

TOWARD A COMPLEMENTARY USE OF CONCILIATION IN
INVESTOR-STATE DISPUTES—A PRELIMINARY SKETCH

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I. INTRODUCTION

At a recent gathering of the American Bar Association (ABA), Grant Kesler, Metalclad's former CEO, reflected upon his experience with NAFTA Chapter Eleven.¹ Perhaps to the disquiet of the many arbitration specialists present, he revealed that the arbitral mechanism he experienced was so dissatisfying that he wished he had merely entrusted his company's fate to informal mechanisms.² His remarks could have been expected had his Chapter Eleven claim been one of the many that fail, but Metalclad had been awarded nearly \$17

¹ The ABA is the largest voluntary professional association in the world. See The American Bar Association Website, available at <http://www.abanet.org>. Grant Kesler, remarks at a panel organized by the Am. Bar Assoc. Section of International Law and Practice in Houston, Texas (Oct. 14, 2004) [hereinafter *Kesler Remarks*] (transcript on file with the author). NAFTA Chapter Eleven is in effect a trilateral investment treaty, which like the majority of the 2000-plus Bilateral Investment Treaties (BITs) in force, allows an aggrieved investor to bring direct arbitral claims against a host government. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993). Chapter Eleven has inspired extensive commentary. See CHARLES H. BROWER, II, JACK J. COE, JR. AND WILLIAM S. DODGE, NAFTA CHAPTER ELEVEN REPORTS VOL. I 683-98 (Chapter Eleven Bibliography) (2006).

² Mr. Kesler referred to these as the company's "political options." *Kesler Remarks*, *supra* note 1, at 6.

million.³

That a seasoned, law-trained, manager would openly lament resources devoted to an adjudicative system from which his company emerged a “winner” may be telling. Certainly, expectations about recovery explain a great deal: the tribunal had agreed that Metalclad's investment had been expropriated, but it awarded roughly 20 per cent of the value ascribed to it by the claimant's expert.⁴ Kesler's indictment, however, went further, and one suspects that his views may be shared by others: the process, he opined, was too slow, too costly, and too indeterminate.⁵ The proceedings had spanned approximately five years,⁶ involved a battle in domestic courts,⁷ and consumed on Claimant's side alone an estimated \$4 million in direct and indirect

³ See *Metalclad Corp. v. United Mexican States (U.S. v. Mex.)*, ICSID Case No. ARB(AF)/97/1 ¶ 31 (NAFTA) (Aug. 30, 2000), 40 I.L.M. 36 (2001) [hereinafter *Metalclad Award*]; See generally Clyde C. Pearce & Jack J. Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INV. 685 (2001). The case has generated remarkable levels of commentary, and has appeared in excerpted form in several casebooks. For a recent assessment, see Todd Weiler, *Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 701 (Todd Weiler ed., 2005). I was counsel to claimant in the *Metalclad* case.

⁴ See Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in its Tenth Year*, 36 VAND. J. TRANSNAT'L L. 1381, 1459 (2003) [hereinafter *Taking Stock*].

⁵ *Kesler Remarks*, *supra* note 1, at 5-6.

⁶ The Notice of Intent to file a claim was dated December 30, 1996, available at http://www.naftaclaims.com/Disputes_Mexico_Metalclad.htm (last visited Nov. 7, 2005) and the Award was issued on Aug. 30, 2000. *Metalclad Award*, *supra* note 3. The tribunal, which was made up of very capable and celebrated lawyers, had required roughly ten months to produce its unanimous award, the satisfaction of which was delayed another ten months while the respondent sought with partial success to set the award aside in a domestic court. In defending that court action in British Columbia, Metalclad was required quickly to appoint and instruct local counsel, and though moving with dispatch, the trial court faced numerous issues of first impression. See Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?* 19 J. INT'L ARB. 185, 195-98, (2002); David Williams, *Review and Recourse Against Awards Rendered Under Investment Treaties*, 4 J. WORLD INV. 251, 259-66 (2003). As has now been richly commented upon, that court partially set aside the award and accordingly made downward adjustments in the amount awarded. Both sides anticipated appeals, which were nevertheless mutually abandoned after intense settlement negotiations led to Mexico tendering a check in exchange for title to the property. See generally Todd J. Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INV. 685 (2001).

⁷ See generally Jack J. Coe, Jr., *Metalclad -A Retrospective*, in NAFTA ARB. REP. 65 (J.C. Thomas & J.C. Mowatt, eds., Cameron May Publishers 2002).

costs.⁸ The costs to Mexico, also unreimbursed, were no doubt considerable as well.⁹

Though a distinctive part of Chapter Eleven history, the *Metalclad* proceedings were not aberrant. Indeed, in light of subsequent Chapter Eleven docket activity, it might be argued that Metalclad enjoyed a relatively uneventful tour of investor-state system. Other Chapter Eleven proceedings have taken longer to conclude,¹⁰ and have involved amicus petitions,¹¹ arbitrator challenges,¹² Free Trade Commission (FTC) interpretations¹³ and other episodes not certain to enlarge a

⁸ See *Kesler Remarks*, *supra* note 1, at 6. Under many arbitral rule formulae, tribunals have discretion in allocating costs; costs need not be awarded to a prevailing party, though the loser-pays rule is the default principle in some texts. See generally John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 18 (1999). Chapter Eleven tribunals have been disinclined, for various reasons, to award costs. See *Taking Stock*, *supra* note 4, at 1401. But see *Methanex v. United States (Can. v. U.S.)*, Final Award, ¶ 14 (NAFTA, UNCITRAL) (Aug. 3, 2005) [hereinafter *Methanex Final Award*], available at <http://naftaclaims.com>.

⁹ Mexico sought a costs award of approximately \$2.8 million. It had employed two North American law firms, and was assisted by several government lawyers. Added to the monetary costs of both sides was an intangible toll exacted through the more than spirited proceedings. They were punctuated with allegations and counter allegations of discreditable conduct, which naturally contributed to a highly-charged atmosphere. See *Metalclad Hearing Transcript*, available at http://www.naftaclaims.com/Disputes__Disputes__Mexico_passim.

¹⁰ *Taking Stock*, *supra* note 4, at 1456.

¹¹ See *Methanex v. United States (Can. v. U.S.)*, Decision on petitions from third parties to intervene as Amici Curiae (NAFTA, UNCITRAL) (Jan. 15, 2001) available at <http://www.international-economic-law.org/Methanex/Methanex%20-%20Amicus%20Decision.pdf>.

¹² *Methanex Final Award*, *supra* note 8, ¶ 14 (Methanex challenged Warren Christopher on grounds said by him to be without foundation but causing him to withdraw, "to avoid continuing distractions").

¹³ The NAFTA contemplates that the three NAFTA states, acting through the FTC created by NAFTA, may issue interpretive notes which are in principle binding on tribunals. On July 31, 2001 the FTC issued such a note, addressing *inter alia*, the content of Article 1105's fair and equitable treatment clause. See Notes of Interpretation of Certain NAFTA 11 Provisions, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> (last visited Nov. 8, 2005). The effect and legitimacy of the Note continues to be debated. See generally Charles H. Brower, II et al., *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9 (2002); Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L LAW. 345 (2002); *Taking Stock*, *supra* note 8, at 1429-30 (explaining tribunals giving effect to the Note on one basis or another); Charles H. Brower, II, *Why the FTC Note of Interpretation Constitutes a Partial Amendment of Article 1105*, 5(2) INT'L ARB. NEWS 2 (Summer 2005) (noting that tribunals have evaded the Note's strict application).

disputant's admiration for the process.¹⁴

Regardless, Kesler's remarks are a reaction to certain modern realities. Investor-state arbitration has come to resemble in many respects common law style commercial litigation,¹⁵ albeit without the procedural predictability engendered by codes of civil procedure and established rules of court.¹⁶ Often, the discretion that resides with arbitrators is not exercised to aggressively expedite proceedings in part because the disputants generally do not agree that speed is a priority; the disputes are after all complex and fact-intensive, and the in-demand specialists who act as counsel and arbitrators often must orchestrate obligations to several on-going proceedings. Also conspiring to require deliberateness are an underdeveloped law of jurisdiction and admissibility,¹⁷ a somewhat indeterminate substantive

¹⁴ Metalclad did not, for example, suffer the fate of the investor in *Loewen*—a final award (issued after an arbitration of several years) confirming that the investor had received standard treatment but rejecting the claim on jurisdictional grounds and for the claimants' failure to perfect its theory of recovery by exhausting local remedies. See *Loewen Group, Inc. v. United States (Can. v. U.S.)*, ICSID Case No. ARB(AF)/98/3 ¶¶ 216-217 (NAFTA) (June 26, 2003), 42 I.L.M. 811 (2003). See generally Maurice Mendelson, *Runaway Train: The 'Continuous Nationality' Rule from the Panavezys-Saldutiskis Railway Case to Loewen*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 97 (Todd Weiler ed., 2005) (discussing *Loewen* case); Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Chatten v. Mexico and Loewen v. USA*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 669 (Todd Weiler ed., 2005).

¹⁵ Investor-state tribunals are first-instance fact-finders, but in being composed of three members whose decisions are subject to only limited review, they also resemble appellate courts.

¹⁶ The present model, at its core the same one serving international commercial disputes, evidences a determination to adopt initially what is familiar, tested, and in place, along with supplemental treaty architecture intended to adopt, and qualify, existing regimes. Practices under NAFTA's investor-state apparatus have not generally been fully devoted to streamlining the process. Especially when viewed from outside the ranks of arbitration specialists, moreover, the system may appear to lack the procedural predictability that characterizes civil litigation, containing rather the usual ad hoc elements and occasional matters of first impression that may give disputants the sense that strategically important details are both difficult to anticipate and beyond their control. *Kesler Remarks*, *supra* note 1, at 1-2 (Mr. Kesler's complaints about process vagueness no doubt reflect both general characteristics of arbitration and the fact that he was experiencing one of the first cases processed under Chapter Eleven and the ICSID's first Additional Facility Rules arbitration). See generally William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 *ARB. INT'L* 279 (2003).

¹⁷ See generally Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals -- Jurisdiction and Related Questions*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 215 (Todd Weiler ed., 2004).

law,¹⁸ and increasing efforts to accommodate third party participants.¹⁹

Dedicated students of investor-state arbitration will appreciate that many of these traits are not new. What is unprecedented, however, is the number of investor-state proceedings that have occupied the dockets in recent years.²⁰ The amplified roster of cases has both placed pressure on the institutions established to handle such disputes (principally ICSID), and fueled interest in questions of reform and process design.²¹ Not surprisingly, the ICSID Secretariat now routinely alerts disputants to the conciliation alternative and is exploring ways to increase access to conciliation.²² The Model BIT of the United States in turn makes reference to third party assistance in its standard exhortation to consult before arbitrating.²³ Still, little has been written discussing how third-party-facilitated collaboration might be made routine in processing investor-state disputes.²⁴

¹⁸ *Taking Stock*, *supra* note 4, at 1425-33.

¹⁹ See generally Jeffery Atik, *Legitimacy, Transparency, and NGO Participation in the NAFTA Chapter 11*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES CURRENT PRACTICE, FUTURE PROSPECTS* 135 (Todd Weiler ed., 2004); Loukas Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp v. USA*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 169 (Todd Weiler ed., 2005); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 747-51 (2004).

²⁰ Compare 1994 ICSID Ann. Rep. (stating that “[d]uring the year there were five cases before the Centre”) and <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Oct. 22, 2005) (pending arbitration cases includes one hundred proceedings); <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Oct. 22, 2005) (listing ninety-four cases in turn have been concluded).

²¹ ICSID News Release, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat, Oct. 22, 2004, available at <http://www.worldbank.org/icsid/improve-arb.htm> (last visited Nov. 8, 2005).

