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Spain Bradley, Anna

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USING INTERNATIONAL DISPUTE RESOLUTION TO ADDRESS THE COMPLIANCE QUESTION IN INTERNATIONAL LAW

ANNA SPAIN*

I. INTRODUCTION

In July 2007, the Democratic People's Republic of Korea (North Korea) announced its decision to shut down four facilities at its Yongbyon nuclear site and allow International Atomic Energy Agency (IAEA) monitoring there.¹ Subsequently, on October 12, 2008, the U.S. Department of State removed North Korea from its decade-long placement on the State Sponsors of Terrorism list.² These events stemmed from ongoing multilateral efforts to peacefully denuclearize the Korean Peninsula through an international process known as the Six-Party Talks. Through this process, North Korea has taken steps to recommence conformity with its international legal obligations.³ UN Security Council resolutions, IAEA findings of noncompliance, politi-

* Incoming Associate Professor of Law, University of Colorado at Boulder Law School. Deputy Director, UCLA Burkle Center for International Relations (2007–2009). The author was formerly an Attorney-Adviser at the U.S. Department of State. The views expressed herein are solely those of the author and do not represent the views of the U.S. Government. Appreciation and thanks to Angela Banks, Jacob Bercovitch, Bob Bordone, David Kaye, Russell Korobkin, Doug Kysar, Michael Moffitt, Kal Raustiala, Richard Reuben, Cesare Romano, Richard Steinberg, and Kantathi Suphamongkhon for their helpful comments on earlier drafts and to Erik Preston and the UCLA Law Library for valuable research assistance. © 2009, Anna Spain.

1. David E. Sanger, *North Korea Says They've Shut Nuclear Reactor*, N.Y. TIMES, July 15, 2007, at A1; Press Release, Sean McCormack, U.S. Dep't of State, North Korea—Shutdown of Yongbyon Facilities (July 14, 2007), available at <http://2001-2009.state.gov/r/pa/prs/ps/2007/88414.htm>.

2. The U.S. Department of State considers nations listed on its State Sponsors of Terrorism list as States of Concern. See U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm>. In March 2008, there were five countries on the State Sponsors of Terrorism list, including North Korea. North Korea was removed in October 2008. See Helene Cooper, *U.S. Declares North Korea Off Terror List*, N.Y. TIMES, Oct. 12, 2008, at A1. See also Jeremy Walden-Schertz, *North Korea's Leaders Master the Mixed Signal*, THE NATIONAL, Jan. 6, 2009, available at <http://www.thenational.ae/article/20090106/FOREIGN/407286230/1015>.

3. See JOSEPH CIRINCIONE & JON WOLFSTHAL, CARNEGIE ENDOWMENT FOR INT'L PEACE, BREACH OF CONTRACT IN KOREA I (1998), <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=110&prog=zgp&proj=znpp> (noting that although North Korea became a member state to the Nuclear Non-Proliferation Treaty (NPT) in 1985, its continued nuclear program activities led to an IAEA finding of nonconformity with safeguard obligations in 1993 prompting the formation of the Agreed Framework Agreement in 1994 between North Korea and the U.S.); see also David Albright and Paul Brennan, *Disabling DPRK Nuclear Facilities* (Oct. 23, 2007)

cal pressure and economic isolation have failed to achieve the outcomes, albeit preliminary, reached through the Six-Party Talks. As then Secretary of State, Condoleezza Rice, acknowledged, “[W]e are learning more about Pyongyang’s nuclear efforts through the six-party framework than we otherwise would be. And . . . this policy is our best option to achieve the strategic goal of verifiably eliminating North Korea’s nuclear weapons and programs.”⁴

The basic premise that international law (IL) is the preferred process for resolving conflict between nations is evident.⁵ Peace among nations has been a long-standing goal. In 1899, nations gathered at the First Hague Peace Conference to establish a series of declarations supporting the peaceful settlement of disputes between nations.⁶ After World War II, nations gathered again to adopt Chapter VI of the UN Charter requiring that states seek peaceful methods to resolve disputes that could lead to war or if efforts fail, refer the matter to the UN Security Council.⁷ When international law fails to secure peace or achieve desired outcomes, states resort to the use of force or other coercive measures. As the Six-Party Talks demonstrate, states also seek options for the peaceful resolution of disputes that range from the use of conciliation to mediation to truth and reconciliation processes. Yet understanding how and why process affects behavior remains limited. Existing compliance theories consider how interests, norms and legal process impact states. Within the international legal process school, theories either narrowly define process as methods that achieve a legal aim (i.e., dispute settlement, tribunals) or broadly consider diplomatic activities without sufficiently connecting them to the structural elements of process. This leaves many questions about process unanswered. What exact influence did the Six-Party Talks exert on North Korea and what is the best system of analysis for understanding such questions? Drawing from the existing compliance literature as well as related discipline of conflict resolution, this Article addresses these questions by offering an analytical framework for understanding how

(working paper, on file with the U.S. Institute for Peace, Institute for Science and International Security), available at http://www.usip.org/pubs/working_papers/wp5_dprk.pdf.

4. Condoleezza Rice, Op-Ed., *Diplomacy Is Working on North Korea*, WALL ST. J., June 26, 2008, at A15.

5. JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENTS OF DISPUTES IN INTERNATIONAL LAW* 2–3 (1999).

6. Jacob Bercovitch, *Introduction: Putting Mediation in Context*, in *STUDIES IN INTERNATIONAL MEDIATION: ESSAYS IN HONOR OF JEFFREY Z. RUBIN* 1, 3 (Jacob Bercovitch ed., 2002) [hereinafter *STUDIES IN INTERNATIONAL MEDIATION*].

7. U.N. Charter art. 33, para. 1.

international legal process impacts the behavioral factors (interests, rights, identity, power, etc.) and tools (coercion, persuasion, acculturation, coordination, etc.) that affect state behavior. This Article makes the following central claims.

First, international legal process theory has the potential to offer a superior descriptive framework for analyzing state behavior because it can comprehensively address a variety of criteria. Mainstream compliance theories do not adequately account for all aspects of state behavior.⁸ For example, interests, albeit important, are not the only factors that shape what states do.⁹ Rational choice theory may explain why North Korea's internal interests motivate it to bargain for heavy fuel oil in exchange for giving up components of its nuclear program, but the theory fails to illuminate why such an exchange has been possible through the Six-Party Talks when earlier attempts failed.¹⁰ As the Six-Party Talks example demonstrates, there is a real need to address how and why process can influence states. While scholarship has advanced understanding about state interests, norms, and institutions, the importance of process is often overlooked.¹¹

Second, expanding international legal process theory to include tools defined here as international dispute resolution is necessary in order to account for the full range of mechanisms currently in use.

8. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 541–44 (Walter Carlsnaes et al. eds., 2002) (offering a chronological review of the literature starting with Cold War theorists McDougal, Chayes, Henkin, Shachter, and Falk, then moving to 1980s regime theorists Keohane, Kratochwil, Checkel, and Risse et al., to 1990s focus on legitimacy theory by Franck, Hart, and Keohane, and finally to a more recent focus on state compliance with decisions of international courts and tribunals).

9. See FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 1–6 (Oona A. Hathaway & Harold Hongju Koh eds., 2005) [hereinafter FOUNDATIONS]. Hathaway & Koh provide an overview of leading IL and international relations (IR) theories organized conceptually as interest-based and norm-based. They also provide an overview of literature organized by discipline, including IL theories like Chayes & Chayes' general theory of compliance promoting international collaboration and collective management and Koh's obedience theory discussing a transnational, as opposed to an international approach, as well as IR theories like those of Keohane, Kratochwil, Checkel, and Risse on regime theory and rational choice and Downs, Rocke, and Barssom on enforcement theory of compliance, proposing a direct causal relationship between increased state compliance with regime commitments and more stringent enforcement mechanisms for those commitments.

10. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 15–17 (2005). See also Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law* 34 GA. J. INT'L & COMP. L. 393 (2006).

11. See ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 1–2 (Oxford Univ. Press 2006) (1994).

Categories of international legal process are commonly separated into legal methods that are binding (adjudication through courts or tribunals, arbitration) and diplomatic methods that are non-binding (good offices, negotiation, and conciliation).¹² This distinction fails to acknowledge another disciplinary perspective, commonly referred to in the U.S. as alternative dispute resolution, which includes all alternatives to litigation (mediation, arbitration, negotiation, conciliation, etc.). Thus, for the purposes of this Article, I introduce a new organizing principle—international dispute resolution (IDR).¹³ This umbrella term refers to the methods of arbitration, conciliation, facilitation, negotiation, and mediation used in an international context to prevent, manage, or resolve international disputes. While each process is distinct, they share a common set of unifying principles and assumptions. IDR is voluntary, strives to achieve peaceful resolution of disputes, aims to reframe conceptions of rational decision-making, and understands that individuals are the driving force behind even state behavior. However, despite the increasing use of IDR to deal with global problems, existing compliance theories do not comprehensively address how IDR affects state behavior.¹⁴ Although methods of dispute settlement are discussed, they are treated merely as tools for achieving judicial settlement¹⁵ and thus fail to account for the full effect IDR has on state behavior. They neglect the larger historical, normative, and functional aspects that make IDR a distinctive area of study. Because international legal process theory needs to be inclusive of these kinds of process. This Article introduces IDR into the analysis. Given the wide range of

12. Each process is distinct as to whether or not it is binding and the level of control that the parties have over the process. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 275 (7th ed. 1997).

13. For purposes of this article International Dispute Resolution or IDR includes a) arbitration, conciliation, facilitation, negotiation, mediation b) when applied in an inter-state, transnational or international context c) for the purposes of assessing, preventing, managing, or resolving relations and/or disputes or conflicts. The processes referred to under the IDR term are also commonly used in domestic and foreign settings and are commonly known as alternative dispute resolution or ADR. There is no generally accepted framework for differentiating between an ADR process or and IDR process, although the application of a process in the international arena often involves specialized theories and practices that include and go beyond domestic ADR. For purposes of clarification in this Article, I distinguish such international uses of ADR by referring to them as International Dispute Resolution.

14. See generally Oona Hathaway & Ariel Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (book review).

15. See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty*, in FOUNDATIONS, *supra* note 10, at 174, 179–80 (discussing the use of dispute settlement within the larger rubric of international legal process).

available forms, only four IDR methods—arbitration, negotiation, mediation, and conciliation—are addressed here.¹⁶

Third, the analysis suggests that IDR influences states in ways that are distinctive and important. IDR's assumptions (i.e., that human beings are the driving force behind even state behavior and actors do not always make rational decisions) allow for more precise analysis of state behavior. IDR affects states by creating a permeable culture in which actors are more likely to absorb the norms of IDR (e.g., collaboration, coordination, problem-solving, etc.).¹⁷ Following the work of Hart & Sacks and Franck, IDR encourages criteria like voluntary participation and legitimacy, which can foster greater compliance with international law.¹⁸ For example, Tyler has demonstrated that when actors find that the process used to create a law is legitimate, they are more likely to comply with it.¹⁹ IDR supports the creation of legitimate processes because of its design elements like structural flexibility and lack of a strict hierarchy, emphasizing factors that can induce agreement formation and ultimately voluntary compliance.²⁰

The example of the Six-Party Talks demonstrates these insights. North Korea's decision to disarm several nuclear sites came out of the Six-Party Talks and was undoubtedly the result of a complex interplay of factors (e.g. interests, identity, etc.) and process. As this Article will demonstrate, expanded international legal theory analysis provides the following explanation for North Korea's decision. North Korea's ability to design and influence the process appears paramount in its decision to participate.²¹ Through participation, it was able to help design the

16. Arbitration is often placed under the rubric of international adjudication instead of diplomacy. IDR offers a third organizing principle that includes all forms of collaborative dispute resolution methods. Although arbitration shares many similarities with court-based adjudication, it differs in its more collaborative procedural elements and has been used as a diplomatic platform to repair inter-state relations, e.g. Iran-U.S. Claims Tribunal. In the domestic context, arbitration is considered to be a form of ADR as opposed to litigation. For these reasons, arbitration is included under the umbrella of IDR.

17. See CHESTER A. CROCKER ET AL., *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 447–48 (2001) (discussing mutual gains theory, value creation and other problem solving theories) [hereinafter CROCKER ET AL., *TURBULENT PEACE*].

18. See generally HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

19. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 62 (2006) (1990).

20. Dean G. Pruitt, *Mediator Behavior and Success in Mediation*, in *STUDIES IN INTERNATIONAL MEDIATION*, *supra* note 7, at 41, 43.

