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International Dispute System Design: Shoals and Shifting Goals

*Janet Martinez**

I. AN INTRODUCTION TO COMPARATIVE LAW IN INTERNATIONAL DISPUTE RESOLUTION

The American Society of Comparative Law's annual meeting and works in progress conference spanned topics of process and substance. Looking to the future, panelists highlighted challenges to the rule of law, access to justice, and use of online dispute resolution ("ODR"). This Article approaches the future through a system-design lens to trace how established dispute-handling systems for international commerce, trade, and foreign investments are roiling in rough waters. These systems have emphasized the use of formal, rights-based public and private processes.¹

Cross-border commercial disputes traditionally designate a provider organization, such as the International Commerce Centre in Paris or the Singapore International Arbitration Center, to administer a confidential, expert arbitral process. Since the advent of the World Trade Organization in 1995, international trade has followed a structured process under its Understanding on Rules and Procedures Governing the Settlement of Disputes ("DU").² International investment disputes between investor and host countries also tend to use an arbitral process under the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"). While a variety of processes are contemplated—ranging from direct negotiation, to mediation, to arbitration, to courts—most disputes are submitted to an arbitral proceeding before a panel of expert arbitrators who render an award that, subject to specified rules, is final and binding.³

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1. See 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014) (explaining international arbitration and its use as an international commerce dispute resolution tool); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 3–20 (1st ed. 1988) (explaining the power-rights-interests framework which posits that: processes that are primarily oriented to the parties' interests are more likely to lead to results with long-term sustainability. Interests encompass whatever the parties care about, including economic, political, and social values; disputes resolved according to interests take time, and it is exceedingly cumbersome to balance the myriad interests of multiple parties. Resolving disputes on the basis of rights calls for the application of agreed-upon-rules to a given circumstance in order to determine who prevails; rights-based processes value procedural justice but may not address the more qualitative underlying interests. Disputes resolved according to power weight the outcome to the party with more leverage and status but may do so at the expense of relationships).

2. See generally DSU, *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU] (structured process of the WTO that guides resolving disputes of international trade between organizational members).

3. See generally BORN, *supra* note 1.

This Article considers the abovementioned system domains, their founding purpose and structure, and their response to contemporary pressures. For discussion purposes, “system” refers generally to a process or series of processes formed by an organization to prevent, manage, or resolve a stream of disputes. Section II opens with an overview of an analytical approach to system design. Sections III, IV, and V, in turn, briefly review the systems established for the resolution of international commerce, international trade, and international investment disputes, as well as recent proposals for change in each system. While each of these sectors warrants a deeper analysis (and are, in fact, the subject of extensive scholarship), this Article is intended to note the pending redesign of the relevant systems in response to a rebalancing of system goals.

II. ANALYTIC FRAMEWORK FOR DISPUTE SYSTEM DESIGN

One approach to dispute system design (“DSD”) is to utilize the following analytic framework with its six elements: goals, stakeholders, context and culture, structures and processes, resources, and accountability.⁴

Specifying the goals of the system is the first and most critical of the design elements. This element asks, “What does the designer seek to accomplish, and what disputes will be addressed?” Potential goals include compliance, efficiency for parties and institutions, justice, relationships, institutional reputation, dispute prevention, user experience, autonomy, flexibility, consistency, predictability, and more (all of which are likely desirable by some subset of stakeholders). That said, a decision-making body, whether an individual or entity, will need to decide which goals are most important. Prioritizing certain goals will focus the choice of process and provide a metric for evaluating the system’s effectiveness over time. For example, tradeoffs are often made between equity and efficiency, interests and rights, and confidentiality and transparency.

The second framework element is the identification of stakeholders, their interests, relationships, and relative power. Stakeholders include the people and organizations that create, host, use, and are affected by a system. Ideally, they will be involved in the design from the start and share their user experience. In an international context, stakeholders include citizens; local, state, and national officials and agencies; the parties; legal counsel; private firms; courts; and third-party neutrals and providers.

Context and culture, meaning the circumstance or situation in which a system is diagnosed and designed, comprise the third element. “Culture” refers to the implicit assumptions and values held by the surrounding community—including individuals, agencies, industries, states, and regions—that shape the dispute.

As an element, structures and processes examine how one or more processes are related to each other and the formal legal system. The range of process types includes direct negotiation, third-party facilitation, mediation, arbitration, and court adjudication. Generally, moving from left to right in the table below, processes move from more interest-based to more rights-based.⁵ Also from left to right, the

4. See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 129–33 (2009).

5. See *id.* at 127; URY ET AL., *supra* note 1.

processes get incrementally more costly in time and money, more formal, and more within the control non-parties (i.e., the power of the process and outcome shifts from the parties to a third-party neutral like an arbitrator or judge).

Dispute Resolution Spectrum

Negotiation	Mediation	Arbitration	Trial
No third-party	Third-party (mediator)	Third-party (arbitrator)	Third-party (judge, jury)
Nonbinding	Nonbinding	Nonbinding or binding	Binding
	Facilitated	Adjudicative	Adjudicative

Resources—financial, human, data, technological, information, and training resources—are critical to support a system. Leadership from the top, combined with understanding of the users’ perspective, are both key to identifying motives and building scale capacity.

Lastly, a system’s accountability and success will depend on the degree of transparency around its operation and whether it includes monitoring, learning, and evaluation components. Evaluation enables the organization to establish metrics on whether the system is functioning effectively in terms of participation, cost–benefit, quality neutrals, and user satisfaction.

