Rapporteur Report: 
The Way Forward
By: Brandon Hasbrouck and Jason Ratigan

I. Introduction and Summary Overview

The time and expense of arbitration under International Investment Agreements (IIAs) has caused many to re-examine the existing system of resolving investor-state disputes arising under IIAs. Although methods of amicable settlement are available, arbitration has remained the mainstay. Processes which prevent conflict escalation, manage disputes that have arisen, and channel disputes to their efficient resolution have been lauded during the pre-symposium dialogue. Why are these potentially more cost effective, relationship maintaining and development friendly methods foregone when many believe it to be in all parties' interests to utilize them? The Joint Symposium is designed to integrate our collective experience to find an answer to this and many other questions. It may be that the ultimate answer is arguably less important than the process of joining together to create collaborative solutions. Understanding the viewpoint of practitioners, states, investors, academics and others will provide the information needed to diagnose conflict and find the remedy.

The pre-symposium brainstorming has primarily considered the perspectives of practitioners and academics on evaluations of the current system and the possible alternatives to arbitration. In the future, it may prove useful to offer practical guidelines or hypothetical conflicts as a baseline for assessing the value of unique dispute resolution processes and their relative merits. Moving beyond abstract discussion of ADR methods could facilitate the formation of concrete solutions in light of existing experiences and shared values.

II. Synthesis of the Pre-Symposium Commentary

Dispute System Design (DSD), as defined in the resources section of the symposium website, involves, "the systematic process of creating a dispute resolution system that harnesses the positive aspects of conflict or at least minimizes the negative aspects." The pre-symposium discussion has considered what principles and processes might underlie that future system. One commentator discussed the "multi-door courthouse" metaphor (as an effective architectural design) together with consensus building (as a participatory procedural design) to maximize value. This post emphasized consensus-building and using creative options to address the interests of stakeholders. Other opportunities, such as the Dispute Prevention Policies (DPPs)—highlighted in the UNCTAD White Paper entitled Exploring Alternatives to Investment Treaty Arbitration and the Prevention of Investor-State Disputes—might also involve establishing inter-institutional alert mechanisms within States or encouraging information sharing among government entities. The hope is that, by considering these opportunities, the system should be sustainable, the results should be less objectionable across stakeholder groups and the process would be more likely to be honored in the future.
As pointed out by one commentator, it is critical to consider the role of various cultural and legal traditions. That is, in some cultures, the imperative to save face is such that conflict escalation is unavoidable once the dispute becomes public. This supports the claim that non-adjudicative models in such cultures will be far cheaper and sustainable because the parties will not become intransigent or risk a loss of public reputation. As another commentator suggested, beyond cultural issues, state practice must be cognizant of the bargain that IIAs naturally include—i.e., investment for stability. Taken together with cultural awareness, the way forward should include the consideration of constructive practices that facilitate investment while also addressing sources of conflict and avoiding counter-productive tactics. This may require consideration of a stronger network among states and investors to resolve budding conflicts.

Another commentator went further to suggest a categorical approach to channeling and screening disputes before they escalate to arbitration. That commentator suggested that categories of meritorious, uncertain, and unmeritorious claims can be used to designate the appropriate method of resolution. Using DSD to channel particular disputes to particular dispute resolution processes in advance permits parties to choose their dispute resolution strategy and manage their expectations. Commentators recommended using a "learning perspective" to build knowledge about alleged treaty violations to find the root causes and thereby avoid dispute escalation.

Moving forward, issues of transparency will also need to be addressed. Transparency issues can evolve in different dispute resolution settings. Transparency in adjudicative processes, like in many national courts, appears to be on the rise in the context of investment treaty arbitration. The question then arises whether the same concerns can or should apply in the context of other ADR mechanisms. Pre-symposium discussion highlighted concerns about who is the public, who represents the public, and should there be different levels of transparency in different contexts? On one hand, state entities with a defined public interest goal might be obliged to intervene in mediations for the sake of transparency. Nevertheless, in other contexts, different situations might lead to different needs and different transparency obligations.

A different discussion has arisen over the conception of arbitration panels and ways to address the delegation of sovereignty. It may be that, beyond simply using arbitral tribunals to adjudicate IIA-based rights, there may be other opportunities to provide guidance to both states and investors about the scope of their rights and responsibilities. This might take the form of interpretive notes issued by a joint commission or more particularized guidance within treaties. The objective would be to offer guidance prior to dispute resolution (or even prior to investment) to manage the expectations of states and investors.

