

## Article

# Integrating Investment Treaty Conflict and Dispute Systems Design

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I.	Foreign Investment and Investment Treaties .....	168
A.	The Role of Foreign Investment .....	168
B.	Investment Treaties .....	171
1.	Substantive Rights .....	172
2.	Procedural Rights: Resolving Investment Treaty Disputes .....	172
II.	Conflict Theory and Dispute Systems Design .....	173
A.	Conflict Theory .....	173
B.	Dispute Systems Design .....	177
C.	An Application to Investment Treaty Conflict? .....	180
III.	A Theoretical Approach to Investment Treaty Conflict and Dispute Systems Design .....	182
A.	DSD: Some Possibilities for Investment Treaties .	184
B.	The Nature of Investment Treaty Conflict .....	185
1.	Investment Treaty Conflict .....	185
2.	Using DSD: Systematic Analysis of Investment Treaty Conflict .....	187

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162	<i>MINNESOTA LAW REVIEW</i>	[92:161
	C. The Systems to Address Investment Conflict .....	190
	1. Historical Antecedents: The Previous Methods of Resolving Investment Treaty Conflict .....	190
	2. The Current Framework for Resolving Investment Treaty Conflict .....	191
	a. First-Tier Dispute Resolution .....	192
	b. Second-Tier Dispute Resolution .....	193
	3. Consideration of Specific Dispute Resolution Provisions .....	194
	D. Using DSD: Analyzing the Utility of the Current System .....	195
	1. First-Tier Dispute Resolution: Nonbinding Methods .....	195
	a. Difficulties with “Amicable Resolution” .....	195
	b. Difficulties Communicating the Existence of Disputes .....	199
	2. Second-Tier Dispute Resolution .....	201
	a. Understanding the Choice for Arbitration ..	202
	b. The Challenge and Costs .....	204
IV.	The Costs and Benefits of DSD .....	207
	A. Benefits .....	208
	1. Efficient Administration of Existing Disputes .....	208
	2. Early Management of Conflict .....	212
	3. Procedural Justice and Institutional Legitimacy .....	214
	B. Costs .....	216
	1. Appropriateness of a DSD Model .....	216
	2. Generalizability of a DSD Model .....	217
	3. The Challenge of Structuring DSD .....	218
	a. A Few Critical Questions .....	218
	b. Possible Ways Forward .....	219
	i. A Multilateral Approach .....	219
	ii. A Bilateral Approach .....	220
	iii. The Hybrid: A Third Way? .....	222
	4. Moving Beyond Inertia: A Constituency for Change .....	223
	a. The Role of Foreign Investors .....	224
	b. The Role of Non-Governmental Organizations .....	225
	c. The Role of Governments .....	226
	Conclusion .....	228

*If the only tool you have is a hammer, you tend to see every problem as a nail.*

—Abraham Maslow<sup>1</sup>

Henry Ward Beecher once observed, “Laws and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up, and set to true time.”<sup>2</sup> As law, societies, and governments evolve, challenging transitional periods inevitably arise, requiring reexamination of the bedrock upon which a system was founded.

Dispute resolution systems exhibit a similar phenomenon. As a system develops and undergoes fundamental growth, reconsideration of its efficacy can promote both the integrity and the legitimacy of the system to ensure it provides appropriate services to its stakeholders.<sup>3</sup> The resolution of international investment disputes is a salient example of this maxim.

International investment law has experienced significant growth. Within the last two decades, the number of interna-

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1. See ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE* 15–16 (1996).

2. HENRY WARD BEECHER, *LIFE THOUGHTS* 129 (Sheldon & Co. 1866) (1858).

3. The birth and growth of the “Alternative Dispute Resolution” movement—with its focus on the multi-door courthouse and development of non-traditional dispute resolution mechanisms—is an example of this phenomenon. See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 12–62 (3d ed. 2005); see also Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276–77 (1982) (discussing developments in arbitration and other alternatives to court); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 111–12 (1976) (noting that increased pressure on the court system would likely prompt the use of alternative dispute resolution mechanisms); cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073–75 (1984) (tracing the development of alternative dispute resolution while questioning the value of settlement). The area continues to evolve. See Christopher Honeyman & Andrea Kupfer Schneider, *Introduction to THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 1, 2 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter *NEGOTIATOR'S FIELDBOOK*] (considering dispute resolution from an interdisciplinary perspective); INST. ON CONFLICT RESOL. & SOC'Y OF PROF'LS IN DISPUTE RESOL., *DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS* (2001), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1001&context=icrpubs> (suggesting that, as the process of evaluating dispute resolution evolves, there is an increased emphasis on creating integrated conflict management systems); James R. Coben, *Intentional Conversations About the Globalization of ADR*, 27 HAMLINE J. PUB. L. & POL'Y 217, 222 (2006) (referring to scholarship that suggests a need to reconsider conflict management in light of the evolution of dispute systems).

tional investment treaties, which provide foreign investors with substantive rights and procedural remedies, has surged to nearly 2500.<sup>4</sup> Meanwhile, foreign investment spiked to levels over \$1 trillion,<sup>5</sup> and foreign investors have brought vital capital and know-how to countries in need of basic infrastructure like clean water, paved roads, electricity, and telecommunications.<sup>6</sup> While these investments can benefit both investors and

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4. See U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], BILATERAL INVESTMENT TREATIES IN THE MID-1990S at 10, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) [hereinafter UNCTAD, BITS] (observing the surge in the number of investment treaties during the 1990s); UNCTAD, *Developments in International Investment Agreements in 2005*, 2, IIA MONITOR, No. 2 2006, at 1, 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/7, [http://www.unctad.org/en/docs/webiteia20067\\_en.pdf](http://www.unctad.org/en/docs/webiteia20067_en.pdf) [hereinafter UNCTAD, *International Investment Agreements*] (finding that, by the end of 2005, there were 2495 bilateral investment treaties); see also Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 338 (2007) (explaining that the number of investment treaties has tripled in the past two decades). *But see* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], INTERNATIONAL INVESTMENT PERSPECTIVES: 2006, at 144 (2006) (suggesting that the number of international investment agreements actually in force and effect is around seventeen hundred); UNCTAD, *The Entry into Force of Bilateral Investment Treaties (BITs)*, IIA MONITOR, No. 3 2006, at 1, 2–3, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/9, [http://www.unctad.org/en/docs/webiteia20069\\_en.pdf](http://www.unctad.org/en/docs/webiteia20069_en.pdf) [hereinafter UNCTAD, *Entry into Force*] (acknowledging that, out of the 2495 investment treaties in existence at the end of 2005, only 75.8% had entered into force).

5. See ECONOMIST INTELLIGENCE UNIT & COLUMBIA PROGRAM ON INT'L INV., WORLD INVESTMENT PROSPECTS TO 2010: BOOM OR BACKLASH? 6 (Laza Kekic & Karl P. Sauvant eds., 2006), available at [http://www.cpii.columbia.edu/pubs/documents/WIP\\_to\\_2010\\_SPECIAL\\_EDITION.pdf](http://www.cpii.columbia.edu/pubs/documents/WIP_to_2010_SPECIAL_EDITION.pdf) [hereinafter WORLD INVESTMENT PROSPECTS] (indicating that levels of foreign direct investment (FDI) in 2006 are approximately \$1165 billion and expected to grow to \$1407.3 billion by 2010); Franck, *supra* note 4, at 338 (indicating that FDI surged from \$200 billion in 1990 to over \$1 trillion in 2000). *But see* UNCTAD, WORLD INVESTMENT REPORT 2006 at xvii, U.N. Doc. UNCTAD/WIR/2006, U.N. Sales No. E.06.II.D.11 (2006), available at [http://www.unctad.org/en/docs/wir2006\\_en.pdf](http://www.unctad.org/en/docs/wir2006_en.pdf) (suggesting that the level of FDI in 2005 was \$916 billion, but noting that the peak in 2000 was \$1.4 trillion). FDI in member states of the Organisation for Economic Co-operation and Development (OECD) reached \$622 billion in 2005, which was a twenty-seven percent increase since 2004. OECD, *supra* note 4, at 15.

6. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS. J. INT'L L. & POL'Y 47, 48–49 (2005); see also PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW, at xvii, xxv (1997) (discussing the vital contributions made by foreign investment, including important contributions for local entrepreneurs, the provision of an integrated package of financial backing and skills, the introduction of competitive enterprises, the adoption of new management tech-

host states, there are latent tensions between the two groups when their interests diverge. When this unaddressed tension encounters an appropriate catalyst, disputes can result.<sup>7</sup>

Unsurprisingly, where conflict has festered, foreign investors have used their new treaty rights to bring claims against host governments. Perhaps less expected, however, is the number and magnitude of disputes arising under investment treaties.<sup>8</sup> Some have referred to this as a “litigation explosion”<sup>9</sup> where billions of dollars and sovereignty are at stake.<sup>10</sup>

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niques, and the catalyst for new opportunities).

7. See *infra* notes 101–06 and accompanying text (discussing examples of investment treaty disputes).

8. Compare K. Scott Gudgeon, *Avoidance and Settlement of International Investment Disputes*, 78 AM. SOC'Y INT'L L. PROC. 38, 49 (1984) (“I expect that the BIT arbitration feature, even if it may not lead to a surge of business for arbitral fora, will assist investors in minimizing risks . . . [and] avoiding disputes . . .”), with George M. von Mehren et al., *Navigating Through Investor-State Arbitrations—An Overview of Bilateral Investment Treaty Claims*, DISP. RESOL. J., Feb.–Apr. 2004, at 69, 76 (suggesting that the “number of global investors seeking to recoup losses through BIT arbitrations will increase in the coming years”).

9. UNCTAD, INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW at 4–6, U.N. Doc. UNCTAD/ITE/IIT/2005/4, U.N. Sales No. E.06.II.D.1 (2005), available at [http://www.unctad.org/en/docs/iteiit20054\\_en.pdf](http://www.unctad.org/en/docs/iteiit20054_en.pdf) [hereinafter UNCTAD, DISPUTES]; UNCTAD, *Recent Developments in International Investment Agreements*, IIA MONITOR, No. 2 2005, at 1, 1–3, 13–15, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/1, [http://www.unctad.org/sections/dite\\_dir/docs/webiteiit20051\\_en.pdf](http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf) [hereinafter UNCTAD, *Recent Developments*]; Jeswald W. Salacuse, *Explanations for the Increased Recourse to Treaty-Based Investment Dispute Settlement: Resolving the Struggle of Life Against Form?*, in COHERENCE AND CONSISTENCY IN INTERNATIONAL INVESTMENT LAW (Karl P. Sauvant ed., forthcoming 2007); see also Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119, 119 (noting an “explosion” of international trials to resolve disputes that formerly would have been resolved through diplomacy); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 124 & n.11 (2006) (referring to the growth of investment treaty arbitration and noting that “ICSID arbitration is only part of the explosion”).

10. See Michael D. Goldhaber, *Treaty Disputes: Arbitration Scorecard*, FOCUS EUR., Summer 2007, at 22, 22–27, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Inside&id=1180947929487> (describing twenty-five cases where the amount in controversy is over \$1 billion per case and the total amount in dispute is over \$103.77 billion); Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 452 (2007) (suggesting that there were at least thirty-four investment treaty claims against Argentina, which also defaulted on government debt in the order of \$80 billion); PUBLIC CITIZEN, NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005, at vii–xxi (2005), <http://www>

The escalation in the availability and use of the treaty-based dispute resolution process has led to a teething period. The boundaries of states' previously untested international law obligations are being sketched, and parties and nonparties have cheered and jeered the efficacy, efficiency, and fairness of the current system for resolving investment treaty disputes.<sup>11</sup> In the United States, for example, there is an ongoing debate about the proper terms for investment treaties and the renewal of the Trade Promotion Authority Act.<sup>12</sup>

With its fundamental growth<sup>13</sup>—and divergent views as to its success—the process of resolving investment treaty disputes

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.citizen.org/documents/Chapter%2011%20Report%20Final.pdf (detailing the rights of foreign investors to seek enforcement from governments under the North American Free Trade Agreement). *But see* W. Michael Reisman, Reflections on Economic Development, National Sovereignty and International Arbitration 16–20 (Apr. 13, 2006) (unpublished manuscript, available at <http://www.law.yale.edu/documents/pdf/Bogota.4.13.06.pdf>) (observing that the consent to arbitration is itself an exercise of sovereignty, suggesting that arbitral tribunals strictly apply the law, and commenting that countries can then take steps to accommodate concerns about sovereignty through the normal political process).

11. Compare Charles H. Brower, II, *Structure Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 49–51, 77–81 (2003) (expressing concerns about the legitimacy of resolving investment disputes under NAFTA), Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1582–83 (2005) (expressing concerns about the legitimacy of resolution of investment treaty disputes generally), and Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 338–46, 352–56 (2004) (exploring procedural deficiencies and costs of investor-state arbitration), with Judith A.E. Gill, *Inconsistent Decisions: An Issue to Be Addressed or a Fact of Life?*, 2 TRANSNAT'L DISP. MGMT. 12, 15 (2005) (suggesting that concerns with the current arbitration system will be addressed over time), and Daniel M. Price, *Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 114 (2000) (suggesting that the system can handle some inconsistency and suggesting “fears about overreaching [arbitral] panels are quite premature”).

12. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.A. §§ 3801–13 (West 2005 & Supp. 2007); see Lee Hudson Teslik, *Fast-Track Trade Promotion Authority and Its Impact on U.S. Trade Policy*, COUNCIL ON FOREIGN RELATIONS, June 25, 2007, [http://www.cfr.org/publication/13663/fasttrack\\_trade\\_promotion\\_authority\\_and\\_its\\_impact\\_on\\_us\\_trade\\_policy.htm](http://www.cfr.org/publication/13663/fasttrack_trade_promotion_authority_and_its_impact_on_us_trade_policy.htm) (discussing the debate about the renewal of Trade Promotion Authority Act).

13. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=969257> (discussing the purported increase in the rise of investment treaty arbitration and offering data that demonstrate a marked increase in the number of arbitration awards).

is at a critical historical juncture that requires reexamination of its foundations. Given that treaties provide a set of legal rights and parties can now bargain with some information about where the shadow of the law may fall, it is time to think strategically about how to manage conflict effectively.

In an effort to consider how best to examine the system's efficacy to promote its long-term integrity, this Article considers two discrete areas—investment treaties and Dispute Systems Design—to suggest how they might inform each other.<sup>14</sup> Dispute Systems Design is not a form of dispute resolution or a type of “alternative dispute resolution.” Rather it is a process of analyzing existing patterns of disputing, creating new processes, and implementing and testing the new design in order to create a process that effectively and efficiently resolves disputes.<sup>15</sup> The central question this Article addresses is: Can and should Dispute Systems Design play a role in developing the processes for resolving investment treaty-related conflict?

As this is the first scholarship to consider this intersection, the issues raised in this Article are tentative and calculated to encourage more systematic analysis.<sup>16</sup> Part I introduces basic concepts related to investment treaties. Part II outlines the more general context of conflict resolution theory and Dispute Systems Design principles. Part III of the Article then demonstrates how these related—but thus far distinct—areas might inform each other. It explores the potential application of Dispute Systems Design principles to investment conflict and then, in Part IV, considers the costs and benefits of such an approach. Part IV also identifies key issues for this integration and recommends exploration of critical questions such as the identification of organizing principles for dispute resolution processes.

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14. See Andrea Kupfer Schneider, *Public and Private International Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION 438, 451 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (discussing the value of interdisciplinary discussions and cross-fertilization between the international law and dispute resolution disciplines).

15. At its core, Dispute Systems Design is a systematic process of choosing a dispute resolution methodology. See *infra* notes 62–66 and accompanying text for a detailed definition and discussion of Dispute Systems Design.

16. There is scholarship that considers aspects of dispute resolution, such as improvements to investment treaty arbitration rules and nonbinding dispute resolution processes. This literature is an important contribution, but it has not yet taken a systematic approach to diagnosing and managing conflict. See *infra* note 78 and accompanying text.

The Article concludes that this new area of scholarship should play a role in the effective and efficient management of investment treaty conflict. It then considers the next steps for implementing and diffusing Dispute Systems Design to develop processes to manage investment treaty conflict. Without a considered assessment and development of dispute resolution processes, the legitimacy of existing systems will continue to be questioned, and dispute resolution mechanisms might fail to harness the positive aspects of conflict while minimizing the negative ones. With Dispute Systems Design, stakeholders will be in a better position to maximize satisfaction and legitimacy of the dispute resolution process.

## I. FOREIGN INVESTMENT AND INVESTMENT TREATIES

### A. THE ROLE OF FOREIGN INVESTMENT

Foreign investment has a critical impact on the world economy and development.<sup>17</sup> In previous decades, foreign investment involved billions of dollars annually, and current projections suggest that investment inflows will be close to \$1.5 trillion by 2010.<sup>18</sup>

While its definition is a subject of debate,<sup>19</sup> foreign investment archetypically involves a large infrastructure project. It

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17. See R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 2–7 (2005); II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 435–37 (1995).

18. WORLD INVESTMENT PROSPECTS, *supra* note 5, at 6.

19. Professor Sornarajah defines foreign investment as “the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.” M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 4 (1994) (footnotes omitted); see also COMEAUX & KINSELLA, *supra* note 6, at xix–xx (“Foreign direct investment refers to direct control of either assets or an enterprise in a foreign country through ownership of a substantial portion of the assets or enterprise.”).

There is a debate about the definition of investment. Some scholars distinguish among direct investment projects where investors control the project’s development, portfolio investments that involve buying shares in the company, and cross-border trade in goods and services; others disagree with this approach. See SORNARAJAH, *supra*, at 4–8; Alfred Escher, *Current Developments, Legal Challenges, and Definition of FDI*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 3, 20–25 (Daniel D. Bradlow & Alfred Escher eds., 1999) (considering the broad and narrow definitions of FDI and observing that the International Monetary Fund defines investment as “acquir[ing] a lasting interest in an enterprise operating in an economy”); see also II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 435 (1995) (characterizing foreign investment as “the transfer of funds or materials from one country (called the capital ex-

might range from something as basic as the construction of a road, the financing and development of a power plant, or the development of telecommunications capacity.<sup>20</sup> Investment can be broader than this, however. Foreign investment also might involve intellectual property rights<sup>21</sup> or other types of vital commercial activity.<sup>22</sup> These basic investments can have profound effects on the alleviation of global poverty and the promotion of economic opportunities.<sup>23</sup>

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porting country) to another country (called the host country) to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise. . . . Foreign investment may consist of 'direct investment' or 'portfolio investment'. The distinguishing factor is the degree of managerial control acquired by the investor").

Irrespective of this debate, most investment treaties have a specific yet broad definition of "investment." The 2004 U.S. Model Bilateral Investment Treaty (BIT) defines investment, for example, as "every asset that an investor owns or controls, directly or indirectly . . . [including] (a) an enterprise; (b) shares, stock, and other forms of equity participation . . . ; (d) futures, options, and other derivatives; . . . (f) intellectual property rights; . . . (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges." Model Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-[Country], art. 1, Feb. 5, 2004, [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf) [hereinafter 2004 U.S. Model BIT].

20. See Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 406–07 (2006) (outlining various scenarios involving foreign investment).

21. Ingo Selting, *FDI and International Protection of Intellectual Property*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 19, at 205, 205–06.

22. A synthesis of the current investment treaty case law might reasonably suggest that services, construction, trade, and financial-related investments can qualify as investments under appropriate circumstances. See UNCTAD, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID]: MODULE 2.5, REQUIREMENTS RATIONE MATERIAE 19–24 (2003), U.N. Doc. UNCTAD/EDM/Misc.232/Add.4 (*prepared by* Alejandro A. Escobar), in UNCTAD, COURSE ON DISPUTE SETTLEMENT, *available at* [http://www.unctad.org/en/docs/edmmisc232add4\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add4_en.pdf) [hereinafter UNCTAD, DISPUTE SETTLEMENT]. *But see* Mitchell v. Democratic Republic of Congo, No. ARB/99/7, Decision on the Application for Annulment of the Award (ICSID Nov. 1, 2006), <http://ita.law.uvic.ca/documents/mitchellannulment.pdf> (holding that there was insufficient evidence to conclude that a business providing legal services related to debt collection qualified as investment in part because it lacked a nexus with development); UNCTAD, DISPUTE SETTLEMENT, *supra*, at 17 (noting that the ICSID Secretariat refused to register a case because a supply contract for the sale of goods was not deemed to be a qualifying investment).