21. See statements made by Dr. Kantathi Suphamongkon recalling from his discussions with North Korea that North Korea was encouraged to participate in the Six-Party talks in part due to its

process to allow for bilateral communication with the U.S. within the multilateral framework. The flexibility of a framework that allows all key participants to help shape process was critical. North Korea's ability to help design the process also served another important function—it served North Korea's identity-based needs: to be seen as an equal sovereign state and to receive clear recognition by the U.S.²² By having needs like these met, North Korea (and other participants) engaged in the process in a way that fostered communication and coordination about interests, not just positions. The Six-Party Talks demonstrate how allowing participants to help design process is one way to encourage participation, which is often a prerequisite for voluntary compliance and problem-solving behavior.

This Article proceeds as follows: Part II reviews existing compliance theories and presents an expanded international legal process approach that introduces critical IDR perspectives. Part III provides necessary historical background and overview of IDR. Part IV establishes the core claims of this Article and presents the analytical framework for assessing state behavior that considers how international legal process, particularly IDR, shapes the factors (interests, identity, rights, power, etc.), and tools (coercion, persuasion, acculturation, etc.) that influence state behavior. Part V addresses three core challenges: selection bias, the shortcomings of interdisciplinary analysis, and relevant limits of IDR. The Article concludes by offering normative perspectives about how international legal process and IDR should inform future conceptions of state behavior.

II. THE VALUE OF INTERNATIONAL LEGAL PROCESS THEORY IN STATE BEHAVIOR ANALYSIS

Before discussing IDR, it is necessary to place international legal process theory into existing compliance literature and examine why it offers a comprehensive analytical framework for understanding state

ability to have direct and private talks with the United States within the context of the Six-Party talks. Podcast: Kantathi Suphamongkon, Foreign Minister of Thailand, Conference on U.S. Foreign Policy Toward Rogue States (Mar. 11, 2008), *available at* <http://www.international.ucla.edu/burkle/podcasts/article.asp?parentid=105882> (Dr. Suphamonkhon's statements are 15 minutes into the recording).

22. *Id.*; see also Interview with Kantathi Suphamongkhon, Foreign Minister of Thailand, in L.A., Cal. (Jan. 23, 2009). During his tenure as Foreign Minister of Thailand, Dr. Suphamongkhon traveled to Pyongyang on an official diplomatic visit and met with North Korean government officials. His knowledge regarding North Korea's perspectives on the Six-Party Talks is based on discussions he had during this visit.

behavior. State compliance with international legal rules and obligations is often the measuring device used to gauge whether international law influences states. Scholarship on state behavior and compliance is prolific and originates from many disciplines including international law and international relations.²³ Theories vary by organizing principle and are categorized historically²⁴ by disciplinary perspective²⁵ and by analytical aim.²⁶ For example, scholars have proposed arguments of compliance, such as Henkin's theory that most states comply most of the time;²⁷ arguments about why and when states comply, delving into analysis of factors and tools that motivate and affect state behavior;²⁸ and entirely new theories categorized as interest-based vs. norm-based²⁹ that redefine compliance and its relationship to international law by examining external factors such as legitimacy and obedience.³⁰ Compliance literature traditionally treats the principles and norms that form IL and the outcomes themselves, such as rules or

23. As there are many differences between IL and IR approaches to compliance, I mention two that are particularly relevant here. Much of IL scholarship assumes Henkin's theory on state compliance as fact where IR scholars test the assumption through empirical studies. Second, IL makes distinctions between legal and non-legal rules whereas IR does not. See Raustiala & Slaughter, *supra* note 9, at 539.

24. See *id.* at 539–44.

25. See FOUNDATIONS, *supra* note 10, at 1–6.

26. For a review of leading IL and IR theories organized conceptually as interest-based and norm-based, see *id.* at 2–3.

27. See generally LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979) (presenting a theory that most states comply with international law most of the time).

28. See FOUNDATIONS, *supra* note 10, at 112–32 (discussing the arguments of constructivists such as Keohane, Katochwil, Checkel, and Risse et al. that state behavior is motivated by internalized identities and norms of appropriate behavior).

29. *Id.* at 2–3.

30. See Thomas M. Franck, *Fairness in International Law and Institutions*, in FOUNDATIONS, *supra* note 10, at 46 (providing an overview of Franck's theory of legitimacy, in which Franck argues that perceptions about the legitimacy of rules directly impact a community's motivation to comply with those rules, when that community and its cultural identity is organized around rules); H.L.A. Hart, *International Law*, in FOUNDATIONS, *supra* note 10, at 136 (discussing how legitimacy plus the four characteristics of the "right process" lead to compliance; Harold Hongju Koh, *Why Do Nations Obey?*, in FOUNDATIONS, *supra* note 10, at 195 (discussing a theory of obedience based on state internalization of norms occurring as a part of the transnational legal process); FOUNDATIONS, *supra* note 10, at 171 (discussing Robert Keohane's critique of Franck's theory from an IR rationalist-instrumentalist perspective, whereby Keohane claims that Franck's argument is circular because if Franck is correct about a chain of causation between the right process and state compliance, state behavior essentially recycles back to affect the right process).

agreements.³¹

Given the diversity of such theories, explaining North Korea's behavior would seem straightforward. Realists consider state behavior to be primarily motivated by internal interests. The underlying assumption is that while external factors may constrain state behavior, they do not motivate it.³² Specifically, Goldsmith and Posner's expansion of rational-choice theory relies on assumptions about domestic politics and democratic governance that become less relevant for a state ruled by a dictator, like North Korea.³³ An institutionalism perspective may consider how the regime theory aspects of the Six-Party process influenced state behavior.³⁴ As Keohane posits, states strategically use regimes to achieve their interests.³⁵ Although this approach considers a broader array of behavioral influences, it falls short of analyzing the full complexity of factors behind North Korea's behavior. Liberal theories offer insights that are helpful elsewhere, they are not particularly instructive for explaining the behavior of an authoritarian state that lacks considerations of domestic politics.³⁶

Norm-based theories of state compliance generally share an assumption that states are motivated by moral obligation and legitimacy of the law.³⁷ Legal process scholars argue that the legitimacy of law should be measured by the process through which it was created. Hart links legitimacy to process by suggesting that four characteristics of the "right process" lead to compliance.³⁸ Further considerations about process have been offered by Franck's theory as to how perceptions about the legitimacy of rules can directly impact a community's motivation to comply with those rules. Tyler expands this to show why

31. Raustiala & Slaughter, *supra* note 9, at 539 (arguing that "most theories of compliance with international law are at bottom theories of the behavioral influence of legal rules").

32. See generally Duncan Snidal, *Rational Choice and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 9 (overview of rational choice theory).

33. GOLDSMITH & POSNER, *supra* note 11 at 7–10. But see Margaret E. McGuinness, *supra* note 11, at 395–98 (noting that Goldsmith and Posner's theory does not extend to international human rights system because it fails to consider the broad range of interactions and influences between human rights legal institutions and domestic actors and that law can result from state preferences such as protection of human rights).

34. See FOUNDATIONS, *supra* note 10, at 50.

35. See *id.*

36. See generally Anne-Marie Slaughter, *A Liberal Theory of International Law*, in FOUNDATIONS, *supra* note 10, at 94 (offering a description of liberalism and arguing that certain liberal arguments are troubling because they fail to deal with the global reality which includes non-liberal states like North Korea).

37. Raustiala & Slaughter, *supra* note 9, at 544.

38. *Id.* at 541 (citing H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994)).

compliance is a function of legitimacy and hence a legitimate process. Constructivists study how social constructs influence behavior-motivating factors (norms, interests, identity).³⁹ Although much of this work is consistent with the claims made here, at present there is little expansion of this work into international legal process, and even less so to IDR. Furthermore, most theories concentrate on one or a few factors, but do not present a comprehensive approach that incorporates all the factors and their interplay with process.

These theories of compliance are inadequate because they share an assumption that interests or norms are the primary motivating factors behind state behavior, and in doing so fail to account for the larger interplay between other factors as well as tools of influence. The unitary focus inhibits the observation of other critical factors, such as state identity. A nation's leadership, the demographics of its citizens, and its history and culture all play a role in determining politics, policy, and therefore behavior. States' notions about other states shape conceptions of motivations and interests. The individual identities of diplomats who represent a state in an international legal process can also influence the outcome. For North Korea, identity was arguably a key factor of its decision-making process. North Korea is an authoritarian state that maintains internal order through strict controls, some of which violate norms of human rights. If North Korean diplomats are interested in maintaining a perception of control, confidence, and independence from the outside world, then yielding to predetermined rules and process does not serve North Korea's interests in maintaining its identity. Beyond interests and identity, there are a host of other factors that influence behavior. In assuming a fixed primary motivating factor, these theories of compliance fail to accommodate the fluid nature of factors.

International legal process theory incorporates the role *process* plays in affecting state behavior and compliance. The organizing philosophy centers on the idea that behavior must be managed, not forced, through process because addressing complex, global problems will necessarily require the cooperation of states. The managerial approach developed by Chayes emphasizes the horizontal interplay that occurs between governments at the international level.⁴⁰ While this approach demonstrates how international cooperation and management can

39. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, in FOUNDATIONS, *supra* note 10, at 120.

40. See FOUNDATIONS, *supra* note 10, at 173.

influence state compliance with treaty obligations, it does not adequately address the growing role of non-state actors. Furthermore, because applications of this theory have focused on international *legal* processes, they currently do not provide the necessary framework to analyze broader forms including IDR.⁴¹ Koh's extension of this theory considers the vertical, transnational approach and expands the analysis beyond functionality into normativity.⁴² Koh's work also breaks down traditional IL assumptions that IDR does not share, like the importance of state actors over non-state actors.⁴³ Compliance behavior is considered within the larger context of how outcomes are created, formalized, accepted, implemented and enforced,⁴⁴ thus recognizing political, social and economic considerations.⁴⁵ This approach helps reveal how interests, decision-making and compliance behavior are formed and, thus, how they can be influenced. In this same light, Higgins' definition of law as a decision-making process captures the broader view of process that this Article seeks to demonstrate.⁴⁶

Following the prevailing wisdom of international legal process theory that state behavior can be managed through process, this Article proposes an analytic framework that comprehensively considers how process affects the factors (interests, identity, rights, power, etc.) and tools (coercion, persuasion, acculturation, etc.) that influence state behavior⁴⁷ as the following diagram illustrates:

41. See generally Chayes & Chayes, *supra* note 16, at 179–80 (discussing the role of dispute settlement in relations to treaty regimes and international adjudication).

42. See Koh, *supra* note 31, at 194–95 (discussing Koh's theory of obedience based on state internalization of norms occurring as a part of the transnational legal process).

43. The distinction between legal vs. nonlegal process is important in IL but less so in IR. See Raustiala & Slaughter, *supra* note 9, at 539 (discussing reasons why). See also Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996) (discussing the breakdown of this barrier under the transnational legal process approach).

44. See Koh, *supra* note 44, at 183–84.

45. PHILLIPE SANDS, *LAWLESS WORLD* 15–29 (2005) (documenting how international law has changed in the past two decades and arguing that during the 1990's public perception of international law transformed because globalization connected state interests, technological innovation made information more accessible and more open to citizen scrutiny); see also ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* 31–34 (2004) (arguing that the traditional conceptual lens of the unitary state is disaggregating because the increasingly important cast of international actors are subcomponents of each state—individual government institutions like regulators, judges, and legislators—are creating their own horizontal networks and even their own transgovernmental organizations that reach across borders).

46. See generally HIGGINS, *supra* note 12.

47. See Raustiala & Slaughter, *supra* note 9, at 545–48.

Expanded International Legal Process Theory: Analytical Framework



III. EXPANDING INTERNATIONAL LEGAL PROCESS THEORY THROUGH IDR

International legal process theory has considered how various methods of law-making and problem solving affect state behavior. Yet, IDR is a category of process that has been overlooked by international legal scholars, despite rapid increase in its use. In order to account for the full array of mechanisms in use today, international legal process theory must be expanded. Understanding IDR's influence on states requires understanding the culture of norms and principles that inform its theory and practice. This is challenging because the field of

dispute resolution lacks a well-defined and widely-accepted theoretical foundation that connects the various types.⁴⁸ Efforts to clarify are further frustrated by the interdisciplinary nature of IDR and the distinct vocabularies of different disciplines that comprise IDR. For example, because much of the literature on peacemaking and international mediation is not grounded in international relations theory, some argue that it suffers from conceptual confusion and lack of true evidence.⁴⁹ Even within the field of international law there is no formal or broadly recognized “law of international ADR.”⁵⁰ By necessity, practitioners have developed codes of conduct and best practices for international mediation and arbitration, sparking debate as to how much formal guidance is necessary and recommended. In the absence of a universal IDR theory, this Article relies on widely-accepted core principles of IDR:⁵¹

- Obligation to strive for peace and non-violence
- Right of self-determination
- Informed and voluntary participation
- Confidentiality
- Duty to participate in good faith
- Neutrality/impartiality of the mediator, facilitator, or other third party
- Duty to disclose conflicts of interest by the mediator, facilitator, or other third party
- Maximum inclusion by all stakeholders in the process
- Consensus building at all levels of the conflict

These core principles are not entirely novel nor are they unique to

48. Christer Jönsson, *Diplomacy, Bargaining, and Negotiation*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 9 at 212 (providing an overview of diplomacy, bargaining, and negotiation theory and scholarship while noting that there is not a generally accepted theoretical foundation for these concepts).

