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## The Past, Present, and Future of Investment Treaty Conflict Management and Dispute Systems Design

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## ARTICLE

# THE PAST, PRESENT, AND FUTURE OF INVESTMENT TREATY CONFLICT MANAGEMENT AND DISPUTE SYSTEMS DESIGN

SUSAN D. FRANCK\*

**ABSTRACT:** International investment dispute resolution is in an era of unprecedented flux. At first blush, it might appear that major transformations in international law are pulling in opposite directions. On the one hand, non-adjudicative dispute resolution and “alternative” dispute resolution mechanisms like mediation are gaining traction, and with the creation of a Convention on the Enforcement of Mediated Settlement, it might appear to reign supreme. On the other hand, traditional rule of law mechanisms, namely international courts, seem to be gaining momentum with the strong advocacy of the European Union for the creation of an International Investment Court and major revision currently underway at the United Nations Commission on International Trade Law (UNCITRAL). Yet, there is a way to bring these themes together and understand them within the larger framework of Dispute Systems Design (DSD). To offer a framework to begin this discussion, this article frames the origins and history of international investment dispute settlement to facilitate a more structured conversation about the larger question of DSD and offers insights for future innovation. This article explores the historical context, the innovations, and how to facilitate an integrated approach to derive value from conflict management mechanisms, which can identify flexible paradigms of dispute resolution modalities for adaptation to local communities and individual contexts. The article recommends that future dispute resolution designers consider three questions to aid structural reform of international investment conflicts.

International investment law and derivative dispute resolution have become areas of intense public focus. As globalization is a fact of life, this attention should, perhaps, be unsurprising. There is an interdependency of

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global supply chains and the production activities of goods, resources, and services that can—and often does—occur across multiple countries. There are open questions about how to manage and identify latent value in the inevitable conflicts that arise out of relationships between human beings located in different countries, with distinct governments, specific cultural expectations, and unique economic and social incentives. How to address normal and natural challenges that occur when dealing with human beings deserves serious and concerted attention. Failure to give conflict management its requisite consideration risks diluting its strategic value and, instead, facilitates decision making based upon intuition, power politics, or historically imbalanced behavior.

I must therefore acknowledge how proud I am of the organizers of this conference who had the foresight to focus on the important topic of investor-state conflict management. Given my remote participation, I must acknowledge how lucky all the attendees are—and those who subsequently benefit from the memorialized published materials—for you have all engaged in a critical examination of a fundamental topic at a turning point in history.

This conference's timing is also auspicious. It is, in many ways, a reminder of the journey that I started more than a decade ago. That journey involved beginning a conversation to integrate the conscious and evidence-based design of dispute resolution systems and to incorporate conflict management principles into the practical reality of the daily challenges of implementing international investment.<sup>1</sup> Other thoughtful scholars have subsequently taken up the call.<sup>2</sup> As exploring conflict management in its

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1. See, e.g., Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007) [hereinafter Franck, *DSD*]; see also Susan D. Franck, *Crafting Appropriate Dispute Settlement: The Politics of International Investment Disputes*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2015 134 (Arthur W. Rovine ed., 2016); see also Susan D. Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID REV. 66 (2014); see also Susan D. Franck, *Managing Expectations: Beyond Formal Adjudication*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM 371 (Roberto Echandi & Pierre Sauvé eds., 2013).

2. See Lisa Blomgren Amsler, *Combating Structural Bias in Dispute Systems Design That Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32 (2014); Roberto Echandi, *Investor-State Conflict Management: A Preliminary Sketch*, 1 TRANSNAT'L DISPUTE MGMT. 1 (2014); Roberto Echandi, *Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY: WORLD TRADE FORUM 270 (Roberto Echandi & Pierre Sauvé eds., 2013) [hereinafter Echandi, *Complementing Investor-State Dispute Resolution*]; Mariana Hernandez Crespo G., *A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design ("SDSD") to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551 (2017); Andrea Kupfer Schneider, *How Does DSD Help Us Teach About Community Conflict (and How Can Community Conflict Help Illustrate DSD)?*, 13 UNIV. ST. THOMAS L.J. 370 (2017); Nancy A. Welsh & Andrea K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71 (2013); see also Anna Spain, *Integration Matters: Rethinking the Architecture of International*

current form is fundamental, it is inevitably useful both to frame the conversation and to offer a historical context for moving forward. My hope is that these remarks will offer a baseline both for future conversations and consideration of the evolution of conflict management mechanisms.