Although this report represents a synthesis of a sub-set of discussions, ultimately the totality of pre-symposium discussions and symposium itself is about the way forward. When considering the scope of material, symposium participants are encouraged to keep in mind the salient learning points that expand knowledge, facilitate improved diagnosis and generate superior remedies for conflict management and prevention. Guidelines and hypothetical cases with common fact patterns would allow participants to illustrate timelines and processes to make intangible theory concrete for those less familiar with these institutions.
III. The Way Forward: Future Discussions and Debates

The Joint Symposium will explore existing approaches, develop alternative approaches, and introduce new alternatives available to states and investors to resolve their disputes. Moving forward, all actors in the area of international investment should be encouraged to give these alternative approaches more intensive consideration. Their nature of involvement in this area, however, will differ in many ways.

States could engage in active policy-making on alternative approaches. For example, states could pay more attention to ADR techniques as alternatives to conventional investment treaty arbitration by making them available and building the necessary capacity and authority within the government to enable the appropriate application of such techniques. This includes the delegation of authority, including budgetary authority, to the relevant government officials or authorities at the appropriate level of the government, allowing them to settle a claim through amicable settlement, conciliation, mediation, or other relevant techniques, and providing them with the necessary protection and safeguards under law. Such an approach by a government would implicitly communicate to investors that mediation or conciliation are viable options to be considered as alternatives to arbitration and not merely additional bureaucratic hurdles preventing a swift response to a problem arising with state authorities.

Investors will also have to take an active role. Investors experiencing difficulties, managing conflict or in the midst of a more formal investment dispute related to government measures could give more consideration to alternative means. In particular, small and medium sized enterprises may wish to seek out modalities to have their concerns heard and addressed through the institutions put in place for dispute prevention.

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 encourage the use of alternative approaches in cases where it seems particularly viable. The community of practitioners may need to consider enhancing its capacity to handle an increase in the use of alternative means, especially for ADR techniques. This requires that lawyers become more familiar with and gain experience in using mediation, conciliation and other methods to resolve investment disputes. Practitioners may expand their scope of services and adapt their expertise in international investment law by adding substantive experience in the use of ADR.

We are at a unique juncture where, in the context of IIA conflict, the world of arbitration and mediation are converging in a way that permits the creation of unique value. In light of this and the issues raised in this Report, it may be worthwhile for the Joint Symposium to explore a variety of themes and issues.

- First, it may be prudent to go back to the text of IIAs themselves and consider how to draft the dispute resolution terms more effectively, concretely and precisely. This might
include drafting and implementing: (a) more precise references to those individuals responsible for resolving disputes, (b) specification of timeframes and other obligations, or (c) greater opportunities for state-to-state consultation.

- Second, exploration of institutional re-design, at the national or international level, may prove fruitful. This might, for example, involve enacting national legislation, programs or training at the local level to facilitate what policy programs that might prevent conflict from escalating into a formal dispute. Similarly, it may also involve the creation of international entities to enhance coordination between states and among other stakeholders.

- Third, consideration of rules or guidelines related to ADR methods may provide useful baselines. This might, for example, involve consideration of the procedures and expectations of parties, their lawyers and mediators in the conduct of arbitration proceedings. 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. Likewise, it may be helpful to explore the standards for when, where and how settlement is appropriate in the context of investor-state dispute settlement. Presumably, such rules, guidelines and baselines will promote simple, nimble and efficient dispute resolution.

- Finally, it may be useful to explore opportunities for institutional support of ADR and DPPs. This is likely to require the creation of capacity to serve the expanded need for ADR and conflict management services. This may mean that government stakeholders, private sector law firms and other individuals may need to gain enhanced training 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. Such consideration will permit the reality-testing of ideas and aid in the assessment of what steps will be required to put systems in place that maximize the value of ADR and DPPs.

The consideration of these issues requires the active participation of investors and states. It also necessitates a willingness to think about how to achieve improvements in practical terms and the concrete steps required to accomplish such ideas. Ideally, by identifying these areas in this Report, we hope that the Joint Symposium will generate debate, discussion and perhaps even concrete suggestions for implementation now and in the future.