23. For example, the World Bank explains that "[b]uilding rural roads helps firms get their goods to market, and in Morocco also increased primary school enrollment from 28 to 68 percent." WORLD BANK, WORLD DEVELOP-

Because of its importance to development and economic prosperity, there is keen competition among developed and developing countries to attract foreign investment.<sup>24</sup> Governments use various strategies at the national and sub-national levels to facilitate this objective.<sup>25</sup> Some of these strategies might be straightforward, such as liberalizing an economic sector or providing tax incentives.<sup>26</sup> Other strategies might be more complex, such as improving the court system or creating effective alternative dispute resolution mechanisms.<sup>27</sup>

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MENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 4 (2004), available at [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf) [hereinafter WORLD DEVELOPMENT REPORT 2005].

24. See Robert O. Keohane & Van Doorn Ooms, *The Multinational Firm and International Regulation*, 29 INT'L ORG. 169, 170 (1975) ("Almost every government in the world . . . attempts to entice foreign capital."); Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 314 (2001) ("[G]overnments in both rich and poor nations compete in a 'race to the bottom' to attract needed foreign investment."). There is evidence that this competition is prevalent among developing countries. See Teresa Edwards, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 183, 190 (2002) ("[G]overnments of these less-developed countries, in an effort to attract foreign investment, compete with one another to make their standards the most attractive to the investing companies."); Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT'L L. 237, 266 (2006) ("[D]eveloping states compete with each other to attract foreign investment . . .").

25. See Thomas W. Soseman, *International Law—The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?*, 15 J. CORP. L. 597, 603 (1990) ("[S]tate and city governments fiercely compete with each other to attract foreign investment.").

26. The World Bank, for example, suggests that governments might provide fiscal incentives (like tax concessions or subsidies), improve domestic infrastructure, promote a skilled labor force, establish agencies to promote foreign investment, improve the regulatory environment, or enter into international agreements. See WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 7–13; World Bank, *Policies to Attract Foreign Direct Investment*, <http://rru.worldbank.org/PapersLinks/ReadingList.aspx?topicid=10> (last visited Oct. 17, 2007); see also Paul J. Heald, *Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study*, 10 J. INTELL. PROP. L. 309, 318 (2003) (critiquing empirical research suggesting the protection of intellectual property rights fosters investment).

27. Franck, *supra* note 4, at 340 (discussing how India and China are attempting to improve their alternative dispute resolution systems as a tactic for fostering foreign investment).

## B. INVESTMENT TREATIES

While there is mixed empirical evidence as to its actual success in securing foreign investment, one popular tactic governments use to promote foreign investment is signing an investment treaty.<sup>28</sup> An investment treaty is an agreement made between two or more governments that safeguards investments made in the territory of other signatory countries.<sup>29</sup> For example, the United States and Ukraine might sign and ratify a bilateral investment treaty.<sup>30</sup> The United States must then provide a series of rights to Ukrainian investors investing in the United States. The reciprocal nature of the treaty means United States investors in the Ukraine will have those same rights.

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28. While the stated goal of signing these international investment agreements is largely to increase foreign investment levels, empirical analyses are mixed as to whether treaties achieve that objective. See Franck, *supra* note 6, at 48–51 (outlining the issue); Franck, *supra* note 4, at 348–53 (surveying the empirical literature, including studies by Hallward-Dreimer, Rose-Ackerman and Tobin, UNCTAD, Salacuse and Sullivan, Neumayer and Spess, and Swenson, on the topic of how investment treaties affect foreign investment).

29. Franck, *supra* note 6, at 52. While these treaties typically take the form of BITs, an emerging trend is the creation of larger, multilateral investment treaties (MITs) or a larger trade agreement. See, e.g., Gary G. Yerkey, *Bush's Plan to Create Mideast Free Trade Area by 2013 Could Take Off This Year*, BNA WTO REPORTER, Jan. 20, 2006, <http://pubs.bna.com/NWSSTND/IP/BNA/wto.nsf/SearchAllView/E06B2B933FB0617D852570FC00042923?Open&highlight=BUSH'S,PLAN,TO,CREATE> (discussing the possibility of Middle-East trade and investment treaties). MITs like the North American Free Trade Agreement and Central American Free Trade Agreement function in the same way as BITs, but provide investment protection on a multilateral basis. North American Free Trade Agreement, U.S.-Can.-Mex. ch. 11, Dec. 17, 1992, 107 Stat. 2057 [hereinafter NAFTA]; Dominican Republic-Central America-United States Free Trade Agreement ch. 10, Aug. 5, 2004, 119 Stat. 462, available at [http://www.ustr.gov/Trade\\_Agreements/Regional/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html) [hereinafter CAFTA-DR]; see also Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. FOREIGN INV. L.J. 287, 290–95 (1997). MITs also tend to address issues beyond investment protection and may address issues such as rules of origin, customs obligations, sanitary and phytosanitary measures, and cross-border trade in services. See NAFTA, *supra*, chs. 4, 5, 7, 15; CAFTA-DR, *supra*, chs. 4, 5, 7, 11.

30. There is a treaty between the United States and Ukraine. See Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., Mar. 4, 1994, S. TREATY DOC. NO. 103-37 (1994), available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_ukraine.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_ukraine.pdf).

By the end of 2005, there were at least 2495 investment treaties signed among at least 175 different countries.<sup>31</sup> The proliferation of these investment treaties was a paradigm shift for both substantive and procedural investor rights.

### 1. Substantive Rights

Rather than relying on the contested meaning of certain international law standards, investment treaties articulate specific substantive investment rights.<sup>32</sup> In essence, investment treaties provide foreign investors with an economic bill of rights from a host state.<sup>33</sup> Typically, these rights include guarantees of appropriate compensation for expropriation, promises of freedom from unreasonable or discriminatory measures, guarantees of national treatment for the investment, assurances of fair and equitable treatment, promises that investments will receive full protection and security, undertakings that a sovereign will honor its obligations, and assurances that foreign direct investment (FDI) will receive treatment no less favorable than that accorded under international law.<sup>34</sup> At a basic level, investment treaties promise that host governments will not treat investors and their investments unreasonably.<sup>35</sup>

### 2. Procedural Rights: Resolving Investment Treaty Disputes

Investment treaties are not simply revolutionary because of the substantive protections that they provide. The real innovation was the grant of procedural rights.<sup>36</sup> These rights offered investors direct access to dispute resolution to redress their grievances against host governments. Rather than creating un-

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31. UNCTAD, DISPUTES, *supra* note 9; UNCTAD, *Entry into Force*, *supra* note 4; *see also* UNCTAD, WORLD INVESTMENT REPORT 2004 at 221, U.N. Doc. UNCTAD/WIR/2004, U.N. Sales No. E.04.II.D.33 (2004), available at [http://www.unctad.org/en/docs/wir2004\\_en.pdf](http://www.unctad.org/en/docs/wir2004_en.pdf); *supra* note 4 and accompanying text (discussing the increase in the number of investment treaties).

32. *See, e.g.*, Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 641 (1998) (discussing the uncertainty and controversy surrounding standards for international expropriation, including the rise and fall of the Hull Rule).

33. Franck, *supra* note 6, at 48.

34. *See* RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 1–18 (1995); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 298, 299 (1997).

35. Franck, *supra* note 4, at 342.

36. *Id.*

enforceable substantive rights or forcing investors to rely on their home governments to resolve disputes on their behalf, treaties provide a forum to redress alleged wrongs.<sup>37</sup> Broadly speaking, in what amounts to a sophisticated choice-of-forum clause, investors have an opportunity to engage in nonbinding or binding dispute resolution.<sup>38</sup>

## II. CONFLICT THEORY AND DISPUTE SYSTEMS DESIGN

With imperfect human beings involved, conflict is inherent in foreign investment. Equipped with broad substantive rights and a forum to redress perceived wrongs, creative investors are testing the scope of their investment treaty rights.<sup>39</sup> It is therefore useful to explore the general context of conflict resolution theory in order to understand the specific implications for investment treaty conflict.<sup>40</sup>

### A. CONFLICT THEORY

In a classic formulation, conflict has been compared to water.<sup>41</sup> Both substances are neither inherently positive nor negative. Like water, conflict is necessary,<sup>42</sup> but an overabundance or shortage of this resource can inhibit its potential positive force.<sup>43</sup>

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37. See William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5–14 (2006) (describing the evolution from diplomatic protection to treaties of Friendship, Commerce, and Navigation to investment treaties); see also Franck, *supra* note 11, at 1525–29; *infra* Part III.C.1 (discussing historical methods of resolving investment disputes).

38. See *infra* section Part III.C.2 for a detailed discussion of the dispute resolution mechanisms typically available in investment treaties.

39. See *infra* notes 101–07 and accompanying text (discussing cases where foreign investors have brought claims against host governments).

40. See *infra* Part III.B for a more detailed discussion of the nature of investment treaty conflict.

41. William L. Ury, *Foreword*, in CATHY COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS*, at xiii, xiii (1996).

42. See LEWIS COSER, *FUNCTIONS OF SOCIAL CONFLICT* 15–31 (1956); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 8–10 (1973); MARY PARKER FOLLETT, *Constructive Conflict*, in *DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT* 30, 30–31 (Henry C. Metcalf & L. Urwick eds., 1940); DEAN PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 9–11 (3d ed. 2004).

43. See ALLAN J. STITT, *ALTERNATIVE DISPUTE RESOLUTION FOR ORGANIZATIONS* 3–4 (1998); John W. Burton, *Conflict Resolution as a Political Philos-*

This notion of conflict applies equally in the context of international investment.<sup>44</sup> Conflict between foreign investors and host governments occurs when interests diverge and where parties are dissatisfied with an interaction, process, or substantive result. Despite its traditional negative connotation, investment conflict can be positive.<sup>45</sup> Managed conflict creates opportunities for commercial, social, and political innovation.<sup>46</sup> It may, for example, attract attention to important issues that require redress. Conflict can also lead to new insights and innovations by creating incentives to explore new ideas and develop alternative solutions.<sup>47</sup> It may also provide opportunities for more meaningful dialogue and the development of stronger relationships and greater levels of investment.<sup>48</sup>

Imagine, for example, that a group of investment mavens<sup>49</sup> who have made a foreign investment in a new country, geo-

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ophy, in CONFLICT RESOLUTION THEORY AND PRACTICE 55, 55–56 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993); Dennis J.D. Sandole, *Paradigm, Theories, and Metaphors in Conflict and Conflict Resolution: Coherence or Confusion?*, in CONFLICT RESOLUTION THEORY AND PRACTICE, *supra*, at 3, 6–7; Morton Deutsch, *Introduction*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 1, 1–16 (Morton Deutsch & Peter T. Coleman eds., 2000); Ury, *supra* note 41, at xiii; Kevin E. Joyce, *Stop the Fight Without Throwing in the Towel*, LEGAL MGMT., Jan.–Feb. 2002, at 58, 58–60.

44. J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 1 (4th ed. 2005).

45. See John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of “Environmental Sustainability” in International Jurisprudence*, 42 STAN. J. INT’L L. 1, 20 (2006) (stating that, while “the existence of international conflict is invariably a sign that the existing order is not satisfactorily accommodating the interests of every one of the members of the international community . . . , conflict is necessary for the development of any society”) (citation omitted).

46. See DEUTSCH, *supra* note 42, at 8–10 (identifying personal and social benefits of conflict); FOLLETT, *supra* note 42, at 39–40 (identifying the benefits of conflict in commercial and political contexts).

47. See Raymond Shonholtz, *A General Theory on Disputes and Conflicts*, 2003 J. DISP. RESOL. 403, 412 (observing, in the context of international conflict, that it “is better to have a process that manages conflicts as disputes, as such mechanisms through experience and practice can correct, refine, and improve”).

48. See Joyce, *supra* note 43, at 60 (outlining positive aspects of conflict such as deterring complacency, promoting greater understanding of views and ideas, improving cohesiveness, enhancing innovation, increasing motivation, and boosting productivity).

49. Malcolm Gladwell describes information “mavens” as those who are intense gatherers of information and impressions, and so are often the first to pick up on new or nascent trends. MALCOLM GLADWELL, THE TIPPING POINT 59–60 (2002). Gladwell suggests that mavens may act most effectively in collaboration with “connectors,” namely charismatic people who have a wide net-

graphic region, or market have a conflict with a government regulator. If the conflict is addressed in a constructive manner, there are opportunities for the country to increase investor loyalty and develop a reputation for being a good place to invest, both of which may increase the likelihood of securing future investment.<sup>50</sup>

Unmanaged or improperly managed conflict, by contrast, can have critical consequences. For example, the Argentinean currency crisis of January 2002 led thirty-nine foreign investors to initiate claims under investment treaties for the economic harm they suffered from Argentina's devaluation of the peso.<sup>51</sup> As a result, one tribunal awarded \$133,200,000 in damages,<sup>52</sup> another awarded \$165,240,753,<sup>53</sup> and a third held that

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work of affiliations and who can transmit the advice or insight of a maven. *Id.* at 55.

50. This is not dissimilar to a phenomenon Gladwell described in *The Tipping Point* where, after Lexus first introduced its line of luxury cars in the United States, the company realized there was a problem that required a recall. *Id.* at 277–78. Rather than let this conflict fester, Lexus made a special effort to provide an exceptionally high level of customer service by calling each owner individually the day the recall was announced. *Id.* In one case, a technician even flew from Los Angeles to Anchorage to make the necessary repairs. *Id.* Acknowledging that only a small number of Lexus owners were actually affected by the repairs, Lexus realized that by treating a small number of influential consumers well, it could benefit from conflict. *Id.* As Gladwell explained, “Lexus realized that it had a captive audience of Mavens and that if they went the extra mile they could kick-start a word-of-mouth epidemic about the quality of their customer service—and that’s just what happened. The company emerged from what could have been a disaster with a reputation for customer service that continues to this day.” *Id.*

51. UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR, No. 4 2006, at 1, 3, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/2, [http://www.unctad.org/en/docs/webiteit20052\\_en.pdf](http://www.unctad.org/en/docs/webiteit20052_en.pdf) [hereinafter UNCTAD, *Latest Developments 2005*].

52. CMS Gas Transmission Co. v. Argentine Republic, 44 I.L.M. 1205, 1257 (ICSID May 12, 2005), available at [http://ita.law.uvic.ca/documents/CMS\\_FinalAward.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf) (holding that Argentina did not expropriate the investment or engage in arbitrary and discriminatory measures, but determining that Argentina failed to provide fair and equitable treatment and failed to “observe any obligation it may have entered into”). An ad hoc committee recently upheld all aspects of the award with the exception of the tribunal’s decision on the observation of obligations (i.e., the so-called umbrella clause). CMS Gas Transmission Co. v. Argentine Republic, No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 163 (ICSID Sept. 25, 2007), available at [http://www.worldbank.org/icsid/cases/pdf/arb0108\\_Annulment\\_Decision.pdf](http://www.worldbank.org/icsid/cases/pdf/arb0108_Annulment_Decision.pdf).

53. See *Azurix Corp. v. Argentine Republic*, No. ARB/01/12, Award, ¶ 442 (ICSID July 14, 2006), available at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf> (holding that Argentina did not expropriate the in-

Argentina breached some (but not all) treaty obligations but has not yet decided the quantum of damages.<sup>54</sup>

Beyond the financial costs of an adverse award, unmanaged conflict has other potential negative implications. There may be challenges for a country's international political credibility. For example, should a country fail to honor its investment treaty obligations,<sup>55</sup> other governments might rightly react with skepticism about that country's willingness to comply with other international economic treaty obligations related to tax or trade.<sup>56</sup> Such a failure to adhere to agreed rules of law might have an economic impact. This might include an increased skepticism that the country is a desirable foreign investment opportunity, making international lenders unwilling to provide funds.<sup>57</sup> These problems could lead to a failure to invest or a decision to invest only if there is an appropriately high

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vestment but had (1) failed to provide fair and equitable treatment, (2) failed to accord full protection and security, and (3) engaged in arbitrary measures).

54. See *LG&E Energy Corp. v. Argentine Republic*, No. ARB/02/1, Decision on Liability, ¶ 267 (ICSID Oct. 3, 2006), available at <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf> (holding that Argentina did not expropriate the foreign investment or treat it arbitrarily but that, except for during a period of necessity, it "breached the standard of fair and equitable treatment, no less favorable treatment than that to be accorded under international law, and adopted discriminatory measures"). It is possible that this award may provide the parties with a basis for a negotiated settlement.

55. There have been some public suggestions by Argentinean political officials that they may choose not to adhere to their legal obligations to enforce adverse arbitration awards. See Osvaldo J. Marzoti, *Enforcement of Treaty Awards and National Constitutions*, 7 *BUS. L. INT'L* 226, 226 (2006); Guido Santiago Tawil, *Arbitration in Latin America: Current Trends and Recent Developments*, <http://web.archive.org/web/20070712134142/http://www.bomchilgroup.org/argmar04.html> (last visited Oct. 17, 2007) ("Argentine top officials have publicly argued the incompatibility of ICSID arbitration with the Argentine Constitution, qualified ICSID arbitration as an immature regime, [and] announced their will to return to the Calvo doctrine abandoned during the [1990s]."). These public comments, particularly if Argentine officials follow through, may have adverse political and economic consequences.

56. In the trade context, this might include obligations under regional trade agreements or the World Trade Organization. In the tax context, it might affect dispute resolution obligations under international tax treaties related to double taxation. See, e.g., Jean-Pierre le Gall, *Foreword to WILLIAM W. PARK & DAVID R. TILLINGHAST, INCOME TAX TREATY ARBITRATION* 5, 5 (2004).

57. See, e.g., Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 *U. PA. J. INT'L ECON. L.* 449, 480–82 (2007) (suggesting that Argentina's difficulties with its arbitration awards may be connected with its treatment of holders of its sovereign debt).

rate of return, which may pass the risk and cost onto citizens.<sup>58</sup> It might also create credibility problems that lead to a decrease in the bond rating associated with government debt instruments—such as Eurobonds—which may prevent governments from raising money for public projects.<sup>59</sup> Beyond this, there may be social costs, such as the unrest during the “Cochabamba Water Wars,”<sup>60</sup> or other consequences that adversely affect development objectives.<sup>61</sup>

## B. DISPUTE SYSTEMS DESIGN

A properly designed dispute resolution system can draw conflict to the surface and channel its productive forces. Dispute Systems Design (DSD) is the systematic process of creating a dispute resolution system that harnesses the positive aspects of conflict or at least minimizes the negative aspects.<sup>62</sup>

DSD originated in the Alternative Dispute Resolution movement and draws on principles of quality control and organizational development.<sup>63</sup> DSD is not a dispute resolution me-

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58. See WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 48 (observing that uncertainty can impact investment decisions and may result in demanding higher rates of return for the extra risk).

59. See, e.g., *id.* at 36–37, 45–53 (discussing difficulties caused by government credibility).

60. OSCAR OLIVERA WITH TOM LEWIS, ¡COCHABAMBA! WATER WAR IN BOLIVIA 33–47 (2004). The social protests related to the privatization of the water sector may be an unrepresentative example of the possibility of social unrest given the imposition of martial law and the nature of the protests. It is nevertheless an interesting case history on the implications of international investment disputes.

61. Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV. FOREIGN INV. L.J. 19, 55 (1987) (“Rejection of duly rendered awards harms the atmosphere of mutual confidence necessary to the process of development . . . if a State enterprise of a developing country repudiates its obligation to respect a duly rendered arbitration award, it not only poisons its relationship with the individual foreign company seeking to rely on the award, but also risks damage to its relations with the ensemble of investors and lenders whose participation is indispensable to the country’s development strategy.”).

62. See STITT, *supra* note 43, at 9–11; see also CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 739–47 (2005) [hereinafter MENKEL-MEADOW ET AL., ADR]; CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY AND ETHICS 417, 437–40 (2006) [hereinafter MENKEL-MEADOW ET AL., MEDIATION].

63. STITT, *supra* note 43, at xv–xvi; see also Brack Brown, *Public Organizations and Policies in Conflict: Notes on Theory and Practice*, in CONFLICT RESOLUTION THEORY AND PRACTICE, *supra* note 43, at 158, 168–69; Michael L. Moffitt & Robert C. Bordone, *Perspectives on Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 14, at 1, 23 (observing that

thodology itself. Rather it is the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system.<sup>64</sup>

The objective of DSD is to design better dispute resolution systems. It does so by (1) analyzing parties' patterns of disputing to diagnose the current system, (2) designing methods to manage conflict more effectively with practical principles, (3) approving and implementing the design architecture, and (4) testing and evaluating the new design to make appropriate revisions prior to disseminating the process to the rest of the system.<sup>65</sup> As sagely explained by one commentator, this description

oversimplifies a complex, challenging process that will almost never satisfy all the stakeholders. A DSD process does, however, offer the potential for organizations, courts, and communities to manage their conflict management system wisely and address concerns such as whether their system needs more of the values that court trials provide.<sup>66</sup>

Both private and public organizations have used DSD techniques to create conflict management systems that settle disputes through a range of processes.<sup>67</sup> Corporations have em-

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DSD has been developed to help parties "craft a menu or tiered system of dispute processes tailored for particular organizations or dispute types, especially in settings of repetitive disputes or complex legal disputes").