49. Lilach Gilady & Bruce Russett, *Peacemaking and Conflict Resolution*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 9, at 392, 394–95 (discussing the limitations of current research on international mediation and noting a need for theory based on understanding international conflict and its management).

50. *Id.*

51. These core principles can be found embedded in the ethical requirements and Codes of Conduct for mediators, arbitrators and other neutrals. *See generally* IMI CODE OF PROF'L CONDUCT (2008), *available at* http://www.imimediation.org/code_professional_conduct.html; MODEL RULES FOR MEDIATION (1998), *available at* http://www.abanet.org/cpr/clientpro/mr_mediation.pdf; AM. ARB. ASS'N STATEMENT OF ETHICAL PRINCIPLES, *available at* <http://www.adr.org/sp.asp?id=22036>.

the field of IDR, but they create a climate that induces states to willingly and proactively collaborate to solve problems. The decision-making paradigm shifts from power based on authority, strength and hierarchy to power based on interests, cooperation and collaboration.⁵² These principles are discussed in other disciplines using a different vocabulary. For example, Slaughter proposes similar organizing principles for international relations.⁵³ Among others, she discusses Global Deliberative Equality to maximize participation by those most affected, which is similar to the principle of maximum inclusion; Positive Comity or a principle of affirmative cooperation, which is similar to the principle of duty to participate in good faith; and Subsidiarity or locating governance at its lowest level, closest to those affected by its rules, which is similar to consensus building.⁵⁴ Holsti suggests that there are some parallels to these principles in international law, including the right of self rule, which is similar to the right of self-determination; nonviolence, which is similar to the obligation to use peaceful procedures; and *pacta sunt servanda*, which correlates to the duty to participate in good faith.⁵⁵ The parallels between these principles in IDR and the distinct fields of international law and international relations suggest that all three fields are responding to the same conditions in the international order.

The following section provides the necessary historical background of IDR, describes the four categories addressed in this Article (negotiation, mediation, conciliation, and arbitration) and presents information documenting its current use.

A. *Historical Background*

Using international legal process to prevent war and foster peace among nations has been an aim of international law since its inception. Within this larger field, IDR holds a distinctive place. The First Hague Peace Conference established an international framework for the peaceful settlement of disputes between nations.⁵⁶ The Conference's particular focus on process—the methods by which nations could resolve disputes—led to the formalization of international arbitration

52. See generally WILLIAM URY, GETTING TO PEACE: TRANSFORMING CONFLICT AT HOME, AT WORK AND IN THE WORLD (1999).

53. SLAUGHTER, *supra* note 46, at 221.

54. *Id.*

55. K.J. HOLSTI, TAMING THE SOVEREIGNS: INSTITUTIONAL CHANGE IN INTERNATIONAL POLITICS 174 (2004).

56. See Bercovitch, *supra* note 7, at 3.

and mediation and the creation of the Permanent Court of Arbitration.⁵⁷ In 1999, a century later, nations reconvened in The Hague to discuss the future of international dispute settlement.⁵⁸

Yet, clarifying IDR's historical origins presents challenges because it is a field that originates from a multitude of disciplinary perspectives. There have been important contributions to this discipline from political scientists and IR scholars concerned with international conflict, negotiation, diplomacy, and game theory.⁵⁹ Early IDR literature shared interdisciplinary perspectives with IR, often because scholars focused on both areas.⁶⁰ Additional scholarship emerged after World War II and the Cold War as the use of IDR became indispensable for diplomats.⁶¹ High profile uses of IDR in intra-state and transnational disputes, such as the South African Truth and Reconciliation Commission, raised additional awareness about IDR.⁶²

In the United States, use of IDR methods emerged from a motivation to move away from the United States' competitive adversarial legal model.⁶³ Referred to as alternative dispute resolution (ADR), these methods were used to address domestic legal disputes, not prevent war between nations. Such thinking originated from a variety of disciplines including law, political science, sociology, psychology and feminist theory,⁶⁴ and predated World War II with early scholars such as Mary Parker Follet writing about conflict resolution in the 1920s.⁶⁵ The field

57. *Id.*

58. See Hague Appeal for Peace, When Did the Conference Take Place?, <http://www.haguepeace.org/index.php?action=history&subAction=conf&selection=when> (noting that the Third Conference was held in the Hague in May 1999 and was a centennial commemoration on the theme, "The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century.").

59. Gilady & Russett, *supra* note 50, at 392–99.

60. See Louis Kriesberg, *The Development of the Conflict Resolution Field*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 25, 66–68 (William Zartman & J. Lewis Rasmussen eds., 1997) [hereinafter PEACEMAKING IN INTERNATIONAL CONFLICT] (noting the convergence and complementarity between conflict resolution and international relations).

61. See *id.* at 66–69 (providing an overview of theoretical changes and developments in conflict resolution theory and practice and noting convergence between conflict resolution and international relations).

62. See INTERNATIONAL MEDIATION IN THEORY AND PRACTICE 67–90 (Saadia Touval & I. William Zartman eds., 1985); see also ROGER FISHER ET AL., COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION 225 (1997).

63. Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 4 NEGOT. J. 485, 489 (2006).

64. Kriesberg, *supra* note 61, at 60–63.

65. See *id.* at 52–53 (providing a comprehensive overview of early thinkers in conflict resolution).

began expanding rapidly in the U.S. in the 1980s with the addition of Fisher and Ury's widely read *Getting to Yes*, Susskind's Consensus Building Theory, game theorists like Raiffa, and international relations scholars Touval and Zartman.⁶⁶ U.S. courts began to recognize and support the use of mediation, arbitration, and other processes in conjunction with and as alternatives to litigation.⁶⁷ The American Bar Association along with other bar associations also embraced the growing movement, forming the ABA Section of Dispute Resolution in 1993,⁶⁸ promoting publications and hosting conferences in the field. Professional organizations and rosters for arbitrators and mediators began to appear as well.⁶⁹

More recently, the United Nations, World Bank, and other international organizations have developed, redefined, and strengthened existing IDR efforts. One prominent trend has been the exportation of U.S. and Western-based models to developing countries in conjunction with justice-based rule of law efforts led by development-oriented institutions.⁷⁰ This trend raises important questions as to the role of IDR as a replacement for traditional rule of law programs and the role of individual rights.⁷¹ In part because of the explosive growth in international commercial dispute resolution, institutional and academic centers of dispute resolution are forming, especially in Asia where places such as Singapore and Hong Kong are emerging as hubs for commercial dispute resolution in the region.⁷²

As the field continues to evolve, so does the scholarship. The first generation of U.S.-based dispute resolution scholarship largely dealt with emerging practices and methodologies of negotiation, mediation

66. *Id.* at 486.

67. See generally SARAH R. COLE, NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* app. C (2d ed. 1994) (listing state statutes calling for mediation of disputes).

68. American Bar Association, About the ABA Section of Dispute Resolution, <http://www.abanet.org/dispute/aboutsec.html> (last visited Feb. 23, 2009).

69. For example, see JAMS, founded in 1979. About JAMS, www.jamsadr.com/practices/about.asp. Outside of the United States, similar fields of study were emerging, notably in Australia, South Africa and the United Kingdom.

70. Amy Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2004).

71. See generally Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons From Abroad*, 56 DEPAUL L. REV. 569, 569 (2007).

72. See Nicholas Fang, *Singapore Aims to Be Arbitration Hub for India*, STRAITS TIMES (Sing.), May 8, 2008; Singapore Sports Council, Alternative Dispute Resolution Framework for Sports Formed to Resolve Disputes, http://www.ssc.gov.sg/publish/Corporate/en/news/media_releases/2008/alternative_dispute.html (noting developments that will increase Singapore's ability to serve as a hub for sports-related dispute resolution).

and arbitration with a normative focus on conflict resolution, as opposed to prevention or management.⁷³ Today, IDR scholarship often utilizes empirical studies and explores conflict systematically through new tools such as dispute systems design.

B. *Defining and Describing IDR*

From a normative perspective, IDR differs from IR and IL in its humanistic approach to international relations.⁷⁴ The underlying assumption is that conflict in the international order stems from frustration, suppression, and denial of basic needs.⁷⁵ Therefore, the prevention, management, and resolution of conflict must address factors beyond power, rights and the interests of states. IDR processes are designed to serve as problem solving tools that can create outcomes (rules, agreements, etc.) and build relations.⁷⁶ Because IDR is used in both traditional legal contexts such as treaty negotiations and arbitrating international legal disputes and in non-legal settings as a decision-making tool to form policies, agreements and resolutions, the IDR discipline does not share IL's legal and non-legal distinction.⁷⁷ It also provides analysis regarding what actors want and how to influence what they should want.⁷⁸ The need for this new approach is underscored by the rapid expansion of IDR.⁷⁹ Because IDR supports voluntary compliance, it can also help address gaps in the compliance literature, such as

73. See GABRIELLA BLUM, *ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES* 36 (2007) (noting that resolution, not management or prevention, has been the focus of ADR scholarship).

74. See Marieke Kleiboer, *Great Power Mediation: Using Leverage to Make Peace?*, in *STUDIES IN INTERNATIONAL MEDIATION*, *supra* note 7, at 137.

75. *Id.*

76. CROCKER ET AL., *TURBULENT PEACE*, *supra* note 18, at 447–48.

77. This distinction is important in IL but less so in IR. See Raustiala & Slaughter, *supra* note 9, at 539 (discussing reasons why); see also Koh, *supra* note 44, at 184 (discussing the breakdown of this barrier under the transnational legal process approach).

78. Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 436 (2006) (citing Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 726 (2001)) (setting forth the reasons why states care about international agreements and organizations, and arguing that states care about institutional design because it affects outcomes).

79. Scholars have observed that emerging new forms of governance require greater skills in negotiation and collaboration. See, e.g., ROBERT AGRANOFF & MICHAEL MCGUIRE, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* (2003); Lisa Blomgren Bingham et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547 (2005); *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., 2002).

Franck's query as to why powerful states follow powerless rules. The overview that follows introduces the general framework that IDR processes follow and provides brief descriptions of the four IDR methods covered in this Article (negotiation, mediation, conciliation, and arbitration), which have been described in detail elsewhere.⁸⁰

IDR Framework

A typical IDR process follows five core steps: 1) conflict assessment, 2) process design, 3) engagement, 4) conclusion of the process, 5) implementation.

First, a conflict assessment is conducted to identify the desired goal(s) (e.g., create a rule, form an agreement, or resolve a dispute); the key stakeholders and their positions, interests, emotions, rights, and identities; and the context (including geographical and cultural information). Conflict assessment can be a formal process conducted by a mediator or an informal process conducted by a stakeholder. Stakeholder analysis and conflict mapping are two tools often used in a conflict assessment.⁸¹

Conceptually, the conflict assessment stage serves a purpose similar to discovery in a legal proceeding. Both steps uncover vital information about the parties, conflicts, and facts. In IDR, this information informs what process should be used and how it should be designed and applied. For example, in a multilateral negotiation designed to form an international agreement among nations, the secretariat or presiding body will often meet with parties informally to map out areas of potential agreement or discord before nations formally state positions at the opening plenary. In this way, they help to coordinate interests, operating much like mediators who converse with disputants before bringing them together in a joint session.

After the assessment phase, an IDR process must be designed to achieve the desired goals within the given context. Referred to as systems design, this step uses the information found during the conflict assessment to strategically decide what IDR process or combination of processes would best achieve the desired goal(s) given the stakehold-

80. For a comprehensive overview of these processes including definitions and use see COLLIER & LOWE, *supra* note 6, at 19–35. See also J. L. BRIERLY, LAW OF NATIONS 373–76 (Sir Humphrey Waldo ed., 6th ed. 1963) (discussing arbitration, mediation, conciliation, and good offices).

81. See generally WILLIAM URY, GETTING DISPUTES RESOLVED (1988) (describing conflict assessment and applicable tools).

ers, conflict, and context. For example, parties may decide to engage in direct negotiations or in mediation with a provision for mandatory arbitration should earlier efforts fail. By designing a system to process disputes at various levels, conflicts are often averted or managed in constructive ways. The design phase is critical to achieving optimal results.