²² *Id.*; Ucheora Onwuamaegbu, *Resolution for Oil and Gas Disputes at ICSID*, 21(1) NEWS FROM ICSID 1, 14 (Summer 2004). See Convention on the Settlement of Investment Dispute between States and Nationals of Other States, art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001); cf. Matthew Gearing & Autumn Ellis, *Reforming ICSID*, 6(1) INT'L ARB. Q. L. Rev. 19, 29 (2005) (stating that for ICSID to sponsor a mediation service “is uncontroversial”). A creature of treaty, ICSID confines its activities accordingly and whatever reforms come about occur within the existing treaty framework, which, for example, establishes jurisdictional limits on the types of disputes the Centre can assist in.

²³ See U.S. Model BIT (2004), Art.18, <http://www.state.gov/documents/organization/38710.pdf> (last visited Nov. 8, 2005) (“[C]onsultation and negotiation...may include the use of non-binding, third-party procedures”).

²⁴ See *infra* note 35. An increasing wealth of literature addresses international ADR. Few writers, however, have spoken to investment disputes and mediation, though valuable contributions can be found. See generally Thomas Walde,

Motivated by the successes enjoyed by ADR in the private commercial setting²⁵ and the pedigree associated with inter-state conciliation,²⁶ this essay will in a preliminary way consider how “mixed” conciliation²⁷ might come to complement arbitration more systematically and routinely. Reference will be made to the NAFTA Chapter Eleven machinery in particular, though much of what is traversed below is relevant to investor-state arbitration in general.

Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective, 1(1) TRANSNAT'L DISP. MGMT. 1 (2004) (a comprehensive and helpful overview addressing in part investor-state mediation); Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corp. v. Trinidad & Tobago*, 1 ICSID REV.- FOREIGN INV. L. J. 340 (1986) (accounting an early success with investor-state mediation). Briefer comments include Noah Rubins, *The Use of Mediation for Investment Disputes*, 1(1) TRANSNAT'L DISP. MGMT. 1 (2004); Clyde C. Pearce & Jack J. Coe, Jr., *Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMPAR. L. REV. 311, 343 (2000) (proposing that pre-arbitration mediation be required).

²⁵ See *infra* note 57 and accompanying text (noting the recurrent claim of an eighty-plus percent settlement rate); Jeanne M. Brett, et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEG. J. 259, 260-67 (1996) (hereinafter *Independent Analysis*).

²⁶ Indications of conciliation's place in interstate practice include the express mention of it in Article 33 of the U.N. Charter, see U.N. CHARTER art. 33, para. 1, and that the Vienna Convention on the Law of Treaties adopts it as the primary method of resolution for disputes under that treaty. See *Vienna Convention on the Law of Treaties*, U.N. Doc A/CONF.39/27 art. 66(b) and Annex (1969); *United Nations Model Rules for the Conciliation of Disputes between States*, G.A. Res. 50/50, 87th Sess., U.N. Doc. A/RES/50/50 (1991), 30 I.L.M. 229 (1991) (stating that conciliation rules sponsored by U.N. General Assembly). See generally H. LAUTERPACHT, *OPPENHEIMS INTERNATIONAL LAW* 75-83 (H. Lauterpacht ed., 1944); DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 234-35 (2001); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 27-31 (1999); RUDOLF L. BINDSCHEDLER, *Conciliation and Mediation*, in Vol I. *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 721 (1992); J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 62-87 (3rd ed., 1998); OSCAR SCHACTER, *Conciliation Procedures in the United Nations Conference on Trade and Development*, in *INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE*, 268, 271-72 (Pieter Sanders ed., 1967).

²⁷ By 'mixed' conciliation I simply mean conciliation, as further defined below, between a state, or state entity, and a private investor.

II. CONCILIATION—MEANING, PEDIGREE AND ABSTRACT FUNCTIONS

A. Terminology

One can be forgiven for insisting that “conciliation” and “mediation” refer to different processes. In some contexts, they no doubt do.²⁸ Perhaps more common, however, is the convention of treating the two terms interchangeably,²⁹ and in their broadest senses³⁰—a usage to be followed in this essay. Therefore, while “conciliation” may connote in some settings the work of a “commission” which, after fact-finding, issues a report containing possible terms of settlement before disbanding,³¹ for present purposes “conciliation” includes such a commission’s work and the often more dynamic efforts associated with private commercial conciliation (often called “mediation”), briefly described in the next section.

B. Abstract Nature of the Technique—Strengths and Weaknesses

Conciliation, while pursued using many styles³² and by the conciliator playing many roles,³³ is at its core facilitated negotiation.³⁴ The subject of vast literature,³⁵ its general character and strengths

²⁸ See, e.g., BEDERMAN, *supra* note 26, at 234 (stating that conciliation as envisioned in the Bryan Treaties of 1914-1924 is more formal than mediation); COLLIER & LOWE, *supra* note 26, at 27-29 (comparing mediation and good offices; explaining that conciliation combines characteristics of fact-finding and mediation).

²⁹ This is a usage adopted by other authors not only for convenience but because they are unable to discern an authentic distinction between the two in practice. See, e.g., BINDSCHEDLER, *supra* note 26 (stating that “no clear distinction can be drawn”); Cf. WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS 193 (2d ed. 1988) (observing that the distinction probably not necessary in most cases).

³⁰ “Conciliation” will be the term more often used in keeping with the usage one encounters in interstate practice. See generally MERRILLS, *supra* note 26.

³¹ See MERRILLS, *supra* note 26, at 71-74; COLLIER & LOWE, *supra* note 26, at 29.

³² See generally Leonard L. Riskin, *Retiring and Replacing the Grid of Mediator Orientations*, 21 ALTERNATIVES TO HIGH COST LITIG. 69 (April 2003); Leonard L. Riskin, *Decision-Making in Mediation: The Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

³³ See BUHRING-UHLE, *infra* note 35, at 287-94.

³⁴ See WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS 194 (2d ed. 1988).

³⁵ Single-volume references addressing alternatives to adjudication, some with an international emphasis, include: HENRY J. BROWN & ARTHUR L. MARRIOTT, ADR PRINCIPLES AND PRACTICE (1993); ISAAC I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS (1986); JAY FOLBERG ET AL., RESOLVING DISPUTES, THEORY, PRACTICE AND LAW (2005);

relative to the adjudicative methods of dispute resolution are well known:³⁶ disputants engage in conciliation voluntarily in the sense that unlike arbitration, the process cannot put an end to the dispute without both disputants agreeing to terms of settlement, and those terms of settlement will ordinarily have been generated by their active participation in the collaborative process. Consequently, disputants retain control of the outcome, and to a large degree, of the process as well; as a by-product they may avoid disputed law and facts to craft durable solutions not dependent on assigning rights and duties. The shift from adjudicating legal issues to identifying shared interests and acceptable accommodations allows the parties to not only avoid the risk of zero-sum outcomes³⁷ but to possibly transform a legal dispute into a restructured relationship, enlarging the value of the relationship to each.³⁸

In conciliation, the neutral plays an essential role; it is typically the conciliator who successfully sponsors terms of settlement, terms that might be rejected if they emanated directly from a disputant.³⁹

GARY GOODPASTER, *A GUIDE TO NEGOTIATIONS AND MEDIATION* (1997); KIMBERLEE K. KOVACH, *MEDIATION PRINCIPLES AND PRACTICE* (2d ed., 2000); CHRISTOPHER MOORE, *THE MEDIATION PROCESS* (2d ed., 1996); JOHN S. MURRAY, ET AL., ALAN SCOTT RAU, EDWARD F. SHERMAN, *MEDIATION AND OTHER NON-BINDING ADR PROCESSES* (1996); STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* (2001). Surveys of conciliation and similar collaborative techniques as they operate in the international commercial disputes include CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 261-312 (1996); EILEEN CARROLL & KARL MACKIE, *INTERNATIONAL MEDIATION--THE ART OF BUSINESS DIPLOMACY* (2000); JACK J. COE, JR., *INTERNATIONAL COMMERCIAL ARBITRATION--AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* 35-42 (1997).

³⁶ See James T. Peter, *Med-Arb in International Arbitration* 83, 84-85 (1997) (explaining time and money efficiencies, party autonomy, scope for creative solutions, empowerment, and reconciliation). See generally Steven K. Andersen, *NAFTA: Mediation and the North American Free Trade Agreement*, *DISP. RESOL. J.* 57 (2000); Julie Barker, *International Mediation -- A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 *LOY. L.A. INT'L & COMP. L. R.* 1, 10-15 (1996); Carmen C. Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, *DISP. RESOL. J.* 82 (1998).

³⁷ To suggest that adjudication invariably produces a winner and a corresponding loser is misleading, of course, since the plaintiff may receive far less than the amount sought, making the resisting party's efforts justified and the claimant a "winner" only in a diluted sense.

³⁸ Though the result may be a restructured relationship that anticipates future dealings, often the process ends with a standard settlement in which money is given in exchange for relinquishing further proceedings.

³⁹ Procedurally, this success is often prefigured by seriatim, ex parte meetings that alternate between the individual disputants ("caucuses"). Such meetings are neither

Conciliators appointed in part for their ability to assess rights and duties are common,⁴⁰ though predictive evaluation is only one technique of many used to promote an accord.⁴¹ Regardless, it is often the uncertainty of an adjudicated outcome that maintains the parties' interest in engineering, with the neutral's assistance, a satisfactory alternative outcome.⁴² The kinds of skills that conciliators deploy in turn are often different from those that typify a capable arbitrator.⁴³

Because conciliation need not be pleadings-intensive⁴⁴ or dependent on adducing full proofs, it can produce results with greater speed⁴⁵ and less expense than arbitration.⁴⁶ In contemporary

circumscribed by legalisms nor limited in scope to legal issues. This "caucusing" aspect of modern, private conciliation distinguishes it from one standard variant of the interstate conciliation commission model. See BUHRING-UHLE, *supra* note 35, at 284-87. Cf. MERRILLS, *supra* note 26, at 70-72 (stating that some conciliation commissions operate with as much formality as arbitration). It also involves ex parte contact ordinarily not permissible in arbitration. These non-joint sessions allow a disputant to suggest terms of settlement and disclose vulnerabilities and non-legal factors that bear on settlement, but about which the disputant may not want the counter party to become aware. The meetings help the neutral formulate and reformulate proposed solutions.

⁴⁰ BROWN & MARRIOTT, *supra* note 35, at 419, 421; BUHRING-UHLE, *supra* note 35, at 302-03 (noting that where mediator performs an assessment of the merits, the process is often called "evaluative," "predictive" or "rights-based" mediation).

⁴¹ The UNCITRAL Conciliation Rules (1980), for example, convey latitude: "The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express...and the need for a speedy settlement of the dispute." CONCILIATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Res. 35/52 (Dec. 4, 1980), available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> [hereinafter UNCITRAL Conciliation Rules].

⁴² Barker, *supra* note 36, at 42-44 (suggesting that cultural influences may affect a disputant's tolerance for risk and uncertainty).

⁴³ See Gerold Herrmann, *The UNCITRAL Conciliation Rules: An Aid Also in Contract Adaptation (And Performance Facilitation)*, in ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 217, 226 (Norbert Horn ed., 1985) ("a person who makes a good arbitrator does not necessarily make a good conciliator").

⁴⁴ If administering a freestanding process (not integrated into an on-going arbitration that has already generated written submissions), a conciliator will often require some form of pleadings from the parties. These not only inform the neutral as to the issues in question, but also help establish common ground, which the neutral may attempt to enlarge in pursuit of a settlement. Concurrently, however, the conciliator may search for differences in priorities that suggest opportunities for deal-making. See Robert Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003).