64. See *supra* note 15 and accompanying text (defining DSD as a process of analyzing existing patterns of disputing, creating new processes, and implementing and evaluating the new system to improve its efficacy).

65. See WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 41–64 (1988); James P. Grotton, *The Progressive or "Stepped" Approach to ADR: Designing Systems to Prevent, Control, and Resolve Disputes*, in CONSTRUCTION DISPUTE RESOLUTION FORMBOOK 1, 6 (Robert F. Cushman et al. eds., 1997) ("The design of a dispute resolution system is not directed at settling a particular dispute, but rather at changing the overall pattern of dispute resolution and ultimately changing for the better the attitudes and relationships of the parties."); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 112–17 (2002); Peter Robinson et al., *DyADS: Encouraging "Dynamic Adaptive Dispute Systems" in the Organized Workplace*, 10 HARV. NEGOT. L. REV. 339, 344 (2005) (explaining that DSD goes "beyond specific disputes or dispute resolution mechanisms and instead tak[es] a broader look at the full range of conflict within an organization in order to determine how best to prevent or address the types of conflicts the organization experiences over time").

66. John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 209 (2005).

67. *Id.*

braced DSD to avoid the expense and destructiveness of individual dispute litigation, and because they realize the value of improved communication and conflict management in development of high-performance organizations.<sup>68</sup>

Outside the investment context, the use of DSD has transformed distressed systems into healthy ones with fewer transaction costs.<sup>69</sup> Improvements include (1) less lost time and money to resolve a conflict, (2) fewer missed commercial opportunities, and (3) fewer outbreaks of violence and decreased resort to power struggles.<sup>70</sup> Meanwhile, DSD can enhance communication and increase party satisfaction with the process and result.<sup>71</sup>

In William L. Ury's classic and effective use of DSD at the Caney Creek coal mine, the typical "dispute resolution" process initially involved employees filing hundreds of grievances each year.<sup>72</sup> Cases were not settled by negotiation. Instead, they went to arbitrations that took years to complete. Meanwhile party frustration with ongoing problems regularly boiled over into "wildcat" strikes. After a dispute resolution team established the trust of employers and employees, it analyzed the disputing system and devised a new set of approaches to facilitate low-cost and rapid resolution of most disputes. Disputes did not disappear, but the parties were better satisfied with the fairness with which disputes were addressed.<sup>73</sup> Another useful by-product was that the rate of strikes dropped considerably.<sup>74</sup>

Given its success, DSD has grown beyond its original use in United States domestic legal institutions related to employment, family law, and consumer protection.<sup>75</sup> Multinational

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68. Robinson et al., *supra* note 65, at 344.

69. See URY ET AL., *supra* note 65, at 170–71.

70. See COSTANTINO & MERCHANT, *supra* note 41, at 172–75, 191–98; URY ET AL., *supra* note 65, at 169–72.

71. See COSTANTINO & MERCHANT, *supra* note 41, at 172–75, 191–98; URY ET AL., *supra* note 65, at 169–72.

72. See URY ET AL., *supra* note 65, at 104–08.

73. See *id.* at 101, 108–15, 130–31.

74. *Id.* at 130–32.

75. See LISA B. BINGHAM, IBM CTR. FOR THE BUS. OF GOV'T, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE 4* (2003); Robinson et al., *supra* note 65, at 342–46 (discussing the application of DSD and related techniques to the workplace). *But see* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases Is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 *HAMLIN L. REV.* 261, 286 (1998) (cautioning that the planning of

commercial entities and government institutions increasingly resort to DSD to establish a tailor-made web of dispute settlement methods to meet individualized needs.<sup>76</sup> International commentators continue to recommend the use of DSD to manage disputes in other jurisdictions.<sup>77</sup>

### C. AN APPLICATION TO INVESTMENT TREATY CONFLICT?

Despite the effectiveness of DSD, there has been little literature considering its utility in approaching investment treaty disputes. An emerging body of literature discusses the use of nonbinding dispute resolution mechanisms, such as mediation and conciliation, on investment treaty claims.<sup>78</sup> Nevertheless,

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resolving employment disputes “should be approached with careful thought and planning”).

76. See Nancy J. Manring, *Dispute Systems Design and the U.S. Forest Service*, 9 NEGOTIATION J. 13, 20 (1993) (describing how the United States Forest Service institutionalized its dispute resolution procedures and outlining challenges for implementing a comprehensive DSD system); Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 139–42, 157–58 (2003) (providing a background on DSD and suggesting a framework for conflict management in post-Taliban Afghanistan); Nancy A. Welsh, *Institutionalization and Professionalization*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 14, at 487, 489 (discussing how Motorola, General Mills, Shell, and Coca-Cola adopted company-wide programs to understand and manage disputes).

77. Kenneth Cloke, *Conflict Resolution Systems Design, the United Nations and the New World Order*, 8 MEDIATION Q. 343, 343–44 (1991) (applying DSD principles to the United Nations); Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, 2005 J. DISP. RESOL. 399, 413 (recommending that Venezuela implement DSD techniques “so that effective policies can be applied to satisfy the needs of the potential users”).

78. Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 7–31 (2005); Barton Legum, *The Difficulties of Conciliation on Investment Treaty Cases: A Comment on Professor Jack C. [sic] Coe’s “Towards a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch,”* MEALEY’S INT’L ARB. REP., Apr. 2006, at 23; Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad & Tobago*, 1 ICSID REV. FOREIGN INV. L.J. 340, 340–50 (1986); Ucheora Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, NEWS FROM ICSID (Int’l Ctr. for Settlement of Inv. Dispute), 2005, at 12, available at [http://www.worldbank.org/icsid/news/news\\_22-2.pdf](http://www.worldbank.org/icsid/news/news_22-2.pdf); Noah Rubins, *Comments to Jack C. [sic] Coe Jr.’s Article on Conciliation*, MEALEY’S INT’L ARB. REP., Apr. 2006, at 21; Thomas Wälde, *Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective*, 1 TRANSNAT’L DISP. MGMT. 2, 2–13 (2004), available at <http://www.dundee.ac.uk/cepmlp/journal/html/Vol13/article13-8.pdf>.

this work is being done on an ad hoc basis and does not consider dispute resolution systematically.

Systematic consideration is critical.<sup>79</sup> Various commentators suggest the dispute resolution system is in crisis<sup>80</sup> and its utility is subject to debate.<sup>81</sup> Meanwhile, the United Nations Commission on Trade and Development (UNCTAD) suggests these challenges “could be addressed by improving the dispute settlement procedures”<sup>82</sup> and the International Centre for the Settlement of Investment Disputes (ICSID) has made certain procedural changes with the intent of improving the process of resolving disputes by arbitration.<sup>83</sup> This puts the evolution of investment treaty disputes at a unique historical junction: we are simultaneously presented with concerns about the system’s efficacy and the opportunity to improve its future development.

Now may be the right time for DSD to borrow a page from Caney Creek’s success and secure the benefits for investment treaty conflict. DSD could create processes that manage treaty conflict in a timely, cost-efficient manner. It might also foster systems that respond to stakeholder needs while avoiding phys-

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79. As Andrea Schneider observes, particularly for international dispute resolution, it is vital to understand how dispute resolution processes started, developed, and currently operate to determine how to make the system work best. Schneider, *supra* note 14, at 451.

80. See Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 *GEO. INT’L ENVTL. L. REV.* 51, 88 (2004) (explaining that NAFTA’s dispute resolution system creates a “legal bifurcation” that leads to the application of different laws to domestic corporations and foreign investors); Brower, *supra* note 11, at 74; Franck, *supra* note 11, at 1583; *supra* note 11 and accompanying text.

81. See generally COHERENCE AND CONSISTENCY IN INTERNATIONAL INVESTMENT LAW (Karl P. Sauvant ed.) (forthcoming 2007); see also WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 179–80 (discussing the various debates about the efficacy of investor-state dispute settlement, including problems related to putting too much discipline on governments, encroaching on regulatory prerogatives, and insufficient transparency).

82. UNCTAD, DISPUTES, *supra* note 9, at 53–54.

83. ICSID, ICSID ADDITIONAL FACILITY RULES 7–43 (2006), available at [http://www.worldbank.org/icsid/facility/AFR\\_English-final.pdf](http://www.worldbank.org/icsid/facility/AFR_English-final.pdf) [hereinafter ICSID ADDITIONAL FACILITY RULES]; ICSID, ICSID CONVENTION RULES AND REGULATIONS 51–99 (2006), available at <http://worldbank.org/icsid/basicdoc/basicdoc.htm> [hereinafter ICSID CONVENTION RULES]; ICSID, Possible Improvements of the Framework for ICSID Arbitration 1–14 (Oct. 22, 2004) (unpublished discussion paper, available at <http://www.worldbank.org/icsid/highlights/improve-arb.pdf>); ICSID, Suggested Changes to the ICSID Rules and Regulations 3–5 (May 12, 2005) (working paper, available at <http://worldbank.org/icsid/highlights/052405-sgmanual.pdf>).

ical violence<sup>84</sup> and protest.<sup>85</sup> DSD could also promote creative problem solving to resolve disputes according to the parties' interests and provide relief that a judge or arbitrator would be unable to offer.<sup>86</sup>

### III. A THEORETICAL APPROACH TO INVESTMENT TREATY CONFLICT AND DISPUTE SYSTEMS DESIGN

Investment treaties and DSD share at least one core concern: both are interested in the effective management of conflict.<sup>87</sup> Governments presumably sign investment treaties to promote investment by providing investors with substantive legal rights.<sup>88</sup> Having reasonably anticipated that conflict might result from the grant of those rights,<sup>89</sup> governments created a process to manage the conflict.<sup>90</sup> DSD offers an approach to

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84. In *Lemire v. Ukraine*, 15 ICSID REV. FOREIGN INV. L.J. 530, 530–41 (2000), available at <http://ita.law.uvic.ca/documents/Lemire-Award.pdf>, for example, there were allegations about physical violence that occurred in connection with a government's treatment of foreign investment. See *infra* notes 107 and 209 (discussing the *Lemire* case).

85. See *supra* note 60 (discussing the Cochabamba Water Wars).

86. See *infra* notes 208–09 (discussing the creative settlement in *Lemire v. Ukraine*).

87. It is possible that governments intend investment treaties to promote other objectives, such as the facilitation of development, the elimination of poverty, or the development of the rule of law. It is even possible that such interests may, at some point, be in conflict. For the purposes of exploring the synergies with DSD, however, this Article focuses on the presumably mutual, and fundamental, objective of needing to manage conflict effectively.

88. There has been little empirical analysis considering the motivation and intention of governments in signing investment treaties. Future analysis might usefully consider the governmental intention as regards the signing of investment treaties by exploring the text of investment treaties, *travaux préparatoires*, signing statements, governmental press releases, or legislative debates regarding treaty implementation. Such an analysis of government intention may provide useful interpretive insights for treaty rights as well as information about whether the governments received the intended benefits.

89. As of February 28, 1977, the United States Department of State estimated that there were at least 102 investment disputes between United States nationals and foreign governments. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 659 n.32 (1990). Between 1960 and 1974, the United Nations identified 875 distinct governmental takings of foreign property in sixty-two countries. *Id.* It is unclear, however, whether investors' home governments ever pursued these claims. *Id.*

90. Governments need not provide a process to resolve investment disputes. See Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 190 (2007) (analyzing a sample of treaties and determining that only half contained dispute resolution provisions).

conflict management focused on effectively and fairly managing individual cases on a systematic basis. Given the unique but related nature of these two areas, the fundamental question is: How, if at all, might these distinct areas of law usefully inform each other?

Effective use of DSD to manage investment treaty conflict is likely to reduce the transaction costs of dispute resolution.<sup>91</sup> This could decrease investment risks, lower the cost of investing, and produce economic incentives that make host governments more attractive investment opportunities.<sup>92</sup> As the World Bank explains, effective dispute resolution under investment treaties benefits investors and governments:

Governments benefit from a commitment device that can address concerns from investors, and thus help them attract more investment at lower cost, and also reduces the risk of any later dispute becoming politicized. Firms benefit from reduced risk and a more reliable mechanism for protecting their rights if the relationship with the host government deteriorates.<sup>93</sup>

Without effective dispute resolution, the goal of using investment treaties to promote investment is undermined.<sup>94</sup> Investors need security, transparency, predictability, reliability, and certainty in the planning of their investments and the resolution of related disputes.<sup>95</sup> Poorly planned and poorly managed dispute resolution increases the cost of resolving disputes, amplifies investment risk, and generates investment disincentives. On a larger scale, the poor management of investment treaty conflict could undermine the success of the investment

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91. The World Bank observes that uncertainty can impact investment decisions in various ways, such as demanding higher rates of return for the extra risk involved, which results in less investment at higher prices. It may also mean that investors may simply refuse to invest at all. WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 48.

92. See *supra* note 27 and accompanying text (discussing India and China's efforts to spur investment by creating more effective dispute resolution systems).

93. WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 179.

94. See Koremenos, *supra* note 90, at 209 (suggesting that the "decision to include certain activities (like dispute resolution) within the governance structure of an international agreement is the result of a cost-benefit analysis" that is presumably provided to further the objectives of the treaty).

95. Governments similarly need certainty, predictability, and reliability in order to govern effectively, efficiently, and fairly. See WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 36–37 (observing that "[g]overnments need to provide clear rules of the game" and noting that "[p]ublic trust and confidence in markets and firms affect not only the feasibility of reforms, but . . . the response of firms").

treaty regime. If DSD can improve the dispute resolution system and promote efficient conflict management, it is worthy of consideration.

Section A considers possible application of DSD methodology to investment treaty conflict, recognizing that we are not yet in a position to apply DSD principles fully.<sup>96</sup> Section B discusses the nature of investment treaty conflict and how DSD can inform its analysis. Section C considers the historical and current methods for resolving investment treaty conflict, and Section D deconstructs those methods and considers the costs and benefits of the current approach to resolving investment conflict. Future scholarship will hopefully use this roadmap to apply DSD principles in greater detail.

#### A. DSD: SOME POSSIBILITIES FOR INVESTMENT TREATIES

An initial aspect of the DSD process analyzes (1) what types of conflict exist, (2) what systems are in place to address that conflict, and (3) what about the system is effective and what is inefficient.<sup>97</sup> Once this phase is complete, designers can determine how best to structure, alter, or augment the existing system according to mutually acceptable principles.<sup>98</sup> Thereafter, the design can be implemented, tested, evaluated, and improved as necessary.<sup>99</sup>

Using this approach, one might imagine that Argentina, for example, could take stock of its investment treaty arbitration experiences, particularly given the number of cases related to its currency crisis.<sup>100</sup> Such a diagnosis might involve inviting

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96. Given the current state of the literature and the lack of general or specific empirical assessments, as well as the lack of shared principles upon which a dispute resolution system should be based, it would also be challenging to do this on a microlevel (i.e., looking at a specific treaty). Narrowing the field of analysis to particular countries could provide significant benefits and provide even more tailor-made dispute resolution procedures.

97. See COSTANTINO & MERCHANT, *supra* note 41, at 96–116; THE CONSENSUS BUILDING HANDBOOK 99–136, 169–97 (Lawrence Susskind et al. eds., 1999) (detailing the initial steps of DSD); URY ET AL., *supra* note 65, at 20–40 (evaluating existing dispute resolution systems); Lande, *supra* note 65, at 115 (describing the initial steps of how DSD might be used in the context of court-connected mediation); Shariff, *supra* note 76, at 139–40 (discussing the need for DSD to be deliberate and purposeful in order to create a system that achieves desired objectives).

98. See COSTANTINO & MERCHANT, *supra* note 41, at 117–33; URY ET AL., *supra* note 65, at 101–33.

99. See *supra* notes 65–66 (describing phases of the DSD process).

100. See ICSID, List of Pending Cases, <http://www.worldbank.org/icsid/>

experts to assess what conduct created potential liability, those sectors affected, and the types of disputes that actually arose. Experts might then assess the adequacy of the current arbitration process and the scope of possible improvements given the principles Argentina wishes to promote in its dispute resolution procedures.

Hypothetically, to save taxpayer and governmental resources and create solutions in the best interests of all parties, Argentina might prefer to mediate and engage in creative problem solving. In the absence of a settlement, however, Argentina might wish to resolve its disputes under different treaties in one place, such as a court or mixed claims commission, that may be open to the public. Such an arrangement would provide cost-efficient dispute resolution in a single, public forum for the resolution of disputes related to a single government measure. If, however, Argentina determined that there was a benefit in the flexibility of ad hoc but potentially inconsistent decisions of arbitration tribunals, it might retain the current mechanism.

Having designed a process based upon the assessment and foundational principles, Argentina might then draft a model investment treaty and use it as a basis for future treaty negotiations. Argentina might have an opportunity to assess the utility of the new procedures and determine whether further changes to the design were warranted. The remainder of this Part explores this potential approach in a generalized way by considering historical and current approaches to investment treaty conflict.

## B. THE NATURE OF INVESTMENT TREATY CONFLICT

### 1. Investment Treaty Conflict

Investment treaty conflict typically arises when government conduct has a direct or indirect adverse effect upon a foreign investment. Historically, this involved activities associated with a traditional international law violation, such as the nationalization of a business without fair compensation.<sup>101</sup> These days, investment treaty conflict can arise from more subtle government conduct, such as (1) the revocation of a banking li-

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cases/pending.htm (last visited Oct. 17, 2007) [hereinafter ICSID Pending Cases] (listing cases involving Argentina's currency crisis).

101. See, e.g., *Elettronica Sicula, S.p.A (ELSI) (U.S. v. Italy)* 1989 I.C.J. 4, 15, 32 (July 20) (addressing an alleged treaty violation involving the public taking of private business assets).

cense,<sup>102</sup> (2) a change in the interpretation of tax law that decreases an anticipated refund,<sup>103</sup> (3) the implementation of an environmental regulation that has a disparate but adverse financial impact upon foreign investors,<sup>104</sup> (4) a failure to advise an investor about the licenses needed to operate an investment,<sup>105</sup> or (5) an alleged breach of a commercial contract to which the government was a party.<sup>106</sup>

As a concrete example of how conflict can arise, imagine a United States investor buys a privatized group of Ukrainian radio stations, develops broadcasting capacity, and becomes the market leader of innovative radio programming. Then imagine that some government conduct prevents the investor from utilizing the broadcast frequencies, and the government fails to renew the investor's broadcasting license. The United States investor, who once had a profitable business, wants to redress the perceived wrong. In some sense, this resembles *Lemire v. Ukraine*, where after failing to resolve the dispute amicably, a United States media entrepreneur, Joseph Lemire, initiated arbitration against Ukraine under the United States/Ukraine bilateral investment treaty.<sup>107</sup>

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102. See, e.g., *Genin v. Estonia*, 17 ICSID REV. FOREIGN INV. L.J. 395, 471 (2002), available at <http://ita.law.uvic.ca/documents/Genin-Award.pdf>.

103. See, e.g., *Occidental Exploration & Prod. Co. v. Ecuador*, No. UN3467, 2004 WL 3267260, at ¶ 29 (London Ct. Int'l Arb. July 1, 2004).

104. See, e.g., *Methanex Corp. v. United States*, 44 I.L.M. 1345, 1345 (UNCITRAL 2005), available at <http://www.state.gov/documents/organizations/51052.pdf>.

105. See, e.g., *Metalclad Corp. v. Mexico*, 40 I.L.M. 36, 41–42 (ICSID 2001), available at <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf>.

106. See, e.g., *SGS Société Générale de Surveillance S.A. v. Philippines*, No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 1 (ICSID Jan. 29, 2004), available at [http://ita.law.uvic.ca/documents/SGSvPhil-final\\_001.pdf](http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf); *LG&E Energy Corp. v. Argentina*, 21 ICSID REV. FOREIGN INV. L.J. 203, 244–46 (2006), available at <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf> (finding a failure to adhere to obligations where there was an “abrogation of the guarantees under the statutory framework”). These are referred to as “umbrella clause” claims. DOLZER & STEVENS, *supra* note 34, at 81–82.