The third step is to engage in the process. At this stage, considerations of stakeholder identity, timing and context come into play. For example, the success of U.S. mediator Richard Holbrooke's efforts in the Serbian-Kosovo conflict in November 1995 demonstrated the importance of some of these considerations.⁸² Holbrooke engaged the parties and successfully mediated the dispute after earlier failed attempts by EU and UN mediators. Scholars believe that Holbrooke was successful because of the following factors: timing (he mediated after the parties failed to resolve the matter on their own) and mediator identity (the skill, power, and clout Holbrooke had as an individual and as an agent of the United States).⁸³ The factors that determine successful engagement of a process include the context of the conflict, nature of the parties involved, timing, strategy, resources, and attributes of the third-party neutral when applicable.⁸⁴ The Holbrook example illustrates how factors surrounding the implementation of the chosen IDR process can influence success or failure.

The fourth step is to conclude the process. Parties that have reached a decision, whether a rule or an agreement, need to formalize and document the terms and obligations set forth in that outcome. Outcomes can be binding or nonbinding and can take many forms, including treaties, accords, or other international legal instruments. When parties do not reach a decision, agreement, or resolution, it is still important to conclude the process in order to clarify outcomes (or lack thereof) and promote good relations among the parties. IDR offers various procedures and rituals for concluding a process.⁸⁵

The fifth and final step involves implementation. An implementation plan specifies a timeline for parties to uphold commitments and obligations. Monitoring and reporting ensure that parties follow through over time. Parties agree to return to negotiation or mediation if a party

82. See Kleiboer, *supra* note 75, at 127–28.

83. See *id.*

84. Jacob Bercovitch, *Conclusion: Some Thoughts on the Process and Potential of Mediation*, in *STUDIES IN INTERNATIONAL MEDIATION*, *supra* note 7, at 258, 261–62.

85. KENNETH CLOKE, *CROSSROADS OF CONFLICT* 181–83 (2006) (describing various techniques for closing the mediation process, i.e., verbal acknowledgements).

to the outcome fails to comply.

Understanding how a typical IDR process works provides a foundation for exploring the nuances of the actual processes themselves. While this schematic highlights the general course of most IDR processes, specific cases do vary. The purpose of this outline is to provide context for the overall IDR process design before describing specific methods.

Types of IDR

There are many recognized forms of IDR. Common examples include negotiation, mediation, conciliation, good offices, shuttle diplomacy, and arbitration.⁸⁶ In this Article, I specifically discuss four: 1) negotiation, 2) mediation, 3) conciliation and 4) arbitration.

Negotiation is a process by which parties engage in direct dialogue in order to make a decision, reach an agreement, or deal with a dispute. During a negotiation, parties may engage in bargaining. In the interstate context, diplomats often begin formal negotiations with an official statement of their countrys' cleared positions. The mutual-gains theory of negotiation encourages bargaining based on interests, not positions.⁸⁷ Instead of focusing on positions, or what a party wants, the goal is to focus on the interests and describe why the party wants something. Interest-based communication takes place in a culture emphasizing coordination and sharing of preferences through collaboration, thus allowing parties to maximize their outcomes through value creation.⁸⁸ Negotiation theory encourages actors to separate the people from the problem. This allows participants to gain emotional perspective and enhance clarity. Studies have shown that people are prone to developing inattentional blindness during conflicts or in competitive environments, effectively blinding them to objective reality.⁸⁹ Negotia-

86. For a comprehensive overview of these processes including definitions and use, see COLLIER & LOWE, *supra* note 6, at 38.

87. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 40–54 (2d ed. 1981).

88. *Id.* at 56–57; see also CROCKER ET AL., *TURBULENT PEACE*, *supra* note 18, at 447–48.

89. See, e.g., Daniel J. Simons & Christopher F. Chabris, *Gorillas in our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059 (1999) (discussing experiment where people who viewed a video of a basketball game were asked to count the number of passes made by one team while a woman in a gorilla costume walks into the middle of the basketball game for nine seconds before departing). Prof Richard Wiseman of the University of Hertfordshire recreated the experiment with a live audience and only 10% of the audience saw the gorilla. Roger Highfield, *Did You See the Gorilla?*, TELEGRAPH (London), May 11, 2004, <http://www.telegraph.co.uk/connected/main.jhtml?xml=%2Fconnected%2F2004%2F05%2F05%2Fecfgorilla05.xml>.

tion theory addresses this phenomenon by educating participants about the dangers of assuming their perceptions of a situation are accurate. When states do not assume that their truth is an objective truth, they are more likely to engage in information sharing and other behaviors that lead to increased participation and coordination. In addition to these theories, there is a vast literature that addresses negotiation strategies, tactics, timing, and context.⁹⁰ Because negotiation involves direct engagement between parties, it is often the first form of IDR that is tried. However, when negotiations fail, states turn to other IDR processes.

The other forms of IDR—mediation, conciliation, and arbitration—share an important factor: they employ the assistance of a neutral third party to facilitate the process. In the international context, mediation can be understood as a voluntary and non-coercive process whereby an impartial third party helps states reach an agreement and repair relations.⁹¹ Although this definition represents the ideal, mediation can take many forms and the distinctions between mediation and other methods (shuttle diplomacy, good offices, consultations, etc.) are often blurred in practice.⁹² The hallmarks of mediation include voluntary participation and agreement by the parties, impartiality of the mediator, confidentiality, and a right to self-determination, although these elements are not practical or possible in every situation. Mediation can lead to agreements that can be both binding and nonbinding in nature. Binding agreements are formed through explicit consent of the signatories, and can be treated as an international legal instrument like a treaty, or as a contract. Mediation can promote cooperative and horizontal decision-making.⁹³ There are several styles of mediation, including facilitative, elicitive, transformative, and evaluative. Choosing an appropriate style is context-dependent. For a mediator who engages heads of state, a facilitative style may be appropriate when the mediation is more a formality and the parties are capable of direct dialogue.

90. See generally THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS (I. William Zartman, ed. 1978); Daniel Druckman, *Negotiating in the International Context*, in PEACEMAKING IN INTERNATIONAL CONFLICT, *supra* note 61, at 81–115; JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES (2nd ed. 2007).

91. For definitions of mediation and similar processes including good offices, see The Hague Conventions of 1899 and 1907; U.N. Charter art. 33, para. 1; COLLIER & LOWE, *supra* note 6, at 27–31.

92. See COLLIER & LOWE, *supra* note 6, at 28–29 (offering instances where the Secretary-General offered his good offices and the UNSC definition of good offices).

93. Bercovitch, *supra* note 85, at 258.

However, empirical studies suggest that structured and firm approaches are generally more effective.⁹⁴ Mediating a multilateral border dispute involving many parties may require a more structured and firm evaluative style. Historical case studies offer insight into what style works best in different situations, but ultimately the mediator decides.

Mediation, as well as shuttle diplomacy, good offices, and other informal methods, has commonly been used to settle treaty disputes such as the Pact of the League of Arab States, Charter of the Organization of African Unity of 1964, and the Antarctic Treaty of 1959 and boundary matters like the Beagle Channel dispute between Chile and Argentina regarding the ownership of island territory.⁹⁵ Pope John Paul II used mediation to resolve the matter after arbitration failed.⁹⁶ Mediation has also been used by states in political disputes, for instance in the Chaco War between Bolivia and Uruguay, in India-Pakistan disputes over Kashmir, and in the Iran-U.S. hostage crisis.⁹⁷ Mediation raises contextual variables (the nature of the dispute, parties and their relationships, and characteristics of the mediator) and process variables (strategies and tactics employed)⁹⁸ that must be carefully considered. The identity of the mediators and the timing of the mediation are also important components. Studies suggest that powerful mediators who enjoy legitimacy based on affiliation with a powerful country or international organization are most effective when disputants lack sufficient motivation to reach resolution.⁹⁹ Private mediators who are lay people or who are operating without the backing of an influential entity can be effective in circumstances where parties require enhanced communication, optimism, or a reality check.¹⁰⁰ Zartman, Rubin and other scholars have debated various theories of ripeness about the appropriate timing for a mediator to intervene.¹⁰¹ Despite the lack of consensus about identity, timing, and other factors, the importance of assessing each conflict scenario before intervening is

94. Jacob Bercovitch & Allison Houston, *Influence of Mediator Characteristics and Behavior on the Success of Mediation in International Relations*, 37 INT'L J. CONFLICT MGMT. 670–91 (1993).

95. See COLLIER & LOWE, *supra* note 6, at 28–29.

96. *Id.* at 27–28.

97. *Id.*

98. Jönsson, *supra* note 49, at 221.

99. See Pruitt, *supra* note 21, at 51 (citing Thomas Princen, *Mediation by a Transnational Organization: The Case of the Vatican*, in *MEDIATION IN INTERNATIONAL RELATIONS* (Jacob Bercovitch & Jeffrey Rubin, eds., 1992)).

100. *Id.*

101. Karin Aggestam, *Quasi-Informal Mediation in the Oslo Channel: Larsen and Holst as Individual Mediators*, in *STUDIES IN INTERNATIONAL MEDIATION*, *supra* note 7, at 69–71.

well-recognized.¹⁰²

Conciliation also involves third-party neutrals who assist parties in resolving disputes.¹⁰³ In conciliation, the neutral may shuttle back and forth between parties that are in different locations or over a period of time. Conciliation has historical roots in Asia and remains popular in Japan due to its non-confrontational format that fosters face-saving and has been used for centuries in private and land disputes.¹⁰⁴ In France during the 1920s and 1930s, conciliation was used in social conflicts that fell outside the judicial arena or when gaps existed in the Civil Code.¹⁰⁵ In practice, the distinction between conciliation and mediation is often blurred as there is no globally-accepted consensus on the exact differentiation between the two methods.

Arbitration is a formal process where parties submit decision-making authority to the arbitrators who make binding determinations about rights and assets based on the legal and factual merits of a dispute.¹⁰⁶ Because participants voluntarily give up the ability to determine their own outcomes, arbitration is classified as the least collaborative of the IDR methods. Arbitration is an effective tool for those seeking settlement agreements, but is less useful for contexts requiring deeper resolution and reconciliation because it is not designed to elicit and address the identity or emotional aspects of a conflict. Domestically, arbitration is considered a form of ADR because it is an alternative to litigation. This alternative paradigm does not exist in the international context, where arbitration is considered to be a primary adjudicative forum for resolving international legal disputes, particularly in the commercial, investment, and trade sectors where it is used for interstate, mixed-state, and private disputes.¹⁰⁷ Unlike the other methods of IDR, arbitration enjoys an institutionalized enforcement framework

102. See Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in LAWRENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK* 99, 101–06 (1999).

103. For an in-depth discussion of conciliation, see COLLIER & LOWE, *supra* note 6, at 29–31; see also UNITED NATIONS, *HANDBOOK ON THE PEACEFUL SETTLEMENTS OF DISPUTES BETWEEN STATES* 45–55 (1999); J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 64–90 (4th ed. 2005).

104. YASUNOBU SATO, *COMMERCIAL DISPUTE PROCESSING AND JAPAN* 280 (1999).

105. *Id.* at 281.

106. COLLIER & LOWE, *supra* note 6, at 38–40 (giving a general overview and specifically noting the rise of mixed arbitrations since World War I and the creation of new mechanisms for dispute prevention and management (not just resolution) by the Organization on Security and Co-operation Dispute Settlement Mechanism in 1991 and the Organization of African Unity's Mechanism for Conflict Prevention, Management and Resolution created in 1993).

107. See *id.* at 47 (noting the creation of the International Chamber of Commerce in 1919, which has housed thousands of arbitrations supervised by the International Court of Arbitration).

through treaties such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention¹⁰⁸) that enforce participation in and compliance with arbitration agreements.¹⁰⁹ International arbitrations are often conducted through institutions that have preset procedures and structures, for instance the International Chamber of Commerce and the UNCITRAL rules, which serve to make arbitral agreements reliably and uniformly enforceable in national courts.¹¹⁰ The binding nature of international arbitration makes it an attractive option, especially to private entities, because of institutionalized enforcement mechanisms such as the New York Convention.¹¹¹ The most prominent use of arbitration for inter-state matters is the Iran-U.S. Claims Tribunal, which was established in response to the Iran hostage crisis as a mechanism for resolving outstanding legal claims between two nations that had severed diplomatic ties.¹¹² However, as this case has demonstrated, arbitration is limited in its ability to resolve political disputes as a part of the formal process.¹¹³

C. *Rise of IDR*

In addition to understanding the origins and categories of IDR, it is important to recognize its increased use by states and non-state actors around the world. Although the focus of this Article is on state use of international legal process, particularly IDR, this section includes data documenting the rise in use among non-state actors and for private and intra-state uses. The overall trend indicates that actors everywhere are seeking new tools for decision-making and problem-solving or are using old tools in new ways. Possible reasons behind this trend are that existing forms of international legal process are not serving the needs of states so they are using new tools, states turn to IDR when other

108. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 38.

