The Investment Agreement for the

134. *See* Welsh & Schneider, *Thoughtful Integration*, *supra* note 1, at 126–27; Zhao, *supra* note 38, at 129 (suggesting potential use of opt out if mediation is made mandatory in China-EU BIT).

135. *See* Dahlan & von Kumberg, *supra* note 16, at 259–60 (noting that "previous case law under the ECT has confirmed that for any arbitral tribunal to have jurisdiction over the dispute, parties must demonstrate evidence of seriously attempting to reach an amicable settlement").

136. *See* Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 427–28 (2011).

137. *See* Claxton, *supra* note 6, at 91 n.103 (citing *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Text and Resources*, N.Z. FOREIGN AFFS. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources (last visited Oct. 23, 2020); Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA), China-H.K, Sept. 29, 2003, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2657/download; Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (noting the attention to defining the mediation process).

Common Market for Eastern and Southern Africa (COMESA) Common Investment Area requires parties to use an alternative means of dispute resolution during the cooling-off period, providing only that mediation will serve as the default if the parties cannot reach an agreement on the means to be used.[138] Article 26.1 of the Energy Charter Treaty does not mandate participation in a consensual process during the cooling-off period, but instead states that disputes "shall, if possible, be settled amicably."[139] Its mediation guidelines provide that the treaty language regarding amicable settlement should be understood to include the use of several alternatives: "good offices, structured negotiation, mediation or conciliation using existing mechanisms or even agreeing on a tailor-made mechanism."[140]

Our proposal would vary from the examples of mandatory participation in a dispute-resolution process by providing quite explicitly that stakeholder negotiation could be used to meet the requirement of mediation.

CONCLUSION

The push for more creative, responsive, and innovative conflict resolution for investor-state disputes is crucial. We can see that in their treaties, states are recognizing process options beyond arbitration. The push for mediation is well underway. Meanwhile, stakeholder negotiation could occur even sooner than mediation, it could be less expensive than mediation, and among certain parties, it could be even more effective.

So why do we nonetheless support mandating mediation? Three primary reasons argue for this. First, mediation itself might well be needed for parties or states where SIRMs are not yet established or working well, or for parties who have made sustained attempts at some form of structured negotiation and now recognize that they need the help of a third party to facilitate their conversations. Whether needed because of more challenging issues or parties, or even lack of time, mandatory mediation has long been

138. Fan, *supra* note 8, at 336 (citing Article 26, paragraph 4, of the Investment Agreement for the COMESA Investment Area, which reads in relevant part: "Where no alternative means of dispute settlement are agreed upon, a party shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between the notice of intention and the initiation of dispute settlement proceedings under Articles 27 or 28." Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area, art. 26, 2007, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf).

139. Int'l Energy Charter, Energy Charter Treaty art. 26.1, May 20, 2015, https://www.energychartertreaty.org/provisions/article-26-settlement-of-disputes-between-an-investor-and-a-contracting-party/261.

140. Int'l Energy Charter, *Guide on Investment Mediation*, at § 2.1, CCDEC 2016 12 INV (July 19, 2016), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf.

shown to help parties settle even when they did not think that was possible.[141]

Second, as mediation becomes expected and thus the norm, the shadow of this process could help parties and their lawyers become even more adept at the kinds of conversations and early interventions that are needed to resolve disputes. Stakeholders will need to be included. Interests and options, in addition to legal rights and responsibilities, will be on the agenda. Parties will need to consent to any resolution. And implementation and compliance will be more likely. Changing the practice and expectations of ISDS to focus on the consensual process of mediation rather than the adversarial process of arbitration will increase the utility of *all* early and consensual conflict management systems.

And, finally, the threat of an impending mandatory mediation might just push parties to agree to stakeholder negotiation sooner rather than later. Knowing that mediation will occur and what it will entail, lead agencies under SIRMs, or even investors themselves, will be better able to persuade recalcitrant participants to sit down and resolve the dispute. In some instances, the lead agency might actually serve as the de facto mediator (or at least the convener) of the stakeholder negotiation.

For all who believe in the benefits of FDI, the overriding goal is more efficient, more effective, relationship-enhancing resolutions of the disputes that will almost inevitably arise between investors and states. For all who believe in mediation, it is time to notice the beneficial and usefully coercive power of its shadow.

141. *See* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 582 (1997) (finding that parties in a study who were referred to mandatory mediation "did not differ from those who chose to mediate in their ratings of the importance of various reasons for reaching or not reaching a settlement").