⁴⁵ See CARROLL & MACKIE, *supra* note 35, at app. V, (providing synopses of cases in which multi-million dollar disputes were resolved within few days through mediation); Louise E. Dembeck, *Book Review: International Mediation-The Art of Business Diplomacy*, 10 AM. REV. INT'L ARB. 265 (1999) (explaining that Carroll & Mackie case studies demonstrate efficiency of mediation).

understanding, the conciliation process is private and confidential.⁴⁷ Candor is thought best promoted by relatively strict confidentiality,⁴⁸ and by according testimonial privileges,⁴⁹ so as to limit the migration of a disputant's vulnerabilities into other processes or contexts.⁵⁰

Among the weaknesses typically associated with conciliation are: that it relies on voluntary, good faith participation (and, as a corollary, that it can be exploited for delay by an insincere but cunning disputant);⁵¹ that it is not certain to yield an outcome and thus may prove to be a waste of resources;⁵² that its effectiveness depends to an extent on the timing of the intervention;⁵³ and that convening and reconvening the disputants can be difficult.⁵⁴ Additionally, where no mechanism exists to transform the mediated agreement into an

⁴⁶ *Independent Analysis*, *supra* note 25, at 262-63 (finding the median cost of the arbitrations considered to be over four times greater than the median cost of the mediations sampled. This was attributed in part to the greater number of lawyer hours spent in preparing for arbitration in comparison to mediation).

⁴⁷ BUHRING-UHLE, *supra* note 35, at 272 (stating that parties have relatively great control over who is privy to the details of the mediation).

⁴⁸ See AAA, ABA, SPIDR, *Standards of Conduct for Mediators, Standard V*, reprinted in 50 DISP. RESOL. J. 78; BROWN & MARRIOTT, *supra* note 35, at 827 (noting that mediator should respect parties' agreements on, and reasonable expectations concerning, confidentiality).

⁴⁹ See NCCUSL, Uniform Mediation Act, §§ 2(7), 3, 6(b), 7 (2002). Of course, in a given system efforts to ensure confidentiality may come into tension with courts' power to regulate the conduct of disputants. See also Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Power to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEG. L. REV. 29 (2003); BROWN & MARRIOTT, *supra* note 35, at 367-71 (discussing differing views concerning the existence and scope of a privilege for conciliators, as distinct from for disputants; primarily English law).

⁵⁰ See, e.g., Permanent Court of Arbitration Optional Conciliation Rules, art. 19-20, <http://www.pca-cpa.org/ENGLISH/BD/> (last visited Nov. 8, 2005) (PCA Optional Rules) (parties undertake that they will not present conciliator as witness in other proceedings; conciliator not to act as arbitrator, counsel or representative in other proceedings; parties undertake to not introduce as evidence in other proceedings views expressed, admissions, proposals or fact of same).

⁵¹ Cf. CARROLL & MACKIE, *supra* note 35, at 96-97 (preventing undue delay by having time limits on mediation).

⁵² *Id.* (positing that uncertainty in yielding a binding result "the most real limitation of mediation" but mitigated by having an adjudicative mechanism as default procedure). See also *Id.* at 52-53 (noting that small chance that mediation will not succeed, but if it does not, preparation undertaken helpful to arbitration that follows).

⁵³ The parties' respective readiness to participate varies with the circumstances. With respect to investor-state arbitration, during the period soon after initiating an arbitration the investor may feel that it has already exhausted softer techniques to achieve a remedy, while the host state may, at the federal level, have no detailed knowledge of the factual background to the dispute; the latter would be irresponsible if settling under such circumstances. See *infra* notes 138 and accompanying text.

⁵⁴ Neither side may wish to appear eager, and thus to signal weakness.

award,⁵⁵ enforcement of the result (effectively a contract) may be more arduous than with an award or court judgment.⁵⁶ These are traits that any system of mixed conciliation would do well to confront, as more fully addressed below. Nevertheless, these perceived liabilities have not prevented relative success in the private commercial setting, where conciliation is credited with impressive rates of settlement.⁵⁷

III. POSSIBLE CONCILIATOR FUNCTIONS IN THE INVESTOR-STATE CONTEXT

A. *In General*

That the principal aim of conciliation is to bring the dispute to an end does not preclude in the context of investor-state disputes a neutral fulfilling a number of other functions that add value to the process even when it does not lead to a full settlement. The following overlapping categories introduce some of these possible functions.

B. *Orientating Disputants and Harmonizing Expectations*

Counsel representing parties in investor-state arbitration bring to the process various levels of skill and familiarity with international law and arbitral practice, as well as diverse expectations based in legal

⁵⁵ CAL. CIV. PROC. CODE § 1297.401 (West Supp. 2004) (providing that a written conciliated agreement signed by the parties and the conciliator is to be “treated [with the] same force and effect as a final award in arbitration”).

⁵⁶ *See generally* SCHREUER, A COMMENTARY, *supra* note 22, at 1143 (noting that investment awards benefit from enforcement conventions with wide adherence. In the case of the ICSID Convention, there are no refusal grounds, save domestic sovereign immunity impediments specific to execution, that can be invoked in a domestic court to slow enforcement).

⁵⁷ *Independent Analysis*, *supra* note 25, at 260-67 (stating one study of 449 contract and tort-based disputes revealed a settlement rate of 81 percent). *See also* CARROLL & MACKIE, *supra* note 35, at 91 (reporting a similar resolution rate from the Center for Dispute Resolution, where 84 percent in 1997 and 85 percent in 1998). Because the investor-state and private commercial contexts are distinguishable in important ways, one cannot comfortably assume that similarly high rates of settlement would occur in relation to investor-state disputes, but the numbers are intriguing and invite guarded optimism. Interestingly, in the *Independent Analysis* study, the settlement rate was somewhat higher when the neutral gave an evaluation of the merits. *Independent Analysis* at 261. *See also* Robert Coulson, *Arbitration and Other Forms of Alternative Dispute Resolution--General Overview*, 5 AM. REV. INT'L ARB. 6, 7 (1994) (reporting that AAA commercial mediation produced settlement rates in excess of 80 per cent). *Cf.* Jernej Sekolec, *Introduction to the UNCITRAL Model Law on International Commercial Conciliation* 27 ICCA Y.B. 398, 399 (2002) (increasing attention given to conciliation justified by considerable, “surprisingly high,” success rate).

culture.⁵⁸ These differences may combine to produce conflicting expectations about the process. Experienced arbitrators align disputant expectations by holding organizational meetings and issuing procedural orders.⁵⁹ Nevertheless, the degree and timing of tribunal guidance vary among tribunals. There would be room therefore for a neutral to anticipate or complement the activities of the tribunal by intercepting misconceptions or misplaced assumptions early in the process.

C. *Claim Refinement, Issue Clarification and Engaging the Parties*

An engaged neutral with appropriate background might also induce refinements of various kinds in the theories advanced by the parties and generally help clarify issues.⁶⁰ The result should be higher quality submissions, and better use of the tribunal's time. The narrowing of claims and defenses may reflect either unilateral or bargained-for disputant adjustments. Conceivably, time savings may result because fewer petitions for claim amendment and dispositive rulings will be made. Additionally, a conciliator's early involvement may prompt a dismissive or otherwise non-responsive host state to become active in the process earlier than would otherwise occur.

D. *Mediating Discovery and Other Procedural Disputes*

A common approach to production of documents in international arbitration⁶¹ holds that each disputant should attach to its written submissions the documents upon which it intends to rely. Copies of documents in the hands of only one party and not introduced by that party may be supplied on a voluntary basis upon the other party's request, and if disagreement arises, the requesting party may seek the

⁵⁸ See generally Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, ARB. DISP. RES. J. 78 (1995); Siegfried Elsing & John Townsend, *Bridging the Common Law-Civil Law Divide*, 18 ARB. INT'L 59 (2002); Paul Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, 12(9) MEALEY'S INT'L ARB. REP. 25 (1997); Andreas Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, MICH. Y.B. INT'L STUD. 163 (1985).

⁵⁹ See generally UNCITRAL Notes on Organizing Arbitral Proceedings, U.N. Comm'n on Int'l Trade Law, U.N. GAOR, 29th Sess., U.N. Doc. A/51/17 (1996), available at <http://www.uncitral.org/english/texts/arbitration/arb-notes-e.pdf>.

⁶⁰ Peter, *supra* note 36, at 106.

⁶¹ See generally Hans Smit, *Managing an International Arbitration: An Arbitrator's View*, 5 AM. REV. INT'L ARB. 129 (1994); Alan Rau & Edward Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L. J. 89 (1995).

tribunal's help.⁶² Under a model in which a conciliator has a broad mandate extending throughout the proceedings, that neutral may be able to resolve such production disputes, without tribunal involvement, by tailoring a document exchange regime accommodating the parties' specific concerns.⁶³ Nothing would prevent the tribunal from asking for additional documents in the usual way.⁶⁴

Other important procedural matters can also be resolved with the help of a skillful neutral. The place of arbitration is such a question; in investor-state arbitration, the disputants often are unable to agree on an arbitral seat, leaving the task to the tribunal.⁶⁵ At a minimum it should be possible to agree to exclude certain places leaving the tribunal to select from among the remaining possibilities.⁶⁶ A neutral may also assist the disputants in designating a presiding arbitrator in situations in which the parties have that power⁶⁷ and wish for whatever reason to not entrust the task to an appointing authority.

E. Drafting Terms of Settlement

It is usual for terms of settlement to be recorded in a writing, signed by the disputants.⁶⁸ In that form it has the character of a contract, and its enforcement is in principle subject to such contract defenses as may be found in the governing law.⁶⁹ One possible answer

⁶² See IBA Rules on Taking of Evidence in International Commercial Arbitration, art.3; Jack J. Coe Jr., *The Serviceable Texts of International Commercial Arbitration--An Embarrassment of Riches*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 143, 156 n.57 (2002). See generally V.V. Veeder, *Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules*, 65 ARB. 291 (1999).

⁶³ Cf. Peter, *supra* note 36, at 103-06 (discussing IBM-Fujitsu arbitration in which process design questions were successfully mediated).

⁶⁴ See, e.g., UNCITRAL Arbitration Rules, art. 24(3) (stating that tribunal may require production of documents).

⁶⁵ See Charles H. Brower, II, *The Place of Arbitration, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 151 (Todd Weiler ed., 2005). Where the proceeding is governed by the ICSID Convention, and thus subject to that system's annulment process, the seat of arbitration is not of central concern. Significantly, where one or both of the states involved is not a party to the Convention, petitions to set aside an award are directed to the courts at the seat of arbitration. See generally Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT'L ARB. 185-207 (2002).

⁶⁶ Cf. Brower, *Place of Arbitration, supra* note 65, at 155 (discussing *UPS* case in which parties reached a negative choice, *i.e.*, one excluding Mexican fora).

⁶⁷ See, e.g., NAFTA, *supra* note 1, art. 11.

⁶⁸ See BROWN & MARRIOTT, *supra* note 35, at 146-47, 177, 309-10.

⁶⁹ *Id.* at 379; CARROLL & MACKIE, *supra* note 35, at 87.

to the problem of enforcement of the settlement agreements is to embody such agreements in an award on agreed terms.⁷⁰ The option of doing so is confirmed in many rule and statutory formulae.⁷¹

If an award on agreed terms is anticipated as part of the settlement, entrusting its initial drafting to the neutral (as opposed to counsel or the tribunal) may abridge the process. Little serious risk of defect should arise given the neutral's ability to consult with the tribunal on matters of form and with the disputants on matters of substance;⁷² ultimately, the tribunal, in final consultation with the parities, will have the last word on the award's content and form.

