Post-Symposium Rapporteur Report: 
The Way Forward

By: Susan Franck and Jason Ratigan

I. Introduction and Summary Overview

The Rapporteur Reports published in advance of the Lexington conference (the Pre-Conference Reports) suggested that stakeholders believe that the current system of international investment dispute resolution is in need of attention and improvement. While many methods of dispute resolution are available, given the typical default to arbitration, the systemic integration and effective utilization of other processes presents challenges. Concerns expressed at Lexington, particularly during the third panel on "Creative Options for the Future", centered on practice and politics rather than theory or values. One theme that recurred was how the process of preventing and managing disputes can be formulated whereby stakeholders can participate in the process and stand by the results. Against this backdrop, the Lexington conference began to explore opportunities for institutionalizing Alternative Dispute Resolution (ADR).

The conference in Lexington offered a forum for integrating stakeholders' collective experience to explore different types of dispute resolution and prevention mechanisms and consider how they might be utilized effectively in the future. Understanding the viewpoint of practitioners, States, investors, academics and others provided vital information necessary for diagnosing possible conflicts and finding useful remedies for investor-State treaty cases. Few were hostile to the concept of ADR in international investment treaty disputes. Although there was a degree of healthy skepticism, such cautious optimism offers a useful catalyst for systemic evolution and the creation of future value for stakeholders.

II. Synthesis of Existing Joint Symposium Commentary

Pre-Conference Reports highlighted the need for stakeholders to gain experience with ADR processes, to establish comfort with ADR methods, and to create the requisite capacity to facilitate effective implementation. Capacity covers a wide range of issues. It may involve the capacity of individuals to function as effective third-party neutrals, whether as mediators, conciliators or those providing an early neutral evaluation. It may also involve the capacity of parties to a dispute, particularly investors and State officials, to understand the value of appropriate settlement opportunities and make informed, reasonable decisions. It may also involve the capacity building of other stakeholders, including the public, to understand what is an appropriate settlement and help parties educate their own constituency or stakeholders that settlement is sound given its formulation through an appropriate process or a trusted and respected person.
Capacity also involves the parties' advocates and representatives. Conference participants expressed concerns that attorneys may have a predisposition towards litigious dispute resolution processes and more formal, adjudicative processes. Such an instinctive approach can potentially escalate disputes, fail to consider opportunities for dispute prevention and undermine the potential value to be gained from ADR methods. Thus, some suggested that a critical way forward is to integrate ADR into the mainstream curriculum of legal training. Others posited that the problem is not that attorneys are involved, but perhaps with the immediate parties to the dispute and their approach to dispute resolution. Another narrative suggests that the issue is not that the presence of lawyers per se, but rather what type of lawyering strategy and advocacy approach lawyers use. In any event, if ADR methods can truly yield cost effective (and perhaps value-creating) results, it would be useful to provide lawyers and their clients with a broad range of capacity building opportunities, including education about ADR theory and practice as well as practical, hands-on experience. This may in turn create an opportunity for States to design, to establish and to implement Dispute Prevention Policies (DPPs) in place in advance of formal disputes and being in a position to utilize ADR effectively at appropriate junctures to remedy the situation.

Discussions during the Lexington conference revealed specific challenges in creating and using effective dispute resolution processes, including:

(1) incentives to settle or resolve disputes early,
(2) personal liability for those involved in non-adjudicatory dispute resolution, and
(3) internal checks and balances to inhibit the possibility of inadvertent violations of international investment agreements (IIAs).

The first aspect applies to both investors and States. Investors have an incentive to conserve scarce fiscal resources, be responsible to their shareholders and use their internal resources for developing commercial innovations rather than focusing on time (and resource) consuming dispute resolution. Likewise, States have a similar incentive to conserve taxpayer dollars, be responsible to their citizens and ensure that resources are used properly to develop the welfare of their people in line with their objectives for investment attraction. This issue may be particularly sensitive for developing countries with unique budgetary restrictions. Early settlement and dispute prevention should permit both investors and States to add value by resolving conflict without expending unnecessary large resources and perhaps even finding value by focusing on non-monetary settlement possibilities.