107. See *Lemire v. Ukraine*, 15 ICSID REV. FOREIGN INV. L.J. 530, 530–41 (2000), available at <http://ita.law.uvic.ca/documents/Lemire-Award.pdf>. Although the details are unknown given the proceedings' confidential nature, there is some public information. See Marek Hessel & Ken Murphy, *Stealing the State, and Everything Else: A Survey of Corruption in the Postcommunist World* (working paper, available at <http://www.toni-schonfelder.com/print.asp?idte=243>) (last visited Oct. 17, 2007) (explaining that when Gala Radio—Mr. Lemire's station—“lawfully reported its income, announcing a profit on which it paid taxes, all hell broke loose. Gala was banned from the airwaves,

## 2. Using DSD: Systematic Analysis of Investment Treaty Conflict

The previous section offers specific examples of investment conflict that have resulted in a final arbitration award. It does not, however, look at investment treaty conflict systematically to describe the universe of investment conflict. DSD adds this vital element and looks beyond the tip of the iceberg to provide a more complete picture of investment treaty conflict. DSD would recommend a system-wide diagnostic to seek out information about the characteristics of investment conflict.<sup>108</sup> This, in turn, would permit stakeholders to create more efficient and properly tailored dispute resolution systems.

At present, there has not been a systematic conflict assessment<sup>109</sup>—let alone general empirical research—to analyze investment treaty conflict. There has been some scrutiny of NAFTA-based investment claims submitted to arbitration, but there is little attention given to investment treaties more broadly.<sup>110</sup>

UNCTAD has done groundbreaking work that analyzes the increasing number of arbitration claims brought.<sup>111</sup> At the end

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equipment was stolen, another station with the same name and logo appeared on the same radio frequency, with a license issued by the National Council on Radio and Television Broadcasting”); see also *Foreign Operations, Export Financing, and Related Programs Appropriations for 1999: Hearing Before the Subcomm. on Foreign Operations, Export Financing, and Related Programs of the H. Comm. on Appropriations*, 105th Cong. 385–402 (1998) (testimony of Joseph Lemire, President, Gala Radio & TV Co. and Olympic Champions, Ltd.) [hereinafter *Foreign Operations*].

108. DSD might be able to examine, for example, what types of conflict do not escalate. For example, it might be able to analyze those cases where disputes are negotiated, settled, or abandoned prior to the crystallization of the dispute or the filing of a request for arbitration.

109. See Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 97, at 99–135 (describing various approaches to conducting conflict assessments).

110. See, e.g., Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 *YALE J. INT’L L.* 365, 401–07 (2003) (outlining a “score card” of investment treaty cases arising under NAFTA); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 *VAND. J. TRANS-NAT’L L.* 1381, 1455–60 (2003) (providing data about NAFTA-based claims). But see Franck, *supra* note 13.

111. See UNCTAD, *Latest Developments 2005*, *supra* note 51 (identifying the number of investment treaty arbitrations, breaking the numbers down by institution, and discussing which sectors the disputes arise in); UNCTAD, *Recent Developments*, *supra* note 9, at 13–15 (discussing recent trends in invest-

of 2005, UNCTAD identified at least 229 known arbitration cases, two-thirds of which were filed within the last five years.<sup>112</sup> In the first eleven months of 2006, at least another twenty-five claims were filed.<sup>113</sup> The financial impact of these cases is not insignificant. While sometimes governments lose and sometimes they win,<sup>114</sup> the amounts in dispute can involve hundreds of millions of dollars<sup>115</sup> and tribunals can make large awards against a government, such as the \$270 million award in *CME v. Czech Republic*.<sup>116</sup> Despite its value, UNCTAD's work is limited. It only considers disputes submitted to arbitra-

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ment treaty disputes). See generally UNCTAD, DISPUTES, *supra* note 9 (reviewing recent disputes arising from investment treaties).

112. Press Release, UNCTAD, UNCTAD Reviews Investor-State Dispute Settlement Cases and Draws Implications for Developing Countries (Feb. 5, 2006), <http://www.unctad.org/Templates/webflyer.asp?docid=6967&intItemID=1528&lang=1> (observing that the "cumulative number of known treaty-based cases [was] at least 229 through the end of the 2005 ([although] the number stood at 219 at the time of printing of [UNCTAD's] report)"); UNCTAD, DISPUTES, *supra* note 9, at 4–5 (referring to the 219 disputes filed as of November 2005). One of the difficulties with this work, however, is the lack of transparency about UNCTAD's research methodology, which creates uncertainties. This makes it difficult to replicate the results or assess the study's validity and reliability.

113. *Latest Developments 2005*, *supra* note 51, at 2. Although the methodology was not explained, the publication did indicate that the draft was prepared by Federico Ortino who works with the Investment Treaty Forum affiliated with the British Institute of International and Comparative Law. See *id.*; see also UNCTAD Study Provides New Data on Incidence of Investment Treaty Arbitration, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Manitoba, Can.), Jan. 12, 2006, [http://www.iisd.org/pdf/2006/itn\\_jan12\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf) (suggesting that Luke Eric Peterson authored similar research and briefly describing his methodology).

114. See Franck, *supra* note 13 (observing that, in the context of final arbitration awards that were publicly available prior to June 1, 2006, governments won approximately 57.7% of the time, investors won 38.5% of the time, and the remaining cases were resolved through settlement agreements).

115. Charles H. Brower, II, *Council Comment: Reform Priorities at International Trade & Investment Institutions*, 21 AM. SOC'Y INT'L L. NEWSLETTER (Am. Soc'y Int'l L., Wash., D.C.), Aug.–Oct. 2005, at 6 (indicating that "ICSID's docket comprises some 90 cases involving \$25 billion, as opposed to five cases involving \$15 million ten years ago"); see also Franck, *supra* note 13 (suggesting that the average amount claimed from publicly available awards was in the order of \$343 million).

116. See UNCTAD, DISPUTES, *supra* note 9, at 9–12 (outlining the potential financial impacts of investment treaty arbitration awards and noting the \$270 million award against the Czech Republic in one case); cf. Franck, *supra* note 13 (suggesting that the average amount received is on the order of \$10 million for all final awards and on the order of \$25 million for final awards where investors recover, which indicates that the \$270 million award of *CME v. Czech Republic* appears to be a statistical outlier).

tion; it does not address investment treaty conflict subject to other types of dispute resolution.<sup>117</sup>

A DSD diagnostic could gather basic information about whether the conflict involves factual, technical, legal, interpersonal, communication, or political issues. Such a diagnostic might also usefully evaluate which investment sectors tend to experience high levels of conflict, the types of harm investors experience, the government conduct most likely to lead to allegations of harm, any explanations given for government conduct, the ways governments find out about disputes, the ways nonparties influence the conflict, which treaties are most frequently invoked in arbitrations, which treaty signatories and investors are involved in investment disputes, and the variables that affect the escalation or resolution of the conflict.<sup>118</sup> In this manner, parties can identify the types of conflict that may arise in the future<sup>119</sup> and create challenges. They can also identify processes to promote effective conflict resolution.<sup>120</sup>

Such an analysis may be useful, in part, because investment treaties were originally promulgated to deal with cases of

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117. Franck, *supra* note 13.

118. One preliminary study analyzing publicly available arbitration awards has begun this process. *See generally* Franck, *supra* note 13. It considers what sectors experience conflict, which investors are invoking the treaties, which countries are subjected to claims, and which treaties are arbitrated. *Id.* The work, however, does not consider all of the issues recommended in this article and is also not a comprehensive assessment of investment treaty conflict. *Id.* It may, however, provide a useful starting point for future empirical assessment. *Id.*

119. It may even be useful to gather this data in order to create various diagnostic tools that predict the types of disputes likely to arise in the future. The construction industry has conducted analysis of construction disputes and the characteristics of construction projects. Groton, *supra* note 65, at 9. This analysis led to the development of the Disputes Potential Index, or DPI, that “identifies the presence of dispute-prone characteristics on a project, evaluates them, and reports the results to project team members so they can take action to correct them before they actually generate problems.” *Id.* Taking a page from the construction industry—whether on a country-by-country or industry-by-industry basis—may yield useful information about investment-related conflict and the most useful methods to manage it.

120. Under the Pareto Principle, for example, eighty percent of a problem can be attributed to twenty percent of the causes. Focusing on the most serious issues may be useful at the outset, but the remaining eighty percent of the causes should not be ignored. *See* Joseph M. Juran, *The Quality Control Process*, in *JURAN'S QUALITY HANDBOOK* 5.1, 5.20–5.24 (Joseph M. Juran & A. Blanton Godfrey eds., 5th ed. 1999) (applying the Pareto principles to issues of quality control).

expropriation.<sup>121</sup> With the grant of new rights—such as the right to “fair and equitable treatment” and the so-called umbrella clause—the nature of problematic government conduct, investor claims, and parties’ needs are likely shifting.<sup>122</sup> It would be useful to identify and understand the areas of most significant risk. This would ensure that conflict is managed through the process most likely to result in an appropriate resolution. In other words, the forum should fit the fuss.<sup>123</sup>

### C. THE SYSTEMS TO ADDRESS INVESTMENT CONFLICT

After a diagnostic of investment treaty conflict, DSD requires consideration of the methods to resolve disputes. This section considers the historical and current methods for resolving investment treaty disputes.

#### 1. Historical Antecedents: The Previous Methods of Resolving Investment Treaty Conflict

In the past, foreign investors had limited options for redressing international law violations. When government conduct adversely affected an investment, investors were relegated to a series of somewhat unappealing dispute resolution options. This typically left investors (1) to the political mercies of their own government, the host government, or both when deciding whether a claim should be brought to address the investor’s complaints, (2) litigating in the host government’s national courts where defenses of sovereign immunity were often readily available, or (3) absorbing the cost of adverse government action by either doing nothing or making a claim under their po-

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121. Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 168–69 (2005).

122. The different nature of the rights may call for the availability of different dispute resolution mechanisms. In expropriation cases, the loss is usually close to one hundred percent, damages can be quite large, and it may be difficult to negotiate a settlement. In contrast, a claim for fair and equitable treatment may be subject to a different set of damages. Because damages may be lower, there is likely to be a broader zone of possible agreement between the parties. LAWRENCE SUSSKIND ET AL., *NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION* 35 (2000) (discussing zones of possible agreement).

123. See Frank E.A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 66 (1994).

litical risk insurance.<sup>124</sup> Ultimately these limited opportunities were often unpalatable for investors who had suffered severe or even total losses related to government expropriation.<sup>125</sup>

## 2. The Current Framework for Resolving Investment Treaty Conflict

The creation of investor-state dispute resolution mechanism in investment treaties was a sea change. These new provisions provided investors with the means to bring host governments to the dispute resolution table.<sup>126</sup>

Treaties are individually negotiated and there is no uniform dispute resolution process. There is, however, a general trend.<sup>127</sup> Many treaties have a two-tiered dispute resolution process leading towards a final resolution by an arbitration tribunal.<sup>128</sup>

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124. See Franck, *supra* note 11, at 1620–21 n.469; Salacuse, *supra* note 9. For those cases where an investor has contracted directly with a host government—for example, in the context of a concession contract—investors may also have a contractual right to arbitrate disputes arising out of or relating to that underlying commercial arrangement. See COMEAUX & KINSELLA, *supra* note 6, at 185–210 (discussing options for investors in contract disputes with governments).

125. See Salacuse, *supra* note 89, at 659 n.32.

126. The investor-state dispute resolution mechanism is a distinct issue from the state-to-state dispute resolution mechanisms also typically provided in investment treaties. See Bernardo M. Cremades, *Has the Proliferation of BITs Gone Too Far? Is It Now Time for a Multilateral Investment Treaty?*, 5 J. WORLD INV. & TRADE 89, 90–91 (2004) (describing the new development of requesting state-to-state arbitration to interpret a BIT); Franck, *supra* note 6, at 53–54 n.26 (discussing cases where state-to-state arbitration was initiated after an investor-state claim was initiated). While this Article primarily focuses on investor-state arbitration, to complete a thorough analysis of the system and given the potential for cross-contamination, both aspects of the system deserve serious consideration.

127. *E.g.*, U.N. CTR. TRANSNAT'L CORPS., BILATERAL INVESTMENT TREATIES at 66–70, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 (1988); UNCTAD, BITs, *supra* note 4, at 92–96; UNCTAD, DISPUTE SETTLEMENT: INVESTOR-STATE at 12–13, U.N. Doc. UNCTAD/ITE/IIT/30, U.N. Sales No. E.03.II.D.5 (2003), available at [http://www.unctad.org/en/docs/iteiit30\\_en.pdf](http://www.unctad.org/en/docs/iteiit30_en.pdf) [hereinafter UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT]; DOLZER & STEVENS, *supra* note 34, at 119–21.

128. *E.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Emirates for the Promotion and Protection of Investments, U.K.-U.A.E., art. 8(1), Dec. 8, 1992, 1994 U.K.T.S. No. 24, available at [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_uae.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_uae.pdf).

a. *First-Tier Dispute Resolution*

The first tier of the dispute resolution is about fulfilling certain conditions precedent to having the right to arbitrate.<sup>129</sup> This may, for example, require investors to engage in “amicable settlement” for a few months.<sup>130</sup> Although less frequent, investors may also be required to litigate in home government courts and exhaust their local remedies before proceeding to their international ones.<sup>131</sup> In some circumstances, however, there is no obligation to engage in a pre-arbitration dispute resolution process or even a suggestion that such a method might be prudent.<sup>132</sup>

Regardless of whether investors are required or recommended to engage in these activities, there are often other pre-conditions to accessing arbitration. First, investors must often submit a dispute notice.<sup>133</sup> Second, investors are typically required to wait for a few months—often three to six—to “cool

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129. See *id.* (providing for informal resolution prior to arbitration). Furthermore, not all investment treaties permit arbitration. For example, a treaty between Japan and the Philippines states that in the absence of a subsequent agreement to a formal investor-state dispute resolution procedure, arbitration can only occur with both parties' consent. Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Japan-Phil., art. 107, Sept. 9, 2006, <http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf>.

130. UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT, *supra* note 127, at 22–23; Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 50 (2005); see also NAFTA, *supra* note 29, ch.11, art. 1118 (referring instead to dispute settlement by “consultation or negotiation”). Many treaties do not make “amicable settlement” mandatory. Sometimes they do not even mention it as an option, and in other instances it is merely a recommended, nonbinding option. Instead, treaties permit investors to bypass this step and go directly to arbitration, provided they meet all other preconditions, like submitting a dispute notice. See *infra* note 272 (discussing the various positions of the U.S. Model BITs on the issue of mandatory versus optional negotiation).

131. Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 876 (2005); Vandeveld, *supra* note 121, at 174–75.

132. The 1994 U.S. Model BIT did not refer to pre-arbitration negotiation, consultation, or the amicable resolution of disputes. Model Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-[Country], art. IX, Apr. 1994, *reprinted in* UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM VOL. III at 201–02, U.N. Doc. UNCTAD/DTC/30, U.N. Sales No. E.96.II.A.11 (1996).

133. Hamilton & Rochwerger, *supra* note 130, at 50; see also 2004 U.S. Model BIT, *supra* note 19, art. 24(2)–(3).

off” from the time the dispute arose to when it can formally request arbitration.<sup>134</sup> As a practical matter, this might mean that some kind of negotiation can occur during the prescribed waiting period after an investor submits a dispute notice.<sup>135</sup> It also means, however, that an investor may be able to submit a dispute notice and head to arbitration without ever trying and perhaps without even considering other forms of dispute resolution.<sup>136</sup>

*b. Second-Tier Dispute Resolution*

At the second tier, governments typically offer to arbitrate claims of treaty violations to finally resolve disputes.<sup>137</sup> Treaties usually permit investors to choose where to arbitrate those claims. Often, this means investors can elect to arbitrate before (1) an ad hoc tribunal organized under the UNCITRAL Arbitration Rules, (2) the Stockholm Chamber of Commerce, or (3) a tribunal organized through ICSID.<sup>138</sup>

When investors fulfill their first-tier obligations but the conflict remains unresolved, an investor then selects an arbitral forum from the treaty and submits a “Request for Arbitra-

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134. UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT, *supra* note 127, at 25; *see also* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ecuador for the Promotion and Protection of Investments, U.K.-Ecuador, art. 8, May 10, 1994, 1996 U.K.T.S. No. 18, *available at* [http://www.unctad.org/sections/dite/iiia/docs/bits/ecuador\\_uk.pdf](http://www.unctad.org/sections/dite/iiia/docs/bits/ecuador_uk.pdf) (permitting the arbitration of disputes where “agreement cannot be reached within six months between the parties to this dispute through the pursuit of local remedies or otherwise”).

135. This appears to be the hope of certain institutions. *See* WORLD DEVELOPMENT REPORT 2005, *supra* note 23, at 88 (suggesting disputes can be resolved with informal negotiation).

136. Presumably, it would not necessarily be in an investor’s economic, rational self-interest to incur the costs of arbitration without having tried other types of dispute resolution. This, however, presumes that investors are rational, profit-maximizing individuals. There may be situations where the initiation of a process will waste resources if appropriate government officials have indicated they are unwilling to consider such a process.

137. DOLZER & STEVENS, *supra* note 34, at 129–56. In some cases, countries let investors elect between national courts, pre-existing dispute resolution arrangements, and international arbitration in order to finally resolve the dispute. Franck, *supra* note 11, at 1541–42. There are few, if any, known instances where an investor has brought an investment treaty claim to either a national court or a pre-agreed dispute resolution process. Franck, *supra* note 6, at 54–55; *see also* Franck, *supra* note 11, at 1542 n.78 (noting that investment claims might go to national courts but only where investors are unaware of their arbitration options).

138. *See* Franck, *supra* note 6, at 54.

tion” or equivalent document.<sup>139</sup> The investor then selects one arbitrator.<sup>140</sup> After, the state picks a second arbitrator, and the parties typically select a third arbitrator who serves as the chair.<sup>141</sup> Next, the parties gather evidence and present arguments,<sup>142</sup> and the tribunal renders an award that is enforceable worldwide.<sup>143</sup>

### 3. Consideration of Specific Dispute Resolution Provisions

It could be appropriate to assess a country’s specific dispute resolution systems. This might occur at a macrolevel, a microlevel, or perhaps both.

A macrolevel analysis of the dispute resolution mechanisms in the nearly 2500 investment treaties would be a rather significant undertaking.<sup>144</sup> It could reveal useful information about patterns and variations in dispute resolution that would place specific dispute resolution mechanisms in a global context. UNCTAD’s analysis of variations in investment treaty provisions is a useful step in this direction.<sup>145</sup>

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139. See, e.g., Arbitration Inst. of the Stockholm Chamber of Commerce [SCC Inst.], Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 2 (2007), available at [http://www.sccinstitute.com/\\_upload/shared\\_files/regler/2007\\_Arbitration\\_Rules\\_eng.pdf](http://www.sccinstitute.com/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf) (establishing the requirements for a claimant’s request for arbitration); Int’l Bank for Reconstr. Dev., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 36, Mar. 18, 1965, 4 I.L.M. 524, 536 [hereinafter ICSID Convention] (establishing the requirements of a request for arbitration); ICSID ADDITIONAL FACILITY RULES, *supra* note 83, arts. 1–3 (establishing the requirements of a request for arbitration); U.N. Comm’n on Int’l Trade Law [UNCITRAL], Decision on UNCITRAL Arbitration Rules, art. 18, Apr. 28, 1976, 15 I.L.M. 701, 708 [hereinafter UNCITRAL, Rules] (providing for a claimant to file a statement of claim).

140. UNCITRAL, Rules, *supra* note 139.

141. Under the ICSID Convention, parties can agree on the appointment of the president of the tribunal. ICSID Convention, *supra* note 139, art. 37(2). By contrast, under ad hoc UNCITRAL arbitration, the party-appointed arbitrators agree on the appointment of the Chair. UNCITRAL, Rules, *supra* note 139, art. 7(1).

142. See, e.g., UNCITRAL, Rules, *supra* note 139, art. 15. While this has historically occurred in private, with a push towards enhanced transparency in the dispute resolution process, more of the arbitration process is accessible to the public. See Franck, *supra* note 11, at 1544–45.

143. See Franck, *supra* note 11, at 1543–45; Franck, *supra* note 6, at 55.

144. See Jason W. Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties 12–17 (May 2006) (working paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=903680](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903680)) (providing an empirical analysis of dispute resolution provisions of 1000 investment treaties).

145. See generally UNCTAD, BILATERAL INVESTMENT TREATIES 1995–

A microlevel analysis would involve analyzing a state's specific dispute resolution obligations. For example, Argentina might engage in two types of analysis. First, it might analyze the treaty between Argentina and France, which has been the subject of arbitration.<sup>146</sup> Second, it might consult treaties with its other counter-parties. Having contextualized their own procedures, Argentina would be able to better assess the utility of its dispute resolution systems.