## I. THE GROWTH OF INTERNATIONAL INVESTMENT TREATIES AND INVESTMENT TREATY ARBITRATION

As a young scholar, I watched the blossoming of investment treaty arbitration (ITA)<sup>3</sup> and the rise of the so-called ISDS.<sup>4</sup> I also taught classes about mediation and ADR. At the time, there was *no one* writing about the intersections among conflict management, ADR, and investment treaty disputes. Perhaps that was a by-product of the small number of cases and what was then little interest in the area.<sup>5</sup> I remember struggling to get people (including law students who were selecting articles for publication) to pay attention to the issues, particularly given what was at stake economically and politically. My, how times have changed. Today, there is enhanced public attention on ITA,<sup>6</sup> and there is a major transnational effort at reform occurring at the United Nations, which is exploring normative reform, including the potential creation of a new international court to deal exclusively with international investment disputes.<sup>7</sup>

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*Dispute Resolution*, 32 UNIV. PA. J. INT'L L. 1 (2010) (exploring dispute systems design in international law more generally).

3. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

4. “Commentators sometimes use the term ‘ISDS,’ or Investor-State Dispute Settlement, in a doctrinally inaccurate way. Some ISDS cases involve commercial disputes created under national law, rather than rights [ ] granted through international investment treaties.” SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* 3 n.11 (2019). When there are concerns about the meaning of a state’s international law obligations and the scope of a state’s right to regulate its internal sovereign authority, this is distinct from commercial disputes, interpreting the meaning of commercial terms in light of applicable national law, and compliance with legal obligations deriving from domestic law, which are all typical hallmarks of international commercial arbitration (ICA). Susan D. Franck et al., *Inside the Arbitrator’s Mind*, 66 EMORY L.J. 1115, 1121–26 (2017) (discussing distinctions between ICA and ITA). ITA is a more accurate, and preferable, term to use to specifically address concerns arising from treaty-based investment conflict, lest commentary conflate the two distinct systems.

5. See, e.g., Franck, *supra* note 3, at 24–64 (providing a historical snapshot of the caseload of ITA disputes in 2006).

6. Chapter 1 of my 2019 book with Oxford University Press offers a detailed historical overview of the ongoing debates about the functionality of ITA, which many people sometimes call ISDS, which confuses those disputes with states that arise under international law and a specific treaty and those commercial and contractual claims involving states that arise under national law. FRANCK, *supra* note 4, at 1–24; see also Franck et al., *supra* note 4 and accompanying text.

7. *Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court*, EUR. COMM’N (Mar. 20, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1819>; see Fernanda Nicola & Daniele Gallo, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 FORDHAM INT’L L.J. 1081 (2016).

One need only look at the literature of diffusion of innovations—including the innovation of ITA—to know that a material sea change in dispute settlement will inevitably experience growths and setbacks, or ebbs and flows, as the conflict management system begins to work out its kinks.<sup>8</sup> I saw then (before 2008)—and it is easy for others to see now given hindsight bias<sup>9</sup>—that when human beings interact in complex interdisciplinary, international, intercultural contexts involving sensitive issues of commerce, politics, resources, and community identity, conflicts are inevitable, and disputes are likely.<sup>10</sup> We should be neither surprised nor angry. Rather, we should deal with real problems in a reasonable way.