III. INTERNATIONAL COMMERCE

International commercial disputes are generally characterized as cross-border between parties of different national jurisdictions. As with domestic commercial disputes, parties undertake obligations by contract, which may provide for the resolution of any dispute by a choice of process (e.g., negotiation mediation, arbitration, or national courts). Most parties resist resolving their dispute in the other party’s national courts. Thus, parties select an institution and set of rules to govern, typically choosing to arbitrate through the American Arbitration Association (“AAA”), JAMS, or the International Chamber of Commerce (“ICC”). The New York Convention for the Recognition and Enforcement of Arbitral Awards is the means by which 160 countries have agreed to enforce arbitral awards.⁶

Factors that figure into the choice of process are the goals of the stakeholders, as well as the context and culture of the parties and the individual dispute. For commercial disputes, goals may be motivated by the law, the need for efficiency, and users’ overall experience. A party’s dominant interest may be to enforce his or her rights and achieve some measure of justice, which may manifest in substantive, procedural, and interpersonal dimensions.⁷ One of the most compelling goals may be a desire to increase case management capacity and efficiency of case handling

6. See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought).

7. For an in-depth review, see Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO STATE J. ON DISP. RESOL. 1 (2008).

(i.e., a need to reduce the time and expense for the conflict-handling institution). Alternatively, more complex user preferences may dominate, such as the opportunity to present one's case in public before a tribunal; the desire for self-determination; a flexible, tailored array of processes that provide more participatory and interest-driven options; or a less adversarial process that allows the parties to preserve or repair their relationships. This last issue, the call for a less adversarial process, reflects a global shift towards using more facilitative options. While mediation has long been part of many cultures' systems for dealing with conflict, it has been less common in the commercial context.⁸

Standardized arbitration clauses have been used for decades, as have forum selection, choice of law, and other, more procedural, terms. More recently, multistep or tiered clause drafting has allowed sequential stages of dispute resolution in both consensual (negotiation or mediation) and adjudicatory (arbitration or litigation) processes.⁹ Mediation of cross-border disputes is gradually gaining ground with parties and counsel. In 2008, the European Directive on Mediation was adopted.¹⁰ Since then, mediation has gained broader support at the World Bank and the ICC.¹¹

In 2016 and 2017, the Global Pound Conference (“GPC”)¹² sponsored a series of forty events, bringing together stakeholders in dispute resolution, such as commercial parties, lawyers, dispute resolution providers, and influencers. The GPC asked four “core” questions:

1. What do parties want, need, and expect with regard to access to justice and dispute resolution systems?
2. How is the market currently addressing those needs and expectations?
3. How can dispute resolution be improved?
4. What action items should be considered and by whom?¹³

8. For an overview of international mediation, see JACQUELINE NOLAN-HALEY, ELLEN E. DEASON, & MARIANA HERNANDEZ-CRESPO GONSTEAD, *GLOBAL ISSUES IN MEDIATION* (1st ed. 2019).

9. See KATHLEEN M. SCANLON, *DRAFTING DISPUTE RESOLUTION CLAUSES: BETTER SOLUTIONS FOR BUSINESS* (Helena Tavares Erickson ed., 2008).

10. See Council Directive 2008/52, 2008 O.J. (L 136) 3 (EC); Directorate General for Internal Policies, *The Implementation of the Mediation Directive Workshop 29 November 2016*, PE 571.395 (Nov. 29, 2016), https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf (providing a preliminary evaluation of mediation's use and effect); see generally Nations Convention on International Settlement Agreements Resulting from Mediation, annex, G.A. Res. 73/198 (Dec. 20, 2018).

11. See generally *Mediation Services*, WORLD BANK, <https://www.worldbank.org/en/about/unit/mediation-services#1> (last visited Apr. 4, 2020) (providing mediation services for staff and consultants with workplace disputes); *Investor-State Mediation*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx> (last visited Apr. 4, 2020) (offering mediation for investor-state disputes); *ICC International Center for ADR*, INT'L CHAMBER OF COMMERCE, <https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/> (last visited Apr. 4, 2020) (offering mediation services including rules, clauses, procedures, and neutrals).

12. At the original Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in 1976, Frank Sander introduced ideas that led to the concept of the multidoor courthouse. A. LEO LEVIN & RUSSELL R. WHEELER, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (1979).

13. The four core questions were posed at all forty events in the *GPC Series Data and Reports*, INT'L MEDIATION INST., <https://www.imimmediation.org/research/gpc/series-data-and-reports/#0-core-question> (last visited Apr. 4, 2020).

The surveys conducted as part of the conference series uncovered methods for improving commercial dispute resolution, such as drafting pre-dispute clauses as an early, deliberate exercise rather than a last-minute boilerplate insertion; exploring how a conflict specialist (as part of upper management) could integrate dispute handling across an organization; and cooperating with experienced litigation counsel to select the processes that balance legal counsel, the likely outcome, and efficiency.¹⁴

Responses also revealed the following key points:

- Parties focus on money or a particular legal outcome and look to legal counsel to lead them to efficient and predictable responses;
- Providers tend to focus on parties' interests, the rule of law, and general principles of fairness, with significant value placed on face-saving, control over outcomes, and cost efficiency;
- Mediation was considered the most effective ADR process, but adjudicative processes were supported by roughly half the attendees;
- More emphasis should be placed on pre-dispute processes, such as mediation, arbitration, and hybrids, all with court encouragement;
- Lawyers were deemed most resistant to change; and
- Education was identified as the key action item, and the government, arbitrators, and judges were named as the chief actors.¹⁵

Two years prior, in 2014, Professor S.I. Strong undertook a significant empirical study on the use of mediation.¹⁶ She noted that while parties, counsel, and policymakers had long considered arbitration the preferred means of resolving commercial disputes, the increasing expense in terms of time, money, and relationships challenged that reality.¹⁷ She noted characteristics that made certain disputes amenable to the use of mediation, primarily the “potential for preserving ongoing relationships,” the absence of a need for legal precedent, and a lot at stake in a complex case that would benefit from a creative solution.¹⁸

Her findings garnered the views of parties, counsel, academics, and professional neutrals regarding mediation and the utility of a convention on mediation. When survey respondents were asked why they would use mediation, they noted the benefits of reduced cost, decreased time, and a lesser potential to harm relationships, plus the opportunity for more flexibility and creativity in

14. Deborah Masucci & Shrvanthi Suresh, *Transforming Business Through Proactive Dispute Management*, 18 CARDOZO J. CONFLICT RESOL. 659 (2017).