#### D. USING DSD: ANALYZING THE UTILITY OF THE CURRENT SYSTEM

DSD necessitates a deconstruction of existing processes in light of the actual conflicts to determine what is effective and what is inefficient.<sup>147</sup> In the investment treaty context, DSD might usefully examine the utility, costs, and benefits of the existing two-tier system.<sup>148</sup>

##### 1. First-Tier Dispute Resolution: Nonbinding Methods

There are a variety of difficulties related to the first tier of the process. Most of the problems are likely to result from the use of "amicable resolution" of disputes or difficulties related to communicating about conflict.

###### *a. Difficulties with "Amicable Resolution"*

The reference to the "amicable resolution" of disputes exhibits a variety of potential problems. First, there is a lack of clarity and consensus about the need to require, recommend, or even mention nonbinding forms of dispute resolution in in-

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2006: TRENDS IN INVESTMENT RULEMAKING, U.N. Doc. UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D.16 (2006), available at [http://www.unctad.org/en/docs/iteia20065\\_en.pdf](http://www.unctad.org/en/docs/iteia20065_en.pdf).

146. Décret n° 93-834 du 28 mai 1993 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (ensemble une déclaration), Fr.-Arg., July 3, 1991, 1993 Fr. T.S. 8164, available at [http://www.unctad.org/sections/dite/ia/docs/bits/france\\_argentina\\_fr.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/france_argentina_fr.pdf).

147. During the stage of determining the mutually acceptable principles upon which the dispute resolution system should be based, parties can assess the value of aspects such as fairness, transparency, and precedent.

148. The limited nature of information about investment treaty conflict necessarily makes this analysis preliminary and tentative. Once further information is available, a reevaluation of the two tiers and overall structure might provide further insights.

vestment treaties.<sup>149</sup> It is vital to debate the utility of a mandatory versus consensual approach to dispute resolution<sup>150</sup> and consider the availability of different types of dispute resolution. Nevertheless, the lack of clarity and consensus may adversely affect parties' opportunities to discuss possible solutions or promote alternative settlement opportunities.<sup>151</sup> For example, parties might use the failure to reference or require "amicable resolution" in the treaty as an excuse to avoid possible conflict resolution.

Second, it is not clear what process the parties are electing with the "amicable resolution" methodology. While it presumably refers to a nonbinding process like negotiation or mediation, this meaning is not typically explained.<sup>152</sup> While the lack of guidance about the process may provide the parties with a degree of flexibility,<sup>153</sup> there are nevertheless problems. This may cause confusion for legal cultures with different dispute resolution traditions<sup>154</sup> or working definitions of mediation and other forms of nonbinding dispute resolution.<sup>155</sup>

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149. See *infra* note 272 and accompanying text (observing that the United States has vacillated between mandating and recommending first-tier dispute resolution).

150. There is debate in investment conflict about the appropriateness of required versus consensual negotiation. See Coe, *supra* note 78, at 14–18. This reflects larger debates in the dispute resolution literature about the challenges related to mandatory or consensual use of nonbinding dispute resolution mechanisms. See MENKEL-MEADOW ET AL., ADR, *supra* note 62, at 560–63; MENKEL-MEADOW ET AL., MEDIATION, *supra* note 62, at 286–89. See generally RISKIN ET AL., *supra* note 3 (discussing the pros and cons of various systems).

151. Presumably, reasonable and rational investors and governments may have tried to negotiate a settlement prior to the escalation of the conflict. Nevertheless, this is not always an appropriate presumption. Sometimes a resolution cannot be achieved without consulting a different group of decision makers in a different context.

152. See Rubins, *supra* note 78, at 3. NAFTA is slightly more precise and requires that "disputing parties should first attempt to settle a claim through consultation or negotiation." NAFTA, *supra* note 29, art. 1118. It does not define what consultation should or must entail. *Id.*

153. One might argue it is better to leave the terms of amicable resolution as broad and undefined as possible. But where parties are in the middle of a conflict and there may be tactical advantages to delaying or foreclosing certain dispute resolution methods, the parties may spend energy disputing the dispute resolution method rather than resolving the underlying dispute. A clear set of dispute resolution procedures has critical systematic efficiencies in these circumstances.

154. A classic example of cultural and linguistic misunderstanding was made in the Iran-United States hostage crisis. "[I]n Persian, the word 'compromise' apparently lacks the positive meaning it has in English of 'a midway solution both sides can live with,' but has only a negative meaning as in 'her

Third, it can be unclear what affirmative obligations may exist in connection with the dispute resolution method. This may create difficulties, for example, where one party presumes there must be “good faith” in this aspect of the dispute resolution process, but another party disagrees with this obligation or has a different understanding of what it means to bargain “in good faith.”<sup>156</sup>

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virtue was compromised’ or ‘our integrity was compromised.’ Similarly, the word ‘mediator’ in Persian suggests ‘meddler,’ someone who is barging in uninvited. In early 1980 U.N. Secretary General Waldheim flew to Iran to deal with the hostage question. His efforts were seriously set back when Iranian national radio and television broadcast in Persian a remark he reportedly made on his arrival in Tehran: ‘I have come as a *mediator* to work out a *compromise*.’ Within an hour of the broadcast, his car was being stoned by angry Iranians.” ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 34 (1981) (emphasis in original).

155. Amy Cohen explains that in western traditions “mediation is a fixed, bounded, and determinate set of institutional practices to resolve conflict that are, at all times, informal (dissociated from the state), private, neutral, and non-coercive. Any analysis of mediation in developing countries, however, reveals a set of institutional practices that are far more complex than this assumption allows. Mediation changes as it travels . . .” Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 296 (2006). In Japan, even though its civil procedure system is nearly identical to Germany’s, the mediation experience is quite different from many Western countries. Katja Funken, *Comparative Dispute Management: Court-Connected Mediation in Japan and Germany*, 3 GERMAN L.J. ¶ 2 (2002), <http://www.germanlawjournal.com/article.php?id=130>. Prior to the Law Concerning Promotion and Use of Alternative Dispute Resolution (Law No. 151 of 2004), Japanese court-connected mediation included many unique features, such as the following: (1) Japanese courts appointed a mediation committee composed of a judge and two non-judge mediators, (2) mediators had the status of government employees and “female mediators hired by the family courts [were] housewives,” (3) the mediation committee could ask interested persons to attend the mediation irrespective of party agreement, (4) parties met with mediators individually and did not negotiate directly on the theory that “negative emotions will burst out . . . [and violate] the court’s dignity and make it more difficult to reach an agreement,” (5) mediators had the power to examine witnesses and procure expert opinions, and (6) mediation agreements were enforceable as court judgments, unless the court deemed it is contrary to law or public policy. *Id.* ¶¶ 8–13, 24–29. The new law was scheduled to become effective before June 2007 to set out principles for ADR and introduce government certificates for ADR service providers. Hiroyuki Tezekua & Yoko Maeda, *Japan: Recent Developments in ADR Law*, 1 MEDIATION NEWSL. (Int’l Bar Assoc., London, U.K.), Apr. 2005, at 23–25.

156. Referring to the *Tradex* case, UNCTAD suggests that “the obligation to negotiate and consult before initiating the other means of dispute settlement is not to be taken lightly: it is an obligation of substance and context. The parties to the dispute must negotiate in good faith.” UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT, *supra* note 127, at 24. Unfortunately, the cited

Fourth, despite a textual obligation to “cool off” or negotiate disputes, arbitrators have not enforced these obligations.<sup>157</sup> Instead, tribunals let investors proceed to arbitration without fulfilling the preconditions.<sup>158</sup> Ultimately, the failure to articulate mutual expectations, the lack of substantive parameters, and an unwillingness to enforce these provisions leaves this “amicable resolution” methodology with much confusion and little force.<sup>159</sup>

Given the generally confidential nature of investment treaty dispute resolution, it is difficult to isolate those factors that actively affect parties’ decisions to resolve cases prior to the submission of a request for arbitration.<sup>160</sup> Although ICSID’s arbitration docket and anecdotal evidence suggest that settlements occur,<sup>161</sup> there is little empirical evidence describing settlement rates generally, let alone whether settlements were

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authority does not support the argument. Rather, in a case involving a national investment law and *not* an investment treaty, *Tradex* holds that an investor sending the government a series of letters made a “sufficient good faith effort to reach an amicable settlement.” It did not address whether there was a general obligation to bargain in good faith under international law or whether the respondent’s failure to answer the letters constituted a breach of a “good faith” bargaining obligation. *Tradex Helles S.A. v. Albania*, No. ARB/94/2, 14 ICSID REV. FOREIGN INV. L.J. 161, 182–84 (1999).

157. See Christoph Schreuer, *Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 231–39 (2004) (discussing several cases in which the respective presiding tribunal elected not to enforce the applicable waiting period).

158. See *Ethyl Corp. v. Canada*, 38 I.L.M. 700, 729 (UNCITRAL 1999) (permitting arbitration to proceed where an investor waited five days—instead of the required six months—to initiate arbitration).

159. The only parameter typically provided is a time limit on how long the undefined period must continue. See Schreuer, *supra* note 157, at 232 (quoting Article 11 of the German Model BIT wherein the only articulated parameter of the waiting period is its duration).

160. Factors might include the availability and clarity of nonbinding dispute resolution mechanisms, a change in corporate ownership or government control, the size of the dispute, the ease of redressing the conflict, the public perception of the conflict, and the availability of dispute resolution professionals to provide effective advice about the process of resolving the conflict and its potential implications.

161. See ICSID Pending Cases, *supra* note 100; ICSID, List of Concluded Cases, <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Oct. 17, 2007) [hereinafter ICSID Concluded Cases] (reflecting settlements in investment treaty cases such as *AES Summit Generation Ltd. v. Hung.*, *Lemire v. Ukraine*, and *Goetz v. Burundi*); Onwuamaegbu, *supra* note 78, at 12 (noting the “increasing percentage of ICSID [arbitration] cases that are discontinued following settlement”); see also Coe, *supra* note 78, at 29–30 (commenting on the settlement in an ad hoc UNCITRAL arbitration in the *Ethyl Corp. v. Canada* dispute).

influenced by the “amicable resolution” obligation.<sup>162</sup> In its current format, the process’s efficacy is uncertain.

*b. Difficulties Communicating the Existence of Disputes*

Stakeholders could also use DSD to analyze the efficacy of dispute resolution notifications. Theoretically, the process of alerting governments to the existence of conflicts or submitting an official dispute notice should be straightforward. Nevertheless, there are special challenges indigenous to investment treaty conflict that should be considered in the design of a system. These challenges relate primarily to the structures governments may have in place to resolve treaty-related conflict.

First, although treaties might require investors to provide the host government with a dispute notice, they often do not specify to whom it should be sent. This lack of clarity can frustrate the ability to use first-tier dispute resolution effectively.<sup>163</sup> One can easily imagine the frustration of trying to resolve a dispute amicably but not knowing whom to contact about beginning or completing that process.

This problem is compounded where host governments have not determined what agencies are responsible for managing investment treaty conflict.<sup>164</sup> Indeed, where the chain of command has not been specified in advance, it is likely that there

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162. Empirical analysis into this issue would be helpful, particularly if it could isolate variables affecting settlement. Factors might include (1) the type of the claim, (2) the text of the treaty, (3) the existence of cases involving similar facts or the same or similar treaty obligations, (4) the relationship between the signatories to the treaty, (5) the availability of political risk insurance or foreign aid, (6) a change of government, (7) the number of government agencies involved, (8) the nationality or background of the arbitrators, and (9) the likely cost of pursuing arbitration and the possibility of shifting the costs.

163. See Carlos Ramos Miranda, *Legal Issues in the Regulation of Water Supply in Mexico*, 11 U.S.-MEX. L.J. 75, 81 (2003) (referring to difficulties related to a lack of clarity with contractual provisions such as dispute resolution); Linda Stamato, *Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. DISP. RESOL. 81, 83 (referring to confusion caused by a “lack of clarity at the policy level about the goals and benefits of dispute resolution processes”); see also Franck, *supra* note 11, at 1588 n.335 (referring to difficulties related to NAFTA’s lack of clarity).

164. Cf. Kirk Blackard, *Assessing Workplace Conflict Resolution Options*, DISP. RESOL. J., Feb.–Apr. 2001, at 57, 60 (2001) (suggesting that an effective dispute resolution system addresses issues of poor communication); Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT’L L.J. 45, 84 n.180 (1995) (discussing the implications of an inability to create a binding resolution in state-to-state disputes).

will be internal government conflict about which agency—each with different political mandates and objectives—will control and pay for the dispute resolution process.<sup>165</sup> Tensions can also increase when government officials who are not responsible for or interested in the dispute rebuff or ignore investors.<sup>166</sup> Frustration and other difficulties might also result from investors bargaining with officials who lack actual financial, legal, or political authority to resolve the dispute.<sup>167</sup>

A second difficulty involves the role of subnational units. Investment treaty conflict can arise as a result of conduct by governmental subdivisions such as governors, state assemblies, and town councils.<sup>168</sup> Where there is poor communication among these subdivisions and national units, it may be challenging to engage in effective dispute resolution prior to the submission of a request for arbitration. Dispute notices may be mistakenly sent to subdivisions that do not know how to act upon them, or a national government may learn of the difficulties for the first time upon receiving a request for arbitration. Either of these scenarios will mean that the national government cannot utilize first-tier dispute resolution effectively.

Ultimately these difficulties do not mean that the use of dispute notices and nonbinding dispute resolution such as “amicable settlement” is inappropriate.<sup>169</sup> Rather, using DSD to analyze the costs and benefits of these methods would create an

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165. Theoretically, different agencies, such as those in charge of administering justice, intergovernmental political affairs, international trade, or a specific investment sector (e.g., energy), may be available and interested in controlling the resolution of government disputes.

166. See Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 197 (2001) (observing that the “whims of individual bureaucrats may cause a government to downgrade, or even ignore, meritorious claims”).

167. See generally Legum, *supra* note 78 (illustrating the complexity of multiple agencies' simultaneous involvement in settlements); Rubins, *supra* note 78 (noting the factors that affect the ability of government officials to facilitate settlement).

168. Jeswald Salacuse, *Alternative Methods of Treaty-Based, Investor-State Dispute Resolution 11* (2007) (unpublished manuscript, on file with author). This may create difficulties for subnational units that may not recognize that their conduct may create an international law violation.

169. There is literature indicating that mediation and other forms of nonbinding dispute resolution might be effective in the international context. See, e.g., WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1967); RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION (Jacob Bercovitch ed., 1996).

opportunity to ensure that the processes function more effectively for the system's stakeholders.

## 2. Second-Tier Dispute Resolution

The prevalence of arbitration provisions and the apparent structural inclination towards arbitration indicate a presumption that arbitration is the "best" mechanism for resolving treaty disputes.<sup>170</sup> Scholars even suggest that countries realized "that their self-interest was served by agreeing to arbitrate investment disputes."<sup>171</sup>

Nevertheless, arbitration is only one of many dispute resolution choices,<sup>172</sup> and it "would be a misperception to believe that all the disputes related to foreign direct investment can be referred to international arbitration."<sup>173</sup> Other dispute resolution options, binding or nonbinding, may provide critical opportunities to resolve disputes more efficiently.<sup>174</sup> Unfortunately, there has been little empirical enquiry into the validity of arbitration's presumed superiority, let alone a coherent explanation of why other dispute resolution systems<sup>175</sup> are less desirable.<sup>176</sup>

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170. The basis for this historical preference is unclear. While not a comprehensive or empirical assessment of all international dispute resolution, traditional texts appear to extol the benefit of arbitration and appear to reference more cases being resolved by arbitration than by other formats. *See, e.g.*, MERRILLS, *supra* note 44, at 92–126.

171. Alvarez & Park, *supra* note 110, at 368.

172. COSTANTINO & MERCHANT, *supra* note 41, at 37–41; *see also* Groton, *supra* note 65, at 4 ("Experience has shown that no single dispute resolution technique, regardless of how good it is, can be used for all disputes, or for different stages of the same dispute. The causes of disputes come from so many different sources and are so complex that there is no 'one size fits all' technique for dispute resolution.")

173. Alfred Escher, *Foreign Direct Investment (FDI)*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 19, at 42.

174. The classic formulation is that the "forum [should fit] the fuss." Sander & Goldberg, *supra* note 123, at 49.

175. Costantino and Merchant identify six broad categories of alternative dispute resolution options—namely Preventative, Negotiated, Facilitative, Fact-Finding, Advisory, and Imposed ADR. Each category involves varying levels of third-party intervention, ranging from heavy involvement to no involvement, and each category has its own distinct costs and benefits. COSTANTINO & MERCHANT, *supra* note 41, at 37–41.

176. This phenomenon may not be unique to investment treaty disputes. For example, the OECD recently proposed the use of arbitration to resolve disputes arising in connection with international tax treaties. *See generally* CTR. FOR TAX POL'Y & ADMIN., OECD, PROPOSALS FOR IMPROVING MECHANISMS FOR THE RESOLUTION OF TAX TREATY DISPUTES (2006), <http://www.oecd.org/dataoecd/5/20/36054823.pdf> (outlining an arbitration process for resolving

a. *Understanding the Choice for Arbitration*

The trend towards arbitration, despite its corresponding lack of reliance on other effective dispute resolution mechanisms,<sup>177</sup> is not completely surprising. The first investment treaties were negotiated in the 1960s and 1970s, and many countries developed model investment treaties around the same time that served as the basis for future negotiations.<sup>178</sup> Notably, these paradigms were developed prior to the “ADR Revolution” in the United States in the 1970s and the development of DSD literature in the late 1980s.<sup>179</sup> Curiously, even during the surge of treaty drafting during the 1990s,<sup>180</sup> drafters performed little or no analysis of why arbitration is the preferred or appropriate method for resolving disputes. No one justified the exclusion of other methods.<sup>181</sup>

There are various explanations for this phenomenon. First, during the 1980s and 1990s, the resolution of investment treaty conflict was largely untested. As a result, there was little evidence that the system was managing conflict inefficiently and little need to evaluate the status quo. Second, as countries continued to negotiate treaties based on established formats for

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international tax disputes). *But see* Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 VA. TAX REV. 81, 118 (2006) (noting the development of “[a] new arbitration mechanism” by the OECD, but also mentioning the OECD position “that arbitration is to be used only in those ‘rare cases’” wherein timely resolution is unlikely); Michael J. McIntyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes*, 7 FLA. TAX REV. 622, 623–47 (2006) (critiquing the OECD’s arbitration proposals).

177. *See* Franck, *supra* note 13 (discussing the increase in the number of investment treaty arbitration awards over time).

178. *See* DOLZER & STEVENS, *supra* note 34, at 167–253 (providing model investment treaties for Austria, Denmark, Germany, Hong Kong, the Netherlands, Switzerland, Great Britain, and the United States); UNCTAD, BITs, *supra* note 4 (demonstrating the increase in BITs since 1959).

179. Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 289 (2003). It has taken longer for the benefits of ADR and DSD to find a home in Europe. David J.A. Cairns, *Mediating International Commercial Disputes: Differences in U.S. and European Approaches*, DISP. RESOL. J., Aug.–Sept. 2005, at 62, 64–68; Francisco Orrego Vicuña, *Arbitration in a New International Alternative Dispute Resolution System*, 18(2) ICSID NEWS (2001), <http://www.worldbank.org/icsid/news/n-18-2-1.htm>.

180. UNCTAD, BITs, *supra* note 4.

181. One likely explanation for this is that dispute resolution theorists and investment treaty specialists were not engaged in a dialogue that recognized and drew upon their overlapping strengths and interests. This article is intended to be the first step towards promoting a broader dialogue.

conflict resolution, institutional momentum likely prevented alterations to the traditional format.<sup>182</sup> Any departures would likely have required significant internal justification.<sup>183</sup> Third, as the judicialization of investment rights marked a major departure from traditional diplomatic protection, investors may have been uncomfortable advocating for a conflict management system that might reincorporate aspects of negotiation. Without evidence that interest-based methods of dispute resolution could be used to successfully resolve disputes with host governments, investors may have been unwilling to break new ground when millions of dollars were potentially at stake.<sup>184</sup> Fourth, there might have been political disincentive for governments to take responsibility for their conduct when it might be politically expedient, for example, to hold an arbitral tribunal responsible for a particular result.<sup>185</sup>

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182. See UNCTAD, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING at 141, U.N. Doc. UNCTAD/ITE/IIA/2006/5, U.N. Sales No. E.06.II.D.16 (2007), available at [http://www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf) (observing the similarity in terms of investment treaties, but stating that a “relatively small, but increasing, group of BITs have started to introduce some innovations”).

183. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605–14 (2001) (discussing path dependence in common law systems and observing that these can result in legal decisions that are “locked-in” at an early stage).