The existing design of treaties, however, has serious implications. Although treaties can contain textual obligations to consider “amicable settlement,” these procedures are not necessarily explained, clear, predictable, institutionally supported, or even mandatory.<sup>11</sup> This void creates, in many ways, an unreasonable pressure on a single dispute resolution—namely the arbitration option—that the treaties do actually provide. Without another viable safety valve for letting off steam, it was inevitable that the allowed arbitration processes were likely to be highly used—and potentially over-used—in the absence of any other viable structures offering a meaningful remedy. This is particularly the case in investment-related conflict, as historically there was no clear, direct, and binding forum for the resolution of conflict. Rather, much was left to diplomatic efforts alone, or conflict was effectively ignored, making any “ghostly” rights functionally unenforceable.<sup>12</sup>

There is, nevertheless, value in providing a forum to redress harm, which can aid stakeholders both in bargaining effectively in the shadow of the law and in having some control over the chaos and challenges they face. Put differently, rather than ignoring conflicts or permitting nation-states to strategically invoke gunboat diplomacy, the creation of *any* adjudicative system is fundamental to permitting any other system that aids in the man-

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8. See, e.g., EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (4th ed. 2010) (discussing how innovations and systemic changes are adopted; also explaining the “curve of innovation” and the rates of adoption by different groups of system users, including innovators, early adopters, early majority, late majority, and laggards); see also MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002) (discussing the curve of adoption and transmission of innovations).

9. See, e.g., Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *UNIV. CHI. L. REV.* 571 (1998); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 *L. & HUM. BEHAV.* 89 (1995).

10. Franck, *DSD*, *supra* note 1.

11. *Id.*

12. See *The W. Maid v. Thompson*, 42 S. Ct. 159, 161 (1922) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1244 (1931) (noting law’s fundamental value quality is not just the right but “what can be done: Not only ‘no remedy, no right’ but ‘precisely as much right as remedy’”); see also FRANCK, *supra* note 4, at 1–24.

agement of conflicts.<sup>13</sup> Without an adjudicative backstop, any other negotiation (whether before or after a formal dispute arises) and the facilitation of cooperative conversations would simply be an exercise of political power, personal preference, or momentary whim—and not a system that either actualized the best values in the rule of law or the efficient management of conflicts to strategically channel potential value.

## II. THE ORIGINS OF INVESTMENT TREATY CONFLICT MANAGEMENT

With this in mind, over twelve years ago, I started writing on the subject of investment treaty conflict management using the thoughtful insights that came from scholars of domestic dispute resolution and ADR who demonstrated the unique and substantial benefits of Dispute Systems Design (DSD). My objective was to draw from those experiences of structured DSD to implement change and manage both our expectations and conflicts more effectively and efficiently.<sup>14</sup> Both the gap in the literature and the practical need inspired me to write one of my first articles that sought to bridge the distance and create a way forward.<sup>15</sup>

Part of bridging gaps—or in the words of Hans Rosling, being a “gap minder” when trying to build bridges between people and data<sup>16</sup>—requires the building of both interest in the topic and the capacity of individuals to ensure that there is the right infrastructure available to increase the likelihood of securing a desirable result. For this reason, I solicited thoughtful thinkers, practitioners, and government officials to more holistically explore conflict management in the context of international investment. I was able to bring together and convince people who did not know each other—including Roberto Echandi, then based out of Switzerland, and Mariana Hernandez Crespo, based out of Minnesota—to start building the future together. When people have limited interactions with one another, it is vital they are provided a safe space to gather and create community and a shared vision for the future. I am proud and honored to have been the catalyst for this sea change and to have created that platform for informed interdisciplinary conversations that is in the interests of the greater good.

In 2009, I set up an online collaboration blog where, through a series of videos, podcasts, and chats on an online portal, stakeholders came together and began exploring ideas in a virtual community. That content was summarized and memorialized in reports, which in turn were recorded in a

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13. Franck, *DSD*, *supra* note 1.

14. *Id.*

15. *See also supra* notes 1, 6, and sources gathered therein for a broader accounting of my scholarship in the area.

16. HANS ROSLING, *FACTFULNESS: TEN REASONS WHY WE'RE WRONG ABOUT THE WORLD—AND WHY THINGS ARE BETTER THAN YOU THINK* (2018).