The second aspect is peculiar to States and acts as a disincentive to resolve disputes outside of adjudication. Making sure settlements occur properly and without corruption is a serious issue. Yet these concerns must be balanced against the need to promote effective dispute settlement that conserves scarce resources. It is therefore vital when formulating ADR methods and developing settlement capacity to create responses to corruption or threats of corruption that do not counteract the underlying model.

The Lexington conference also explored how IIAs create dispute resolution mechanisms, and how IIAs themselves may become subjects of possible reform. Speakers considered a variety of issues. One speaker discussed the need for coordination between States, especially for
developing nations. Another speaker discussed how IIAs should articulate, even if only a
general outline, options for how parties can use ADR methods.

Others identified "soft law" opportunities for facilitating ADR. Some commentators observed
that there may be benefits in building a support network among States that allow those with less
experience or infrastructure to learn from the practices and experiences of others; this could be as
simple as a reference for a law firm or legal aid of some kind or more in-depth guidance on how
to deal with investment disputes. Such an approach accomplishes the dual goal of providing
accessible support networks (through developed and experienced nations) and facilitating
potentially cheaper methods of dispute resolution (which is important for developing nations).

Another concern related to the effectiveness of both arbitration and ADR is the degree of
uncertainty in the legal doctrine. Several commentators opined on the lack of clarity—and
sometimes contradictory awards—on fundamental issues such as the meaning of Regulatory
Expropriation, Fair and Equitable Treatment, and Most Favored Nation Treatment. Recognizing
that negotiation and various ADR efforts require parties to "bargain in the shadow of the law",
when the law casts a long and unclear shadow because of its uncertain application, this creates
challenges for using ADR. Without predictability, parties have decreased incentives to settle
because it is uncertain whether the benefit is worth the cost, particularly in light of the
uncertainties related to cost-shifting; but paradoxically, that lack of certainty may also create
unique opportunities to settle, avoid the quagmire of uncertainty and tailor-make a resolution that
the parties control. In any event, many commentators expressed that, in order for ADR to move
forward effectively, stakeholders will want to be able to predict adjudicatory outcomes to create
incentives (or understand disincentives) for ADR.

The Lexington conference also explored the available models of ADR. With arbitration,
negotiation, mediation, conciliation, ombuds systems and hybridization of all of those models,
there are ample possibilities to meet the need of almost any dispute. The discussions in
Lexington highlighted that a critical issue is what method to choose and why to choose it. Part
of the attraction of arbitration—and the concern about ADR—is that it simplifies the process by
providing one clear track rather than providing an endless menu of options. Similarly, there may
be certain disputes, such as those inextricably intertwined with politics or public policy, that are
most amenable to adjudicative options such as arbitration. Nevertheless, it is this freedom to
choose among useful options, perhaps with guidance about effective permutations, that can
inform the creation of enhanced decision-making and the design of effective dispute resolution
systems.

Finally, participants explored issues related to the importance of ongoing relationships and the
enforceability of certain dispute resolution processes. The way forward, according to some
participants, should include interest-based dispute resolution that formulates creative outcomes
that create value for the parties and maintain positive relationships. As one speaker noted, the
current state of private international relations is such that there is substantial risk that investments
will require the compliance of the same State with which the investor is in conflict. It was also
suggested that, irrespective of maintaining positive relationships between States and investors
through ADR, the use of interest-based dispute settlement and dispute prevention might tap into
unknown value. Investors or States may consider approaching conflict as a problem to solve
rather than a fight to win. Such a positive approach could enhance the reputation of States as a productive jurisdiction in which to invest and create an institutional shifts likely to foster business and government cultures that facilitate settlement, create value and foster development objectives.