15. These responses were from San Francisco. As a center of ADR practice development, the San Francisco community has taken mediation for granted as a staple of our legal system and our legal culture, and innovation may be harder to achieve. Deborah Masucci, *2016–2017 Global Pound Conference*, 73 A.B.A. DISPUTE RESOL. SECTION MAG. 6–8 (Spring 2018); see Jed D. Melnick, *Symposium: The Pound Conferences; Where Do We Come From? What Are We? Where Are We Going?*, 18 CARDOZO J. CONFLICT RESOL. 513 (2017).

16. S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973 (2016).

17. *Id.* at 2064–65.

18. S.I. Strong, *Beyond International Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL'Y 11, 16–17 (2014) (quoting John Lande & Rachel Wohl, *Listening to Experienced Users*, 13 DISP. RESOL. MAG. 18, 19 (2007)).

resolving disputes.¹⁹ When asked the inverse, why *not* use mediation, the responses noted limited experience, lack of trust in the process and mediators, the risk of not reaching a resolution and incurring the cost of a court or arbitral process, and unpredictable enforcement.²⁰ When asked whether they would support the development of a convention on mediation, respondents supported provisions to enforce both agreements to mediate and settlement agreements.²¹

Mediation gradually gained appeal as a process that was more interest-based, flexible, faster, more likely to preserve commercial relationships, and less expensive than adjudication, but use of the process was modest in light of unpredictable enforcement of mediated settlement agreements.²² The New York Convention recognized the value of mediation for settling commercial disputes and set as its goal to promote the use of “mediation as a method for settling commercial disputes.”²³ In 2017, the United States submitted a proposal to the United Nations Commission on International Trade Law (“UNCITRAL”) to develop a means by which mediation agreements might be enforced in a way similar to that of the New York Convention.²⁴ After over two years of work, the Convention was signed in Singapore on August 7, 2019.²⁵ The Convention established a regime for contracting states to recognize and enforce settlement agreements that result from the mediation of international commercial disputes.

The canonical sequence of methods recognized by international law for the peaceful settlement of disputes starts with negotiation, followed by a stepladder of facilitated (conciliation and mediation) and adjudicated (or arbitrated) processes.²⁶ Recent international commercial disputes seem to reflect a realignment of goals, as the facilitated options are being activated from paper to practice. The following table compares key aspects of arbitration and mediation.²⁷

Conciliation Versus Arbitration

	Arbitration	Conciliation / Mediation
<i>Process</i>	Parties choose	Parties choose
<i>Administration</i>	Parties choose	Parties choose
<i>Applicable rules</i>	Parties choose	Parties choose
<i>Applicable law</i>	Parties choose	Parties choose
<i>Location</i>	Parties choose	Parties choose
<i>Confidentiality</i>	Not confidential as to admissions by either party during the proceedings;	Discussions with other party and mediator subject to mediator

19. Strong, *Realizing Rationality*, *supra* note 16, at 2068, App. A.

20. *Id.* at 2035.

21. *Id.* at 2051.

22. See Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 2 (2019).

23. U.N. Convention on International Settlement Agreements Resulting from Mediation, annex, G.A. Res. 73/198 (Dec. 20, 2018).

24. See Schnabel, *supra* note 23 (describing the work of the UNCITRAL’s Working Group II, the purposes and goals of the convention, and the course of negotiations).

25. U.N. Treaty Collection, U.N. Convention on International Settlement Agreements Resulting from Mediation (status as of March 2020), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXII-4&chapter=22&clang=_en.

26. U.N. Charter art. 33, ¶ 1.

27. See Hal Abramson, Ema Vidak–Gojkovic, & Janet Martinez, *Presentation to UNCITRAL Working Group II* (Jan. 2016).

	proceedings confidential as to external parties (but decision may be subject to public disclosure).	confidentiality and may not be produced or used as evidence in arbitration or other legal proceedings.
<i>Neutral</i>	Parties choose arbitrator / panel	Parties choose conciliator / mediator
<i>Presence of counsel</i>	Yes	Yes
<i>Participation</i>	Parties, lawyers, arbitrator	Parties, lawyers, conciliator
<i>Discovery</i>	Parties decide scope	Parties decide scope
<i>Procedure</i>	Formal testimony of parties and witnesses; formal submission of documents.	Flexible and informal exchange of documents and views.
<i>Target of persuasion</i>	Arbitrator	Parties / conciliator
<i>Form of decision</i>	Arbitrator issues award	Parties sign an agreement
<i>Scope of decision</i>	Arbitrator decides to award or reject what is claimed / counterclaimed.	Parties may craft an agreement that involves economic, performance, and creative resolution of parties' overlapping interests.
<i>Defenses to enforcement</i>	Applicable law	Applicable law
<i>Time</i>	Months to years	Usually day(s)
<i>Cost</i>	Substantial	Modest
<i>Relationship with other party</i>	Adversarial	Less adversarial; potential to preserve business relationships.

While many aspects of mediation/conciliation and arbitration are similar, the distinction lies in the locus of decision making and the formality and expense of process. Further, with regard to participation, while mediation/conciliation and arbitration are alike in presence and control of process, the players assume different roles as to decision making. The 2014 S.I. Strong survey can serve as a baseline regarding stakeholders' general experience with arbitration and mediation; a repeat survey in the future would significantly contribute to the understanding of stakeholder goals and satisfaction.

Increasing experience with and confidence in facilitated dispute handling is occurring in both domestic and cross-border venues, and it has been further buttressed by the recognition of mediated settlement agreements in the Singapore Convention. In the international commercial dispute arena, the goals appear to be shifting from the priority of confidential, expert adjudication to processes that achieve the benefits of preserved relationships, more flexible settlements, and reduced costs that are the hallmark of mediation and conciliation.