109. RUFUS V. RHOADES ET AL., PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 102–05 (2d ed. 2007) (noting that national laws like the FSIA where Congress provides an exception to state immunity from judicial proceedings so that courts can enforce an arbitration agreement where the arbitration is to take place in the U.S. or is governed by a treaty, i.e., the New York Convention).

110. *See id.* at 103.

111. *See* COLLIER & LOWE, *supra* note 6, at 45–46.

112. *Id.* at 73–74 (citing G. H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996)).

113. *See* RHOADES ET AL., *supra* note 110, at 105.

options fail, or IDR “works” as measured by achieving outcomes or compliance. Similar trends can be found within states. In the United States, for example, the increase of ADR has often paralleled the decline of litigation, suggesting that parties are using ADR tools in lieu of litigation.¹¹⁴ While this explanation cannot be extrapolated to the international legal system, it does suggest that states may be seeking out forms of problem-solving processes more often than in the past, particularly given the rise in international adjudication.¹¹⁵

Nations employ negotiation, mediation, conciliation, and arbitration at the international level to prevent wars, make peace, manage relations, and solve problems. Documentation of IDR use at this level, particularly compliance with agreements and other long-term outcomes is scarce. The sources that do exist come primarily from political scientists and various institutes that track IDR for research or marketing purposes. Such scarcity can be attributed to political sensitivity, need for confidentiality, and the lack of resources for research.¹¹⁶ A few studies do suggest that IDR usage at this level is on the rise. A study documenting 310 international conflicts occurring between 1945 and 1974 found that mediation was used in 82% of the cases.¹¹⁷ Another study found that 45% of 94 post-World War II international disputes employed mediation, further noting that 71% of the mediations resulted in partially successful outcomes.¹¹⁸ A third study cites that mediation was used in 60% of 241 conflicts between 1945 and 1990.¹¹⁹

114. See Thomas J. Stipanowich, *ADR and ‘The Vanishing Trial’ What We Know and What We Don’t*, DISP. RESOL. MAG., Summer 2004, at 7 (suggesting that the use of ADR may reduce litigation); see also Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004) (noting the decrease in filings in Texas as well as other states); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 166–67 (2003).

115. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 79 (1999); see also Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L L. & POL. 792, 794 (2007).

116. MICHAEL S. LUND, PREVENTING VIOLENT CONFLICT 84–85 (1997).

117. Jacob Bercovitch, *Mediation in International Conflicts: Theory, Practice, and Developments*, in PEACEMAKING IN INTERNATIONAL CONFLICT, *supra* note 61, at 131 (citing ROBERT L. BUTTERWORTH, *MANAGING INTERSTATE DISPUTES, 1945–1974* (1976); KALEVI J. HOLSTI, *INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS* (1983)).

118. *Id.* (citing HOLSTI, *supra* note 118).

119. *Id.* (citing Jacob Bercovitch, *Understanding Mediation’s Role in Preventive Diplomacy*, 12 NEGOTIATION J. 241, 241–59 (1996)); see also Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues & Empirical Evidence*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* 11, 11 (Jacob Bercovitch ed., 1996).

An empirical study by Bercovitch documenting the increased use of available international conflict management processes—multilateral conferences, referrals to international organizations, arbitration, negotiation, and mediation—showed that all categories enjoyed overall increases in use between 1949 and 1995, the period of the study.¹²⁰ However, the more collaborative processes of negotiation and mediation had the highest increases in growth rates between 1966 and 1995, with mediation growing the most.¹²¹ This study suggests that mediation and negotiation are the IDR methods most preferred by states, and that these processes have become significantly more popular over the past twenty years. The creation of organizations that use IDR to prevent and manage disputes, such as the Organization on Security and Cooperation Dispute Settlement Mechanism created in 1991¹²² and the Organization of African Unity's Mechanism for Conflict Prevention, Management, and Resolution created in 1993, support this proposition.¹²³ Yet, research comparing a variety of IDR processes is rare.¹²⁴ Instead, most studies focus on growth occurring within a single area of IDR, particularly arbitration and mediation, or by category, e.g., international commercial disputes or political disputes.

Nations also utilize IDR through international and regional organizations. From 1945–1995, more than 50% of all documented inter-state mediations were conducted by regional organizations or the UN.¹²⁵ These organizations were sought out to mediate because of state perceptions about the legitimacy, moral authority and clearly identifiable norms of the mediating organizations. They had no power over states in the traditional sense and no legal enforcement mechanisms at their disposal.

120. See generally JACOB BERCOVITCH & JUDITH FRETTER, *REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945 TO 2003* (2004).

121. See *id.*

122. COLLIER & LOWE, *supra* note 6, at 39–40.

123. CROCKER ET AL., *TURBULENT PEACE*, *supra* note 18, at 574–75.

124. See Cohen, *supra* note 71, at 312 n.47 (citing Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. R. 339, 343 (2000)) (noting common methods for evaluation of IDR processes, including surveys and case studies. For example, in the United States, studies evaluating the success of mediation have focused on reporting the number of cases resolved, financial savings to the parties, and participant satisfaction.). For a discussion of the limitations in international mediation and peacemaking research related to the study of violent conflicts, see Gilady & Russett, *supra* note 50, at 405.

125. Bercovitch, *supra* note 85, at 261; see also Jacob Bercovitch & Paul Diehl, *Conflict Management on Enduring Rivalries: The Frequency, Timing and Short Term Impact of Mediation*, 22 INT'L INTERACTIONS 299–320 (1997).

The United Nations serves an increasingly important role in managing relations between states. State requests for UN Security Council (UNSC)¹²⁶ assistance in resolving conflicts is on the rise. Prior to 1990, the UNSC adopted enforcement mechanisms in only two situations—the arms embargo against South Africa (resulting in a successful Truth and Reconciliation Commission) and the trade embargo against Southern Rhodesia (present-day Zimbabwe).¹²⁷ During the 1990–2008 period, the UNSC has adopted sanctions against Iraq, Libya, the former Yugoslavia, Somalia, Liberia, Rwanda, Angola, and Haiti.¹²⁸ Such assistance employs enforcement-based elements that have led to successful IDR processes. UN peacekeepers operate to assist with conflict prevention and management. They use the tools of coercion and mediation together to enforce peace, pre-empt further violence and resolve conflict.¹²⁹ Peacekeepers are often effective because they enjoy the legitimacy of their respective organizations and engage for humanitarian, strategic, security and political reasons.¹³⁰ In March 2008, the UN announced the formation of the UN Mediation Standby Team, a rapid-response team of highly-skilled international mediators housed under the UN Department of Political Affairs.¹³¹ Efforts to mediate domestic crises to prevent regional or global spillover effects are also common, especially when legalized enforcement mechanisms fail. For example, in February of 2008, the State Department announced its support for the mediation efforts of former UN Secretary-General Kofi Anan in the Kenyan crisis after the failure of negotiations.¹³²

Although less relevant for this Article's focus on state behavior, the rise in mixed-state commercial arbitrations parallels the overall trend. Mixed-state arbitrations have been rising progressively since World War I¹³³ and there has been significant growth in the use of international

126. Cameron R. Hume, *A Diplomat's View*, in PEACEMAKING IN INTERNATIONAL CONFLICT, *supra* note 61, at 322–23 (describing the UNSC as a political and legislative forum that focuses on decision making via negotiations where the council acts as a diplomatic emergency room).

127. *Id.* at 320.

128. *Id.*

129. Bercovitch, *supra* note 85, at 261.

130. See CROCKER ET AL., TURBULENT PEACE, *supra* note 18, at 27–41.

131. Geoff Sharp, *UN Announces New 'On-Call' Mediation Team*, <http://www.mediate.com/articles/SharpGbl20080310B.cfm>.

132. TED DAGNE, CONG. RES. SERV., KENYA: THE DECEMBER 2007 ELECTIONS AND THE CHALLENGES AHEAD 2 (2008) (noting that twelve senior government officials and opposition members from Kenya have reportedly been banned from entering the U.S. by the State Department).

133. See COLLIER & LOWE, *supra* note 6, at 38.

arbitration for commercial cases in recent years.¹³⁴ In fact, eleven major international arbitration institutions¹³⁵ reported that annual case filings nearly doubled, from 1,392 cases per year in 1993 to 2,628 cases per year in 2001.¹³⁶ The World Bank's International Centre for Settlement of Investment Disputes (ICSID), which uses arbitration and conciliation to settle investment disputes, reported three cases in 1994, 106 in 2004, and a record high of 130 in 2007.¹³⁷ In 2007, 599 new cases were filed with the ICC International Court of Arbitration from over 126 countries, "a figure unprecedented in the Court's 85-year history."¹³⁸ This suggests that states and private actors are increasing their use of commercial arbitration, perhaps for some of the same reasons they are drawn to inter-state IDR.

Growth in non-state actor use of IDR is also increasing. In the United States, the significant reduction in federal jury trials has been well-documented and attributed to the increased use of dispute resolution¹³⁹ and the increased rate of voluntary settlements.¹⁴⁰ The American Arbitration Association reported a 17% increase in its international case load, and other studies report similar increases and predictions

134. Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, DISP. RES. J., Feb.-Apr. 2005, at 95 (citing KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 & n.62 (1993) (stating that "About 90% of international economic contracts contain an arbitration clause."))

135. The reporting institutions are: American Arbitration Association; China International Economic and Trade Arbitration Commission; Hong Kong International Arbitration Centre; International Chamber of Commerce; Japan Commercial Arbitration Association; Korean Commercial Arbitration Board; Kuala Lumpur Regional Centre for Arbitration; London Court of International Arbitration; Singapore International Arbitration Centre; Arbitration Institute of the Stockholm Chamber of Commerce; and British Columbia International Commercial Arbitration Centre.

136. Christopher Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 ARB. INT'L 291, 299-300 (2006).

137. *News from ICSID* (Int'l Ctr. for Settlement of Inv. Disp., Wash., D.C.), Winter 2007, at 20-21 (reporting statements by Secretary-General, ICSID Ana Palacio noting arbitration's increased role in public policy and international law matters).

138. See Record Year for ICC Court in 2007, <http://www.iccwbo.org/iccbihfi/index.html>.

139. David Azar, Association for Conflict Resolution, Conflict Resolution Reduces the Number of Federal Cases Decided by Juries, http://acrnet.org/acrlibrary/more.php?id=P10_0_1_0_C.

140. *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the S. Subcomm. on the Constitution of the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Richard Naimark, Senior Vice President, American Arbitration Association) (noting that the American Arbitration Association reports that 58% of consumer cases before the AAA in 2006 reached a voluntary settlement).

that the growth will continue.¹⁴¹ In Japan, there is a preference toward consensus-building dispute resolution methods such as mediation and conciliation over litigation due to cultural preferences for options that are more collaborative and less divisive.¹⁴² In China, there are over six million mediators and 950,000 People's Mediation Committees nationwide that resolve over seven million disputes annually.¹⁴³ The China International Economic and Trade Arbitration Commission (CIETAC) estimates that more than half of the international arbitration cases before the Commission are resolved through conciliation and 88% of domestic arbitration cases are resolved through mediation.¹⁴⁴

As the use of IDR processes continues to grow, data about use will become more readily available. Empirical data about IDR is not as prevalent on the public international side as it is on the private side, largely due to commercially-driven reporting demands of institutions that facilitate private IDR. Reporting on the frequency of use of IDR processes is often conducted by IDR service providers or coordination bodies that cater to commercial and other private matters. Data on arbitration is also more common than other forms of IDR, perhaps due

141. See Stephen K. Huber & E. Wendy Trachea-Huber, *International ADR in the 1990's: The Top Ten Developments*, 1 HOUS. BUS. & TAX L.J. 184, 219–20 (discussing the explosive growth in international mediation defined broadly to include conciliation and other voluntary processes); AMERICAN ARBITRATION ASSOCIATION, ANNUAL REPORT (1999), available at <http://www.adr.org> (reporting that the American Arbitration Association's international case load increased by 17% in 1999 "with two trends in evidence—an increasing number of cases that have no U.S.-based participants and the size of the average claim is increasing"); George H. Friedman, *American Arbitration Association Initiatives: Looking Toward the New Millennium*, 6 METRO. CORP. COUNS., 29 (1998). Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, 53 DISP. RESOL. J. 62, 68 (1998) (predicting that the importance of international mediation will increase because "it is traditional to use conciliation as a mechanism to resolve domestic and labor matters and civil disputes of all types" in Asia and because "40% of the U.S. exports are made to Asian countries"); 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.J. 1, 21–22 (1996) (predicting the increasing importance of international mediation because "Naphtha's dispute resolution mechanisms encourage consensus and collaboration over speed of resolution" and because "mediation is ideally suited to achieve many of these goals").

142. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy, in Promoting the Rule of Law Abroad* (Carnegie, Paper No. 34 Jan. 2003) at 32; see also John Owen Haley, *The Politics of Informal Justice: The Japanese Experience 1922–1942*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 2: COMPARATIVE STUDIES 125 (Richard Abel ed., 1982) (providing another account of the Japanese attempt to replace litigation with conciliation).

143. JAMES ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 834 (ABA ed., 2005) (citing *Civil Dispute Mediation Committees* (BBC Oct. 19, 1991)).

144. *Id.* at 835.

to the absence of negotiation- or mediation-centric organizations that exist for arbitration, like the WTO's Dispute Settlement Body and ICSID, which collect and publish data. Collecting data on long-term compliance behavior for IDR is challenging because of high costs, lack of established measurement criteria, and its time-consuming nature.

IV. IDR AND STATE BEHAVIOR: LINKING PROCESS TO COMPLIANCE

The first two central claims of this Article have been presented: that international legal process theory offers a comprehensive analytical framework for describing and analyzing state behavior, and that in order to remain accurate international legal process theory must be expanded to include the other kinds of processes states use. This section applies the analytical framework to describe the interplay between IDR and the factors and tools that influence state behavior. IDR's unique influence on states, particularly its ability to foster compliance with international law, is then examined.

A. *Analyzing How IDR Affects State Behavior*

This section explores how IDR uniquely advances criteria that influence state behavior and describes how IDR has the potential to foster greater state compliance with international law. Given the vast number of possible elements, in-depth analysis of any one element remains the aim of future work. For purposes of this analysis, factors refer to the elements that constitute state behavior and tools refer to the mechanisms through which behavior can be influenced. This analysis considers the impact on both on state actors as well as the individuals that represent states. Although the focus here is on IDR, this framework could be used to analyze other processes.

1. Through Factors: Interests, Identity, Rights, Legitimacy, Reputation, Emotions

Interests

International law primarily considers the *rational* interests of *state* actors. This disqualifies the interests of other important stakeholders like non-state actors or unrecognized political entities. It also fails to consider the wider range of interests that affect decision-making, such as emotional factors. The approach in IDR is different. IDR facilitates the inclusion of more parties' interests into the process. During the conflict assessment phase, all of the stakeholders' interests are exam-

ined, including parties that are not at the table. Inclusion of traditionally unrecognized actors allows for a more comprehensive and accurate assessment of goals and problems, which improves process design. IDR also widens the scope of interests that may be considered by analyzing all of the potential interests that form an asserted position. These include rational interests, but also interests that are based on needs, identity, and a host of other factors. Recognizing that emotions and personalities play an important role in behavior, IDR processes elicit the emotional aspects of human nature that international legal processes often discourage. IDR recognizes that nations are ultimately represented by individuals, so a process designed to address the complexity of human nature will be more effective at influencing state behavior. These aspects of IDR are intentional. IDR processes are structured to induce collaborative bargaining in order to achieve outcomes that provide mutual gains.¹⁴⁵ IDR literature has shown how parties can achieve more optimal outcomes through engaging in a mutual gains approach rather than a traditional hard bargaining approach to negotiation. IDR's benefits have been documented in places such as Nepal where IDR's success has been attributed to its ability to embrace the full set of needs and interests of those involved in problem-solving, to deal with legal and non-legal matters and to provide for contextual sensitivity.¹⁴⁶

IDR offers techniques for eliciting information about state interests. Mediators or conciliators utilize tools to encourage diplomats and decision-makers to think beyond their original positions to the underlying interests and needs. Mediators may use reality testing to help parties affirm what is essential to reaching an agreement. The formal process of mediation, its confidentiality, and its face-saving attributes encourages parties to coordinate information and seek resolution. At the person-to-person level, mediators may use acknowledgement, reframing and caucusing to facilitate more honest negotiation between parties and to move the discussion toward emotional concerns that often block rational thinking. Even direct negotiations can benefit from a third party that facilitates the exchange of information about positions and interests using tools of convening, the single-text ap-

145. FISHER & URY, *supra* note 88, at 10–11.

146. Cohen, *supra* note 71, at 353; *see also* Laura Nader, *The Recurrent Dialectic between Legality and Its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621, 644 (1984) (reviewing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983)).

proach, and stakeholder identification.¹⁴⁷ Negotiation uses coordination and acculturation to shape interests and form outcomes with which parties want to comply. Negotiation has been used to achieve secondary compliance when a party to an international court case refused to comply.¹⁴⁸ In *Lena Goldfields*, a noncompliant Soviet Union refused to follow the court's award until the matter was raised during trade negotiations with the UK.¹⁴⁹

In order for peace agreements and other deals to last in the interstate conflict setting, an arrangement must address the needs and interests of as many of the stakeholders as possible and account for changes in the future. Crocker, Hampson, and Aall call this "reaching out" and "reaching down."¹⁵⁰ Decision-makers who are at the table forming and ultimately reaching agreements must work to ensure that the groups they represent, in some cases domestic constituents, are informed and engaged so that their needs will be considered by the agreement. This component, although not easy, is possible and essential to ensuring long-lasting compliance, as is demonstrated by Cambodia's peace process in the early 1990s, which included representatives from the UNSC in addition to regional and local groups. Another example is the 1988 Namibia-Angola settlement, which was structured to include not only parties to the conflict, but also outside stakeholders whose participation in the peace process would ultimately be essential to achieving successful outcomes.¹⁵¹

147. See Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, in CONSENSUS BUILDING HANDBOOK, *supra* note 103, at 3, 33, for a detailed description of these facilitation tools. The single-text approach is a tool used to create agreement through the collective revision of one document. Stakeholder identification is a strategy for identifying representative stakeholders and the intensity in which they should engage in the process.

148. See COLLIER & LOWE, *supra* note 6, at 264.

149. *Id.*; see also V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 INT'L & COMP. L.Q. 747 (1998); Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31, 36-37, available at http://tldb.uni-koeln.de/php/pub_show_content.php?page=pub_show_document.php&pubdocid=127500&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=959000.

150. CHESTER A. CROCKER ET AL., TAMING INTRACTABLE CONFLICTS: MEDIATION IN THE HARDEST CASES 178-84 (2004) [hereinafter CROCKER, TAMING INTRACTABLE CONFLICTS].

151. *Id.* at 179 (noting the need to include international, regional, and domestic interest groups in the agreement-formation process in order to make the settlement "stick" and offering process design suggestions to do this).

Identity

Identity considerations play an important role in influencing behavior. Identity is the image a state has about itself and projects into the world.¹⁵² States are considered small or large depending on their political and economic resources.¹⁵³ Labeling a state (e.g., authoritarian or democratic) shapes perspectives about its intentions and motivations and affects how leaders will engage in cooperative problem-solving.¹⁵⁴ Identity can be a source of conflict, as demonstrated by the genocide that occurred in Rwanda. Yet it can also be a source of resolution. In Northern Ireland, mediators helped the parties move past identity-based conflict by creating a vision of a future joint identity with increased economic incentives.¹⁵⁵

The identity of individuals involved in state use of IDR is also relevant. For instance, before the U.S. government enters into treaty negotiations, hundreds of people within various government agencies must work through an inter-agency process to formalize the U.S. position. While this is state behavior, it also involves sustained interaction among individuals, who form relationships with one another. Thus, how people work together in a process, as well as the distinct identities of the people involved, ultimately affects the outcome. Our perceptions and preferences are filtered through who we are. Culture, age, gender, family background, and religion are just a few of the many factors that form identity and affect perception.¹⁵⁶ IDR helps bring these complexities to the surface. During the assessment phase, parties deconstruct their positions, interests, and underlying identity considerations, allowing participants to develop informed perceptions about their own identities as well as those of their counterparts. By breaking the analysis down to this elemental level, parties become aware of how these elements are contributing to their interests and ultimately to their decisions. Fact-finding and fact-sharing help parties become aware of how these elements are shaping others' outcomes. By doing

152. CROCKER ET AL., *TAMING INTRACTABLE CONFLICTS*, *supra* note 151, at 191; *see also* James M. Goldgeier, *The Role of Political Psychology in Rethinking Security Studies* (unpublished paper) (1997) (discussing the condition under which identity and violence are related, e.g. violence between Hutus and Tutsis in Rwanda).

153. CROCKER ET AL., *TURBULENT PEACE*, *supra* note 18, at 11.

154. *Id.* at 191.

155. *Id.* at 788, 792.

156. *See* Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT'L L. & INT'L REL. 151, 166 (describing the interplay between culture and identity).

so, a party that has shifted from interest-based decision-making into identity-based decision-making can reengage in an informed and constructive way. IDR helps parties set realistic expectations and promotes satisfaction with the process—factors essential to motivating voluntary compliance. For example, during the conflicts that surrounded Namibia's movement toward independence in the late 1980's, mediation and negotiation were used to end hostilities and pave the way toward independence in 1990.¹⁵⁷ IDR was successful for the following reasons: the mediator, being from the United States, had leverage, used a negotiating strategy that integrated stakeholder interests and rights into the process, and had sufficient and long-term resources. The mediation process also included a national reconciliation process designed to promote forgiveness and nation-building, which changed parties' behavior because it helped people reframe their identities and thus change the dynamic of the conflict. Victims and perpetrators were humanized. The IDR process was designed to encourage people to see each other as individuals, allowing them to coordinate interests, stimulate empathy, and promote reconciliation. This example illustrates how IDR can be used effectively to influence identity.

Rights

Legal systems aspire to protect rights. Laws are set up to establish sovereignty, territory and property rights, protect human rights, interpret universal rights and advance the civil rights of vulnerable groups in society. Rights can become a language of hierarchy. In the international legal system, states are afforded more rights (and responsibilities) than the individuals within a state or non-state actors. Identity becomes a prerequisite for determining which parties may adjudicate rights in certain forums (e.g. the International Court of Justice). Disputes are resolved by interpreting the parties' rights in accordance with the law leading to questions about the enforceability of international legal judgments. Yet not all rights are universal nor are they universally applied. Many sources of international law were established by relatively few nations and serve to protect their interests. Thus, states who were not involved with the creation of the law or the formation of the adjudicative forum may avoid adjudication when they disagree with these pre-established rights. The debates between the UN General Assembly and the UN Security Council illustrate this tension. When

157. FEN OSLER HAMPSON, *NURTURING PEACE: WHY PEACE SETTLEMENTS SUCCEED OR FAIL* 53–58 (1996).

rights are enjoyed by only a few or deemed to be absolute, they can become non-negotiable and thus a source of conflict.

IDR approaches rights by treating them as components of the dispute. A conflict arising over interests may be expressed in the language of rights. By shifting the language back to interests, parties can reengage in problem-solving behavior based on creating value and collaborating to achieve common goals. Other aspects of IDR are also important. For example, increased participation in the process can provide participants with a sense that their rights are being protected even absent a formal court proceeding. Bangladeshi women who participated in community mediation reported that they “believe that they receive better protection and more compensation . . . than from the formal court system.”¹⁵⁸

However, a tension can form between problem-solving and promoting rights and justice. Truth and reconciliation commissions (TRC) are IDR mechanisms designed for the purpose of promoting forgiveness and healing among many people after a mass-trauma has occurred; the primary purpose is not to adjudicate crimes or protect the legal rights of victims. TRC’s have been used in many countries around the world, most notably in South Africa and Northern Ireland. Alternatively, after the mass-atrocities in the former Yugoslavia and in Rwanda, ad-hoc adjudicative tribunals were set up to hold perpetrators legally accountable for their crimes.¹⁵⁹ The costs and benefits of both approaches must be closely examined to determine the best method for future use. Perhaps the existing either-or model can be exchanged for options designed to achieve the desirable outcomes of both.

Legitimacy

International law lacks centralized authority, but centralized authority is not the only way to achieve legitimacy and accountability.¹⁶⁰ IDR

158. CENTER FOR DEMOCRACY AND GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS’ GUIDE 14 (1998); Cohen, *supra* note 71, at 337–40 (exploring the use of “rights-based” mediation in Nepal); see also C.J. Larkin & Pamela A. DeVoe, *Community Mediation in the Shadow of Revolution: The Nepal Experience*, ACRESOLUTION, Summer 2006, at 20 (describing the use of rights-based community mediation in Nepal); Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 576 n.44 (2007).

159. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW—BEYOND THE NUREMBERG LEGACY 190–91 (2d ed. 2001) (discussing the establishment of the International Criminal Tribunal for the former Yugoslavia); *id.* at 201–02 (discussing the establishment of the International Criminal Tribunal for Rwanda).