III. The Way Forward: Future Discussions and Debates

The Joint Symposium confirmed that there is an interest in—and need for—exploration of alternatives to arbitration for the management of investment treaty conflict. As anticipated, the Joint Symposium explored the existing approaches of stakeholders and the theoretical opportunities to develop new possibilities and alternative modalities for States and investors when considering how to prevent, to manage and to streamline the resolution of their investment treaty disputes. In light of this, stakeholders could use the ideas and experiences discussed in Lexington to give further and deeper attention to alternative methods of conflict prevention, de-escalation, management and resolution. This could involve a variety of different steps and is not limited to one type of stakeholder. Rather it is about when, where, why and how multiple stakeholders can begin to add value by engaging in alternative approaches to manage investment treaty conflict.

A. Identifying Stages of Possible Intervention

Although much of the discussion in Lexington focused on what can be done at the juncture when there is a formalized dispute, other discussions clarified that there can and should be a way forward at the pre-dispute phase. In other words, the future of alternative modalities will need to provide nuanced approaches to conflict management that permit stakeholders to consider multiple phases for strategic intervention. This might include various stages that can occur either in isolation or in combination with each other, including:

(1) in the **preliminary design phase** of creating dispute resolution systems when States create treaty or other rights related to international investment,
(2) the **pre-conflict phase** when a problem exists, but it has not been identified or communicated from the investor to the State,
(3) in the **pre-dispute phase** when an investment-related conflict has been identified but conflict has not yet escalated,
(4) in the **formalized dispute phase** where an investor has submitted a formal notice of dispute or similar document, such as a Request for Arbitration,
(5) **during** the course of **adjudicative proceedings**, such as arbitration, where there may be areas to either narrow the range of issues in dispute or settle aspects (or possibly all) of the on-going dispute in light of changes over the course of the proceedings, and
(6) in the **post-award phase** where there may nevertheless be policy space for settlement of outstanding issues.

In each of these phases, there are unique opportunities to create processes that lead to outcomes that improve conflict management and result in solutions that address the mutual needs and interest of stakeholders. Different stakeholders could take responsibility during these different
phases to make use of the available opportunities. This will eventually aid in the evolution of international investment dispute resolution.

At the **preliminary design phase**, States could engage in active policy-making on alternative approaches to conflict management. This may require States to construct and negotiate the text of IIAs and their dispute resolution provisions in a more effective, concrete and precise manner. In this respect, States may consider reaching out to various national stakeholders, including their own investors and other appropriate groups, to gather information about their interests and objectives as regards international investment to garner critical insights to the policy debate. Similarly, it may require States to analyze the scope of their existing international obligations, to conduct an internal diagnostic about their experience with investor-State treaty dispute resolution to date, to explore those sectors that are most susceptible to investment conflict and to identify areas of political and economic sensitivity. In this way States can understand the current state of affairs, begin to understand the scope of their risk, articulate their fundamental needs, and design and implement processes that provide systemic value. This may include, for example, drafting and implementing: (a) more precise references to those government officials or institutions responsible for resolving disputes, (b) specification of timeframes and other obligations, or (c) greater opportunities for State-to-State consultation. The overall objective should be to prevent disputes from arising, to manage conflict that does arise effectively and to offer solutions that address the greatest number of stakeholder concerns possible.

IIAs can play a key role in defining a State's approach to dispute prevention and management. IIAs could theoretically elaborate precisely what States and investors are obliged and/or encouraged to do in the pre-conflict, conflict, dispute and dispute resolution stages. Instead of only stressing what should be done when a dispute occurs—which is late in the dispute resolution process—IIAs could list further options and necessary steps to be taken by the involved State and investor at earlier stages. For example, an IIA could include a provision on dispute prevention, listing the various options that investors have to express their grievances and concerns to a government before a conflict or dispute emerges. Similarly, IIAs could also identify the government agency in charge at an early stage of a misunderstanding.

Tied to this is the need of the State to link its domestic investment policy framework to these IIA provisions. This includes, amongst other issues, the establishment of effective information sharing mechanisms between government agencies, the institution of government entities that investors experiencing problems can approach, and the creation of necessary authority for government officials to manage such conflicts.