IV. INTERNATIONAL TRADE

The World Trade Organization ("WTO") hosts one of the most frequently utilized international dispute handling processes.²⁸ The WTO and its antecedent, the General Agreement on Tariffs and Trade ("GATT"), have been resolving international trade disputes for over seventy years. At the end of World War II, as part of the Bretton Woods negotiations on international commercial and financial

28. *Understanding the WTO: Settling Disputes; A Unique Contribution*, WORLD TRADE ORG., wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Apr. 4, 2020).

institutions, twenty–three countries drafted the GATT treaty to govern trading relations.²⁹ The GATT’s primary purpose was to reduce trade barriers that would impede the free movement of goods and services across borders through a complex set of reciprocal trade commitments.³⁰ Parties to the GATT are obligated to limit tariffs, avoid discrimination among nations and between domestically produced and imported goods, and avoid the use of quotas and other restrictions on imports.³¹

Following the Bretton Woods agreement, for over forty years, the GATT’s signatories conducted a series of negotiating rounds to expand the treaty’s scope of coverage.³² An eighth round, the Uruguay Round of Multilateral Trade Negotiations (1986 to 1994) was not simply a revision of the original GATT treaty, but a fully reconceived institutional structure with an elaborate series of rules and remedies.³³ In 1994, nearly 130 member countries established the WTO.³⁴ Among the WTO agreements was the Dispute Settlement Understanding (“DSU”), which sets forth specific steps for pursuing trade disputes: consultations, panel proceedings, appellate proceedings, reasonable period of time to comply with panel/appellate ruling, compliance panel, and retaliation arbitration.³⁵ The decision makers are appointed trade–expert panelists, appellate judges, and all WTO members sitting as the dispute settlement body.

In addition to this policy–enforcement process, the WTO also engages in policy making (treaty negotiation through biennial ministerial conferences) and policy implementation. In these three phases of WTO activity, as with most international organizations, the primary stakeholders are the member nations and their constituent ministries, legislatures, citizens, industries, and nongovernmental organizations.

Winfried Lang, the former Austrian ambassador to the WTO, described the trade treaty negotiations as follows:

Because consensus is not unanimity but the construction of a coalition that agrees surrounded by a group that is willing to go along, power is the way in which consensual coalitions are created. Proximity of parties on issues

29. *Bretton Woods–GATT, 1941–1947*, DEP’T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/bretton-woods> (last visited Apr. 4, 2020).

30. The General Agreement on Tariffs and Trade, pmbl., October 30, 1947, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (last visited Apr. 4, 2020).

31. *Understanding the WTO: What We Stand For*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (last visited Apr. 4, 2020).

32. *GATT Bilateral Negotiating Material by Round*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (last visited Apr. 4, 2020).

33. *See, e.g.*, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) (establishing the WTO as a byproduct of the Uruguay Round of negotiations and incorporating “decision–making by consensus,” through which “the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”).

34. *Understanding the WTO: Basics, The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Apr. 4, 2020).

35. Daniel H. Erskine, *Resolving Trade Disputes: The Mechanisms of GATT/WTO Dispute Resolution*, 2 SANTA CLARA J. INT’L L. 40, 70–74 (2003).

and differentiation of coalitions among various types account for the types of power available and are applicable to building winning coalitions.³⁶

Between these policy-making negotiations and the policy enforcement of the DSU lies policy implementation, or what a nation does to make its national regulation of domestic industries align with its international commitments. Two mechanisms for doing so are the WTO's operating committees and the Trade Policy Review Mechanism ("TPRM"), which consists of mandated periodic country reviews. Implementation is designing the legal infrastructure to make international law also the law of the nation through legislative, executive, and judicial means. Professor Harold Koh of Yale Law School has noted that "[i]t is through this repeated process of interaction and internalization that international law acquires its 'stickiness,' that nation-states acquire their identity and that nations define promoting the rule of international law as part of their national self-interest."³⁷

A former GATT official wrote that the institution's councils and committees are under-utilized as "operational forums to discuss WTO law, to devise adequate means for its implementations, and so reconcile diverging opinions, that could help to diminish the heavy case load of the adjudicative organs."³⁸ Individual members, he says, would be well-advised to exercise more self-restraint on submissions to the Dispute Settlement Body and instead "devote their energies to facilitating the work of WTO committees established to oversee the functioning of the different covered agreements."³⁹ This is particularly apropos for developing countries' access to justice, which Annet Blank contends will depend on their meaningful involvement in the "everyday work of the WTO, such as the drafting of agendas within the WTO councils and committees and participation in their discussions and decisions."⁴⁰

The committees and TPRM both provide regular, transparent discussions that are open to all WTO members, and they are designed to gather relevant information and consult on implementation that would appear to offer a relatively lower-cost process for understanding the basis for noncompliant behavior and developing a program for improvement.

In policy making, the scope of the goals is broadest—security and predictability in multilateral trade relations—and the process requires achievement of consensus for adoption. The extended struggles of the most recent negotiations, the Doha Round begun in 2001 and still ongoing in 2020, reflect the overwhelming procedural and substantive complexity of multiparty negotiations. Multiparty negotiations are significantly impaired by the power dynamics between developing nations (e.g., Brazil and India), China, and large, developed countries (e.g., the European Union and the United States). Countries with relatively less power cannot impose consensus, but they can block it.

36. I. William Zartman, *The Elephant and the Holograph: Toward a Theoretical Synthesis, in* INTERNATIONAL MULTILATERAL NEGOTIATION: APPROACHES TO THE MANAGEMENT OF COMPLEXITY 213, 215 (I. William Zartman ed., 1994).

37. Harold Kongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996).

38. Claus-Dieter Ehlermann, *Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO*, 1 WORLD TRADE REVIEW 301 (2002).

39. *Id.*

40. Annet Blank, *Equal Access to Justice in the WTO for Developing Countries, in* DUE PROCESS IN WTO DISPUTE SETTLEMENT 141, 193 (Philippe Turrley, Iain MacVay, & Marc Weisberger eds., 2001).