160. See Raustiala, *supra* note 79, at 430.

also provides tools that build these elements. Legitimacy is defined as the perception that an actor (individual or organization) has the right to intervene in a conflict, make a decision, and enforce an outcome.¹⁶¹ Mediation makes parties want to comply because it promotes creative problem-solving, legitimacy, cost savings, more complete and durable solutions, and improved reputations.¹⁶² A powerful and impartial mediator who has legitimacy and credibility is able to induce compliance. This was the role the UNSC played in putting forth the June 1967 Middle East ceasefire, which parties complied with because the demand came from the UN.¹⁶³ IDR also reduces barriers to forming agreements. For example, mediation overcomes uncertainty by providing structured information exchange, balancing power dynamics and ensuring a fair process.¹⁶⁴ Even when mediations fail, they still facilitate fact finding for subsequent processes and can improve understanding between parties.¹⁶⁵ IDR also builds accountability into the process, creating feedback loops where parties monitor and rely upon each other. Improved accountability helps to establish credibility, improving the legitimacy of the parties and the process. These factors improve coordination between the parties by promoting dialogue, communication, and collaboration.

Reputation

Reputation is a strong behavioral-motivation factor.¹⁶⁶ A nation's concerns about preserving, repairing, or advancing its reputation can encourage participation in agreement-formation or dispute-resolution processes and compliance with outcomes. IDR processes can highlight or protect participants' reputations. Sometimes political pressure is needed to motivate parties to participate in a negotiation or peace process. Given the collaborative nature and problem-solving focus of

161. Bercovitch, *supra* note 85, at 260.

162. *See id.* at 261–62 (concluding that the success of mediation depends on the confluence of all of the factors discussed—context, nature of the stakeholders, timing, strategy, mediator behavior, etc. of all parties and ability to finalize agreements).

163. FISHER ET AL., *supra* note 62, at 235–36 (discussing the UNSC decision regarding the Suez Canal).

164. CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 336 tbl.3 (2006).

165. *Id.* at 337–38.

166. *See* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1239 n.23 (2004). *See generally* Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002).

IDR, parties may be encouraged to participate so they can enjoy the reputational benefits of being viewed as a team player. A mediator can invite both parties to participate, taking the blame if the process dissolves while allowing the parties to receive credit if the process succeeds. The confidential nature of mediation also encourages participation when reputations are at risk. Ultimately, parties must weigh the risks and benefits to reputation with those of other factors like interests or rights. Once involved in the IDR process, that participant may find other motivations for participating. The opposite can also be the case. Sometimes states avoid participating when their political reputation would suffer. A state may want to negotiate with another state, but does not want to be the one to extend an offer. IDR processes like mediation and conciliation are used in inter-state political matters because of their confidential nature and face-saving benefits. This design element of IDR offers a benefit to states, namely a chance to improve or regain reputation, which becomes an interest. In low-stakes situations, parties may comply with outcomes because the reputation benefits outweigh the costs. Reputational benefits are particularly important in the inter-state context for politically sensitive matters involving questions of foreign policy that affect large numbers of people.¹⁶⁷

Emotions

IDR approaches are based on an understanding that influencing behavior requires changing not only minds but also emotion. According to Gardner the five primary ways to change minds are 1) reason—change the way people think; 2) research—present new content that changes what people think; 3) resonance—change minds because of relation between mind-changer and change, i.e., you like them, they like you, credibility, legitimacy, accountability, etc.; 4) resources—new options become available making the impossible possible; and 5) changed circumstances—events occur that modify the context.¹⁶⁸ Thus, thinking that informs behavior can be changed through new information and through emotion.

IDR has the capacity to address such underlying emotional factors that are present in conflicts. Every dispute has a negative emotional element. IDR encourages parties to understand what is producing

167. CROCKER ET AL., *supra* note 18, at 24–25.

168. HOWARD GARDNER, CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS 15–18 (2006).

negative emotions.¹⁶⁹ Sources include identity issues, concerns about reputation, and the need for respect. In IL, emotional concerns are channeled into intellectual concerns resulting in discussions about rights or power instead of bruised reputations, for example. IDR not only recognizes emotional elements, it also provides techniques for constructively dealing with them as elements of conflict. Mediators often use reframing as a technique to inform content. Updating information, whether through reframing, storytelling or other methods is a proven technique for influencing behavior.

In legal systems, behavioral change of individuals is achieved through deterrence models that apply a fine or penalty if a person takes a certain course of action. The logic behind this model assumes the penalty will cause the person to behave differently in the future. When effective, this system merely prevents a certain type of behavior, but it is not designed to address the underlying cause. IDR-based systems transform behavior by addressing the emotional aspects of a conflict. One good example is when mediation is used in victim and offender reconciliation programs as an alternative to the criminal legal system. A woman is driving her car on the freeway when her windshield shatters and almost causes a massive accident. The two young boys who had shot BB pellets at her car were arrested and the case was referred to mediation by the district attorney. During the session, the women exploded angrily at the boys and they responded with tears and apologized. They began to realize that their actions almost cost this woman her life. As a part of the mediation settlement agreement the boys agreed to wash the woman's car once a month because they did not have the money to purchase a new windshield. She was nervous at first but after several months, she came to trust them to be reliable and do a good job. The relationship evolved as they helped her with more tasks. Eventually, the older boy decided to go to college with her encouragement and she paid for his tuition.¹⁷⁰ This story illustrates how emotion is a key factor of conflict and how IDR-based processes are designed to transform even the most difficult aspects of fault, revenge, restitution and remorse into constructive outcomes.

169. *See generally* ROGER FISHER & DAVID SHAPIRO, *BEYOND REASON* (2005); *see also* FISHER & URY, *supra* note 88, at 30.

170. KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 85 (2001).

2. Through Tools: Coercion, Persuasion, Acculturation,
Participation, Coordination

Coercion

Coercion is the use of power to change state behavior against its will. It can be understood as the use of threats (sanctions, removing political or diplomatic support, reduction in aid, etc.) to induce compliance.¹⁷¹ Realists commonly assume that international conflicts between states are ultimately settled by coercive measures.¹⁷² However, coercion has its limitations. First, it can fail to achieve long-term results. Once the coercive measure has been lifted, not only do states frequently resume the undesirable behavior but the negative sentiments that follow often lead to retribution. Second, the costs associated with enforcing first order compliance are expensive and take resources away from dealing with the situation coercion sought to resolve in the first instance.¹⁷³ States use sanctions to pressure a state to change its behavior by “raising the cost to an adversary of pursuing a course of action” the other side does not like.¹⁷⁴ Although sanctions have been successful, when they fail it is often because they create a situation where the coerced state becomes invested in the adversarial relationship and entrenched in their opposing course of action, not motivated to change it.¹⁷⁵ For example, one state may respond to another by withholding something they assume to be of value (e.g., preferential trade treatment, finances, military support). Entrenchment occurs when the coerced state concludes that if it has already lost most of its privileges it is not going to give in now to save the few that remain. This demonstrates how the use of coercion to increase pain is often an ineffective strategy for behavior change. When incurred costs do not influence change, marginal shifts in future costs are not likely to produce change.¹⁷⁶ Trying to reverse a decision through coercion is unlikely to yield results due to natural inertia, preventing reconsideration of past decisions and producing negative implications of perceived reversal of a prior decision.¹⁷⁷

IDR recognizes the importance and prominence of coercive measures. Coercion and military force were used in conjunction with

171. Bercovitch, *supra* note 85, at 260.

172. Kriesberg, *supra* note 61, at 65.

173. FISHER, *supra* note 63, at 194.

174. *Id.*

175. *Id.* at 195–96.

176. *Id.*

177. *Id.* at 196–97.

mediation to secure an end to the active violent conflict in Bosnia resulting in the 1995 Dayton accords.¹⁷⁸ Yet U.S. and NATO forces are resources not readily available for most international conflicts. IDR offers alternatives. Coercion relies on a weaker party that is uninformed about tactics and options. IDR empowers parties about coercive tactics so that they can recognize and call other participants on their use of such tactics, resulting in the reduction of coercion.¹⁷⁹ For example, clear determination of BATNAs (best alternative to a negotiated agreement) arms parties with power in a negotiation because they help parties know their walk-away point, which protects them from making a bad deal.¹⁸⁰ The use of coalition-building to form allies often strengthens the position of weaker states, as has been the case for the Group of 77 at the United Nations.¹⁸¹ It is important to understand the limits of coercion and to offer other alternatives. In order to change state behavior over the long-term, states must be influenced in ways that do not require continuous enforcement because the international system is not set up to effectively force a state to behave a certain way indefinitely.

Persuasion

Persuasion is technique for changing behavior that involves influencing through information, incentives, norms, and other factors. IDR encourages the use of persuasion through mutual-gains negotiation theory as well as by encouraging information sharing, which leads to coordination. Mediators and conciliators use persuasion to motivate disputants to seek common ground through their ability to portray an alternative future that is more favorable than continuing the conflict.¹⁸² Promoting full information exchange and good relations are

178. CROCKER ET AL., *TAMING INTRACTABLE CONFLICTS*, *supra* note 151, at 169.

179. See Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002) (describing participation in dispute resolution procedures as an alternative to sanctions for enforcing IL rules and commitments).

180. FISHER & URY, *supra* note 88, at 97.

181. The Group of 77 is a loose coalition of developing nations to further economic interests. It was founded in 1964 by joint declaration at the first session of the UN Conference on Trade and Development. Group of 77 at the United Nations, About the Group of 77, <http://www.g77.org/doc>.

182. CROCKER ET AL., *TURBULENT PEACE*, *supra* note 18, at 437 (noting the use of persuasion by then Secretary of State Henry Kissinger and President Jimmy Carter as they mediated between Egypt, Syria and Israel in 1978).

criteria of effective problem-solving.¹⁸³ Mediators may persuade parties to engage in IDR by using elicitive techniques that gain trust and allow the mediator to reframe options.¹⁸⁴ Yet mediators must take caution not to let persuasion turn into coercion because it could threaten the mediator's neutrality and derail the process. Persuasion is a tool that can lead to coordination, collaboration and problem-solving.¹⁸⁵ Persuasion may be viewed as a secondary alternative to coercion when the use of force is not an option, yet sometimes it is the most preferable tool. The example of the 1998 Good Friday Agreement is a good example.¹⁸⁶ Using coercive measures to pressure paramilitary groups in Northern Ireland to decommission had not proven successful.¹⁸⁷ Instead, these groups were persuaded to participate in an IDR process that would create a power-sharing framework, elections and joint governance. Creating such a process allowed the various stakeholders to assess and pursue their own interests in coordination with the other parties. Thus, persuasion was the primary tool for influencing behavior change in this example.

Acculturation

Acculturation is the exchange of cultures that takes place when groups interact.¹⁸⁸ As a tool of influence, acculturation works by encouraging assimilation with the dominant culture. For example, when delegates to the UN adopt "dip talk," they are assimilating into the dominant diplomatic culture despite the differing national identities, ethnicities and languages.¹⁸⁹ Acculturation is cited as being particularly helpful in international human rights organizations. These inter-

183. See Pruitt, *supra* note 21, at 43–44 (noting the criteria of effective problem-solving: firm flexibility, good relations between the parties, full information and reframing).

184. CROCKER ET AL., *TAMING INTRACTABLE CONFLICTS*, *supra* note 151, at 14.

185. Scholars have observed that emerging new forms of governance require greater skills in negotiation and collaboration. See, e.g., AGRANOFF & MCGUIRE, *supra* note 80; Bingham et al., *supra* note 80; THE TOOLS OF GOVERNMENT, *supra* note 80.

186. CROCKER ET AL., *TAMING INTRACTABLE CONFLICTS*, *supra* note 151, at 174–75.

187. *Id.*

188. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 638 (2004).

189. Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003) (discussing how acculturation is particularly effective when states belong to a social club by participating in a particular international regime and demonstrating how acculturation is used as a socialization process to influence states to adopt international norms, particularly in the human rights context although it can be distinguished from persuasion because although acculturation can occur through the use of persuasive tactics, like shaming and back patting, this

national processes help to acculturate parties to consider international law when making decisions. Although IL scholarship debates the merits of acculturation, it is generally recognized as a tool for influencing state behavior.

Acculturation takes place during a mediation or negotiation when parties become highly motivated to reach an agreement due to IDR's cultural focus on interest-based collaboration and problem-solving. The principal-agent¹⁹⁰ problem illustrates how parties involved in a process have different perceptions (different interests and incentives) of the terms of an agreement than decision-makers who are not present. Many diplomats have experienced this when, after achieving a seeming breakthrough in negotiation, they place a call to headquarters only to be told "no deal." Participants in the decision-making process become acculturated in a way that non-participants do not.

