Rapporteur Report:
Assessing the Current System — Systemic Issues
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I. Introduction

The Joint Symposium on International Investment and Alternative Dispute Resolution (ADR) seeks to generate ideas and explore good practices for preventing, managing, and resolving investment treaty conflict in order to facilitate investment, development, and sustainable dispute resolution systems. In an effort to generate conversation that aids this effort, academics, governments, practitioners, investors, representatives from international organizations, and non-governmental entities from around the world have participated in lively pre-symposium discussions. These stakeholders endeavored to assess the current system and identify systemic issues about the value of International Investment Agreements (IIAs) and related dispute resolution mechanisms. Such a discussion is a necessary precursor to a meaningful dialogue about how to reform the current system, to prevent the unnecessary escalation of conflict and to facilitate the effective management of treaty disputes. The discussion offered a critique of the current system of primarily resolving disputes via arbitration with a limited number of disputes addressed through ADR. This Report summarizes the issues identified as critical, particularly issues of procedural and substantive fairness in light of the primary use of investor-state arbitration, and identifies areas for further assessment at the Joint Symposium.

II. Synthesis of the Pre-Symposium Discussion

During the pre-symposium discussions, several key themes emerged. They related primarily to procedural integrity of the dispute prevention and management process and the substantive implications for IIAs as these issues pertain to the future of foreign investment and related development objectives. On the procedural level, participants cited concerns about the process of selecting arbitral tribunals and other third-party neutrals, transparency during the arbitration process, the potential implications for transparency in mediation, facilitation of settlement opportunities, the availability of methods to prevent disputes from crystallizing, and the encouragement of non-adversarial approaches to dispute resolution. Other procedural concerns related to the creation of the necessary infrastructure to facilitate mediation and other ADR methods, including the creation of skill sets for stakeholders, transparent availability of information, and other infrastructure needed to facilitate mediation processes. Experts also raised concerns about party access to dispute resolution and the implications for the balance of substantive rights in IIAs.

- Questions about the legitimacy of and participant confidence in the current system – The discussions identified that, for the IIA system to function effectively, both states and investors must have confidence in the legitimacy of a dispute resolution system. Stakeholders need to eliminate the risk related to foreign investment and government regulatory authority. This requires a dispute resolution system that offers a fair and
enforceable result. Otherwise there is little incentive for parties to utilize the dispute resolution system, and one of the major advancements of IIAs could be undermined. Commentators identified concerns related to arbitral procedure, the enforceability of awards, and the selection of fair, neutral, and appropriate tribunals. Addressing these concerns can promote confidence in the system and ensure that, when arbitration is used to finally resolve investment treaty conflict, it is resolved properly.

- **Barriers in attempting to reach amicable settlements** – The divergence of tribunals’ decisions on issues, including procedural requirements, jurisdiction, applicable legal standards, and the selection of tribunals leads to inconsistent awards along various dimensions. This inconsistency, in turn, creates uncertainty for parties trying to conduct a cost-benefit analysis in the settlement process. Moreover, when states sign IIAs, the procedural and substantive uncertainty can create challenges in understanding the precise benefits and costs they are securing by entering into the agreement. Clarity and determinacy, at least as regards the dispute resolution system, is vital. Commentators noted that inconsistent procedures create challenges for setting a baseline of mutual expectations, which, in turn, may make arbitration a less attractive option. Inconsistency may also lead to a perception of bias that can adversely affect party confidence in a dispute resolution system.

- **The values of adversarial arbitration versus and forms of dispute resolution** – Commentators identified that there may be an over-reliance on adversarial forms of dispute resolution, such as arbitration and other adjudicative processes. There was a particular interest in using more collaborative processes to resolve disputes, such as mediation and amicable settlement. There was also interest in creating infrastructure that would minimize conflict and prevent disputes from arising. Several commentators suggested the overall dispute management system should be more inclusive of ADR either in addition to or, in some cases, in lieu of, the current arbitration default. Consensus-building approaches such as mediation and negotiation offer unique benefits to parties; but they can also be time-consuming and do not necessarily result in the same outcome with an award that is easily enforceable as a matter of law. Future discussion might therefore assess the relative costs and benefits of arbitration and other ADR strategies. Debate at the Joint Symposium might also consider the value of institutional reforms and the creation of governmental (whether intra-governmental or inter-governmental) infrastructure to prevent conflict from becoming a formalized dispute and, thus, avoid the issue of the need for an appropriate dispute resolution process.

- **The role of transparency in international investment disputes** – Another key area of discussion is the appropriate level of transparency for investment disputes. While the degree of transparency varies depending on the method and forum of dispute resolution, there was an underlying concern about what degree of transparency should permeate all international investment dispute settlement. The benefits of transparency run largely to

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1 The commentary did not discuss how both negotiation and mediation can involve the use of adversarial bargaining techniques (sometimes referred to as "hard bargaining", positional negotiation or evaluative mediation). See, e.g., LEONARD L. RISKIN, ET AL., DISPUTE RESOLUTION AND LAWYERS (4th ed. 2009).
public confidence and an overall perception of fairness while the costs include decreased privacy and potential participation. The costs and benefits of transparency should be explored further both for the system as a whole and specific dispute resolution methods.

- **Training and Capacity Building for Parties and Independent, Third-Party Neutrals**
  – The current system primarily uses third-party neutrals to make adjudicative determinations for the parties in order to finally resolve disputes. Commentators also recognized that the process sometimes does benefit from using third party neutrals to facilitate dispute prevention and promote negotiated settlement. The question remains of how to build pathways, capacity, and standards to capture additional benefits from those processes. The training and capacity building of parties as well as third-party neutrals will perhaps be a critical aspect of this evolution. Training parties will promote party autonomy in selecting proper third-party neutrals. With the relevant knowledge base, they can approach conflict resolution according to the needs of the individual situation. Training third-party neutrals will provide skills and education to enhance the quality of the process and, presumably, the ultimate result. The question then becomes what should the normative baseline be for the standard skills required of third-party neutrals, how should that be determined and assessed, and whether this skill set should include negotiation, mediation, arbitration or a hybrid of such skills.

- **Resolving cases via arbitration awards versus through settlement** – Recent ICSID data indicates that nearly 40% of ICSID cases are resolved without a final award. This could suggest that a high percentage of cases brought before ICSID could be more appropriately resolved through other dispute resolution techniques. In light of this, the Joint Symposium might usefully explore the business case for attempting ADR before, during or after arbitration. Similarly, it could prove useful to explore if there are particular types of disputes, parties or situations that make a conflict best suited for a particular type of dispute resolution. An exploration of the relative costs and time allocated to these different mechanisms may also be useful.

### III. Implications for Future Debate and Discussion

Having identified several key issues with the current system, stakeholders should begin to evaluate their relative importance and consider how best to address the identified concerns. Issues of fairness, whether substantive or procedural, should be considered. Substantively, stakeholders should strive to achieve outcomes that are appropriate and reliable; and these substantive objectives have procedural implications. The process of resolving investment treaty disputes might consider encouraging procedures that protect participants, encourage informed participation, promote efficiency and fairness, and support the long term sustainability of the process of managing investment treaty conflicts. Effective management is only part of the solution as it presumes that dispute resolution is even necessary. The current assessment suggests that there is value in exploring methods that may prevent party dissatisfaction from emerging and escalating. Putting safeguards in place that might minimize conflict before it becomes a formal dispute—and potentially alleviates the value of the investment and underlying relationships—is therefore worthy of consideration in the Joint Symposium.