184. Lawyers might be psychologically averse to recommending non-traditional dispute resolution to clients. Lawyers may be more comfortable with arbitration—which has similarities to litigation and other adversarial dispute resolution methods taught in law schools. They may be less inclined to engage in other methods such as interest-based negotiation, mediation, or fact-finding. Lawyers may, for example, have difficulty estimating risk and providing advice about processes with which they have less experience. Larger financial exposures may magnify this risk and create an incentive for adherence to existing processes that are tried, tested, and capable of facilitating better risk assessment. See, e.g., Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 44–45 (1982) (discussing the lawyer’s “philosophical map”); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 16 (2002) (observing that lawyers’ preconceptions, experiences, and biases mean they “often miss opportunities for uncovering and addressing their clients’ real needs”); see also Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 149–50 (2001) (discussing the characteristics of lawyers and the perceptions of disputants in the context of mediation).

185. See Todd Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Adjudication as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 219 (2006) (“[L]eaders will seek legal dispute settlement in situations where they anticipate sizeable domestic political costs should they attempt to

Beyond these practical explanations, there are undoubtedly important legal reasons why arbitration is a primary mechanism for resolving investment treaty conflict. Arbitration has institutional legitimacy because it is associated with a tried and tested dispute resolution process.<sup>186</sup> The arbitration process relies on functioning international law regimes such as the New York and ICSID Conventions, which provide streamlined enforcement mechanisms.<sup>187</sup> Beyond this, a variety of practical legal realities—such as the ability to choose neutral decision makers with subject matter expertise and an experienced arbitration bar—made arbitration historically desirable in the international commercial context.<sup>188</sup> Ultimately, investment treaty arbitration has resolved disputes, and after exhausting contested awards through the normal legal process, parties have generally paid awards.<sup>189</sup> These factors cannot and should not be discounted.

*b. The Challenge and Costs*

Simply because we can use arbitration does not mean that we always should. Just as a physician who diagnoses a patient with a heart arrhythmia does not recommend a quadruple bypass without considering a range of less intrusive or more efficient options, a different system of resolving investment disputes may effectively address the diagnosed problems with fewer complications than arbitration.<sup>190</sup> The failure to engage

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settle a dispute through the making of bilateral, negotiated concessions.”); Salacuse, *supra* note 168, at 14 (“[H]ost government officials can blame any unfavorable result on three foreign arbitrators, thereby shifting responsibility away from the host government itself.”).

186. Other investment-related claims have been successfully resolved using international arbitration, including the Iran-U.S. Claims Tribunal and the Alabama Claims Commission. See MERRILLS, *supra* note 44, at 92–95, 101–03.

187. See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; ICSID Convention, *supra* note 139.

188. The benefits of other aspects of international commercial arbitration are less certain in the investment treaty context. It is not clear that investment treaty arbitration is the most cost-efficient and timely manner of resolving disputes. Likewise, the confidentiality that is often desirable in the international commercial context may be a drawback in the investment context where public rights granted by public actors are at stake.

189. See *supra* text accompanying notes 52–54.

190. UNCTAD observed that the “settlement of any dispute, not just investment disputes, requires the adoption of the most speedy, informal, amicable and inexpensive method available.” UNCTAD, *Recent Developments*, *supra* note 9, at 11. Finding the most “appropriate” mechanism for resolving specific

in diagnosis and systematic analysis to recalibrate the system will have costs.

Obvious costs relate to process inefficiencies. The presumption that arbitration is the one-size-fits-all model for dispute resolution prevents exploration of other options that may be speedier, cheaper, or simply better at maximizing party control and satisfaction with the process and result.<sup>191</sup> Moreover, the availability of an arbitration mechanism does not prevent parties from engaging in more traditional dispute resolution, such as the exercise of power. For example, in *Lemire v. Ukraine*, Mr. Lemire testified before Congress that, after filing his request for arbitration, there was “tremendous retaliation . . . [including] investigations, and just last week, we had armed guards come to our offices as well as—on Friday we had our bank accounts frozen. On Thursday of last week, our offices were surrounded with armed guards with sub-machine guns.”<sup>192</sup>

There may also be hidden costs that inhibit conflict resolution. By placing undue reliance on arbitration, there may be categories of simmering conflict that have not become formal disputes but are nevertheless important to address. For example, unresolved treaty conflicts may provide a disincentive to investors considering initial or further investments in the host country. Bringing investment arbitration may be cost prohibitive,<sup>193</sup> particularly for small investors whose rights have been

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categories of types of investment disputes, however, can be challenging. Nevertheless, there are decided benefits to tailoring a dispute resolution design to the unique needs of the particular system. These values might include the promotion of democratic values, minimizing resources exerted on dispute resolution, increasing productivity, increasing satisfaction with outcomes, decreasing the recurrence of disputes, and improving public relations. *E.g.*, URY ET AL., *supra* note 65, at 169–73; Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 13–14 (2005) (discussing the use of dispute resolution mechanisms in the modern workplace that foster democratic governance).

191. See *infra* Part IV (identifying the benefits of DSD).

192. *Foreign Operations*, *supra* note 107; see also *id.* at 392 (stating a concert manager was “severely beaten in the face when the U.S. government stepped in on [Gala Radio’s] behalf . . . [t]wo days after that, one of our dj’s had her flat set on fire,” and providing pictures).

193. At present, there is no comprehensive analysis of the actual cost of bringing or defending an investment arbitration claim. This is due in part to the unavailability of the data necessary for such an analysis—namely a specific articulation of the parties’ legal costs and the tribunal’s costs and expenses. Nevertheless, anecdotal evidence suggests that the costs of these claims are not insignificant. See Franck, *supra* note 11, at 1592 (noting that an invest-

violated where the arbitration costs may be larger than the potential damages.<sup>194</sup> This limitation on a party's access to dispute resolution is troubling because other mechanisms could provide cost-effective redress. This has implications for investors who are unable to justify bringing a claim or governments who face challenges (financial or otherwise) in defending claims.<sup>195</sup>

Beyond this, arbitration has the capacity to exclude those impacted by the result from the dispute resolution process. This can have serious ramifications. Members of the public who feel disenfranchised—whether they are unable to participate in the proceedings, attend the proceedings, or have access to the underlying documents—may respond in ways that increase the social, political, or economic costs of conflict.<sup>196</sup> This can serve

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ment treaty claim may cost \$1 million per year and gathering comments suggesting that costs could be in the \$1–4 million range); *see also* UNCTAD, DISPUTES, *supra* note 9, at 8–10 (observing that a “cursory review of cost decisions in recent awards suggests that the average legal costs incurred by Governments are between \$1 million and \$2 million, including lawyers’ fees, the costs for the tribunal [are] about \$400,000 or more, and the costs for the claimants . . . are about the same as those for the defendant,” and observing that the investor in *Metalclad* spent \$4 million in bringing its claim and the Czech government has spent nearly \$17 million in two years defending claims); Franck, *supra* note 13 (discussing the tribunal’s average costs and expenses and the amount of the parties’ legal costs, while acknowledging the limited nature of the empirical data).

194. The decision to bring a claim is in the hands of investors who may bring a claim irrespective of the economic benefit. In litigation related to an investment treaty arbitration, a party brought a claim before a New York court to enforce a \$23.35 million arbitration award even though there were only five cents in an account to secure the debt. *CME Media Enters. B.V. v. Zelezny*, No. 01-CV-1733-DC, 2001 WL 1035138, at \*1 (S.D.N.Y. Sept. 10, 2001).

195. *See* Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT’L L. REV. 237, 250–60 (2007) (providing evidence of the difficulties host governments can face when defending investment treaty claims, such as access to the law, due to a lack of financial resources and basic infrastructure).

196. As a result of concerns related to the lack of transparency in arbitration, non-governmental organizations (NGOs) have advocated reforms to increase public access to information. *See generally* HOWARD MANN, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS (2001), available at [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf). Some inroads have been made on this issue. Franck, *supra* note 6, at 87–88. Two countries, the United States and Canada, have changed their model investment treaties to permit public access under appropriate circumstances. *Id.* at 91. Meanwhile, ICSID changed its arbitration rules to permit public access in limited circumstances. ICSID CONVENTION RULES, *supra* note 83, at 115, 117, 122 (permitting the attendance and sub-

as a magnet for social or political unrest and possibly affect the case outcome.

In *Aguas del Tunari v. Bolivia*, United States and Spanish investors claimed there was an expropriation of their concession to provide water and sewer services in Cochabamba, Bolivia.<sup>197</sup> As a result of the public interest and protests related to the case, more than three hundred organizations from forty-three countries asked to participate but were denied.<sup>198</sup> Interest groups put pressure on the investor to drop the case, complaining about these “secretive” proceedings.<sup>199</sup> The case eventually settled<sup>200</sup> without the investors receiving compensation from Bolivia.<sup>201</sup>

#### IV. THE COSTS AND BENEFITS OF DSD

Concerns about efficacy, transparency, consistency, fairness, and regulatory authority of the current two-tier approach are unlikely to be ameliorated just by choosing a different dispute resolution system. Without careful consideration, the

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missions by non-parties under limited circumstances and permitting publication of extracts of awards under Arbitration Rules 32(2), 37(2), and 48(4), effective April 10, 2006); ICSID ADDITIONAL FACILITY RULES, *supra* note 83, at 61–62, 67 (describing Rules 39(2), 41(3), and 53). There are nevertheless interesting contradictions. For example, under the ICSID Rules, a member of the public may attend a hearing, but she cannot obtain a transcript without consent of both parties. *See id.* at 40, 42 (permitting persons other than the parties to attend hearings under Article 34, but Article 39 makes no mention of the availability of reports to nonparties).

197. *See* OLIVERA WITH LEWIS, *supra* note 60 (referring to negotiations during Bolivia’s “Water Wars”).

198. Petition to the Arbitral Tribunal, La Coordinadora para la Defensa del Agua y Vida, No. ARB/02/3 (Aug. 29, 2002), <http://ita.law.uvic.ca/documents/Aguaaboliviapetition.pdf>; Franck, *supra* note 6, at 90 n.163; Letter from Prof. David F. Caron, President of the Tribunal in the Matter of *Aguas del Tunari v. Bolivia*, to J. Martin Wagner, Director, Int’l Program, Earthjustice (Jan. 29, 2003), available at <http://ita.law.uvic.ca/documents/Aguas-BoliviaResponse.pdf>.

199. *See generally* Press Release, Ctr. for Int’l Envtl. Law, Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water (Feb. 12, 2003), [http://www.ciel.org/Ifi/Bechtel\\_Lawsuit\\_12Feb03.html](http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html); Jim Shultz, *Bechtel Vs. Bolivia: The People Win!!*, THE DEMOCRACY CENTER ON-LINE, Jan. 19, 2006, <http://www.scoop.co.nz/stories/HL0601/S00159.htm>.

200. ICSID Concluded Cases, *supra* note 161; *see also* Hamilton & Rochweger, *supra* note 130, at 23 (noting that a foreign investor “eventually dropped the [ICSID] case against Guyana in light of continued public opposition”).

201. Press Release, Bechtel, Cochabamba Water Dispute Settled (Jan. 19, 2006), <http://www.bechtel.com/newsarticles/487.asp>.

same issues may simply manifest themselves in a different fashion. Purifying the waters of investment-related conflict should be the goal. Systematic diagnosis through DSD is a tool to begin this process.

In the same way that a one-size-fits-all dispute resolution system may be inappropriate, it is possible that using DSD to manage conflict and create disputing systems might not be appropriate for all situations.<sup>202</sup> Prior to making that individualized determination, however, it would be prudent to consider the general costs and benefits of using DSD to manage investment treaty-related conflict.

#### A. BENEFITS

DSD can benefit the management of investment treaty conflict. First, the objective of DSD is to improve the quality and efficiency of the process of resolving disputes.<sup>203</sup> In the context of investment treaty disputes, this can occur through considering the types of disputes likely to arise under the treaty, improving the process's efficiency once disputes are formalized by tailoring the design to meet the system's unique needs, and managing conflict before disputes crystallize. These steps may provide opportunities to assist UNCTAD's objective of strengthening institutional capacities to manage investor-state disputes in a more cost-effective manner.<sup>204</sup>

##### 1. Efficient Administration of Existing Disputes

Past experience in the domestic and multinational context suggests that once a formal dispute exists, DSD can provide opportunities to decrease the social, political, and financial costs of managing conflict.<sup>205</sup> In the investment context, the benefits may be as simple as (1) paying decreased attorneys fees, (2) eliminating the need to pay arbitrators for their services, (3) permitting investors to focus on their core business activ-

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202. See STITT, *supra* note 43, at 9 (recognizing that dispute resolution is often an individual process and that "cookie-cutter" solutions can be inappropriate).

203. See *id.* (describing that ADR system design values cost efficiency); COSTANTINO & MERCHANT, *supra* note 41, at 46 (listing the six principles of DSD); URY ET AL., *supra* note 65, at 42–46 (describing the six principles of DSD and providing examples).

204. UNCTAD, DISPUTES, *supra* note 9, at 61.

205. See *supra* notes 67–77 and accompanying text (identifying the historical evolution of DSD).

ities, (4) letting governments focus upon the process of governing their citizens, and (5) increasing party control to create solutions that enhance satisfaction with the result.

While the first four are straightforward, the fifth benefit can be demonstrated by example. *Lemire v. Ukraine* involved a dispute about radio broadcasting.<sup>206</sup> Ukraine did pay damages, but it promised to (1) “examine the quality of broadcasting . . . [and] take necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio” and (2) use its “best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licenses for radio frequencies.”<sup>207</sup> A solution addressing the station’s broadcasting needs is not surprising because the conflict was about the station’s capacity to broadcast.

The final aspect of the settlement was a bit more unusual. Ukraine also promised to provide “three locations for the beauty salon.”<sup>208</sup> At first blush, it is unclear what, if anything, beauty salons have to do with a radio broadcasting investment.<sup>209</sup> Nevertheless, this term of the settlement agreement permitted the parties to achieve their shared underlying interests. Perhaps more interestingly, this creative solution was within the parties’ control. It is unlikely that courts or arbitral tribunals could order relief on matters beyond the scope of the dispute articulated in the pleadings.<sup>210</sup>

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206. *Lemire v. Ukraine*, 15 ICSID REV. FOREIGN INV. L.J. 530 (2000), available at <http://ita.law.uvic.ca/documents/Lemire-Award.pdf>.

207. *Id.* at 535–36.

208. *Id.* at 536.

209. While the confidential nature of the case makes it difficult to determine, Mr. Lemire’s congressional testimony suggests that there is a relationship between his enterprises and the Oksana Baiul Beauty Salons. See *Foreign Operations*, *supra* note 107, at 391 (observing that Lemire is affiliated with Olympic Champions, Ltd., which has involvement with Oksana Baiul and a beauty salon that Mr. Lemire alleged was “completely expropriated in January of 1997 after refusing to pay a bribe”). If this relationship exists and the beauty salons were related to his larger foreign investment strategy (i.e., “deal swapping” one investment for another), this presumably explains part of the settlement terms.

210. After this Article was drafted, Lemire initiated another ICSID arbitration against Ukraine. *Lemire v. Ukraine*, No. ARB/06/18, available at ICSID Pending Cases, *supra* note 100, at 31. Commentary suggests the case involves alleged breaches of the previous settlement agreement as well as new breaches of the U.S./Ukraine BIT. Luke Eric Peterson, *US Investor Invokes BIT to Sue Ukraine over Broadcasting Quotas and Licensing*, INVESTMENT TREATY NEWS (Int’l Inst. for Sustainable Dev., Winnipeg, Manitoba, Can.), Oct. 13, 2006, [http://www.iisd.org/pdf/2006/itn\\_oct13\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_oct13_2006.pdf); see also *Lemire*

Building procedural opportunities to capitalize on other types of dispute resolution—such as the negotiation in *Le-mire*—could be useful. There is some institutional support in place to facilitate access to non-arbitration-based dispute resolution. For instance, ICSID has a conciliation facility,<sup>211</sup> but it has only been used six times.<sup>212</sup> Counsel for ICSID notes that “the Centre has recently begun to remind parties of the existence of the [conciliation] mechanism.”<sup>213</sup> ICSID also has a fact-finding facility,<sup>214</sup> which has never been used since its inception

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v. Ukraine, No. ARB/06/18, *available at* ICSID Pending Cases, *supra* note 100, at 31. Planting the seeds of later conflict in the resolution of an initial dispute is not unique to investment treaty conflict. *Occidental Exploration & Production Co. v. Ecuador* resulted in an arbitration award. *Occidental Exploration & Prod. Co. v. Ecuador*, No. UN 3467, 2004 WL 3267260, at \*72–74 (UNCITRAL July 1, 2004). Conflict has arisen about that particular case, and Occidental filed a new claim. *See Occidental Petroleum Corp. v. Ecuador*, No. ARB/06/11, Decision on Provisional Measures, *available at* [http://www.worldbank.org/icsid/cases/pdf/Occidental\\_Decision\\_on\\_Provisional\\_Measures\\_August\\_17\\_2007.pdf](http://www.worldbank.org/icsid/cases/pdf/Occidental_Decision_on_Provisional_Measures_August_17_2007.pdf); ICSID Pending Cases, *supra* note 100.

211. ICSID CONVENTION RULES, *supra* note 83, at 12. ICSID’s conciliation functions like a nonbinding arbitration or highly formalized, evaluative mediation. The Conciliation Commission has powers to (1) at any time, “recommend that the parties accept specific terms of settlement or that they refrain . . . from specific acts that might aggravate the dispute [and] point out to the parties the arguments in favor of its recommendations,” (2) request written statements from the parties, (3) rule on its own jurisdiction, (4) rule on requests to disqualify conciliators, (5) hold hearings and take evidence in the form of documents or witness testimony, and (6) issue a report at the closure of the proceedings. *Id.* at 89–97.

212. ICSID has only registered six conciliations: (1) Shareholders of SE-SAM v. Central African Republic, No. CONC/07/01, (2) SEDITEX Eng’g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar, No. CONC/82/1, (3), Tesoro Petroleum Corp. v. Trinidad and Tobago, No. CONC/83/1, (4) SEDITEX Eng’g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar, No. CONC/94/1, (5) TG World Petroleum Ltd. v. Niger, No. CONC/03/1, and (6) Togo Electricité v. Togo, No. CONC/05/1). ICSID Pending Cases, *supra* note 100; ICSID Concluded Cases, *supra* note 161; *see also* Onwuamaegbu, *supra* note 78, at 13–14 (noting the limited use of ICSID’s conciliation mechanism). Given the confidential nature of ICSID’s docket, these may not all be investment treaty cases.

213. Onwuamaegbu, *supra* note 78, at 13.

214. ICSID, Additional Facility Rules for the Administration of Conciliation, Arbitration, and Fact-Finding Proceedings, at vi (Jan. 2003), <http://worldbank.com/icsid/facility-archive/facility-en.htm> [hereinafter, ICSID Fact-Finding]. Either an investor or a government can initiate a fact-finding proceeding to examine and report on facts. ICSID ADDITIONAL FACILITY RULES, *supra* note 83, at 16. Provided both parties consent, a committee will be established to provide the parties with an impartial assessment of facts which, if accepted by them, resolve a conflict about specific factual issues. *See id.* at 16–18; ICSID Fact-Finding, *supra*. The Rules envisage that there will be oral proceedings, written submissions, evidence, witness testimony, and a report that

in 1978.<sup>215</sup> Parties may hesitate to use relatively untried or relatively untested dispute resolution mechanisms. ICSID, however, currently lacks a facility to promote the use of negotiation, mediation (whether through the use of ombuds or otherwise), or other nonbinding dispute resolution processes.<sup>216</sup>

Making parties aware of and improving the existing facilities are part of the challenge of designing useful dispute systems.<sup>217</sup> There may also be challenges in providing access to institutions or convincing parties to use other dispute resolution processes that may not be associated with existing institutions.<sup>218</sup> Other challenges may involve educating stakeholders about the value of other forms of dispute resolution, including interest-based dispute resolution, and providing training to lawyers and parties about how to utilize each option effectively. DSD provides an opportunity to maximize efficiency and stakeholder satisfaction by assessing the suitability of dispute resolution options based upon the nature of conflicts and the unique context of the system's stakeholders.

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“shall be limited to findings of fact [and] shall not contain any recommendations to the parties nor shall it have the character of an award,” and the parties will be “entirely free as to the effect to be given to the Report.” ICSID ADDITIONAL FACILITY RULES, *supra* note 83, at 20–22.

215. Onwuamaegbu, *supra* note 78, at 13.

216. See ICSID ADDITIONAL FACILITY RULES, *supra* note 83, at 5 (noting that ICSID only has facilities for arbitration, conciliation, and fact-finding).