The **pre-conflict phase** may actually be one of the most critical phases, as it implies the actual existence of a problem, a grievance or concern by an investor, which may be unknown or unaddressed by responsible State entities. It may however be valuable for a State to be aware of an investor's problem as early as possible, so as to have ample opportunity and time to address matters. Two particular challenges exist in this context: (1) to assure that the investor communicates the problem, and communicates it to the appropriate government entity, so that the State does not remain ignorant of it; and (2) to establish appropriate mechanisms that the State addresses the concerns of the investor. Investors will only communicate their problems if they are aware of the channels for such communication put in place by the host country.
government. Hence, host country governments may need to consult and inform new investors about these channels, e.g. through investment promotion agencies that are often seen to be in contact with new investors at the initiation stage of their investment. The establishment of mechanisms through which the State can address the complaints of investors can be accomplished through various approaches, such as investor after-care, ombuds services and the like.

During the pre-dispute phase, stakeholders could be engaged in systematic activities to de-escalate the situation in an effort to avoid the crystallization of disputes. Such a strategy offers stakeholders an opportunity to recall the mutual value derived from international investment, to focus on their respective business and government functions and to minimize the costs expended on unnecessary dispute resolution. This may necessitate training of government officials—whether at the national or local level—about the scope of their potential obligations under IIAs, with the objective to sensitize officials to the possible scope of liability and create incentives for them to act in accordance with their international legal obligations. The design of appropriate information sharing arrangements may also prove useful in this context, such as Peruvian Law No. 28933 (Establishing the System of Coordination and Response of the State in International Investment Disputes). States might also follow the lead of countries such as the Dominican Republic and Colombia to create "investment after care" initiatives or South Korea that has an ombuds facility to create opportunities for dialogue with foreign investors. This might include delegations of authority, including budgetary authority to relevant officials and other legal safeguards, who could devote their efforts towards conflict prevention, amicable settlement, conciliation or other relevant settlement techniques. The objective would be: (1) to create programs that permit harmonious interaction between investors and States, and (2) to provide a venue for investors to express directly their concerns to relevant government entities and frame their concerns in a productive manner. This delegation might extend beyond interactions between a specific State and groups of investors operating within the Host State. It may also involve the creation of an international body that could involve groups of States and investors to enhance coordination and distribution of information about international investment law obligations under IIAs, DPPs and offer guidance about capacity building opportunities to promote thoughtful government policy choices and sound investments that promote development.

During the formalized dispute phase, even though a conflict has crystallized in the registration of a formal legal dispute, there are nevertheless opportunities for ADR. Irrespective of whether a State has created an agency to act as an ombuds or provide “aftercare” for dispute prevention, entrusting a division or department with the budget, authority and responsibility for the amicable resolution of investment treaty disputes would create a clear chain of communication. This institutionalization would offer a benchmark that conciliation, mediation, early neutral evaluation or other relevant techniques are appropriate methods to settle disputes. Institutionalization would implicitly communicate to investors that mediation or conciliation are viable alternatives to arbitration and not merely additional bureaucratic hurdles preventing a swift response to problems. It would also send a positive signal to investors that States are willing to abide by the rule of law; likewise, investors would be expected to abide by their own legal obligations. It may also require the training of parties and their counsel about different dispute resolution methods at an early stage of the arbitration process. Training and technical assistance might, for
example, encourage consideration of the different types of mediation approaches—whether evaluative or facilitative—and how to use mediation to promote useful outcomes. Stakeholders might also work in concert to consider the creation of best practices related to settlement—that takes into account the unique variables at play in the context of investor-State treaty dispute resolution—and considers under what circumstances, even after the initiation of a formal claim, which ADR methods might be most appropriate and when. A parallel effort might involve the elaboration of a set of procedural guidelines and practices related to investor-State mediation or other third-party neutral assessment in order to provide a context for using ADR. Presumably, such rules, guidelines and baselines will aid the promotion of efficient dispute resolution.