UN publication, colloquially called *ADR II*.<sup>17</sup> Those posts facilitated dialogue at an in-person conference I organized in Lexington, Virginia,<sup>18</sup> to explore how to enhance the dialogue between conflict management specialists and those immersed in the world of international investment law and dispute settlement. The conference had representatives from every continent on the planet (with the exception of Antarctica), including government officials from North America, Asia, Africa, and Europe (and practitioners from those same locations). Even now, I strongly encourage reviewing the reports and contributions from that conference, whether the written publications contributed in the *ADR II* publication<sup>19</sup> or the recordings of the conference that remain available on YouTube.<sup>20</sup> The publication includes contributions from officials in many countries (including Latin America) who explored thoughtful ways to prevent conflicts from becoming disputes, guide conflict management, and promote better relationships post-investment with foreign investors.

The fruits of that effort have been rewarding, due in no small part to the people who were there in 2010 and who have contributed to the conference and its proceedings, including Professor Gonstead, Robert Echandi, Andrea Schneider, Nancy Welsh, Frauke Nitschke, and Meg Kinnear. As a result of the Lexington conference, the International Bar Association (IBA) created a task force that generated rules for mediation in investor-state dispute management (although they have focused on conflict management *after* disputes have formalized).<sup>21</sup> The International Mediation Institute (IMI)

17. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II (Susan D. Franck & Anna Joubin-Bret eds., 2011), [https://unctad.org/system/files/official-document/webdiaeia20108\\_en.pdf](https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf) [hereinafter, UNCTAD, *ADR II*].

18. The conference, which was held on March 29, 2010, involved live Tweeting using #wluadr: TWITTER, [https://twitter.com/hashtag/wluadr?src=hashtag\\_click](https://twitter.com/hashtag/wluadr?src=hashtag_click) (last visited April 26, 2021). Professor and law librarian Caroline Osborne also created a pathfinder on investment law and ADR to help develop capacity and streamline efficient research. See Caroline L. Osborne, *International Investment Law and Alternative Dispute Resolution: A Guide to Web Based Resources*, 4 W. VA. L. RSCH. PAPER SERIES 1 (2018); Caroline L. Osborne, *Pathfinder on International Investment Law and Alternative Dispute Resolution Web-Based Resources*, WASH. & LEE LEGAL STUD. RSCH. PAPER SERIES 1 (2010).

19. UNCTAD, *ADR II*, *supra* note 17.

20. The following are weblinks to the W&L conference: wluweb, *Prof. Susan Franck*, YOUTUBE (Mar. 29, 2010), <https://www.youtube.com/watch?v=6XMzRS2vOxk>; wluaw, *International Investment and Alternative Dispute Resolution Conference*, YOUTUBE (June 21, 2010), <https://www.youtube.com/watch?v=QSMt5KMAvK4>; wluaw, *Panel 1: International Investment and Alternative Dispute Resolution Conference*, YOUTUBE (June 21, 2010), <https://www.youtube.com/watch?v=2vQtMVge-iM>; wluaw, *Panel 2: International Investment and Alternative Dispute Resolution Conference*, YOUTUBE (June 21, 2010), <https://www.youtube.com/watch?v=tipvtf7mGkk>; wluaw, *Panel 3: International Investment and Alternative Dispute Resolution Conference*, YOUTUBE (June 21, 2010), <https://www.youtube.com/watch?v=ZWg4rRQNRs>; wluaw, *Closing Remarks: International Investment and Alternative Dispute Resolution Conference*, YOUTUBE (June 21, 2010), <https://www.youtube.com/watch?v=E12L4QbJ6s4>.