217. In the 1982 and 1983 U.S. Model BITs, there were references to using ICSID's fact-finding facility. Model Treaty Between the United States of America and [Country] Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-[Country], art. VII(2), Jan. 11, 1982, *reprinted in* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE app. A-1 (1992); Model Treaty Between the United States of America and [Country] Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-[Country], art. VII(2), Jan. 21, 1983, *reprinted in* VANDEVELDE, *supra*, at app. A-2. Interestingly this “explicit reference was omitted as unnecessary from the 1984 and 1987 drafts.” VANDEVELDE, *supra*, at 165.

218. There might be utility in encouraging stakeholders to consider using other forms of binding dispute resolution with transparent procedures and the possibility of enforcement. This might involve recourse to a national court or an international claims commission. See Franck, *supra* note 6, at 81–82 n.130; W. Michael Reisman, *Control Mechanisms in International Dispute Resolution*, 2 U.S.-MEX. L.J. 129, 136–37 (1994); see also Bjorklund, *supra* note 131, at 825–27 (describing the use of mixed claims commissions).

## 2. Early Management of Conflict

There are benefits to instituting early, preventative conflict management.<sup>219</sup> DSD can be used to normalize conflict and institute measures that prevent its escalation. A redesigned system might create a process that provides “early warning signs” to prevent the escalation of disputes.<sup>220</sup>

Some commentators suggest that once a conflict has escalated and investors submit a request for arbitration, there is no turning back.<sup>221</sup> Governments dig in their heels and refuse to settle, lest there be political fall-out in the future.<sup>222</sup> Using DSD to provide early intervention that normalizes conflict management may depoliticize the dispute resolution, promote legitimacy, and provide early opportunities for both investors and governments to come to mutually acceptable positions.

For instance, there might be utility in setting up an ombuds office to act as a complaint center.<sup>223</sup> Ombuds traditionally use a variety of tools to resolve complaints at an early stage and have historically been used effectively in dealing with public-private disputes.<sup>224</sup> They might direct constituents to other processes or opportunities that may resolve the issues; likewise, they may raise the problem at an appropriate level within the organization.<sup>225</sup>

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219. COSTANTINO & MERCHANT, *supra* note 41, at 38–39; STITT, *supra* note 43, at 2, 10; URY ET AL., *supra* note 65, at 61, 170–72.

220. See STITT, *supra* note 43, at 10 (“An organization need not, however, wait until it is in distress to look for an appropriate dispute resolution. The best time, in fact, for organizations to look at systems design is before a crisis has arisen, when conflict has not yet manifested itself.”).

221. See Coe, *supra* note 78, at 29, 41; Legum, *supra* note 78, at 25 (“[T]he best chance to resolve a dispute between a foreign investor and a government agency is likely before the investment dispute becomes a dispute under an investment treaty.”).

222. See Legum, *supra* note 78, at 24.

223. Karl Sauvart, *Mediation Is the Key for Future Investment*, FDI, Apr. 2, 2002, [http://www.fdimagazine.com/news/fullstory.php/aid/108/Mediation\\_is\\_the\\_key\\_for\\_future\\_investment.html](http://www.fdimagazine.com/news/fullstory.php/aid/108/Mediation_is_the_key_for_future_investment.html).

224. Philip J. Harter, *Ombuds: A Voice for the People*, DISP. RESOL. MAG. Winter 2005, at 5, 5–6; Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits and Countenance of Confidentiality*, 52 ADMIN. L. REV. 17, 18, 20–22 (2000). See generally GELLHORN, *supra* note 169 (setting out how nine different countries have effectively used ombuds).

225. An ombud is an “officer appointed by the legislature to handle complaints against administrative and judicial action,” serving as a watchdog over those actions while exercising independence, expertise, impartiality, accessibility, and powers of persuasion rather than control. Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12

Ombuds offices have the benefit of equality where those who are affected by a conflict have a place to give voice to their concerns.<sup>226</sup> Unlike an investor's unilateral right to bring claims to arbitration, investors, citizens, and governmental officials could have theoretical access to the ombuds office for the filing of complaints.<sup>227</sup> This option might also provide practical benefits by offering a clear line of authority for receiving complaints, providing governmental authority for managing disputes, and lowering the cost of raising issues. This has the benefit of clarifying communication lines and permitting smaller investors to be heard or smaller conflicts to be addressed. It also facilitates access to justice and decreases the stigma of announcing and quickly resolving disputes.<sup>228</sup> Rather than letting problems fester or creating an intractable dispute, an ombud provides an official channel that permits stakeholders to address issues informally before ratcheting up the cost and formality of conflict resolution.<sup>229</sup> For governments, such an office creates opportunities to assess and address potential litigation risks—correcting problems before they worsen—or making informed determinations about how best to manage their policy choices. For investors, early intervention might provide opportunities to resolve disputes before having to allocate resources

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OHIO ST. J. DISP. RESOL. 95, 98 (1996). Other international law scholars have also pointed to the importance of a mechanism of this kind. See Sauvart, *supra* note 223 (“One option to consider is the establishment of an office of investment mediation, to deal with complaints before they turn into conflicts of a sort that only courts can resolve. The idea is similar to that of an ombuds-person.”).

226. There is evidence that those experiencing disputes seek to voice their conflict regardless of whether there is a legally cognizable claim. Kathy L. Cerminara, *Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict*, 33 LOY. U. CHI. L.J. 547, 587 (2002). This suggests a greater concern for communication than a denial of legal rights.

227. An ombuds office could serve as a conflict barometer. It would alert governments to where they are most likely to encounter difficulties; with that information, governments will be in a position to make more informed and rational legislative and regulatory choices. Ombuds might also enhance governmental legitimacy. While ombuds cannot traditionally make government policy, the existence of the office may encourage government officials to support decisions with clear reasons. Moreover, providing the regulated public with a direct form of communication and feedback can promote democratic values and institutional legitimacy. There would, undoubtedly, be important costs to using ombuds; DSD might usefully consider who best to use this approach.

228. While theoretically it could increase the number of recorded disputes, this might not mean an increased number of actual disputes but rather an increased reporting of conflict.

229. Wiegand, *supra* note 225, at 119–21.

to dispute resolution instead of core commercial activities. For citizens, it offers an opportunity to voice their concerns.

This type of model is not completely unknown in the international context. The Commission for Environmental Cooperation was designed to help prevent the escalation of potential trade and environmental conflicts related to NAFTA.<sup>230</sup> Something similar may be worth exploring for investment disputes. Such a model need not exclude access to arbitration, as the use of ombuds could take various forms. Ombuds might theoretically provide an exclusive dispute resolution mechanism. More probably, use of ombuds might complement the arbitration process where it could either be a precondition to arbitration or used simultaneously with arbitration. Ultimately, the principles upon which stakeholders agree to organize dispute resolution will determine how to use ombuds (if at all). Nevertheless, the benefits of using ombuds to manage conflict at an early stage are promising.

### 3. Procedural Justice and Institutional Legitimacy

Beyond these efficiency measures, there are systematic benefits to engaging in DSD. In particular, reevaluation of the system through DSD can enhance its institutional legitimacy and promote procedural justice.

There is a need for procedural fairness in terms of how the dispute resolution process is created.<sup>231</sup> Empirical evidence suggests that when stakeholders believe a system is procedurally just, they are more likely to buy into the result and the

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230. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 10(6)(c), Sept. 14, 1993, 32 I.L.M. 1480; Comm'n for Env'tl. Cooperation, *Who We Are*, [http://www.cec.org/who\\_we\\_are/index.cfm?varlan=english](http://www.cec.org/who_we_are/index.cfm?varlan=english) (last visited Oct. 17, 2007) (providing basic information about the Commission for Environmental Cooperation); see also David. L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 659 (2006) (analyzing the Commission for Environmental Cooperation and citizen participation and the implications for procedural justice).

231. See Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 221, 251 (referring to the importance of the conflict resolution system design); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 907 (2002) (suggesting the importance of stakeholder participation in the design of a dispute resolution system); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, in NEGOTIATOR'S FIELDBOOK, *supra* note 3, at 165, 170 (outlining the potential benefits of procedural fairness).

process, comply with the outcome, comply with the law in the future, increase commitment to the organization, accord respect and loyalty to the institution, and perceive the system to be legitimate.<sup>232</sup> This evidence indicates that the trust in the legal institution can be more influential than even substantive correctness in determining whether parties will comply with the law.<sup>233</sup>

It is useful to consider how best to use these empirical findings to enhance procedural justice.<sup>234</sup> Various approaches have been shown to enhance perceptions of procedural justice, such as (1) creating chances for the parties to provide input into the process of resolving disputes, (2) providing an opportunity to voice each party's views and concerns, (3) having a third party consider a party's views and concerns, and (4) ensuring that both the process and the third party treat a party in a dignified and respectful manner.<sup>235</sup>

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232. TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 77–80 (2000); *see also* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 94 (1975) (arguing that the process used in resolving a dispute strongly influences the disputants' level of satisfaction with the ultimate resolution); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 82, 107–08 (1990) (reporting research demonstrating that people who are confident that decision-making procedures are fair are more likely to obey the law); Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49, 65, 67–68 (1983) (suggesting that parties value process control because they view it as a means of controlling outcome); William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137, 137 (1988) ("We find litigants are at least as concerned with issues of process as they are with the substantive questions that make up their cases."); John T. Scholz, *Contractual Compliance and the Federal Income Tax System*, 13 WASH. U. J.L. & POL'Y 139, 176–77 (2003) (discussing an empirical analysis that confirms that procedural justice plays a strong role in a party's willingness to comply with a decision). These studies may, however, be of limited generalizability as the samples and methodologies do not analyze investment treaty disputes or the management of international conflicts.

233. Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856–60, 867–70 (1998); *see also* RISKIN ET AL., *supra* note 3, at 808 (suggesting that people are more willing to comply with the law when it is perceived to be legitimate and deserving of compliance, and the primary aspect of legitimacy is perceived procedural fairness and trust in legal authorities).

234. The empirical research was not conducted in the investment treaty context and its external validity may therefore be limited. Future studies, however, might conduct procedural justice research to address this issue.

235. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 788–95 (2001); *see also* Stefan Machura, *Introduction: Procedural Justice, Law and Policy*, 20 LAW & POL'Y 1,

DSD can utilize these elements to enhance legitimacy and promote procedural justice on multiple levels. First, DSD designers might invite those affected by conflict—investors or governments and their citizens—to have a voice in creating the process of resolving disputes. This might advance democratic values<sup>236</sup> and enhance perceived procedural justice.<sup>237</sup> Second, the design that is ultimately created can incorporate disputing systems that are most likely to provide those parties with choice and a voice, as well as offering dignity and respect.

Irrespective of whether change is implemented, a transparent evaluation process can strengthen institutional credibility.<sup>238</sup> It sends a message that the system is not static. Rather, it can be open to critique and improvement that enhances quality and improves satisfaction for those directly or indirectly affected by treaty-related conflict. All of these factors are likely to enhance the credibility of the disputing process and promote its long-term stability.

## B. COSTS

There are, however, potential downsides to using DSD to resolve investment treaty conflict.

### 1. Appropriateness of a DSD Model

Some might suggest that using DSD to analyze and select a dispute resolution process is unnecessary. Rather, because these critics might believe that only one form of dispute resolution is ever appropriate, DSD would seem an unwarranted waste of resources. As the boundaries of substantive treaty

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3–4, 6–7 (1998) (reviewing empirical research on the effect of procedural justice and observing that parties are more likely to accept unfavorable outcomes and remain committed to a group if they have participated in the decisions, the process recognizes their status in the group, and authorities appear to be neutral and benevolent in application).

236. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 279, 295; Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 625–29 (1998).

237. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 208–09 (1988).

238. There is also a benefit “from considering whether there may be more appropriate ways to resolve disputes. Even if no process is found that can improve the existing structures, the exercise of considering appropriate processes will still help an organization assess its sources of its conflict, and may lead to a better understanding of the conflict.” STITT, *supra* note 43, at 10.

rights are still being sketched and implicate public policy, taking a page from Owen Fiss's classic critique,<sup>239</sup> these commentators might suggest that mechanisms other than public adjudication are inappropriate.<sup>240</sup>

This position ignores the possibility that utilization of DSD methods may result in the creation of a system that only uses public adjudication. If that were the case, the systematic analysis leading to this recommendation would provide enhanced public trust in the resulting mechanism. Moreover, a single dispute resolution mechanism is rarely a silver bullet. Limiting parties to a single forum may prevent parties from using a mutually satisfactory process to resolve a conflict in a mutually acceptable way.

## 2. Generalizability of a DSD Model

There may be important challenges related to the generalizability of DSD to manage conflict.<sup>241</sup> In particular, there may be important differences amongst legal cultures, dispute resolution traditions, and economic and political contexts that make the utilization of DSD approaches untenable or, at a minimum, more challenging.<sup>242</sup> Undoubtedly, cultural, psychological, eco-

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239. Fiss, *supra* note 3, at 1085–90.

240. These advocates might be arbitration rejectors advocating a return of disputes to public forums. See Franck, *supra* note 11, at 1594–1601.

241. See Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 325 (“Exportation of ADR techniques and theories must be culturally and politically sensitive to the host nations or cultures . . . .”); Wallace Warfield, *Response to Carrie Menkel-Meadow’s “Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts,”* 2003 J. DISP. RESOL. 417, 417–18 (questioning whether Western approaches to conflict resolution are generalizable to other cultures or simply reflect unique, nontransferable values and methodologies).

242. See JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 203–09 (2001); Julie Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 317–20; see also BRISHKAI LUND ET AL., *CONFLICT AND CULTURE: REPORT OF THE MULTICULTURALISM AND DISPUTE RESOLUTION PROJECT* 26–27 (1994) (discussing the importance of individualist and collectivist dimensions in designing and providing conflict resolution programs or training); Cohen, *supra* note 155, at 329–32 (discussing difficulties arising from different dispute resolution traditions and high and low context cultures); Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1, 9–13 (2005) (analyzing the im-

nomic, political, and legal contexts may make the DSD inappropriate in certain circumstances. Nevertheless, thoughtful consideration of what factors may make DSD unsuitable can be part of a preliminary diagnosis.

### 3. The Challenge of Structuring DSD

#### *a. A Few Critical Questions*

There will also be challenges related to the specific and structured application of DSD principles. There will undoubtedly be questions about (1) whether a design should proceed on a bilateral or multilateral basis, (2) how designers would be selected and paid, (3) who should be involved in the design process, (4) what are the foundational values for a system's organization, (5) whether there is an appropriate laboratory for DSD and how pilot testing might be conducted, (6) what mechanisms will be available for correcting inefficiencies in the new system, (7) how stakeholders can be educated to maximize the benefits of the newly designed system, (8) whether there is something unique about the role of governments or investors in this context that may inhibit the benefits of DSD, (9) whether the scope of conflict is large enough to justify using DSD, and (10) whether the costs of setting up the system would be worth the eventual benefits.<sup>243</sup>

These are important questions. Nevertheless, these issues should not prevent scholars and policymakers from thinking, discussing, and analyzing the potential benefits of DSD. Instead, these questions are best viewed through a lens that opens up the possibility for creative experimentation.<sup>244</sup>

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pact of high and low context cultures and the impact of apology on dispute resolution).

243. This is not an exclusive list. Future scholarship might usefully supplement and tease out critical sub-issues related to efficient management of DSD in the investment treaty context.

244. This is not dissimilar to the potential benefits of experimentation available through regulatory competition. See Joel P. Trachtman, *Institutional Linkage: Transcending "Trade And . . ."*, 96 AM. J. INT'L L. 77, 84 (2002) ("[P]ressure [of regulatory competition] is expected to lead to regulation that is more efficient, that achieves the regulatory goal at less cost; or perhaps to the repeal of regulation that does not provide benefits sufficient to justify its costs."); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 63–70 (1993) (explaining that the benefits of multiple legal regimes in transnational law permit regulatory experimentation).

b. *Possible Ways Forward*

Ultimately DSD can be implemented however stakeholders wish. That said, one of the most fundamental decisions to be made is whether DSD should proceed on a multilateral or bilateral basis.<sup>245</sup> The answer to this issue is critical as the resulting dispute resolution mechanism(s) may vary significantly depending on that single answer.

i. *A Multilateral Approach*

A broad, multilateral approach has certain benefits. First, it would offer a uniform and consistent approach to dispute resolution, which may decrease the confusion of investors and governments alike.<sup>246</sup> Second, there may be a possibility of affiliating with an established international organization such as ICSID to provide a central repository to manage claims.<sup>247</sup> Third, it offers an opportunity to hear and address a broad constituency of stakeholders.<sup>248</sup> Fourth, a multilateral implemen-

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245. There may be additional subtleties that stakeholders wish to consider. Rather than using DSD to create a generalized conflict management process, stakeholders may create project- or industry-specific dispute resolution systems.

246. A uniform approach might involve a multilateral treaty based upon multilateral consultation. Under this approach, all governments would be subjected to the same obligations and they could look at the text of a single agreement to determine their rights and responsibilities. Some might reasonably view this as an improvement from having to consider the text of multiple treaties to determine the scope of their rights. Similarly, should they be granted rights on a multilateral basis, investors need only look towards a single document to determine the scope of their rights. Such clarity has the benefit of streamlining the process of advising investors. Not all investors, however, may view such clarity as an advantage as it may not provide the current flexibility.

247. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 87–88 (1990); see also THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 41–46 (1995) (discussing the benefit of “adherence” to established international and institutional norms). The World Bank has a certain status as a critical lending institution to promote economic development and ICSID likewise has a reputation as a key arbitral institution. See MARTIN A. WEISS, CONG. RESEARCH SERV., *THE WORLD BANK’S INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA)* 2–3 (2007), available at <http://fpc.state.gov/documents/organization/84308.pdf>; Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?*, 97 AM. SOC’Y INT’L L. PROC. 41, 42–43 (2000). But see ICSID, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, May 16, 2007, <http://www.worldbank.org/icsid/highlights/05-16-07.htm> (indicating that Bolivia is withdrawing from ICSID).

248. Acting on a broad, multilateral basis creates an opportunity to secure input from a broad group of perspectives including different governments (i.e.,

tation—which results in the creation of a single treaty or a DSD Working Group or Advisory Committee<sup>249</sup>—might be more efficient than implementing DSD on a treaty-by-treaty basis and amending around 2500 individual treaties. As a practical matter, however, a multilateral approach would need to address investment conflict on a global scale. Likewise, it would need to offer broad solutions to address the mutual needs of stakeholders with different political, economic, cultural, and legal traditions.

ii. A Bilateral Approach

The costs of a multilateral approach translate into a significant benefit for a bilateral approach. Because it addresses the lowest common denominators of countries with different traditions, a multilateral approach may create a race to the bottom. Rather than having the flexibility that comes from a tailor-made process, a multilateral approach may ultimately only create a narrow, rigid, and unrefined range of acceptable options.

A system focused instead on bilateral relationships can actualize the core benefits of DSD. A bilateral approach permits stakeholders to make an accurate assessment of the appropriateness of DSD. A contextual application of DSD means the proposed dispute resolution process can account for local variations and needs. This is likely to mean that conflict indigenous to its disputing system is managed more effectively.

While there may be concerns about the splintering of dispute resolution that a bilateral use of DSD might bring, this may not prove overwhelming.<sup>250</sup> Investors are accustomed to

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developing, developed, or transitional economies); different types of investors (i.e., different industry sectors, financiers, and insurers); and other NGO perspectives. Including an overly large number of constituents may, however, create a cacophony with off-setting inefficiencies.

249. This might be similar to the NAFTA Advisory Committee on Private Commercial Disputes, which was an advisory committee established to make reports and recommendations on the availability, use, and effectiveness of arbitration, mediation, and other procedures for the resolution of private international commercial disputes. See NAFTA, *supra* note 29, art. 2022; NAFTA ADVISORY COMM. ON PRIVATE COMMERCIAL DISPUTES, NOVEMBER 1996 REPORT OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES TO THE NAFTA FREE TRADE COMMISSION app. A (1996), available at <http://www.dfait-maeci.gc.ca/nafta-ALENA/report12-en.asp>.

250. The challenge of fragmentation of dispute resolution systems may simply be a question of degree that can be addressed by the proper balance between uniformity and diversification. Beyond this, there may be less of a con-

different processes (both internal and external) for managing disputes. While variations may prove challenging for governments,<sup>251</sup> they retain ultimate control over the degree of dispute resolution uniformity and can even factor the need for uniformity into their DSD process.<sup>252</sup>

One way to begin using DSD would be to encourage treaty partners to consider the possibility of DSD opportunities. When negotiating treaties in the future, governments might include a specific provision to establish a working group to make DSD-related recommendations, or at the very minimum, they might consider establishing a group to consider the utility of the DSD process. There is precedent for such an approach.<sup>253</sup> In particular, the 2004 U.S. Model Bilateral Investment Treaty (BIT) includes an opportunity for treaty partners to consider the possibility of augmenting the existing arbitration mechanism to provide for an appellate body.<sup>254</sup> Such an approach might also provide for fruitful opportunities to consider dispute resolution more systematically and create tailor-made mechanisms to address their unique needs.