In policy implementation, the goal is more focused: fact-finding and capacity building to enable countries' adoption of already-committed-to-trade measures. The process is regularized, applied to all member countries, and less dominated by individual members. Problems that surface at this stage can serve as an early warning, enabling conflict prevention. This process is, as mandated by WTO rules, a partially rights-driven consultation on the interests of the target country, its trading partners, and the WTO as an institution.

In policy enforcement, the goal is to preserve the rights and obligations of member countries, with the subsidiary objectives of solving trade disputes while maintaining institutional integrity. This process is primarily rights-driven, but power—the resources to prosecute or defend—is a significant factor.⁴¹ The tendency to negotiate a settlement once the arbitral panel is established, but before the panel renders a decision, suggests that while the legal process provides an important opportunity for public notice, the processes of mutual or facilitated consultations can achieve satisfactory resolution relative to the parties' expected outcomes from arbitration.

This Section has described three domains to facilitate analysis, but the borders are porous. The overview across policymaking, policy implementation, and policy enforcement allows us to examine inputs, processes, outputs, and how the pieces might fit better together. Three happenings are instructive.

Since November 2016, a Dispute Settlement Body negotiating group has engaged regarding an agenda of twelve thematic issues relative to parties and process, including: mutually agreed solutions; third-party rights; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; time frames; remand; panel composition flexibility and member control; effective compliance; and developing country interests. A recent report summarizes progress as of June 2019.⁴² The chair reported significant challenges among the contracting parties, including low expectations of progress and low willingness to compromise.⁴³ While some progress has been made, more work and more flexibility are called for, as evidenced by the paralysis of the Appellate Body.

In December 2019, the WTO Appellate Body (“AB”) ceased to operate, and its full complement of seven members dropped to one.⁴⁴ The United States has blocked new appointments, arguing that the AB has exceeded its mandate as framed at its inception in 1995. The contracting parties continue to wrestle with U.S. concerns.⁴⁵ Authors revisit what the framers sought to achieve and reference

41. See URY et al., *supra* note 1, at 14; see also SIVAN SHLOMO AGON, INTERNATIONAL ADJUDICATION ON TRIAL: THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT SYSTEM (2019). Instead of emphasizing compliance, Agon sets out a goal-based framework that includes both ultimate (preserving the balance of rights and obligations between WTO Members) and intermediate goals (WTO-consistency, preventing unilateralism, and a legitimate dispute settlement system). She distinguishes between linkage disputes and perennial disputes that shape those goals. *Id.*

42. See Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Coly Seck*, June 17, 2019, WTO Doc. TN/DS/31.

43. *Id.* at § 1.3.2.

44. See Jennifer Anne Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

45. Bernard Hoekman & Petros C. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis*, EUROPEAN UNIV. INST., ROBERT SCHUMAN CTR. FOR ADVANCED STUDIES, GLOBAL GOVERNANCE PROGRAMME WORKING PAPER NO. RSCAS 2019/56 (2019). In the summer

Article 3.7 of the DSU: “[T]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”⁴⁶

Article 3.7 of the DSU establishes a benchmark for adjudication: “The prime objective of WTO adjudication is to secure a mutually acceptable solution (MAS) between the parties to the dispute.”⁴⁷ Interestingly, while a mutually acceptable solution is key, authors question, “why not privilege mediation, a technique supremely adjusted to the specificities of resolving disputes amicably, instead of relegating it to a second order option?”⁴⁸ Instead, they note, “the WTO DSU is the only extant compulsory third-party adjudication regime in international relations. Undoing it might lead to a domino effect, a perilous prospect by any reasonable benchmark.”⁴⁹

Over recent years as AB disputes have increased, parties to disputes have increasingly executed “sequencing agreements,” bilateral ad hoc procedural agreements that prescribe the process and order parties undertake to reach a mutually agreed solution.⁵⁰ The prospective processes include both implied consultations at the operating committee and TPRM, as well as the DSU steps to request consultations and panel review. Once a panel report is issued, a party may file a notice of appeal to the Appellate Body.

At a time in which good faith and good will are called for, contending over the formalism of the WTO’s DSU—which historically reflected the WTO’s institutional integrity—bars achieving a mutually acceptable solution, both in the macro and micro sense. With the WTO, goals of security and predictability drive treaty making; goals of factfinding and capacity-building motivate policy implementation through the operating committees and TPRM. The enforcement of rights and obligations through the DSU has foundered. Instead, the parties have essentially suspended the appellate review process vaunted at the WTO’s original aim to achieve mutually acceptable solutions through an ad hoc blend of negotiated settlement, sequencing agreements, and regional trade treaties.⁵¹

preceding, the E.U. and Canada proposed an interim appeal arbitration process pursuant to Article 25 of the DSU. Interim Appeal Arbitration Pursuant to Article 25 of the DSU, Canada and European Union (July 25, 2019), https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf.

46. DSU, *supra* note 2, at art. 17 (“The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.”).

47. Hoekman & Mayroidis, *supra* note 45, at 3.

48. *Id.*

49. *Id.* at 14.

50. Matilda J. Brolin, *Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem*, 81 NORDIC J. INT’L LAW 65 (2016). For a sample sequencing agreement, see the agreed procedures between Mexico and the U.S. regarding a dispute before the DSU on tuna imports that was “designed to facilitate the resolution of the dispute and reduce the scope for procedural disputes.” *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/19 (Aug. 7, 2013).

51. Amidst the suspension of the Appellate Body, an interim appellate review process has been adopted by some of the WTO members as a stop-gap measure. *Trade: E.U. & 16 WTO Members Agree to Work Together on an Interim Appeal Arbitration Arrangement*, EUROPEAN COMM’N (Jan. 24, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113.

V. INTERNATIONAL INVESTMENTS

Firms use foreign direct investment, which now exceed 1.4 trillion U.S. dollars globally,⁵² to better access foreign markets, natural resources, and local labor to advance global trade. The World Bank notes a global goal to promote cross-border investment and, necessarily, to foster confidence in the international investment dispute resolution process.⁵³ A key objective is to protect cross-border investments, both from political risks in the host country—primarily expropriation, adverse regulatory changes, transfer, and convertibility restrictions—and from breach of contract. The host countries, in turn, are seeking to uphold their domestic sovereignty over commercial activities within their borders.