IV. ATTRACTIVE FEATURES AND BY-PRODUCTS—PUBLIC AND PRIVATE

A. *Avoiding Indeterminacy and Precedent*

Seasoned specialists in the investor-state process often counsel their clients to reduce their expectations about outcome predictability

⁷⁰ See generally BUHRING-UHLE, *supra* note 35, at 361.

⁷¹ Accord CARROLL & MACKIE, *supra* note 35, at 87-88; ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 383-85 (student ed., 2003); Christopher Newark, *Observations to Christer Holm's Article 'Mediation In Stockholm'*, 2000 STOCKHOLM ARB. REP. 105 (noting that problems arise when agreement to arbitrate formed after the dispute has settled). See <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Nov. 8, 2005) (stating that dispositions of concluded cases administered by ICSID included several of the awards on agreed terms). There is rich but not fully congruent discussion in the literature about the treatment agreed awards should enjoy domestically or under an otherwise applicable enforcement convention. Among the problems mentioned is that if an arbitration is initiated after the mediated settlement has been concluded, there is no dispute to arbitrate at the time the tribunal comes into being. It seems, however, that a settlement that occurs in the context of a pending arbitration can be embodied in an award with relative confidence that it will be enforced as such. See, e.g., BROWN & MARRIOTT, *supra* note 35, at 379-80 (noting that agreed award originating in parallel mediation enforced in the usual way).

⁷² Customarily, such awards are not reasoned; they may be signed by the disputants to signify that the settlement is correctly set forth in the award, though this is not invariably required in rule formulae. See Pieter Sanders, *THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION* 50 (2001). Compare *Arbitration of the United Nations Commission on International Trade Law*, art. 34, U.N. Comm'n on Int'l Trade Law, U.N. GAOR, 31st Sess., Supp.No.17,U.N.Doc.A/31/17(1976), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/html, and UNCITRAL Arbitration Rules, art. 34 (no party signature mentioned), with Arbitration (Additional Facility) Rules, ICSID Additional Facility Arbitration Rules, art. 49, Jan. 1, 2003, available at <http://www.worldbank.org/icsid/facility-archive/33.htm> (request by parties for award on agreed terms to be accompanied by full and signed text of settlement, but no disputant signatures on award required).

in investor-state matters. Seemingly similar cases may produce different results⁷³ given that arbitral tribunals are ad hoc adjudicators, the applicable doctrines are in application highly fact dependent, and the cases contain many disputed facts.⁷⁴ Governmental and private participants alike may prefer a method over which they can maintain control. Where the dispute can be resolved without obligatory fixing of facts and reference to rules, facts and law become merely incidental.⁷⁵ Moreover, for the host state, which must anticipate being named respondent repeatedly, an ad hoc settlement will avoid the creation or application of unfavorable precedent.⁷⁶

B. *Managing a Caseload*

For a sovereign facing multiple claims at various stages, the ability to designate certain of them as holding special promise for settlement and the general luxury of anticipating a conciliation segment in an otherwise adjudicative format may add flexibility to its operations. Though initially adding further architectural and strategic elements for states to contend with, internal policies can evolve to take advantage of a two method system. An element of chance will always be involved, of course, since investor willingness to prolong conciliation will vary. But at least in certain circumstances investors might find advantage in patience, especially where the host state has demonstrated a willingness to settle appropriate cases and the conciliator has been able

⁷³ Compare CME Czech Republic B.V. v. Czech Republic, UNCITRAL Arbitration Proceedings, Partial Award, Sept. 13, 2001, at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>, with *Lauder v. Czech Republic*, UNCITRAL Arbitration Proceedings, Final Award, Sept. 3, 2004, at <http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf>.

⁷⁴ In a regulatory taking claim, for instance, the government and the claimant may have wildly different submissions as to the peril sought to be regulated. The introduction of experts on both sides may not do much to clarify matters.

⁷⁵ Of course, where the conciliator is asked to render an evaluation of the merits, certain facts will have to be taken as a basis for that assessment. Additionally, there are circumstances in which the conciliator may be asked to act primarily as fact-finder, perhaps applying technical expertise and informed study of the party-experts' respective views. The likely outcomes envisioned by the conciliator are often merely best-guess predictions, based on assumptions perhaps not later adopted by the arbitral tribunal. Thus, evaluation by a neutral who is not also the arbitrator-- preferred by many-- has the potential to mislead the disputants. See Peter, *supra* note 36, at 95 (noting that winner almost "impossible to spot at the outset of an adjudicational process"). This may argue for allowing conciliators to also be the arbitrators in a med-arb scenario. But there are also dangers in doing so. *Id.*

⁷⁶ It is widely conceded that while no formal system of stare decisis operates in investor state arbitration, tribunals consider the awards of other tribunals, and advocates invoke existing awards as authority. See *Taking Stock*, *supra* note 4, at 1407.

to create momentum in the case at hand. As a corollary, the host state can focus its energies on cases that require an adjudicated result.

C. *Enhanced Confidentiality and Privacy*

Putting aside the transparency-related policy issues noted below,⁷⁷ to the extent that mediation proceeds in private, with the participants bound to observe confidentiality, one or both parties may prefer it on those bases alone. A state, for example, may be concerned about the revelation of secrets bearing on national security, or the negative publicity generated by the investor's allegations. The investor may fear disclosure of trade secrets, or to litigation-prone shareholders.⁷⁸

D. *Enlarged Value and Constituencies*

A notion perhaps too fully evident in the literature is that collaborative methodologies allow the parties to avoid win-lose outcomes while moving beyond the narrow legal dispute to a bargain that benefits both sides.⁷⁹ Though trite, the 'win-win' credo draws its essence from real possibilities. In the normal expropriation claim, for instance, either a taking will be demonstrated or it will not, with valuation of the investment following as appropriate. Though fact-intensive, the legal issues are narrow and the remedies limited;⁸⁰ ultimately, any award of compensation may be far less than hoped for⁸¹ and may result in the host state owning a property it may be ill-equipped to exploit.⁸² The legal dispute, moreover, often brings to a halt the investor's operations, not infrequently causing a lasting suspension in activities that bear on the quality of life for host state citizens.

⁷⁷ See *infra* notes 93-97, 136-38, and accompanying text.

⁷⁸ Where the conciliation coexists with an investor-state arbitration, the latter may proceed with relative openness, perhaps neutralizing certain of the confidentiality measures being pursued in the parallel conciliation.

⁷⁹ Regarding the enlarging of the "pie" central to the win-win conception (the product of "integrative" as opposed to "distributive" methodologies) see KOVACH, *MEDIATION PRINCIPLES*, *supra* note 35, at 149-51 (1994).

⁸⁰ Though tribunals may award restitution of property, it is more common for them to award compensation. See Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 597, 627-28 (Todd Weiler ed., 2005).

⁸¹ If an enterprise is not a going concern, the tribunal will be unlikely to accept a DCF method of valuation. See *id.* at 629, 658-661, 666.

⁸² See Noah Rubins, *Must the Victorious Investor-Claimant Relinquish Title to Expropriated Property?*, 4 *J. WORLD INV.* 481 (2003).

Though conciliation may prove only to be a faster way to achieve a money settlement, (or abandonment of the claim), it has the capacity to generate a wholly new relationship between host state and investor. Consider, for instance, the landfill cases: *Metalclad*⁸³ and *Tecmed*.⁸⁴ In both cases, the investments faced activist pressures that influenced the host government. Perhaps in neither case would an alternative location or re-calibration of the particulars of operation have been capable of salvaging a continuing role for the foreign investor. Yet, one may speculate⁸⁵ as to whether an authoritative third party might have been able to build on pre-claim negotiations to find a *via media*, an alternative to the prolonged dormancy that in *Metalclad* characterized the facility in question, even after the property had been transferred to the government pursuant to the award. Such an alternative might well have allowed the investor a continuing role in the activities it originally sought to undertake, while using expertise perhaps not otherwise available in the host state.⁸⁶ The resulting example of integrative bargaining⁸⁷ might also be able to account for the legitimate concerns of the various stakeholders that helped animate the dispute, at least to a greater degree than would occur in arbitration.⁸⁸ It would be naive

⁸³ *Metalclad Award*, *supra* note 3.

⁸⁴ *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Spain/Mexico BIT)*, Award, ICSID Case No. ARB(AF)/00/2 (May 29, 2000), 43 I.L.M. 133 (2004). See generally Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 597 (Todd Weiler ed., 2005).

⁸⁵ Though I was co-counsel to *Metalclad* in the arbitration, I here discuss alternative outcomes on a purely hypothetical, highly oversimplified, basis, for the sake of illustration only.

⁸⁶ Using the well known facts of *Metalclad* strictly as an illustration, one notes in the pleadings of the respondent at least the suggestion that opposition to the landfill at the local level might have abated had operations been limited to *non-hazardous* waste. The proposed limitation was unacceptable to the investor as a significant denaturing of its business model, and was also contrary to the acute needs expressed by federal authorities. However, suppose, hypothetically, that in exchange for full cooperation in locating and permitting a second site where opposition and activism could be more readily overcome, the investor limited its operations at the disputed site to non-hazardous waste, while remediating hazards left by the site's former owners (an imperative accepted by all concerned). Much needed villager jobs and training would be preserved at the disputed site, which could be remediated in the process; the region's critical waste problem would also have begun to be addressed sooner than occurred under the arbitration option.

⁸⁷ See BUHRING-UHLE, *supra* note 35, at 235-37.

⁸⁸ The limited role being afforded amici in arbitration--a rules based system--might well be less meaningful than the consideration such activists might receive in informing a government, or indeed the conciliator, during a conciliation. While the activists might not be given a literal place at the table, the host state might well be informed in part by

optimism to suggest that such results would occur in the majority of cases. Nevertheless, under the arbitral formats currently available, an integrative solution, almost by definition, will not occur.⁸⁹

V. CONCERNS, OBSTACLES AND CHALLENGES—PUBLIC AND PRIVATE

A. *Retarding Jurisprudential Growth*

In a system that could benefit from a deepened jurisprudence, any diversion to non-adjudicative processing of disputes comes at a cost. Each new investor–state award becomes part, de facto, of a primitive system of precedent under which tribunals consult and give various degrees of persuasive weight to the awards of other arbitrators. This functional reality is promoted by the disputants, whose reliance on such other adjudications is natural, and fueled by the increasing availability of investor-state awards. The latter, as reasoned adjudications, elaborate an emerging law of foreign investment.⁹⁰ When a claim settles, there is one less reasoned adjudication than might otherwise have been available to contribute to this process. Accordingly, if a substantial percentage of claims were disposed of through non-adjudicative means, the maturation process now under way would likely suffer. While so many questions remain debatable, the incremental effect of each lost opportunity is arguably material.

B. *The Need for Skill, Depth and Choice*

The success of any collaborative alternative depends heavily on the quality of the persons enlisted to serve as the neutrals. A highly

direct discussions with responsible representatives of various constituencies including, in the hypothetical under consideration, environmental NGOs.

⁸⁹ There is scope for arbitral accommodation of the equities when the parties authorize an award *ex aequo et bono*. Even so authorized, a tribunal's function remains and adjudicative one, conceptually different from conciliation. See generally Ulrich Scheuner, *Decisions Ex Aequo Et Bono by International Courts and Arbitral Tribunals*, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 275 (Pieter Sanders ed., 1967); Louis B. Sohn, *Arbitration of International Disputes Ex Aequo Et Bono*, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 330 (Pieter Sanders ed., 1967); Christoph Schreuer, *Decisions Ex Aequo Et Bono Under the ICSID Convention*, 11 ICSID REV.–FOREIGN INVESTMENT L. J. 37 (1996).