21. INTERNATIONAL BAR ASSOCIATION, MEDIATION SUBCOMMITTEE, STATE MEDIATION SUBCOMMITTEE, IBA RULES FOR INVESTOR-STATE MEDIATION (Anna Joubin-Bret & Barton Legum

created a task force to develop mediator competency.<sup>22</sup> The Singapore Convention was finalized in August 2019 to focus on the enforcement of mediated settlements.<sup>23</sup> After creative rescheduling and changes of format to address the COVID-19 pandemic, the American Society of International Law (ASIL) created a panel for its Annual Meeting (rescheduled to June 2020) to focus on the intersection of Appropriate Dispute Resolution and the Singapore Convention.<sup>24</sup> The International Centre for Settlement of Investment Disputes (ICSID) has been a particular visionary by encouraging multiple forms of dispute settlement and providing mediator training.<sup>25</sup> In connection with its current rules reform process, ICSID is spearheading the inclusion of mediation rules.<sup>26</sup>

There is still much more work to be done. This is why your efforts today, and the efforts of those reading these remarks in the context of history, are exploring a topic of the utmost importance. Our actions and omissions in international investment conflict will have profound consequences for us all, particularly the most vulnerable, who will, whether directly or indirectly, likely end up paying the price.<sup>27</sup>

### III. CONSIDERATIONS FOR THE WAY FORWARD

In an era of intellectual tribalism and rising nationalism, we must be careful and thoughtful about how to structure our dialogues to be inclusive, efficient, dynamic, and long-lasting.<sup>28</sup> It is fundamental to understand that

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eds., 2012); see also Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, 29 ICSID REV. 17 (2014); Welsh & Schneider, *supra* note 2; Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 PENN. ST. J.L. & INT'L AFF. 86 (2012).

22. INTERNATIONAL MEDIATION INSTITUTE, IMI COMPETENCY CRITERIA FOR INVESTOR-STATE MEDIATORS (2016). The mediation competency focus was one of the by-products of IMI's Investor-State Mediation Task Force. See *Investor-State Mediation Task Force*, INT'L MEDIATION INST. (July 31, 2019), <https://www.imimediation.org/about/who-are-imi/ism-tf>.

23. See U.N. Convention on International Settlement Agreements Resulting from Mediation, *opened for signature* Aug. 7, 2019, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf); see also Christina G. Hioureas, *The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?*, 37 BERKELEY J. INT'L L. 215 (2019).

24. See, e.g., American Society of International Law, *The Singapore Convention on Mediation and the Future of Appropriate Dispute Resolution*, in THE PROMISE OF INTERNATIONAL LAW, 114TH ASIL ANNUAL MEETING (2020).

25. See, e.g., *Investor-State Mediator Training*, ICSID WORLD BANK GRP. (July 12, 2017), <https://icsid.worldbank.org/news-and-events/news-releases/investor-state-mediator-training>.

26. *Investor-State Mediation*, ICSID WORLD BANK GRP., <https://icsid.worldbank.org/services-arbitration-investor-state-mediation> (last visited Oct. 24, 2020); see also *Background on Proposals for Amendment of the ICSID Rules*, ICSID WORLD BANK GRP., [https://icsid-archive.worldbank.org/en/Documents/Amendment\\_Background.pdf](https://icsid-archive.worldbank.org/en/Documents/Amendment_Background.pdf) (last visited Oct. 31, 2020).

27. Mariana Hernandez Crespo, *From Problem to Potential*, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR 225 (Krista Nadakavukaren Schefer ed., 2013); see also Hernandez Crespo, *supra* note 2.

28. See, e.g., FRANCK, *supra* note 4 (exploring implications for intellectual tribalism and rising nationalism on management of international investment conflicts); see also Alexandre de



conflict can be a positive force (not merely a negative one) that offers opportunities for strategic conversations that prevent formal disputes from ever arising,<sup>29</sup> enhancing the commercial viability of projects, promoting sustainable governance strategies, and generating value.

The intellectual efforts, scholarly writings, and practical insights of people working in this area—particularly Professor Gonstead and Roberto Echandi—will help provide marching orders for the future. In their own words:

Given the increasing emphasis not just on conflict management, but also on investment retention, CMMs in the institutional setting are called Systemic Investment Response Mechanisms (SIRMs). SIRM protocols have already been tested with initial success in pilots undertaken by the Investment Policy and Promotion Team of the World Bank Group in various regions of the world. “Additionally, SIRMs incorporate an information technology tool to track the investment retention and expansion as a result of timely resolution of problems.”<sup>30</sup>

In addition, I would like to encourage the exploration of a small “shopping list” that may help us strategically explore the core issues in a more robust manner and, in the future, implement innovations in a sustainable manner.