Many treaties currently in existence have sunset provisions that provide an opportunity for renegotiation of treaty

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cern about the fragmentation of the dispute resolution process than there is with the fragmentation of the underlying substantive standards of investment protections. Fragmentation concerns may be of particular concern in the substantive arena because diversification in standards are further fragmented by the sophistry of interpretation by arbitration tribunals.

251. The challenge for governments may be less about managing different dispute resolution processes and more about becoming accustomed to being publicly accountable for their conduct. For countries without a tradition of waiving sovereign immunity, it may be particularly difficult to offer investor-state dispute resolution if there is no internal infrastructure in place—such as the Office of the Legal Advisor at the United States Department of State—to defend claims.

252. Governments might consider DSD on a unilateral basis. They might consider their internal conflicts, needs, and values during the design process. Theoretically, this might result in internal domestic legislation to improve the performance of managing investment disputes. *See, e.g.*, Salacuse, *supra* note 168, at 46–47 (“[H]ost countries might wish to consider enacting legislation that specifically authorizes—if not encourages—[government officials] to employ ADR techniques.”). It also might involve using DSD to create model treaty language that requires adaptation with each trading partner.

253. *See* 2004 U.S. Model BIT, *supra* note 19, at Annex D.

254. *See id.* (“Within three years after the date of entry into force of the Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards . . .”).

terms in five to ten years.<sup>255</sup> Given the increase in the number of countries renegotiating treaties,<sup>256</sup> government negotiators might consider DSD actively. For those forward planners, governments might contemplate the utility of revising the dispute resolution provisions to address their current and future interests. Theoretically, the time between now and the sunset may permit parties to use DSD to agree upon a modified dispute resolution mechanism that is implemented later.

### iii. The Hybrid: A Third Way?

There is a possible “third way” for using DSD. Countries may ultimately prefer to use a centralized set of models—perhaps created by a group representing a broad constituency of stakeholders—but adapt the general approach to meet the unique needs of each individual system. This may minimize the likelihood of confusion caused by a plethora of radically different sets of dispute resolution processes but still provide an opportunity for a degree of customization.

As a practical matter, this latter option may be the most realistic scenario as major capital exporting countries (such as the United States, The Netherlands, Germany, Canada, and France) use Model BITs to begin treaty negotiations.<sup>257</sup> Nevertheless, the Australia/United States Free Trade Agreement demonstrates that parties can significantly alter their standard dispute resolution negotiating strategy should the context warrant it.<sup>258</sup>

Moreover, to the extent that risk-averse stakeholders wish to adhere to tried, tested, and generally accepted models, using a prepackaged DSD model may be more politically tenable. While there would undoubtedly be variations in the models adopted, the degree of uniformity coupled with better tailoring would likely be an improvement to the current approach. A more uniform approach that allows for reasonable variation may also prevent over-fragmentation. Such an outcome for a

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255. See COMEAUX & KINSELLA, *supra* note 6, at 109; LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 61–62 (2004).

256. See UNCTAD, *International Investment Agreements*, *supra* note 4, at 2 (“The trend towards the renegotiation of existing treaties has continued with 13 BITs affected in 2005.”).

257. See DOLZER & STEVENS, *supra* note 34, at 167–253 (providing the text of various model investment treaties).

258. See Dodge, *supra* note 37, at 22–26 (discussing the Australia/United States Free Trade Agreement and NAFTA); Franck, *supra* note 4, at 359–60.

system experiencing substantial variation in the interpretation of textually similar rights<sup>259</sup> may prove quite useful.

The choice as to which level to implement DSD, however, is ultimately a matter of government discretion and presumably an informed exercise of sovereignty. Should governments desire greater variety in their dispute resolution obligations, they are at liberty to create it. Likewise, should governments prefer to trade the benefits of tailor-made dispute resolution for enhanced certainty, they can negotiate that outcome.<sup>260</sup>

#### 4. Moving Beyond Inertia: A Constituency for Change

Because it is a systematic shift to the conflict management mindset, there will be costs associated with using DSD. Given the nature of inertia,<sup>261</sup> some force will be required to adjust the current approach. There may not be a unified constituency to advocate for change. There may be a perception that the problems surrounding the investment treaty dispute have reached neither a cataclysmic stage nor a “mutually hurting stalemate,” where parties become willing to consider new solutions.<sup>262</sup> In other words, until the difficulties with the existing

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259. See generally *supra* notes 11, 80, and accompanying text (discussing concerns regarding inconsistency and legitimacy in the current dispute resolution system).

260. Drafters may need to draft around “Most Favored Nations” (MFN) clauses. One arbitral tribunal held that an MFN clause requires importation of more favorable dispute resolution provisions from other treaties to which the respondent is a party. *Maffezini v. Kingdom of Spain*, 16 ICSID REV. FOREIGN INV. L.J. 212, 232 (2001), available at [http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_001.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf). Not all tribunals have agreed with this approach. See Scott Vessel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 126–27 (2007). To address this issue, stakeholders could include clauses that clearly state that MFN provisions do not apply to the dispute resolution mechanism.

261. Newton’s first law of motion is that an object at rest tends to stay at rest and an object in motion tends to stay in motion with constant velocity unless acted upon by a force. ISAAC NEWTON, *THE PRINCIPIA* 416 (Univ. of Cal. Press, 1st ed. 1999) (1687). This law of inertia suggests that some force will be required to change the present state of affairs. *Cf. id.*

262. I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* (1989) (explaining how foreign powers can contribute to the management and resolution of conflicts in Africa without using military force); I. William Zartman, *The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments*, in *CONTEMPORARY PEACEMAKING: CONFLICT, VIOLENCE AND PEACE PROCESSES* 19, 19–20, 24, 26 (John Darby & Roger MacGinty eds., 2003); I. William Zartman, *Timing and Ripeness*, in *NEGOTIATOR’S FIELDBOOK*, *supra* note 3, at 143 (explaining the concept of a mutually hurting

system reach a point that is unbearable for all stakeholders, the system may not be ripe for the use of Dispute Systems Design.<sup>263</sup>

a. *The Role of Foreign Investors*

Critics might argue that investors have largely been happy with the status quo and immediate access to investment treaty arbitration.<sup>264</sup> Bringing a host government to the table through arbitration is a powerful tool. Because it has been used successfully in the past to obtain multimillion-dollar awards,<sup>265</sup> investors may have little incentive to change the current process.

This position may be shortsighted. Over-reliance on arbitration has its own costs. Some investors have begun to speak out against the use of arbitration.<sup>266</sup> The potentially significant arbitration costs, for which the parties may ultimately be responsible, undoubtedly affect this concern. In several important recent arbitration cases, investors have not prevailed and have

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stalemate); see also Andrea Kupfer Schneider, *The Day After Tomorrow: What Happens Once a Middle East Peace Treaty Is Signed?*, 6 NEV. L.J. 401, 403 (2006) (discussing Zartman's theory of ripeness).

263. See Menkel-Meadow, *supra* note 241, at 344–45 (discussing the problem of ripeness in dispute resolution).

264. There is not yet an empirical analysis quantifying investors' subjective satisfaction with the arbitration process. Future analysis might consider this dimension as treaties provide investors with new procedural rights that investors might reasonably perceive as desirable. One study suggested that arbitration has benefits for states and investors. See CLARK, MARTIRE & BARTOLOMEO, INC., ICSID: STAKEHOLDER SURVEY (2004), available at <http://www.worldbank.org/icsid/highlights/icsid-client-survey-100904.pdf> (surveying parties' and arbitrators' views on ICSID, finding favorable ratings for ICSID, and reporting that 93% of respondents were "likely" to recommend ICSID dispute resolution in the future); see also Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 274 n.120 (2003) (maintaining that, in securities arbitration, investors fare better in arbitration proceedings than in the courts); Michael M. Moore, *International Arbitration Between States and Foreign Investors—The World Bank Convention*, 18 STAN. L. REV. 1359, 1376 (1966) (suggesting that a history of dissatisfaction with arbitration "is no reason to oppose the creation of facilities for conciliation and arbitration of investment disputes to which investors may have access").

265. See, e.g., *supra* notes 52–54 and accompanying text (describing the monetary damages in the Argentina cases).

266. For example, Grant Kesler, the former CEO of Metalclad, a company that won an investment treaty arbitration, was so dissatisfied with the process that he stated he "wished he had merely entrusted his company's fate to informal mechanisms," such as various "political options." Coe, *supra* note 78, at 8 & n.2. After having spent approximately five years and approximately \$4 million in legal fees, Kesler opined the process was too slow, costly, and indeterminate. *Id.* at 9–10.

been required to pay millions of dollars not just for their own legal costs but also the costs of the government and the arbitral tribunal.<sup>267</sup>

Not unlike the situation at the Caney Creek mine, investment treaty arbitration is subject to rising costs and lengthy delays. Investors might be best served by looking for ways to address those issues. In other words, there are aspects of the current system that may not be in an investor's long-term commercial interests. DSD could offer an opportunity to accentuate the positive aspects of the current system while minimizing other important commercial risks.

*b. The Role of Non-Governmental Organizations*

Non-governmental organizations (NGOs) may also not be natural advocates. They have made inroads towards increasing the transparency of the arbitration process and obtaining public access to materials.<sup>268</sup> Accordingly, some NGOs may be unwilling to support reform that may decrease transparency if, for example, DSD results in the implementation of processes that increase confidentiality.

However, opposition to DSD on the part of NGOs may be counterproductive to long-term goals.<sup>269</sup> In particular, DSD may give NGOs a voice in the design process. Likewise, a new design may use processes that promote core NGO policy objectives, such as establishing an ombuds office where citizens and NGOs have an equal opportunity to voice complaints.<sup>270</sup>

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267. See *Int'l Thunderbird Gaming Corp. v. Mexico*, Award (UNCITRAL Jan. 26, 2006), available at <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf> (requiring Thunderbird to pay three-fourths (approximately \$378,939.06) of the tribunal's costs and expenses and \$1,126,549.38 for the respondent's legal costs and expenses); *Methanex Corp. v. United States*, 44 I.L.M. 1345, 1464 (2005) (requiring the losing investor to pay \$2,989,423.76 for the United States' legal costs and also reimburse the United States for \$1,071,539.21 in connection with other arbitration costs); cf. *ADC Affiliate Ltd. v. Republic of Hungary*, No. ARB/03/1, Award (ICSID Oct. 2, 2006), available at <http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf> (requiring the respondent to pay "to the Claimants the sum of \$7,623,693 in full satisfaction of both Claimants' claims for costs and expenses of this arbitration").

268. See *supra* note 196 (discussing aspects of improved transparency in the investment treaty arbitration process); see also 2004 U.S. Model BIT, *supra* note 19, art. 29 (outlining various transparency provisions).

269. URY ET AL., *supra* note 65, at 101–06 (explaining the events that gave rise to a costly and lengthy dispute between management and the union).

270. See Krent, *supra* note 224, at 22 (observing that ombuds through their "interaction with members of the regulated public may help lend legitimacy

c. *The Role of Governments*

More importantly, as they are signing treaties and are the quintessential “repeat players,” governments have not indicated an interest in pursuing DSD. For example, when it re-drafted its Model BIT in 2004, the United States government made certain structural changes.<sup>271</sup> It did provide that “the claimant and respondent *should* initially seek to resolve the disputes through consultation and negotiation, which may include the use of nonbinding, third-party procedures.”<sup>272</sup> There were many other useful improvements made to the dispute resolution provisions, but they were made primarily to the arbitra-

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(as well as transparency) to the affairs of government” through their interactions with members of the regulated public); *cf. supra* note 223 and accompanying text (outlining the implications of an ombuds approach).

271. 2004 U.S. Model BIT, *supra* note 19, art. 23 (emphasis added). Canada also amended its model investment treaty. *See* Agreement Between Canada and [Country] for the Promotion and Protection of Investments, <http://www.international.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> (last visited Oct. 17, 2007) [hereinafter Canada Model BIT].

272. *See* 2004 U.S. Model BIT, *supra* note 19, art. 23 (emphasis added). This was an improvement over Article VI of the 1992 U.S. Model BIT that provided that the “parties to the dispute *should* initially seek a resolution through consultation and negotiation” without specifying how this should happen; but in any event, after a six-month cooling-off period, parties could submit their disputes to arbitration. *See* DOLZER & STEVENS, *supra* note 34, at 247 (emphasis added). Under both versions, it is unclear what is expected of the parties during this process of consultation and negotiation.

Recourse to negotiation does not appear to be mandatory. Instead, parties gain access to arbitration by (1) submitting a notice of intent to submit a claim and (2) waiting the requisite amount of time to file the arbitration. 2004 U.S. Model BIT, *supra* note 19, art. 24(2)–(3). The nature of the obligation to engage in nonbinding dispute resolution in U.S. Model BITs has ebbed and flowed over time. While the 2004 U.S. Model BIT generally resembles the 1987 U.S. Model BIT language, the 1987 language was slightly stronger. The 1987 U.S. Model BIT required that “parties to the dispute *shall* initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding third party procedures.” U.S. BIT Model Negotiating Text of September 1987, art VI(2), *reprinted in* VANDEVELDE, *supra* note 217, app. A-4. The 1982 version of the treaty provides that “the parties *shall* initially seek to resolve the dispute by consultation and negotiation [and] may agree to rely upon non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility” of ICSID. U.S. BIT Model Negotiating Text of January 11, 1982, art. VI(2), *reprinted in* VANDEVELDE, *supra* note 217, app. A-1. By sharp contrast, the April 1994 version of the U.S. Model BIT did not reference any type of nonbinding dispute resolution; it only permitted investors to resolve disputes in national tribunals, by previously agreed methods, and through various arbitration methods. *See* U.S. Model BIT, art. IX (Apr. 1994), *reprinted in* UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM VOL. III at 201, U.N. Doc. UNCTAD/DTC/30, U.N. Sales No. E.96.II.A.11 (1996).

tion process.<sup>273</sup> More importantly, there is no known evidence regarding whether the United States considered DSD systematically.<sup>274</sup>

Governments may not be considering DSD for a variety of reasons. Some countries may not see a need to change. This may be due to practical realities, namely that their investors benefit from the current regime and their government has not had to absorb any of the costs of investment treaty arbitration because they have not (1) lost a case or (2) had to pay for the defense of a treaty claim.<sup>275</sup> Other governments that have been regularly subjected to treaty claims and have had to pay the price—such as Argentina, the Czech Republic, and the Ukraine—may not have the bargaining power to change the status quo.<sup>276</sup>

Basic reasons might explain the failure of governments to engage in DSD. Government officials may simply be unaware of DSD. Similarly, for those governments which have not used it in the past, there may be some skepticism as to its potential benefits or a lack of understanding of how it might be used in the framework of investor-state dispute resolution provisions of a treaty. Moreover, given the challenges of making changes within bureaucracies,<sup>277</sup> inertia may prevent governmental change until a tipping point has been reached.<sup>278</sup>

Despite these concerns, there are social, economic, and political costs of doing nothing. Engineers practicing Total Quality Control<sup>279</sup> recognize that all systems have costs, including

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273. The 2004 U.S. Model BIT gave tribunals the authority to accept *amicus curiae* submissions, address preliminary questions, expand the transparency of arbitration proceedings, and consolidate claims. The 2004 Model BIT also considers the possibility of an appellate mechanism. 2004 U.S. Model BIT, *supra* note 19, arts. 28(3)–(4), 29, 33, Annex D.

274. Canada Model BIT, *supra* note 271, arts. 22–27, 32–39 (providing for consultation before the initiation of arbitration, introducing other improvements to the arbitration system, but apparently failing to include DSD).

275. See, e.g., Gottwald, *supra* note 195, at 253 n.80 (“[The] United States has faced nine different investment treaty arbitration claims brought under NAFTA’s investment chapter, but has not lost a claim to date.”).

276. See *supra* notes 10, 193, 206, and accompanying text.

277. Cf. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 64 (1995) (arguing that the link between thickening government and the diffusion of accountability expresses itself in associated costs, including information distortion, administrative inertia, and disunity of command).

278. See NEWTON, *supra* note 261, at 416.

279. Total Quality Control is a “comprehensive, companywide system” to achieve the goal of “provid[ing] a product and service into which quality is de-

those for planning, appraisal, implementation, and failure.<sup>280</sup> Nevertheless, creating an effective high-quality system is well worth the effort if it eliminates other costs related to the creation of a poor quality product that may serve as the basis of future complaint.<sup>281</sup>

### CONCLUSION

The goal of this Article has been to articulate the case for using DSD to analyze and manage investment-related conflict. This preliminary step is fundamental to providing a constituency and platform for dialogue about DSD in order to supply a framework for its ultimate implementation. It is, however, only one step in a larger process.

It is imperative to engage in systems analysis to diagnose the investment treaty-related conflict and where the dispute resolution processes succeed and fail. Such an assessment might involve both quantitative and qualitative empirical analysis to understand the macro- and microimplications for future dispute resolution processes.<sup>282</sup> In addition, it is vital to gather a constituency to agree on the core set of organizing principles. Bringing together states and investors, as well as international and non-governmental organizations, to create a dialogue may well prove a daunting task. This vital step is worth the effort because it could lead to a consensus on the appropriate framework for the creation of future dispute resolution systems. It might, for example, determine whether predictability or fragmentation should be guiding principles of the system.

Finally, governments might ultimately use the foregoing information and analysis to make innovations in or adaptations of their current processes for resolving investment treaty conflicts. Because not all governments are likely to accept this DSD-based approach to conflict management immediately,<sup>283</sup> it

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signed, built, marketed, and maintained at the most economical costs which allow for full customer satisfaction." A.V. FEIGENBAUM, *TOTAL QUALITY CONTROL* 5 (3d ed. 1991).

280. See generally BILL CREECH, *THE FIVE PILLARS OF TQM: HOW TO MAKE TOTAL QUALITY MANAGEMENT WORK FOR YOU* (1994); FEIGENBAUM, *supra* note 279.

281. FEIGENBAUM, *supra* note 279; JURAN'S *QUALITY HANDBOOK*, *supra* note 120, at 8.1–8.25.

282. Quantitative analysis might include, for example, the use of regression modeling or other statistical techniques to analyze large bodies of data related to particular populations.

283. Everett Rogers's classic book on the theory of diffusion of innovations

will be critical for governments that are perhaps more comfortable with experimentation and more familiar with DSD to innovate and provide an example of the costs and benefits of the approach.<sup>284</sup> While innovation and diffusion are likely to be challenging, completion of the DSD process requires such design, implementation, and assessment of the design. Based upon the success of such innovators, there may be diffusion that encourages more risk-averse governments to use DSD in the future.

The challenge is to think seriously about designing comprehensive systems to resolve investment disputes. This requires consideration not just of traditional binding mechanisms, but of a system that may involve a combination of both binding and nonbinding processes.

We are at a unique historical junction in the evolution of resolving investment-related conflict. Arbitration will no doubt be an important part of the puzzle. Nevertheless, taking a more systematic approach to conflict management provides an opportunity to assess and capitalize on the efficiency of different dispute resolution options. Such an approach should include ongoing scholarship and should address the issues identified in this preliminary work. The approach might also enhance the integrity and legitimacy of the current dispute resolution system.

As with any new venture, there will undoubtedly be challenges involved in integrating DSD into the world of investment treaty conflict. The goal should be to brainstorm possible opportunities before throwing the baby out with the proverbial bathwater. The opportunity to decrease costs, increase efficiency, and interject procedural justice into the system should not be discounted. Ultimately, such an analysis has the unique benefit of strengthening the legitimacy of the dispute resolution

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argues that the adopters of any new innovation or idea could be categorized as “innovators” (2.5 percent), “early adopters” (13.5 percent), “early majority” (34 percent), “late majority” (34 percent), and “laggards” (16 percent), based on bell curve mathematic distribution. EVERETT M. ROGERS, *DIFFUSION OF INNOVATION* 11 (4th ed. 1995). The willingness and ability to adopt an innovation can depend on awareness, interest, evaluation, trial, and adoption. *See id.* at 1 (“Getting a new idea adopted, even when it has obvious advantages, is often very difficult. Many innovations require a lengthy time, often of many years, from the time they become available to the time they are widely adopted.”); GLADWELL, *supra* note 49, at 197 (discussing the “New Product Cycle” and the role of “innovators” in encouraging people to adapt to new ideas).

284. Given its history of ADR and DSD and the ongoing debate about the Trade Promotion Authority Act, the United States is well positioned to consider the use of DSD.

process and giving stakeholders confidence in the system's capacity to protect their rights, satisfy their interests, and produce just results.