⁹⁰ Though doctrinal unity does not exist on many important questions, there can be no doubt that cross-pollination occurs, such that even where full agreement is not established the refining of ideas that results makes for better informed disputants and tribunals.

credentialed and experienced pool of arbitrators has served in investor-state arbitration. The serial appointments of many of these persons reflects both risk averseness on the part of appointing parties and a recognition that the process and governing law is highly specialized. Conciliation is a wholly different process from arbitration and the skill set required for success may not have been acquired by all those presently qualified to serve as arbitrators. Those currently on established lists may be perceived to be distinguished amateurs as regards conciliation technique. At a minimum, the absence to date of a well-worn investor-state conciliation regime raises whether the practical training desirable of such neutrals has been widely acquired.

Warranted or not, some observers also question the extent to which conciliator lists sponsored by states can avoid politically motivated appointments.⁹¹ Certainly, existing lists of conciliators contain persons of great distinction, allowing one no room to make negative generalizations about quality. But these are the same persons whose commitments often place them beyond immediate reach. The goal should be to build on existing lists to assemble a sufficiently large pool of dispute specialists that genuine choice exists. And, there should be power in parties to exercise that choice by departing from any lists assembled.⁹²

One potential source of talent resides in those lawyers known primarily as arbitrators who may welcome service as conciliator and any training that different role implies. It may well be in fact that the process by which conciliators are appointed by the parties will replicate that now used to select arbitrators; as a result, the many respected arbitrators currently serving may be the first conciliators to serve, selected as much on the basis of risk averseness and name recognition as proven skills as conciliators.

C. *Transparency and Related Issues*

One of the more remarkable trends evident in recent years has been the appreciable increase in process transparency and public

⁹¹ Under the ICSID Convention, *supra* note 22, arbitrators and conciliators occupy separate panels, but some persons are designated to serve on both. The panels comprise appointees designated by member states under the Convention's Article 13(1) (four persons per state) and others appointed by the Chairman of ICSID's Administrative Council under Article 13(2) (ten persons for each panel). At present, the Article 13(2) appointees are all named to both the arbitration and conciliation panels of the Centre. State appointees are often designated for one but not the other panel.

⁹² Provided they possess the qualities required of ICSID conciliators (set forth in Article 14(1)), persons not on a panel may be appointed conciliator by the disputing parties. *See* ICSID Convention, *supra* note 22, art. 31.

scrutiny associated with investor-state arbitration, notably that authorized under NAFTA, Chapter Eleven.⁹³ The more open architecture developed in the Chapter Eleven context has been incorporated into the most recent Model BITs of the United States⁹⁴ and Canada,⁹⁵ indicating a lasting commitment to measures calculated to subdue criticism. As noted above, however, the prevailing model of conciliation assumes privacy of both joint sessions and caucuses, and the non-publication of the resulting agreement.⁹⁶ If these standard features were to prevail in the investor-state conciliation context, the differences between the collaborative exercise and the arbitral process would be all the greater, with the former perhaps coming under suspicion as offering states an avenue for reducing accountability. It is thus appropriate to explore how the policies supporting transparency can be addressed in relation to conciliation, while acknowledging that the two processes are fundamentally different so as to avoid rigid insistence that the two methods function with equivalent levels of transparency. The topic is touched upon again below, with the conclusion that privacy and confidentiality in conciliation should be preserved to an appreciable degree.⁹⁷

D. *Reduced Corrective Influence*

Settlements divert attention from the legal merits of the underlying controversy and may thereby shroud dubious levels of treaty compliance in ambiguity, producing less incentive for the states to institute corrective measures.⁹⁸ Though arbitral tribunals typically

⁹³ NAFTA, *supra* note 1. See generally Atik, *supra* note 19. Loukas Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp v. USA*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 169 (Todd Weiler ed., 2005); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 747-51 (2004); Ruth Teitelbaum, *Privacy, Confidentiality and third Party Participation: Recent Developments in NAFTA Chapter Eleven Arbitration*, 2(2) LAW & PRAC. INT'L CTS. 249 (2003).

⁹⁴ See U.S. Model BIT, *supra* note 21, art. 28(3).

⁹⁵ Canadian Model Agreement for Promotion and Protection of Investments (2004), art. 19, 38-39, available at http://www.naftaclaims.com/files/canada_model_bit.pdf.

⁹⁶ See UNCITRAL Conciliation Rules, *supra* note 72, art. 14; see generally PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 76-77 (2001).

⁹⁷ See *infra* notes 137-141 and accompanying text.

⁹⁸ Cf. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (noting that changes in behavior produced by several effects of litigation).

have no power to order an end to an offending measure,⁹⁹ states self-regulate in light of the pronouncements of tribunals and any liability that might flow therefrom. Reasoned adjudications thus provide lawmakers guidance and stimulation not found in mediated agreements, the very point of which might have been to avoid such corrective influences. It is therefore reasonable to question whether states might not find conciliation to be too comfortable a blind, where bad habits might be perpetuated.

In brief reply, it might be argued that a claim that settles may exert many of the reformative influences of full adjudication. The same kind of government self-study precipitated by an award should result from the conciliation process, and where an examination of a measure or policy has revealed merit to the investor's complaint, reform would be expected to follow, subject to the same political and institutional vagaries that would apply with equal force where arbitration alone is used. Moreover, if as proposed herein, conciliation is often part of a two-track mechanism that begins with the initiation of arbitration, sufficient detail will be supplied from claimant's seminal arbitral filings that interested third parties can study the measures complained of; many of these observers can be expected to remain watchful and influential in the reform process.

E. Encouraging Claims

A conciliation mechanism that is to operate in every case may raise concerns relative to docket levels. In particular the number of claims may actually rise if conciliation is perceived as inviting small, or weak but irritating, claims that would otherwise not be brought. This fear assumes poorly informed claimants, however, at least under the integrated system being proposed here. When embedded in an ongoing adjudicative process, conciliation provides little scope for unilaterally avoiding the more elaborate and expensive arbitration process.¹⁰⁰ Moreover, to the extent the latter concern relates to feckless claims, it may well be addressed by the availability of summary adjudication, an authorization given tribunals under the most recent Model BITs of the

⁹⁹ See also NAFTA, art. 1135(b) (providing that tribunal may order restitution of property, but not without allowing respondent to render money compensation instead); *cf. id.*, art. 1134 (tribunal may not enjoin the operation of complained of measure).

¹⁰⁰ The goal of the investor-state architecture and surrounding policies should be to encourage meritorious claims, of various sizes. There may be reason to make architectural changes to facilitate smaller claims, perhaps on a consolidated basis. While conciliation may be part of a system that becomes attractive for smaller claims, to attract smaller disputes would not be the primary goal of the changes under consideration here.

U.S. and Canada, for example.¹⁰¹

F. Lack of Incentive to Avoid Adjudication

Two kinds of anti-bargain influence might undercut efforts to give conciliation an operationally meaningful place within the investor-state mechanism. The first is the sense of advantage felt by one or both disputants, thus promoting a low sense of outcome risk; the second is a disinclination to take responsibility for settlement when that burden can be assigned to an adjudicator.

The first might well be implicated, for example, by the pattern of outcomes generated under NAFTA Chapter Eleven, in which the vast majority of claimants have either not succeeded or have received a low recovery.¹⁰² Presumably, with each NAFTA case successfully defended, the respective host state adds to its experience and expertise, enhancing its confidence. Though claimants outside of NAFTA have had greater success, the pattern within NAFTA would suggest little reason for host states to embrace a method in which they may feel pressured to abandon apparent superiority.¹⁰³

The second anti-collaboration influence mentioned above may be present among both government and private decision makers. Managers in public companies sometimes express a preference for imposed outcomes in light of the tendency of shareholders to punish management for decisions that compromise financial or other ownership expectations. It is more difficult to blame a company's board for the award of arbitrators than for their affirmative decision to settle a claim on what may appear to an outsider to be unsatisfactory terms. A similar force is at work in governments where career paths may be at risk and where various outside stakeholders (such as environmental NGOs) may be unwilling to let the fact of settlement pass without negative fanfare.¹⁰⁴

To some extent, both of these deterrents to conciliation can be addressed by reorienting the disputants' views concerning the

¹⁰¹ See U.S. Model BIT, *supra* note 23, art. 28(4).

¹⁰² See *Taking Stock*, *supra* note 4, at 1459-60.

¹⁰³ More subtly, the belief that a vigorous, well-publicized defense adds legitimacy to the complained of policies may hold sway among governments to some degree. Once a state's formal internal mechanisms are engaged, moreover, inter-agency protocols may make settlement harder to achieve because the power to settle may have become either legally or operationally decentralized.

¹⁰⁴ Cf. Todd Weiler, *Arbitral and Judicial Decision: The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 195 n.22 (2000) (commenting upon settlement entered into by Canada in *Ethyl Corp. v. Government of Canada* (June 24, 1998), 38 I.L.M. 700 (1999)).

functions of conciliation. Though for certain claims a disputant's insistence on adjudication is fully rational and justified,¹⁰⁵ other claims can be managed through conciliation without deep sacrifice. A state entitled to enjoy confidence in the outcome need not jettison its belief in victory when conciliating, but rather should use its advantage to persuade the claimant, through the conduit of the independent conciliator, to discontinue its action.¹⁰⁶ At the same time, neutral third party evaluation may appropriately test the state's position, while giving it a corresponding opportunity to avert through settlement a potentially undesirable precedent.

A settlement, moreover, need not imply culpability and may allow a mutually beneficial outcome serving both the investor and the public interest, such as when through an accord vital services are restored, or when a state satisfies the investor by promising to do that to which it was already committed.¹⁰⁷ Still other claims may have merit as a substantive matter, such as where the host state's defense, realistically assessed, is chiefly dependent on jurisdictional arguments.¹⁰⁸ If viewing

¹⁰⁵ Despite Canada's settlement in *Ethyl*, *see id.*, it is hard to imagine that the United States would settle a case such as *Methanex*, for example, given its implications for the class of claimants and for host state liability for health, safety and environmental regulation. *See Methanex Final Award*, *supra* note 8.

¹⁰⁶ Some writers question whether the potential for disparate bargaining power makes conciliation less desirable than an adjudicative process since in the latter a court or tribunal can neutralize power-disparities by focusing on the merits and by curbing procedural abuses of might. Where arbitration parallels mediation, a weaker party with a meritorious claim can at least count on it being vindicated in due course, provided cost barriers do not preclude full access to the arbitration. Regardless, a conciliated agreement cannot be compelled by a disputant unilaterally or by the conciliator. *See* Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 278 (1996) (mediation generally fair because settlement requires both parties' consent).

¹⁰⁷ Consider, for illustration, the hypothetical Chapter Eleven claim of a Mexican investor damaged by U.S. restrictions on the activities of certain Mexican trucks during the late 1990s. The exemption allowing differential treatment for trucking had run its term, and accordingly, in an inter-state arbitration initiated by Mexico, the United States was held to be in violation of NAFTA under another NAFTA Chapter. *See* In the Matter of Cross-Border Trucking Services, Secretariat File no. USA-Mex-98-2008-01 (Feb. 6, 2001), *available at* http://naftaclaims.com/disputes_us_9.htm (last visited Nov. 8, 2005). *See generally* David Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 516-17 (2000). Establishing compliant measures would take time and political maneuvering, but was consistent with U.S. policy. In such a setting, the United States would seem to have little to lose from exploring ways to accommodate or otherwise placate the claimant until a conforming level of access to the US market could be engineered.

¹⁰⁸ It is not unusual, for example, for a successful defense to depend upon a delicate and uncharted jurisdictional point. *See, e.g.*, *Metalclad Award*, *supra* note 3 (post-filing measure held to be an expropriation despite respondent's argument going to the

conciliation as an opportunity rather than as a collateral exercise, governments should be able to identify from within an array of claims some especially suitable for assisted collaborative processing. If these can be identified and dealt with, fewer distractions will interfere with full attention being given to cases requiring an adjudicated result.