1. First and foremost, what are the efforts that can be taken to promote continued capacity building in this area, both for government regulators and practitioners? For lawyers, the mindset required to explore conflict management may be neither intuitive nor within their set of financial incentives. Challenging people to develop new modes of thinking in an era of stress and cognitive strain is no small matter. So how can we begin to develop models to help show practitioners the incentive to explore (and perhaps commercialize) this new form of conflict management?
2. Second, how can we both create and disseminate conflict management success stories? In 1950, human beings did *not* think it was possible for people to run a mile in four minutes

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Gramont, *The Costs of Investment Treaty Arbitration in the Age of Social Media, Fake News, and the Emergence of a New Nationalism*, 2020(1) ICC DISP. RESOL. BULL. 135 (2020).

29. See, e.g., Franck, *DSD*, *supra* note 1 (discussing positive and negative aspects of conflict).

30. Roberto Echandi & Mariana Hernandez Crespo, *Investor-State Conflict Management*, in ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW 335, 337 (Thomas Cottier & Krista Nadakavukaren Schefer eds., 2017); see also *id.* at 337–38 (discussing the six basic protocols for conflict management mechanisms (CMMs): (1) Stocktaking, (2) Lead Agency, (3) Information Sharing, (4) Early Alert Mechanisms, (5) Problem Solving Techniques and Shared Decisions System Design (SDSD), (6) Political Decision-Making and Enforcement); see also Echandi, *Complementing Investor-State Dispute Resolution*, *supra* note 2; Mariana Hernandez Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction*, in UNCTAD, *ADR II*, *supra* note 17, at 55.

or less. But with much training and practice, a mere four years later, Roger Bannister demonstrated that it was indeed possible and inspired others to follow in his footsteps.<sup>31</sup> Just a few months before this conference, someone ran a marathon (26.2 miles) in less than two hours.<sup>32</sup> My hope is that the creation and dissemination of one example demonstrating conflict management principles—if not a suite of related examples—will show others what is both possible and personally attainable.

3. Third, how can conflict management systems continue not just to dynamically create checklists of general application<sup>33</sup>—an effort which the conference organizers have started<sup>34</sup>—but to explore checklists that permit cultural adaptation for unique factors, including project type, regional challenges, commercial stakeholders, local implications, or personalities and politics involved?

#### IV. CONCLUSION

This conference and its written proceedings are a critical part of changing the cognitive framework and structural dialogue around the issues at the heart of international investment and conflict management. There are challenges ahead that translate into opportunities for constructive change in a time in history. We need positive people to develop sustainable solutions for a future that focuses on questions about what we all have in common, rather than what drives us apart. I encourage everyone to focus on the shared social welfare and joint gains that are possible and continue your journey towards the future. Because otherwise—without a thoughtful, responsible, and sustainable process of addressing the inevitable conflict that comes with human nature—it will be the poorest of the poor who will pay the price of doing nothing.

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31. Frank Litsky & Bruce Weber, *Roger Bannister, First Athlete to Break the 4-Minute Mile, Dies at 88*, N.Y. TIMES (Mar. 4, 2018), <https://nyti.ms/37w7yRR>.

32. Brian Dalek & Christa Sgobba, *Eliud Kipchoge Breaks Two-Hour Marathon Barrier*, RUNNER'S WORLD (Oct. 12, 2019), <https://www.runnersworld.com/news/a29430499/eliud-kipchoge-ineos-159-challenge-result>.

33. Checklists offer fundamental opportunities to decrease error and enhance value. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

34. Echandi, *Complementing Investor-State Dispute Resolution*, *supra* note 2; Echandi & Hernandez Crespo, *supra* note 30; Hernandez Crespo, *supra* note 2; *see also* WORLD BANK, *RETENTION AND EXPANSION OF FOREIGN DIRECT INVESTMENT: POLITICAL RISK AND POLICY RESPONSES* (2019) (offering a report, spearheaded by Roberto Echandi, to explore elements of international investment and how to apply and effectively use conflict management).