International investment agreements are commitments between states concerning the treatment of investors and investments, with a mechanism for enforcement of those commitments.⁵⁴ One type of international investment agreement is a bilateral investment treaty (“BIT”), of which there are nearly 2,400 in force worldwide as of 2019.⁵⁵ An injured investor can sue the host state for damages arising from a violation of the correspondent treaty obligations. The World Bank’s ICSID is the setting of many such disputes, which usually involve an investor bringing a claim against a host developing country, often involving oil, gas, mining, electric power, or energy.⁵⁶ Two or three cases are filed with the convention per month.⁵⁷ Within a BIT terms and conditions are arbitral (and, rarely, conciliation) provisions that provide the requisite consent of both parties to submit any dispute to arbitration. While an individual dispute award is applicable only to the specific parties, without imposing binding precedent on others, interested actors (including executives, bankers, lawyers, government ministers, and public citizens) pay close attention to these cases and their implications for future investment arrangements. While the culture of international dispute resolution is broadly based

52. See U.N. Conference on Trade and Development, *Global Investment Flows Flat in 2019, Moderate Increase Expected in 2020* (Jan. 20, 2020), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2274>.

53. See International Center for Settlement of Investor Disputes, *About ICSID*, WORLD BANK, <https://icsid.worldbank.org/en/Pages/about/default.aspx> (last visited Apr. 4, 2020).

54. See Jonathan D. Greenberg & Evan Darwin Winet, *International Investment Law and Dispute Resolution*, in HANDBOOK ON THE GEOPOLITICS OF BUSINESS (Joseph Mark S. Munoz ed., 2013); ANTONIO R. PARRA, THE HISTORY OF ICSID (2012); see also Ucheora Onwuamaegbu, *Limiting the Participation of Developed States: Impacts on Investor-State Arbitration*, CTR. FOR INT’L GOVERNANCE INNOVATION INVESTOR-STATE ARBITRATION SERIES (Sept. 2016), https://www.cigionline.org/sites/default/files/isa_paper_no.11_web.pdf (discussing the dynamic of investment disputes between developed and developing nations). ICSID is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between international investors. International Center for Settlement of Investor Disputes, *About ICSID*, *supra* note 53. ICSID has 163 member states. International Center for Settlement of Investor Disputes, *List of Member States*, WORLD BANK, <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx> (last visited Apr. 4, 2020).

55. U.N. Conference on Trade and Development, *International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Mar. 17, 2020).

56. SCOTT MILLER & GREGORY N. HICKS, INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK (2015) (outlining a study which found that only ten percent of BITS have disputes, of which a third settle in advance of an arbitral ruling; for cases in which a ruling is rendered, states prevail twice as often as investors).

57. See Investor Dispute Settlement Navigator, *U.N. Conference on Trade & Development: Investor Policy Hub*, <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last visited Apr. 4, 2020).

on Article 33 of the United Nations Charter “to seek peaceful solutions to disputes and engage in good faith negotiation” over gunboat diplomacy, the decision-making processes of ICSID are more directly derived from the procedures developed in international commercial arbitration as discussed above.⁵⁸ Underlying goals for the dispute resolution processes were to provide a neutral venue for international conflict, enhance good governance and rule of law in developing countries, and increase the effectiveness, fairness, and efficiency of developing countries’ domestic courts.⁵⁹ Processes for resolution include negotiation and consultation for some defined period (usually six months), but because this process is usually confidential,⁶⁰ available data on its use are limited. Although a given decision is binding only on the parties, it has implications for bilateral investment treaty rule and norm development.⁶¹

Investors, states, and affected stakeholders have examined the investment arbitration regime regarding coherence and consistency, efficiency, and legitimacy. Arbitral panels are not bound to follow the precedent of a prior tribunal’s decision, and thus awards may interpret the same treaty provisions inconsistently. The consequential lack of predictability undermines the enforcement of a coherent system. Investment treaty arbitration is not really valued for its efficiency. As the number of cases administered increases, so does the time it takes to reach an award (some taking three to four years), despite being reputed as “swifter, cheaper, more flexible and more familiar for economic operators.”⁶² Rather, the value of ISDS is giving investors access to a neutral forum with a highly enforceable arbitral award at the end of the process, rather than having to exhaust their remedies in host-state courts.

In terms of arbitration panels’ legitimacy, the literature presents an array of perspectives. In the strictly rights-based dimension, investment dispute procedures need to withstand both substantive and procedural scrutiny to possess legal legitimacy. Laurence Helfer and Anne-Marie Slaughter of Harvard Law School analyzed, in detail, the qualities of effective supranational adjudication. Helfer and Slaughter found that authoritative, impartial tribunals that issue final rulings have the most legitimacy.⁶³ Academic scholars and political leaders have questioned the fairness and democratic accountability of investor-state arbitration with respect to bias in favor of corporate investors, conflicts of interest among arbitrators, and

58. U.N. Charter art. 33, ¶ 1.

59. Stephan W. Schill, *International Investment Law and the Rule of Law*, in RULE OF LAW SYMPOSIUM 2014: THE IMPORTANCE OF THE RULE OF LAW IN PROMOTING DEVELOPMENT 81–84 (Jeffrey Lowell, J. Christopher Thomas, & Jan van Zyl Smit eds., 2015); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361, 361–66 (2018).

60. Of the cases filed with International Convention on the Settlement of Investment Disputes, about thirty percent are settled. Jack 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, 7–46 (2005). Of the cases submitted to arbitration before the International Chamber of Commerce in Paris, two-thirds are settled. Eric Schwartz, *International Conciliation and the ICC*, 10 ICSID REV.—FOREIGN INV. L. J. 1, 99 (1995).