The fear of having to account for a settlement—the second deterrent identified above— is suggested by recurrent anecdotal accounts. Greater willingness to take responsibility for ending a dispute would require changes in the cultures involved, and refinements in the manner in which the process is framed and explained to the relevant constituencies. Both states and private enterprises should articulate policies that make conciliated outcomes for appropriate cases an overt objective rightly justified as good stewardship.¹⁰⁹ Moreover, where the conciliation process involves an evaluative segment, the predictions offered by the third party ought to provide justification analogous to that provided by an arbitral award,¹¹⁰ though obvious problems of confidentiality may come to the fore if only one party wishes to use the evaluation in this way.¹¹¹

G. Potential for Abuse

As is widely discussed, a measure of good faith is essential for a meaningful mediation to occur. There may be reasons, especially for a respondent sovereign, to welcome delay. For a state facing multiple claims, delay may be a method of managing its resources. It may also be, however, a tool for effecting more Machiavellian strategies.¹¹² In a system in which a parallel arbitration is moving forward apace, either

tribunal's temporal jurisdiction; held to be within tribunal's jurisdiction and admissible through claim amendment); *Loewen Award*, *supra* note 14 (continuous nationality rule and exhaustion requirements peculiar to denial of justice). If a given case is not well suited to establishing jurisprudential clarity on the jurisdictional point, and the merits do not powerfully favor the host, (exemplified by both *Metalclad* and *Loewen* some would argue), the state can be forgiven for relinquishing the opportunity to convince the tribunal. *See also*, Wallace, *supra* note 14 at 686-700 (*Loewen* a case of "unhappy outcomes" in several respects); *cf.* *Loewen Award*, *supra* note 14, (dictum condemning host state court's conduct as below minimum standard, but controversially, dismissing claim on jurisdiction-related grounds).

¹⁰⁹ Professor Walde has rightly referred to the improvident insistence on adjudication as a failure of management technique. *See* Walde, *supra* note 24, at 2.

¹¹⁰ *Cf.* Herrmann, *supra* note 43, at 226 (noting that settlement suggested by third party helps defend decision to settle).

¹¹¹ Ordinarily, the consent of both parties should be given before such a disclosure. *Cf.* Merrills, *supra* note 26 at 73 (Some commissions have resisted giving reasons for proposed terms of settlement to prevent reliance on them in subsequent proceedings).

¹¹² The state may suspect that the claimant is thinly funded, or ambivalent about the costs involved, and thus may pursue tactics to deplete claimant resources and resolve.

side can cut short its efforts in response to truculent behavior or as a way to invite additional demonstrations of good faith. An insincere party thus risks that its counter-party will decide to restrict itself to the arbitral process, a process already in place and not appreciably lessened in momentum by conciliation having been attempted.

VI. ARCHITECTURAL POLICY CHOICES AND CONSIDERATIONS—A PRELIMINARY LIST

A. *In General*

The notion that conciliation might fully replace arbitration is both unrealistic and undesirable. Rather, the more serviceable premise is that conciliation would be one of two—somewhat competing, somewhat complementary—processes with broadly the same goal. To offer distinctive choices should promote legitimacy because the parties will feel less conscripted to a single method. Yet, many of the more interesting questions raised in seeking a greater role for conciliation involve its relationship to arbitration within an overall architecture and the policies that may come into conflict should conciliation come to represent a significant rival methodology. A representative roster of these considerations follows.

B. *Degree of Integration between Arbitration and Conciliation*

Conciliation and arbitration can be linked and coordinated in various ways and to various degrees. A thorough-going study of the topic would consider questions of order (should use of the two methods be consecutive or parallel), various forms of mutual accommodation that might be encouraged (or required), and hierarchy.

At a minimum thought must be given to eliminating to the extent possible inter-process interference. The simplest way to do so might be to adopt the conventional two-step model of med-arb well known to private commercial dispute resolution.¹¹³ The chief weakness of this model is that arbitration makes no progress during the conciliation process. Indeed, the arbitral tribunal may not have yet been formed, reducing the sense among the disputants that the default of adjudication is imminent and eliminating access to interim measures and other arbitrator assistance. Additionally, there is redundancy where one set of submissions (formatted for conciliation) is followed

¹¹³ See generally Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161 (May 2005).

by another, arbitral, set that may be required to assume a different form. In light of these weaknesses, designs built on greater interdependence and integration between the two processes ought to be given priority.

It is not original to this author to propose a conciliation / arbitration model under which the two processes coincide,¹¹⁴ a preference central to the models outlined below.¹¹⁵ The challenge in crafting the supporting architecture and protocols is to promote unencumbered exploitation of the strengths of each method, while also containing costs and preventing one process from disrupting or subjugating the other. To answer the challenge will require that each of the two processes be allowed to function with the other one constantly in mind, as reflected in frequent but efficient communications and cooperation.¹¹⁶ For example, the tribunal and the conciliator might consult in the setting and structuring of hearing days, and perhaps in the timing of the award's issuance.¹¹⁷ Similarly, the conciliator could as a matter of course receive copies of all materials submitted to the tribunal, perhaps when the tribunal does, and be present at all hearings, site inspections, and the like.

¹¹⁴ See generally Klaus Peter Berger, *Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 ARB. INT'L 396 (2003) (discussing 'simultaneous procedures'); Peter, *supra* note 36, at 101-03; BUHRING-UHLE, *supra* note 35 at 370-81 (mediation and other ADR 'windows' within arbitration).

¹¹⁵ See *infra* notes 137-141 and accompanying text.

¹¹⁶ Arbitrators are generally regarded as having a duty to not obstruct efforts at settlement, and some would argue to actively promote it. See, e.g. ABA/AAA Rules of Ethics for Arbitrators Canon IV(F) (2003) (not improper to suggest that parties discuss settlement or mediation, but a party should not be pressured to settle); cf. Harold Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1 (1999) (assuming, though not as the ideal, that arbitrators may actively promote settlement if observing certain standards of good practice). See generally Michael Collins, *Do International Arbitral Tribunals have a any Obligations to Encourage Settlement of the Disputes before Them?*, 19 ARB. INT'L 333 (2003).

¹¹⁷ The tribunal would however remain first among equals, in that it would have the final word about the scheduling of arbitral events, though a spirit of cooperation should prevent true conflict or decisions by the arbitrators that undermine the work of the conciliator. Since the conciliator may have access to the parties during the critical junctures when their cases are taking shape, care must be exercised to prevent undue influence, such as where a disputant is persuaded, perhaps through conciliator ignorance or zeal, to drop a legal theory that in fact would be viable before the arbitrators. The need for especially well-qualified mediators again can be underscored here.

C. *Extent of Comparability, Harmonization and Integration between the Two Options*

Where two options are available to disputants it is inevitable that they will be viewed, through strategic lenses, to be competitors. It might be argued that some element of comparability might be imposed to prevent conciliation from easily winning the race to the bottom in terms of transparency, government accountability, stakeholder inclusion, and other values now pursued to some extent through public-minded amendments to the original investor-state arbitral model.¹¹⁸ Concurrently, it may nevertheless be the absence of such elaborate features that attracts the parties in earnest to conciliation. The tension is obvious, yet to insist that conciliation adopt all of the public-minded features increasingly germane to arbitration is to denature the technique.

D. *The Apt Mix of Sticks and Carrots*

Conciliation is often said to be a voluntary method. Such a characterization alone is not fully precise in that there are two senses in which a dispute mechanism might be “voluntary.” First, the process itself might be wholly uncoerced such that a disputant can preclude the exercise simply by declining an invitation to participate, or after having sampled it, by electing to discontinue it.¹¹⁹

One finds among conciliation systems some variation as to this aspect of voluntariness.¹²⁰ For example, the conciliation rules of the Permanent Court of Arbitration (PCA), like the UNCITRAL Rules inspiring them,¹²¹ allow a disputant to simply decline to participate—and

¹¹⁸ See Atik, *supra* note 19.

¹¹⁹ See, e.g., PCA Conciliation Rules, *supra* note 50, art. 15(d) (disputant by unilateral written notice may terminate the proceedings); see also Herrmann, *supra* note 43, at 223-25 (complete voluntariness fundamental to the UNCITRAL Conciliation Rules) and *Id.* at 224 (the ‘libertarian’ approach allows each party the option to “participate or to pull out”).

¹²⁰ See, e.g., Christopher Lake, *ADR Techniques and International Commercial Arbitration: Are there Lessons to be Learnt from Europe, the Far East, and America, in THE COMMERCIAL WAY to Justice?*, 213, 221 (Geoffrey B. Hartwell, ed., 1997) (no consensus: “Is it truly consensual or can the parties be forced to participate in it?”). See also Sekolec, *Model Law* *supra* note 57, at 1 (widely held view that it makes no sense to compel parties to conciliate “changing because experience has shown that the use of measures to direct parties to conciliate and the greater availability of trained conciliators has resulted in a considerable number of disputes being settled before or at an early stage of court or arbitral proceedings”).

¹²¹ See generally Herrmann, *supra* note 43, at 223-25; DORE, *supra* note 35, at 15-17 (noting the voluntary and non-binding nature fundamental to UNCITRAL Conciliation Rules).

so to preclude the conciliation. By contrast, the Law of the Sea Convention's complex inter-state disputes regime¹²² contemplates that under certain circumstances conciliation is "compulsory."¹²³ When it applies, a duly notified party "shall be obliged to submit" to conciliation and that party's failure to participate in the proceedings "shall not constitute a bar to the proceedings."¹²⁴

The second facet of voluntariness relates to a disputant's entitlement to disregard suggested terms of settlement, however well constructed and fair they might be. Rather uniformly, this latter characteristic is attributed to conciliation. The parties to conciliation, almost by definition, are free to ignore the suggested terms, subject to their mutual willingness to adopt them as a basis of settlement.

With respect to investor-state disputes, one is entitled to be ambivalent about the extent to which elements of voluntariness might be compromised in the interest of making conciliation more fully utilized. It can sensibly be argued that conciliation ought to remain merely a service available to the disputants, and nothing more. Given the not insignificant number of ICSID cases that settle—approximately 30 percent—disputants in mixed arbitrations appear fully able to reach terms without the help of third parties. At the same time, there is reason to hold both that conciliation might be able to add appreciably to that percentage¹²⁵ and that once conciliation is underway, success would generally not depend on the manner in which the parties were induced to participate, provided the system was reasonably predictable, and accommodated party autonomy in critical respects.¹²⁶ As it has been demonstrated that investor-state disputes docketed for

¹²² See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 239-40 (2004); COLLIER & LOWE, *supra* note 26, at 84-95.

¹²³ See United Nations Convention on the Law of the Sea, Dec. 10, 1982, Annex V, §§ 11,12.

¹²⁴ See Robin R. Churchill, *Dispute Settlement in the Law of the Sea: The Context of the International Tribunal for the Law of the Sea and Alternatives to It*, in *REMEDIES IN INTERNATIONAL LAW THE INSTITUTIONAL DILEMMA* 85, 90-91 (Malcolm D. Evans ed., 1998); *cf.* Lake, *supra* note 120, at 221 (noting that in Australia parties can be compelled to participate in conciliation"); CARROLL & MACKIE, *supra* note 35, at 97 (making mediation clauses enforceable depending upon the language used, but not in all jurisdictions). Even under the Law of the Sea Convention's "compulsory" machinery, the terms of settlement proffered by the conciliators do not bind the parties, though under one interpretation non-acceptance may trigger a right in one of them to institute binding adjudication.