During the **adjudicative proceedings**, parties and their lawyers can consider how to use ADR at various phases of the case to streamline case management, eliminate aspects of the case or settle the entirety of the claim. For streamlining case management, it may include encouraging parties to decide particularly contentious disputes—such as the amount of disputed damages and methods of calculation—at an early stage in the dispute (possibly before jurisdiction or the merits) in order to provide greater certainty about the scope of fiscal risk. For eliminating issues in a case, parties can use ADR methods to streamline mini-disputes within the arbitration itself, such as those related to disclosure or damage calculations. It may require an early neutral evaluation or mediation by a third party neutral to focus the dispute, or it could involve the parties negotiating on a particular set of agreed terms that can be proposed to the arbitral tribunal. Similarly, parties might choose to use—or tribunals may wish to encourage parties to consider—using ADR methods at various points, particularly after dispositive aspects of the case (such as jurisdiction or the merits) have been decided and the scope of the dispute and the related risks can be more readily understood.

This will require particularly active consideration of dispute resolution strategies by investors, States, their counsel and possibly even arbitral tribunals. It is likely to require the creation of capacity and assistance to serve the expanded need for ADR and conflict management. This may mean that government stakeholders, private sector law firms, investors and other individuals may need to gain enhanced competence in mediation skills. Likewise, it may require the identification of a pool of mediators competent to manage investor-State disputes and with the proper background in international investment, development and international law. As the legal community of practitioners sits at the interface between both parties of an investment dispute, advising both investors and States and providing for settlement between the two, their involvement in the process may be of particular significance. Legal practitioners can create awareness among investors and States of the multiple alternatives, especially when both parties are not aware of or have full appreciation for the infrastructure in place to aid them in the resolution of disputes. Practitioners may even consider expanding their services to adapt their expertise in international investment law by adding substantive experience in the use of ADR or developing their skills to serve as a mediator competent to manage investor-State disputes.

During the **post-award phase**, there may also be opportunities to foster settlement that minimize enforcement risk. This might involve creative exploration of whether, even at the end of arbitration, there are opportunities to create value amongst investors and States that fosters mutual interests in light of how international law rights have been adjudicated.
Overall, it is imperative to recognize the broad set of opportunities for DPPs and ADR to create efficiencies in addressing investment treaty conflict and finding ways to promote the development objectives of stakeholders. These various options need not be viewed in isolation but rather as a series of integrated opportunities that require holistic consideration. This consideration will require the focus, attention and efforts of a broad set of stakeholders, including investors, States, their counsel, international institutions and professionals who can serve as effective third party neutrals.

B. Considering Concrete Steps for the Future

Rather than simply suggesting a variety of theoretical options, the inputs from the conference in Lexington suggested that there are several concrete steps that can and should be addressed in order to move the dialogue into a framework that provides concrete and tangible outputs. The objective of these suggestions is to create opportunities for a broad cross-section of stakeholders to collaborate for mutual gain and promote investment that fosters both sustainable development and sustainable dispute resolution systems.

- First, it will be necessary to conduct high quality empirical research that explores the outcome of investment treaty arbitrations as well as experiences related to settlement. While some empirical research is already being done as regards arbitration outcomes, there is relatively little research as regards settlement outcomes in investor-State treaty claims. There is currently no research that takes a broad-brush approach to the analysis of cases that settle and the factors that influence parties' settlement efforts. As a result, the time has come for a systematic diagnosis of the system to understand why cases do settle, what factors inhibit settlement, and how the system can create opportunities to promote the prospect of settlement that is of mutual advantage to States and investors. Such research might start with a small pilot project and later evolve into a larger project. It should exhibit care when gathering, analyzing and collecting data. It would seem reasonable to suggest that a joint study between ICSID and UNCTAD, analyzing internal data on a preliminary basis and perhaps growing into a larger project, could evaluate variables affecting dispute escalation, dispute continuation and dispute settlement.