61. Statute of the International Court of Justice, art. 59, ¶ 1.

62. Jonathan D. Greenberg & Evan Darwin Winet, *International Investment Law and Dispute Resolution*, in HANDBOOK ON THE GEOPOLITICS OF BUSINESS 227, 244 (Joseph Mark S. Munoz ed., 2013) (quoting U.N. Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, U.N. Doc. UNCTAD/DIAE/IA/2009/11 (May 2010)).

63. See Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

corporate investment rights without corresponding responsibilities for labor standards and environmental harm.⁶⁴ This tension reflects the public–private hybrid nature of investor–state disputes. On the one hand is the public’s right to have input into matters of public interest, such as the governance, health, land use, and resources of their country. On the other hand is an expectation of confidentiality based on private commercial dealings, which are usually confidential to the contracting parties.⁶⁵

Mariana Hernandez–Crespo Gonstead has focused extensively on the system design challenges of investment treaties in Latin America.⁶⁶ She expounds upon the policy goal of legitimacy and provides an integrated decision–making process for optimal investment stability.⁶⁷ At a micro level, negotiations of sustainable investment agreements would benefit from the participation of local stakeholders, which is instrumental to collaborative governance. At a macro level, building capacity and integrity in the justice system would enhance dispute handling through courts, as well as alternative dispute resolution options.

Despite numerous calls for an overhaul of the investment arbitration system, many experts advocate for consistency and coherency instead of adapting the current system to enhance public accountability.⁶⁸ In 2013, UNCITRAL adopted the Rules on Transparency in Treaty–Based Investor–State Arbitration (“Rules”), and the United Nations General Assembly guaranteed it through the Convention the following year.⁶⁹ The adoption of both the Rules and the Convention changed the paradigm of confidentiality present in international arbitration to prioritize transparency in investor–state arbitration. This new paradigm is gradually shifting

64. See Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross–Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451 (2007); Susan D. Franck, *The ICSID Effect?: Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT’L L. 825 (2011).

65. A further complication is raised by the status of the parties. “State to state” investment traditionally meant a developed country investor and a developing country host. Since the North American Free Trade Agreement came into effect in 1994, there has been an increase in investments among developed states and among developing states and a call for rebalancing the relationship with enhanced procedural protections. See Ucheora Onwuamaegbu, *Limiting the Participation of Developed States: Impacts on Investor–State Arbitration* (Ctr. for Int’l Governance Innovation, Working Paper No. 11, 2016); PARRA, *supra* note 54, at 289.

66. See Mariana Hernandez–Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor–State Satisfaction*, in U.N. Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration II* 55–62 (Susan D. Franck & Anna Joubin–Bret eds., 2010) [hereinafter Hernandez–Crespo, *From Paper to People*]; Mariana Hernandez–Crespo, *From Problem to Potential: The Need to Go Beyond Investor–State Disputes and Integrate Civil Society, Investors and State at the Local Level*, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD’S POOR 225 (Krista Nadakavukaren Schefer ed., 2013).

67. See Hernandez–Crespo, *From Paper to People*, *supra* note 66.

68. See generally George Kahale III, *Is Investor–State Arbitration Broken?*, TRANSNATIONAL DISPUTE MGMT. (2012), <https://www.transnational-dispute-management.com/article.asp?key=1918>.

69. U.N. Commission on International Trade Law, U.N. Convention on Transparency in Treaty–Based Investor–State Arbitration (2015) [hereinafter Convention on Transparency] (At its forty–sixth session in 2013 UNCITRAL adopted Rules on Transparency in Treaty–Based Investor–State Arbitration. To ensure a widespread application of the Rules on Transparency, the Working Group II of the Commission drafted the convention, which was adopted by the U.N. General Assembly on December 10, 2014. The convention was opened for signature in Port Louis, Mauritius, on March 17, 2015); see Nancy A. Welsh, *Dispute Resolution Neutrals’ Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823 (2019) (detailing a perspective on the neutral’s responsibility regarding transparency).

investor–state arbitration from a closed forum to an open forum that fosters public trust in proceedings and contributes to enhancing the legitimacy of the process and its outcomes. Nevertheless, many signatory countries hesitate to ratify the Convention because of the uncertainty that is perceived in the international policy landscape.⁷⁰

As process options, arbitration and conciliation are both available, but the latter is used only rarely, similar to the example of international commercial and international trade disputes discussed above. Antonio Parra, the first deputy–general of ICSID, notes:

[The] desire of parties to engage in third–party dispute settlement procedures only if they produce a definitive outcome to the “nature of bureaucracies, governmental and corporate, to prefer to shift [to an arbitral tribunal responsibility for the terms of settlement] rather than to assume responsibility” themselves, as they would in a conciliation. However, the potential benefits of mediation and conciliation are well recognized.⁷¹

Another process approach is to strengthen the legal consistency of awards through appellate review, bolster domestic courts, and even form a permanent international court.⁷² The EC and the Canadian Government advocate replacing ad hoc investor–state arbitration with a permanent, multilateral investment court, comprising a standing tribunal of first instance and appeal tribunal, with judges appointed by state parties to the treaty without input from claimant investors.⁷³

From both a legal and practical view, Paul Barker observes, the investment treaty arbitration process is an ad hoc system with no doctrine of precedent or appellate review to ensure consistency in the application of international investment law; rather, it has adopted a procedure of international commercial arbitration that values confidentiality over transparency.⁷⁴ Arbitration is seen to undermine host states’ rights to regulate based on the public interest.⁷⁵

Much of the discussion on BITs is focused on stronger downstream enforcement processes that incur high costs (fees and time) to the detriment of both the investor and the host country. An upstream approach to foreign investment

70. The transparency Rules enhance disclosure of arbitral proceedings and accept amicus curiae briefs. See J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor–State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681 (2007).

71. PARRA, *supra* note 54, at 289; Stephen M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?*, 22 FOREIGN INV. L. J. 237–41 (2007).