¹²⁵ The success rate found by different studies offers encouraging data. See *supra* notes 25 and 57 and accompanying text. The question remains whether mixed disputes are different from purely private commercial disputes in ways that preclude similar rates of settlement.

¹²⁶ *Independent Analysis*, *supra* note 25, at 262, (finding that no difference in settlement rate was discernable between voluntary and involuntary mediation).

arbitration do settle, little explains why a third party would not be able to harness that natural proclivity as long her introduction into the process was not so coerced or disruptive as to overshadow all else.

As in most things, balance and flexibility are called for. Initially, given the lack of data, the system ought to be particularly on guard against adding elements of coercion unsupported by data or an articulated policy basis. Arguable justification, of course, might be found in success rates achieved in complex commercial matters. At a minimum, the thesis that conciliation will appreciably increase the number of settlements, or reduce the resources necessary to accomplish mutually agreeable terms, is plausible and ought not to require elaborate marketing. Ultimately, much will depend upon whether the format of third-party intervention is carefully and realistically designed. The system is established by sovereigns for sovereigns, and one cannot expect that constituency to devise or submit to heavy-handed, inflexible initiatives.

Accordingly, while a measure of goading might ultimately be called for, in the ideal circumstance conciliation would be made routine through only softer forms of persuasion. With success will come more standing among institutions and treaty drafters to insist on a robust, third party collaborative mechanism to augment existing arbitral mechanisms. To accommodate the sense that the process ought to remain largely noncompulsory, primary emphasis might be placed on educating the disputants and on removing obstacles that contribute to its present limited use. As has been noted, these obstacles include the hazard of expecting too much from the respondent states and investors early in the process, the fear of appearing weak (the problem of convening the parties), the obstacles placed by internal law to states settling claims, the concern that deleterious, insincere, parties can exploit the process with impunity, and the apprehension that an already costly process will be made more expensive without any guarantee as to what those costs will purchase.

Beyond making the conciliation to some extent automatic, cost-conscious, and minimally disruptive of arbitration, the principal goal should be to attract disputants by demonstrating conciliation's value to them, in part by employing it when it has the best chance of working. Here one encounters again the theme of conciliator quality; the better neutrals will be able to discern when conciliation has a reasonable opportunity of producing value and when, by contrast, its deployment would likely be a waste of resources or otherwise inappropriate.

When moving from the abstract to questions of implementation, numerous practical questions arise. If participation in the conciliation option is to be required, what constitutes satisfactory participation—is it merely the willingness to convene or must the process be seen through

to a point of relative exhaustion? Is an obligation of good faith to attach to each disputant's participation (presumably an essential element in some form),¹²⁷ and if so, how is discharge of that obligation to be assessed? Finally, is it appropriate to promote active consideration of conciliator proposals by attaching consequences to a party's unilateral rebuff of them? Certainly a party's right to an adjudicated result ought to be preserved, but what if that right is foolishly exercised at the expense of resources better deployed in other ways?¹²⁸

VII. A SYNTHESIS AND SELECTED MODELS.

A. *Tentative Conclusions about Some Basic Characteristics*

The forgoing survey of concerns presents a number competing and perhaps irreconcilable goals. It also allows one to reach a few reasonably firm conclusions. These include the following:

1. Any system for introducing conciliation into the investor-state disputes mechanism must be cost-sensitive, such that its involvement in the process neither significantly deters claimants from bringing valid claims nor detracts from disputants' ability to prosecute or defend with reasonable fullness arbitral claims.
2. The system should be designed to initiate conciliation automatically, so as to remove the onus of suggesting it from a party.¹²⁹

¹²⁷ See, e.g., PCA Conciliation Rules, *supra* note 50, art. 11 (stipulating that parties shall cooperate in good faith with the conciliator); ICSID Convention, *supra* note 22, art. 34(1) (requiring that parties shall cooperate with the Commission and "shall give their most serious consideration to its recommendations").

¹²⁸ One suspects that states will be reluctant to craft and commit to ancillary processes that blur the distinction between arbitration and conciliation by attaching to the latter penalties that limit the state's options. At the same time, states ought to appreciate that without some systemic constraints, conciliation might merely provide an additional avenue through which culpable but well financed other host states seek to exhaust and discourage aggrieved investors.

For process designers wishing to explore ways to attach consequences to an otherwise purely voluntary undertaking, the literature outside of investor-state realm gives some ideas. See, e.g., Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 234 (1983) (commenting that subsequent trier of fact might be exposed to details of the preceding ADR procedure, in a departure from the normal rule of strict confidentiality preventing use in other proceedings); COE, PRINCIPLES AND PRACTICE, *supra* note 35, at 46, n.113 (noting that party failing to adhere to neutral's proposed terms of settlement must pay certain costs of ancillary proceedings if adjudicated result not markedly different from that proposed by third party); BUHRING-UHLE, *supra* note 35, at 35.

¹²⁹ The conciliation process will be underutilized if it depends on one party to propose the process and the other party to accept that invitation. The perception that

Making attempted conciliation part of a normal routine might be done by establishing it as a predicate to claim admissibility, or by empowering the tribunal to order it soon after being formed, or by both techniques. With one or more conciliation segments predictably installed, each side can anticipate and more fully engage the process.

3. Parties should be entitled to select their own conciliator or conciliators,¹³⁰ subject to the usual default to an appointing authority where they are unable to do so within a designated period. The delay this may occasion would be offset by the greater trust the parties may place in the process. It would allow the parties to designate a neutral with linguistic, cultural, and technical abilities appropriate to the dispute. Ordinarily, the conciliator selected would not also be an arbitrator in the proceeding.¹³¹ The norm, on cost grounds, should be that only one conciliator serves, subject to the parties agreeing to a different format.¹³²

4. Among the more critical element affecting the success of a neutral-aided collaborative mechanism is the quality of the third parties who serve. Independence and impartiality would be required, but equally so would skill in the techniques of conciliation, familiarity with arbitration practice, knowledge of the governing law, cultural acumen, and availability. ICSID and the PCA, in coordination with institutions known for mediator training, should conduct instructional conferences intended to equip acknowledged investor-state specialists with added skills and techniques and should recruit such persons for supplemental¹³³ conciliator panels.

5. Conciliation should not require an added segment in an already

the invitation may be interpreted as weakness will prevent the invitation from being made in many cases. Accordingly, a formal requirement that the parties participate in some designated manner (however sufficient participation is defined) ensures that both can submit to the process without being seen to prefer it.

¹³⁰ See ICSID Convention, *supra* note 22, art. 31(1) (stating parties to an ICSID conciliation, for instance, are entitled to designate conciliators not on ICSID's Panel).

¹³¹ See Eric Van Ginkle, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21(1) J. INT'L ARB. 1, 52-53 (2004) (discussing Model Law provision precluding conciliators from later acting as arbitrators subject to contrary agreement of the parties). It might be acceptable, with the consent of the tribunal and both disputants, to designate the President of the tribunal as conciliator. In that case, the conciliator should not caucus with any disputant nor offer an evaluation of the merits. See Abramson, *supra* note 116, at 10-12 (adopting the same rules, subject to certain qualifications).

¹³² See also Herrmann, *supra* note 43, 227-28 (supporting the one-conciliator default). See generally, Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corp. v. Trinidad & Tobago*, 1 ICSID REV.-FOREIGN INVESTMENT L. J. 340 (1986) (recounting successful ICSID conciliation in which Lord Wilberforce was the sole conciliator).

¹³³ Presumably, existing panels would not be reconstituted.

long process, but should be inserted into the existing investor-state arbitration time line. Thus, a first conciliation segment might comfortably be fit into the cooling off period, with another following the close of a hearing on liability.

6. There should be cooperation between conciliators and arbitrators so that conciliation has a reasonable opportunity to work, but does not jeopardize the smooth functioning of the arbitration. Arbitrators should increasingly be aware of ways to further the conciliation¹³⁴ component of the process through scheduling of hearings, decisions to bifurcate,¹³⁵ and open encouragement to the parties to meaningfully engage in the collaborative process. The conciliator should have access to hearings,¹³⁶ the materials given to the tribunal and such other documentation as the disputants shall make available. Notably, however, the work of conciliators should not affect in any substantive respect the tribunal's determination of the claim on the merits.

7. The conciliation process should be enforced by meaningful but carefully limited forms of compulsion. The conciliator would play a role in certifying satisfactory participation. Thus, a claim would not be admissible unless the claimant produced a conciliator's confirmation that conciliation had been attempted. A state's failure to satisfy the conciliator through meaningful attendance at one or more sessions would be communicated to the tribunal by the conciliator and would

¹³⁴ See generally BUHRING-UHLE, *supra* note 35, at 196-201; Abramson, *supra* note 116, at 12-14.

¹³⁵ Other things being equal, a tribunal might prefer to bifurcate the liability and damages phases knowing that if the parties settle, there will be no need for submissions on damages. A hearing limited to liability will often be less lengthy than one that included submissions on quantum; the conciliation process can begin all the sooner as a result. On bifurcation generally, see John Y. Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT'L L. 11 (2001).

¹³⁶ ICSID is considering amendments to ICSID Arbitration Rule 32(2) and Additional Facility Arbitration Rule 39(2) to facilitate access to third parties, such as members of the press or amicus representatives. As proposed, the changes should, as a byproduct, remove any doubt that a conciliator may attend, with the tribunal's permission. Article 32(2) would provide:

After consultation with the Secretary-General and with the parties as far as possible, the Tribunal may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.

ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Secretariat Working paper, May 12, 2005, available at <http://www.worldbank.org/icsid/sug-changes.htm> (last visited Nov. 8, 2005).

be considered by the tribunal in assessing costs of the combined (conciliation-arbitration) proceedings.

8. The conciliator's mandate should be broadly defined so as to enable dynamic, repeated attempts to fashion terms of settlement and in discharging its mandate the conciliator or conciliators should be permitted to caucus with a disputant and provide to the parties jointly evaluations of one or more of the substantive issues. The mediator would also be allowed to assist the parties in agreeing upon a place of arbitration, in resolving document production contests, and in mediating any other procedural questions available to the disputants to decide.

9. The conciliation proceedings should be private and confidential, but in deference to policies favoring transparency, should be more open than would be true of purely private commercial mediation. The delicate balance required might be struck by retaining privacy and confidentiality for caucuses and most joint sessions, while making public the terms of settlement, the opening joint session and any session at which agreement is announced. The decision to open a session to the public would be in the discretion of the conciliator in consultation with the parties. The goal would be to acknowledge the important public work being performed, not to satisfy all who might wish broader access. Use of joint disputant communiqués may also be made to keep the public apprized.

10. The conciliation system should be an a-political, supra-national mechanism, attributes that must be reflected in the conciliators chosen in default of the parties' designation, the manner in which states influence the process, and in the policies and affiliations of any institution enlisted to help administer the proceedings. ICSID already pursues these characteristics and has a place in the existing system; so too, though with lesser present involvement, does the PCA. Either might reliably be entrusted with a significant role in offering and helping refine investor-state conciliation as part of the existing treaty and institutional framework.

VIII. A FEW MODELS AMONG MANY

One way to think about the policies, competing interests, and architectural determinations to be made is to examine a series of Models, an exercise begun below. The following are not intended to be discrete choices, nor to exhaust the paradigms, but rather to suggest, in skeletal fashion, certain possibilities.