- Second, States might create inter-institutional working groups of stakeholders at the national level to consider the proper scope of dispute prevention and conflict management in IIAs or in domestic legislation. It may be useful to support such efforts through international organizations or institutions. The objective of such a working group would be to recommend possible ways to prevent and resolve investment treaty disputes effectively that consider unique national policy priorities. In addition to the design of national policy and frameworks for DPPs, such working groups may also consider researching good practices related to the prevention and management of investment treaty disputes for consideration by both national and international entities.

- Third, States could establish a multi-national working group to consider issues of dispute management, prevention and preparedness. Such an international group might involve government officials from various levels, as well as other representative stakeholders and benefit from the support of international organizations and institutions. One possible
outcome might involve the creation of collaborative networks for consideration of how to prevent disputes, educate government officials at various levels about their international law obligations, provide incentives to promote settlement opportunities for foreign investors, and coordinate concerns and ideas related to effective use of DPPs and ADR among international stakeholders.

- Fourth, stakeholders could consider establishing rules or guidelines related to DPPs and ADR methods, particularly early neutral evaluation and mediation, that may provide useful parameters and baselines for conflict de-escalation and dispute management. This might, for example, involve consideration of the procedures and expectations of parties, their lawyers and mediators in the conduct of pending disputes. It might also usefully involve consideration of the different types of mediation approaches—whether evaluative or facilitative—and how to adopt the mediation process to promote useful outcomes at the pre-dispute, formalized dispute and adjudicative proceedings phase. It may be useful to involve expert international dispute resolution institutions at the outset to explore the standards for when, where and how settlement is appropriate in the context of investor-State dispute resolution. Presumably, such rules, guidelines and baselines will promote simple, nimble and efficient dispute resolution.

- Fifth, stakeholders should create a research consortium to consider the creation of a Handbook to offer training, guidance and baselines for policy makers, parties, their lawyers and other interested stakeholders. Such a Handbook could explore specific issues and provide direction about critical topics related to: (a) how to conduct a mediation in the investor-State context, (b) how to establish effective information sharing among State entities, (c) how to create an effective investment after-care or ombuds service, (d) how to effectively manage ADR in parallel to an arbitration, and (e) how to include provisions on ADR or DPPs in IIAs. It might involve tapping into international educational networks to generate ideas from academic institutions with established or developing expertise in dispute resolution and international investment law.

- Sixth, a broad coalition of stakeholders could input into a pilot project aimed at identifying the background and expertise necessary for those individuals who will act as third-party neutrals to facilitate the effective use of ADR in investment disputes. Such a group should seek to identify individuals with a background in dispute resolution and international investment law, with the requisite regional and developmental diversity, who are in a position to act as impartial and independent neutrals to facilitate dispute resolution through formats including conciliation, early neutral evaluation, mediation and other mixed methods.

- Seventh, stakeholders should create a research consortium to consider the creation of a pilot project that explores how to create awareness and capacity among stakeholders about various ADR options and how they might be applied in practice through real scenarios and simulations. This might, for example, take the form of a training course for parties, lawyers and third parties about how to use mediation effectively. Similarly it might also involve technical assistance or other forms of capacity building to advance the understanding of policy makers, investors, arbitrators and relevant counsel.
C. Moving Towards the Future

We are at a unique historical moment, namely we now have an opportunity for the world of arbitration, mediation, negotiation and dispute systems design to converge in a manner that provides a chance to create value for stakeholders. This effort to improve one of the fundamental systems for resolving vital issues in international economic law—namely issues arising under the investment treaty system—requires the active participation of States, investors, dispute resolution professionals and their lawyers. It also necessitates a willingness to think about how to achieve improvements in practical terms and the concrete steps required to accomplish such ideas.

We hope that these recommendations, which were generated in response to the issues raised by and debated in Lexington, will prove useful to a broad constituency of stakeholders and move the debate forward in how to implement small steps now that will lead to the creation of an improved system for the future.