72. European Commission State of the Union, *A New System for Resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way* (Sept. 13, 2017).

73. See Interim Appeal Arbitration Pursuant to Article 25 of the DSU, Canada and European Union (July 25, 2019), https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf.

74. Paul Barker, *Investor–State Dispute Settlement Under Investment Treaties & Free Trade Agreements: Ad Hoc Arbitration or Investment Court System?*, INT’L LAW BULLETIN (Feb. 2017), <https://doughty-street-chambers.newsweaver.com/International/19q5vjt0076?a=1&p=1456996&t=174031>.

75. For example, see the series of cases wherein investors confront host states’ climate change regulation. Energy Charter Treaty arbitrations concern investors’ claims against Spain and other E.U. states regarding renewable energy projects. *Novenergia II—Energy & Env’t (SCA) v. Kingdom of Spain*, No. 18–CV–01148 (TSC), 2020 WL 417794, (D.D.C. Jan. 27, 2020); see also Tim R. Samples, *Winning and Losing in Investor–State Dispute Settlement*, 56 AM. BUS. L. J. 115 (2019).

could be made more robust through due diligence by both parties before the investment decision, secured by investment insurance. Further, the parties could devote more effort to laying the groundwork for implementation as well as adaptation to changing circumstances. These steps could increase the likelihood of preserving the working relationship between the investor and host nation and enhance benefits for workers and local communities.⁷⁶

The parallel moves to increase transparency through the Mauritius Convention, combined with the support for a multilateral investment court that advances coherence, consistency, efficiency, and legitimacy, appears counterintuitive but may, in fact, combine multiple goals of a new age.

VI. CONCLUSION

The dispute resolution mechanisms described for international commerce, trade, and investments reflect a diversity of goals, stakeholders, legal systems, and cultures that have shifted over time.

No one country can unilaterally impose a design goal or structure on another—it must be negotiated to become an accepted norm to have any chance of broad compliance and enforcement. Most of the goals discussed in the analytic framework are pertinent: conflict prevention, management, and resolution; efficient administration and participation; maintenance of relationships; just, consistent, and legitimate outcomes; institutional reputation; transparency; and confidentiality. Achieving a measure of all these goals takes broad participation and, thus, time, effort, and goodwill.

The methods recognized by international law for the peaceful settlement of disputes start with negotiation and are followed by a stepladder of facilitated (conciliation and mediation) and adjudicated (or arbitrated) processes.⁷⁷ Very few disputes are resolved by the International Court of Justice, as countries resist waiving their national sovereignty. Instead, institutionalized negotiation, at its best, offers transparency and broad participation (tempered by political power), often a preferable alternative to the more adversarial processes. With specialized arbitration, the opportunity to select expert neutrals in a regulated process has proven effective and satisfactory in many instances, including investor–state, WTO, and cross–border business–to–business disputes.⁷⁸

International dispute resolution processes have both upstream (policymaking), mid–stream (implementation), and downstream (enforcement) components. Given the severity of relinquishing sovereignty to an extraterritorial downstream process, there may be reasons to focus more on addressing issues upstream and midstream. These issues are situated within the broader context created by the tension between public and private interests. Historically, courts were viewed as public forums with

76. Greenberg & Winet, *supra* note 62, at 249.

77. U.N. Charter art. 33, ¶ 1; *see also* ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 217–23 (1995).

78. The United Nations Convention on Law of the Sea, which encompasses a web of technical, commercial, and security issues, has the most simple and sophisticated dispute handling system: whatever forum or procedure the parties agree to. International environmental treaties like the U.N. Framework Convention on Climate Change provide a consultative process for questions of implementation and compulsory conciliation for dispute settlement. CHAYES & CHAYES, *supra* note 77, at 217–23.

public officials publicly deciding cases on the basis of public law. In contrast, using contemporary private mechanisms, disputants select experts to render decisions according to preferred standards in a more informal and confidential venue. This shift from public to private has occurred in both the domestic and the international arenas. Deborah Hensler reviews this “blurring boundary” and considers the relative benefits, asking: “What do we lose and what do we gain when public dispute resolution becomes private, and private decision-makers acquire the ability to resolve disputes with significant public policy consequences?”⁷⁹ Hensler raises concerns on the diminished legitimacy of government and due process that privatized processes pose.⁸⁰ While transparency is a hallmark of public processes, some private processes are also pushing for more transparency. In the international domain, there is an even stronger tension between the private and public interests. In investor-state disputes, when negotiating with large multinational corporations, state actors have a significant interest in protecting their sovereignty, yet they are also accountable to their citizens. The Mauritius Convention emerged from UNCITRAL’s Working Group II to adopt transparency rules, including open hearings, published awards, and amicus briefs.⁸¹

Conflict that arises internationally spans two-party to multiparty and is multi-issue, multisector (public, private, nonprofit), lengthy, and in both the public and private domains. Similarly, process options designed by governments, private firms, and organizations offer choices on who decides (public officials or private experts), on what basis (law or contract), and under what rules (public or private). An optimal system needs to prevent unnecessary conflict, as well as manage conflict when it does arise. Some conflicts might be prevented, and others might be more effectively resolved by recognizing where the process costs and benefits are more advantageous. The most underutilized dispute handling process seems to be in the implementation phase. Surveillance mechanisms (e.g., transparency, notifications, policy reviews) are available to diagnose the barriers countries or parties experience in fulfilling their obligations. Implementation experience can feed back to policymaking and enable negotiators to draft agreements with more specificity. More success at the implementation phase can diminish the number of cases that go to enforcement.

Despite the complex challenges posed, the international field offers opportunities to deliberate and test those systems on measures of fairness and justice suitable to the stakeholders.

79. Deborah R. Hensler, *The Private in Public, the Public in Private: The Blurring Boundary Between Public and Private Dispute Resolution*, in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION* 45, 47 (Iwo Amelung, Moritz Bälz, & Joachim Zekoll eds., 2014).

80. *Id.*

81. Convention on Transparency, *supra* note 69.