A. *Model I—De Minimis*

Under this format, conciliation would be attempted during a

cooling off period, as a predicate to claim admissibility. It would fulfill any treaty instruction to seek first "consultation."¹³⁷ The disputants would be required to meet with a third party of their own selection, failing which designation, a conciliator selected by an appointing authority (such as ICSID). Under the NAFTA architecture, for instance, the meeting would occur after the claimant issued its Notice of Intent. The conciliator initially would follow a standard format that would include at least one caucus with each disputant and one joint session. A respondent state's defiant failure to engage in meaningful discussions with the third party would be communicated to the tribunal as a possible factor in setting costs in the eventual award. The conciliator would remain available throughout the process to respond to a joint request to resume her efforts.

B. Model II— Dual Opportunities

The second model recognizes that disputant attitudes toward negotiation (and thus to conciliation) and their understanding of the dispute may evolve. Often at an early stage the state has too little information with which responsibly to assess the merits. Investors in turn often feel they have already exhausted negotiation. Model II would thus include a second juncture at which the parties would meet with the third party to explore settlement options. The first opportunity would, as in Model I, be during the cooling off period. The second juncture could conceivably be at numerous points, though to be optimal the timing of the exercise should reflect a balance between information completeness and cost considerations. As a default, the period soon after the parties have made their written submissions, but before the hearing might serve well. At that point, the disputants have not incurred the costs of the hearing, but have a relatively complete sense of their respective cases. The cases will have evolved and with both sides of the dispute having been set forth, strengths and weaknesses will doubtless be more fully appreciated than when the disputants first met with the conciliator.¹³⁸

When not actively exploiting the two windows designated above, the conciliator would remain available to assist the parties in resolving

¹³⁷ See NAFTA, *supra* note 1, art. 1118.

¹³⁸ If cost were not a consideration, the period immediately following the hearing would offer a point supported by even greater information; the expert and fact witnesses will have been cross-examined and the arbitrators' questions perhaps will have prompted a fresh look at the dispute. The period just after a state has unsuccessfully prosecuted a summary adjudication motion, which would ordinarily occur at an earlier juncture in the arbitration than the hearing in chief, might provide an appropriate occasion for the neutral to engage the parties.

procedural and substantive matters.

C. Model III–Shadow Conciliation

A third model would authorize the conciliator to pursue ongoing initiatives throughout the process, that is, whenever an ostensible opportunity arose. The fact of a theoretically unlimited number of entry points, moreover, can be made more meaningful by conferring on the conciliator a broad mandate so that procedural issues are also within the contemplation of all concerned. This shadow process will be most effective if tightly coordinated with the arbitration. At a minimum, the conciliator would be supplied all materials submitted to or issued by the arbitrators (and such other materials as the disputants shall elect to supply) and would be present at all hearings. To the extent consistent with its duties to advance the proceedings efficiently, the tribunal would by its scheduling decisions accommodate conciliation sessions.

D. Model IV–Shadow Conciliation with Sole Arbitrator

A robust role for a conciliator implies potentially significant additional costs, assuming an hourly rate basis of remuneration. Where the mediator is unsuccessful, so that ultimately the arbitrators issue a deliberated, reasoned award in the usual way, the conciliator will have constituted a fourth neutral where three would have sufficed. If the tribunal were composed of one, instead of three arbitrators, however, the proceedings will likely be faster and the total neutrals' fees reduced. There are of course valid reasons to empanel three arbitrators, including the need for linguistic and technical expertise and to ensure that nothing is misunderstood or overlooked.¹³⁹ Yet, in many cases a dedicated, properly chosen arbitrator can serve without significantly greater risks to the disputants. Particularly where the shadow neutral has lent clarity to the issues framed by the parties and perhaps performed other functions that facilitate the tribunal's grasp of the case, the sole arbitrator adjudicative exercise might be as trustworthy as one involving three arbitrators.¹⁴⁰

¹³⁹ See Jack J. Coe, Jr., *From Anecdote to Data: Reflections on the Global Center's Barcelona Meeting*, 20(1) J. INT'L ARB. 11, 18-20 (2003) (discussing intra-tribunal issues).

¹⁴⁰ Sole arbitrator tribunals have not been the norm for ICSID Arbitration, but they are not unheard of. See, e.g., *Amco Asia v. Indonesia (Resubmitted Case)*, ICSID Case No. ARB/81/1, <http://www.worldbank.org/icsid/conclude.htm> (Professor Rosalyn Higgins, QC, sole arbitrator); *Misma Mines Pty. Ltd v. Papua New Guinea*, ICSID Case No ARB/96/2 (Gavan Griffith, QC, sole arbitrator). To the author's knowledge, no sole arbitrator tribunals have served under NAFTA Chapter Eleven. Cf. *Taking Stock*,

E. *Model V–Shadow Co-Conciliation with Sole Arbitrator.*

A variant of Model IV would employ co-shadow conciliators (each party designating one conciliator) and a sole arbitrator. The introduction of a second conciliator would add costs, but may bring added ingenuity or credibility sufficient to precipitate a settlement that would not otherwise occur.¹⁴¹

IX. CONCLUSION

A. *The Way Forward*

Because conciliation has not been widely used in investor-state settings one might be tempted to conclude that it is simply ill-suited to such disputes. Perhaps such controversies are too political, or too public, or perhaps states would just as soon not complicate the proceedings by involving third parties, however eminent; for, if states want to settle, they will.¹⁴² Indeed, some commentators have dismissed conciliation rather summarily.¹⁴³ Yet, a survey of ICSID's docket of decided cases reveals that a significant number of its arbitral proceedings end in settlement, often but not invariably prompted by a key tribunal ruling affording an occasion for the parties to reconsider their cases.¹⁴⁴ Would an advisory opinion by an authoritative third

supra note 4, at 1457 tbl.3 (listing members of Chapter Eleven tribunals).

¹⁴¹ Cf. Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 Tul. L. Rev. 913, 925 (2001) (endorsing co-mediation with each mediator being of a different legal culture, but conversant with that of his counterpart); Herrmann, *supra* note 43, at 227-28 (endorsing single conciliator models as preferred, but acknowledging successful use of 'joint conciliation' in some settings). The ICSID Convention, article 29, requires that there be an uneven number of conciliators, thus seeming to limit this option to settings not controlled by the Convention.

¹⁴² See Lake, *supra* note 120, at 219:

[I]f the parties have chosen to arbitrate...they will probably not want to attempt a different form of dispute resolution. Parties to commercial arbitrations are sophisticated businessmen or state entities. If they want to settle they will.

See also W. LAWRENCE CRAIG, ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 700 (3rd ed. 2000) (Disputants often feel they have already exhausted amicable means through negotiation and are often impatient to get the arbitration underway.).

¹⁴³ M. SONARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 19 (2000) ("Conciliation is seldom resorted to and is hardly useful.").

¹⁴⁴ ICSID List of Concluded Cases, available at <http://www.worldbank.org/icsid/cases/conclude.htm>.

person have accomplished settlement sooner in some cases? Perhaps.

Twenty years ago an investor-state dispute ended through ICSID conciliation using a sole conciliator.¹⁴⁵ Counsel for the host state would later write that: "use of ICSID's conciliation facilities deserves serious consideration in every case."¹⁴⁶ Why conciliation has not indeed come to rival arbitration remains subject to debate.¹⁴⁷ Whatever the reasons, the unprecedented number pending investor-state cases and the rate at which new cases are filed would seem to warrant a renewed dose of "serious consideration" with a view to more fully institutionalizing a conciliation routine. The way forward would include making minor changes in the Model BITs now in service to require conciliation,¹⁴⁸ continuation of the on-going self-studies by institutions such as ICSID to identify ways in which conciliation might more persuasively be recommended to disputants, and training (perhaps by the same institutions) designed to equip conciliators and prospective conciliators. Positive results will require that very well-qualified conciliators serve; the remuneration structure governing their work therefore should be comparable to that applicable to arbitrators. Finally, successes must be chronicled and failures analyzed.

B. Measuring and Identifying Success

The enthusiasm with which a given reform is received and the extent to which it is ultimately declared a success no doubt depends upon the hierarchy of values one adopts, and to some extent upon one's willingness to consider both quantitative and qualitative improvements.¹⁴⁹ Because certain competing interests will be difficult

¹⁴⁵ See generally Nurick & Schnably, *supra* note 24, at 344. In the Tesoro Petroleum conciliation, the governing disputes clause contemplated that arbitration would follow conciliation if necessary.

¹⁴⁶ *Id.* at 350.

¹⁴⁷ Cf. Lake, *supra* note 120, at 219-23 (speculating on reasons affecting private commercial dispute resolution); CARROLL & MACKIE, *supra* note 35.

¹⁴⁸ I would prefer, at a minimum, that some variant of Model II, *supra*, be adopted, because of its second opportunity for conciliation to function. Experience teaches that states often do not have enough information in the early stages of the process to consider any conclusion that would imply a tapping of the fisc. At the initial meeting the conciliator would be able to alert the disputants to other possibilities, including those discussed in relation to Models III-V, some of which might then be adopted by them by mutual consent.

¹⁴⁹ Increases in the number, speed, and costs of settlement can be measured (though doubtless observers will not agree on the point at which the exercise is a break-even proposition). Not to be overlooked, however, (though more difficult to quantify) would be the subtle ways in which the involvement of a skillful third party has improved the arbitral process, even when settlement has not resulted, such as by causing the disputants to hone their respective theories of the case, or perhaps to reach agreement

to fully reconcile, improved speed, reduced cost, and disputant control of the process and outcome may come at the expense of reduced transparency and correspondingly reduced legitimacy in the eyes of some. Nevertheless, increasing settlement rates while reducing tangible and intangible costs would seem to be uncontroversial goals in the short term. The fair likelihood that conciliation can improve the overall process in critical respects ought to be enough to prevent as yet unrealized fears from delaying conciliation's regular use, and multifaceted techniques to promote such use.

As indicated at the outset, the object of this essay is to promote further discussion. Numerous architectural details, many with policy implications, remain to be considered if conciliation is to become a natural part of the investor-state topography.¹⁵⁰ ICSID and the PCA may be able to play central roles though those roles will naturally be circumscribed by their respective founding treaties. Indeed, ICSID has already expressed an interest in exploring the establishment of a mediation service, and other activities in support of the conciliation alternative.¹⁵¹ Nothing should prevent certain other institutions from also making contributions, whether in administering or training conciliators or in studying the data that will ultimately justify the initiatives being proposed here.

The quality of those enlisted to serve remains a critical element. Poor early experiences may have lasting negative effects, causing cost-sensitive disputants to shun conciliation in favor of the familiar if imperfect arbitral mechanism. By contrast, where conciliators enjoy adeptness and authoritativeness equal to that of the arbitrators who regularly handle such disputes, the inherent strengths of conciliation relative to arbitration are more likely to be evident.

on some issues so as to narrow the tribunal's task. *Cf.* Tanzania Electric Supply Independent Power v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Decision on Further Remaining Issues (May 24, 2001) (Parties announced at hearing they had reached agreement on certain issues; tribunal requested that the agreed terms be reduced to writing for incorporation into the ultimate award), *available at* <http://www.worldbank.org/icsid/cases/conclude.htm>.

¹⁵⁰ Prosaic but important matters will require attention as well. The three-year time bar applicable to NAFTA investor claims, for example, has no tolling provision that might be applied to allow conciliation to be pursued without the claimant forfeiting its claim. *See* NAFTA, *supra* note 1, art. 1116, 1117. Similarly, the insurance programs of MIGA and OPIC ought to be examined to determine if an arbitration or anti-settlement bias can be discerned that might discourage use of conciliation.

¹⁵¹ *See* Possible Improvements for the ICSID Arbitration, *supra* note 22, at ¶18 ("ICSID has begun to examine the possibility of helping to sponsor the establishment of a mediation service for investor-to-State disputes.").

Those strengths should continue to include wide party autonomy extending to the selection of conciliators made meaningful by abundance in the pool of available, well-trained, investor-state conciliators.