A good example of how an IDR process enhanced acculturation is the case of the United Nations Compensation Commission (UNCC). The UNCC was formed by the UN Security Council in 1991 to process claims and provide compensation to parties injured by Iraq's invasion into Kuwait.¹⁹¹ This quasi-judicial body was the first of its kind within the UN. In the context of the UNCC multilateral negotiation, mediation and facilitation all take place among the UNCC Secretariat, Governing Council, representatives of claimants' countries and international organizations, and representatives from Iraq. These four categories of stakeholders used IDR processes to engage in decision-making and problem-solving during the course of the UNCC's operation. Together and through this process the UNCC successfully resolved over 2 million claims and awarded over \$52 billion in compensation within just fifteen years. The efficiency of this body was paralleled by its effectiveness in achieving its purpose. The UNCC has currently disbanded its secretariat, a rare example of a UN organ that is shutting

use takes place within a larger social context). *But see* Alkoby, *supra* note 159, at 173–74 (arguing that acculturation relies on the misassumption of one dominant culture).

190. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238–39 (1993) (defining the principal-agent problem and discussing how it can be a barrier to reaching agreement).

191. The UNSC adopted resolution under Chapter VII of the UN Charter, S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991), finding liability of Iraq and delegating adjudication/fact-finding to a newly created sub-body, the UNCC. UN Security Council decisions are binding on Member States. U.N. Charter art. 25. UNSC decided that Iraq was liable leaving quasi-judicial functions to the UNCC Secretariat vs. Governing Body who implemented a hybrid IDR process paving the way for state collaboration on the implementation of environmental remediation in the Gulf through the F4 environmental awards.

down operations because its job has been completed.

Of all the claimants that came before the UNCC, the F4 category was reserved for countries that sought compensation specifically for environmental and ecological damage caused by Iraq's invasion of Kuwait. The UNCC awarded these claimants over \$1.1 billion in compensation. These claimants include certain Gulf states that do not enjoy stable and strong political relationships with each other. In this instance, these nations decided to pool compensation and work together to address the problem of environmental remediation in the Gulf. In my observation, this surprising alliance was due in large part to the recognition that the environmental problems—water pollution, species decline and land pollution, to name a few—went beyond one state's borders and required multilateral cooperation to successfully remediate the damage. These informed stakeholders who shared a common goal were motivated to work collaboratively to solve the problem. The UNCC Secretariat served as a neutral convener and was able to coordinate the parties' interests, manage expectations and facilitate a process to develop a regional environmental remediation program. Despite the larger political differences, these countries used IDR to solve a collective problem (environmental remediation in the Gulf) and form agreements that they are now implementing. This took place within the UNCC—a culture that supported and promoted IDR thinking.

Participation

IDR processes maximize participation. Whether the process is to make a decision, resolve a conflict, or reach an agreement, IDR processes are designed to be as inclusive of all the stakeholders as possible. The benefit of maximizing participation by stakeholders is not always found in reaching an outcome, but in achieving compliance with the outcome. The more participants involved in the process, the more complicated it can become. The IDR perspective advocates having key stakeholders participate at appropriate stages of the process and offers ways to keep others informed and included. Participation breeds a sense of ownership of the process¹⁹² and allows for the internalization of norms. The logistics of who convenes the process, as well as how and when the process commences, affect participation levels and satisfaction rates. Stakeholder participation at the early stages of the process is highly recommended. Ability to participate is

192. Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in CONSENSUS BUILDING HANDBOOK, *supra* note 103, at 61, 62.

determined by those affected by the process. Maximizing participation in the process increases the likelihood of achieving compliance over the long term. For example, if parties find that they cannot comply due to resource constraints, they can better facilitate renegotiations if they were participants in the first round. Risks that non-participants will form coalitions to block a process from being implemented are also minimized.

Participation was an important aspect of the formation of the 1999 Treaty for the Establishment of the East African Community. The lead mediator, Umbricht, designed a participatory law-making process where a draft of the treaty was widely disseminated among East Africans with the goal of eliciting their comments.¹⁹³ In this way, the principles of high participation found in IDR developed out of a mediation effort and spread into the public policy realm. By informing the governed about the law and eliciting their participation in determining the outcome, the process helped shape participants' interests and ultimately led to the successful adoption of the treaty.

Mediators with high status often induce elevated levels of participation because of the propensity for parties to yield to suggestions from a powerful or highly-esteemed source.¹⁹⁴ This was the case when former President Jimmy Carter met with North Korea in 1994 and relayed a message to President Clinton about North Korea's willingness to negotiate, thus preventing escalation.¹⁹⁵

Coordination

Coordination, a concept common in game theory, functions by organizing information. The classic Prisoner's Dilemma game illustrates how parties can achieve maximum outcomes through coordination that they may not achieve operating in isolation.¹⁹⁶ Coordination theory explores the challenges that states or other actors may face when they have common interests but fail to reach an agreed or optimal

193. KHOTI KAMAGA, SOME CONSTITUTIONAL DIMENSIONS OF EAST AFRICAN COOPERATION, <http://www.kituoachakatiba.co.ug/Constm%202001%20%20Khoti%20EAC.pdf>.

194. Pruitt, *supra* note 21, at 51.

195. *Id.* (citing R. Jeffrey Smith and Ann Devroy, *Carter's Call from North Korea Looms Large*, WASH. POST, June 26, 1994, at A1).

196. See Kriesberg, *supra* note 61, at 85 (describing the Prisoner's Dilemma as a model where two suspected criminals cannot communicate with each other but have to choose one of the following options: confess or remain silent. If both confess, they go to prison. If both remain silent, they go free. If one confesses, the other serves time. This demonstrates the classic coordination problem often discussed in game theory).

outcome.¹⁹⁷ Coordination considers the complexities that nations face in organizing aligned and conflicting interests.

IDR processes are designed to serve as coordination mechanisms. Negotiation, arbitration, mediation, and conciliation can all be used to facilitate the exchange of information among the maximum number of stakeholders, creating environments that foster increased access to and sharing of information. These processes also help parties cooperate with each other to select one plan when multiple options are available. Coordination helps when states need to pick the same option to achieve the optimal outcome. Through negotiation, parties are able to reach agreement in principle and on the specific steps needed to implement outcomes. According to Bercovitch, full-information exchange is one of the essential elements for effective problem-solving behavior in international mediation.¹⁹⁸ A common demonstration is the orange dilemma. An orange is divided in equal halves and given to two parties. Both parties assert the position that they want the entire orange, so neither party is happy with the initial outcome of equal division. Using a mutual gains model of negotiation, the parties exchange information about their underlying interests. One side wants to make orange juice and the other wants to make orange meringue. One needs the entire orange and the other needs the entire peel. A trade is arranged and both parties achieve optimal outcomes. In this way, IDR provides processes that help coordinate information and interests among parties, leading to voluntary compliance.

Coordination occurs by clarifying ambiguities and providing signals. A study by Ginsburg and McAdams suggests that states comply with international rules that cannot be enforced through sanctions when international courts rule on state obligations to comply (and when the situation involves a coordination context) because courts clarify ambiguities and courts provide signals that cause parties to update beliefs about facts that both affect decision-making and influence behavior.¹⁹⁹ In addition to judges, mediators, conciliators, and other third-party neutrals also provide these functions.²⁰⁰ Coordination works in conflict settings to motivate parties to settle disputes when parties recognize that they need to work together to overcome costs or avert future risks. For example, the PLO and Israel recognized the threat of a common

197. Ginsburg & McAdams, *supra* note 167, at 1243 n.35.

198. Pruitt, *supra* note 21, at 43–44. *See generally* RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

199. Ginsburg & McAdams, *supra* note 167, at 1229.

200. *See* BLUM, *supra* note 74, at 62.

enemy— Hamas— and were motivated to support each other after the 1992 election of Rabin as the Israeli prime minister.²⁰¹ Both groups relied on the other for political power to counter Hamas.

B. *IDR's Unique Influence on State Behavior*

The analysis above demonstrates how IDR advances the criteria affecting state behavior. This section presents two reasons why IDR influences state behavior. First, the nature in which states engage in IDR makes them more willing to absorb its normative influences. Second, IDR's assumptions offer a more accurate platform for the analysis of state behavior.

1. IDR Fosters Permeability and Therefore Absorption

People distinguish between how decisions are made and the substance of those decisions.²⁰² States are more likely to participate in a process or comply with an arrangement if they elect to do so. IDR represents a category of tools that are used voluntarily. When states elect to use a form of IDR, they understand its voluntary nature and are thus more open to the process. Open engagement creates an environment of high permeability, which fosters absorption. Stated differently, because of IDR's voluntary nature and flexible design, participants are more open to the experience and thus are more susceptible to its influence. Openness allows the norms of IDR to influence what states value and what their interests are. The culture of IDR is malleable—it can adjust to the parties and the parties can adjust to it. This back and forth dynamic creates the permeable membrane between process and actors that fosters the absorption of influence. When state engagement in IDR occurs in a climate of problem solving, collaboration, and flexibility this helps participants engage with openness. This creates permeability, allowing for the ways that IDR influences norms, factors and tools to be absorbed. The logic is that the more open states are to the possibility of problem-solving when they come to the negotiation table or use mediation, the more influence the process will have on them.

201. Pruitt, *supra* note 21, at 49.

202. TYLER, *supra* note 20, at 5.

2. IDR Processes Correct for Common (Mis)Assumptions in International Law

IDR processes of negotiation, conciliation, mediation, and arbitration are methods parties use to make decisions, form agreements, and resolve disputes. While all of these processes differ from one another, they share a set of common assumptions and core principles that both relate to and diverge from those in international law. Many scholars subscribe to the following assumptions about actors in the international legal system: a few powerful states created the existing set of international laws, states are good at assessing self-interests, and states can accurately anticipate the actions of others.²⁰³ IDR methods are not based on these assumptions and, in fact, characterize many of them as imperfect. Instead, IDR makes the following assumptions.

First, actors' perceptions of reality often do not accurately reflect reality because truth and reality are subjective. The concept of inattentional blindness discussed in Part I helps to support this argument.²⁰⁴ Another illustration is a common perception game used in negotiation training that asks participants to look at an image and count the number of squares they see. Answers among participants vary widely from a small to a large number of squares. There is one correct answer to the puzzle, but the majority of participants fail to arrive at an accurate count. Tools like this perception game are used to teach actors that their perception of reality varies widely from others' perceptions of reality and their perception of an objective situation can be, and often is inaccurate. This illustrates a core principle in IDR theory—assumptions can be mistaken and misleading, so actors must rely on information-gathering techniques to assemble precise information. IDR techniques like stakeholder assessment, conflict mapping and the “single text” approach used during the assessment phase of a process facilitate objective information gathering. This design enhances coordination within and among the parties through information sharing and signaling, illustrating how IDR affects an element of behavioral motivation.

Second, actors are not always good at assessing their own interests. It is not enough to assume that states are acting in their best rational

203. Robert Keohane, Comment, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 493 (1997) (discussing common assumptions that a) states are good at assessing self-interests and anticipating the actions of others; b) a few powerful states made the rules and want to enforce them; and c) coordination and assurance situations are common).

204. See Simons & Chabris, *supra* note 90, at 1059–74.

interests because actors within states often have imperfect information, motives or expectations. For example, Burma's decision not to allow foreign aid for cyclone victims is arguably in its best interest. Burma's government has been controlled by the military since 1962.²⁰⁵ Leaders have a strong interest in maintaining absolute authority over the state and portraying an image of ultimate control to the public. Allowing aid workers could risk public scrutiny of the regime, highlighting its inability to accurately assess the damage, count the deceased, and arrange for the logistics necessary to administer aid. Publicity of these facts could spark insurgency and public outcry, running the risk of civil instability. From the government's perspective, the cost of these threats could outweigh the benefit of accepting help with the humanitarian crisis. Framed from a rationalist viewpoint, Burma's decision to close its borders could arguably be said to represent the state's best rational self-interest.

Approaching the crisis in Burma from an IDR perspective would begin with assessing the situation. Assessment is necessary to uncover the government's interests and concerns. There is no assumption that Burma will operate in its rational best interest. By reframing the information to decision-makers, IDR can help make Burmese officials aware of their choices and the costs (including externalities) and benefits that follow. This information can empower informed and more productive decision-making, providing opportunities for maximizing optimal outcomes and enhancing problem-solving. For example, educating parties to consider their BATNA and their reservation point (the point at which it is better to walk away from the deal than agree) compels actors to analyze how to utilize their available assets to reach not just an agreement, but an optimal agreement.²⁰⁶ These techniques highlight the importance IDR places on self-assessment and foster conditions that maximize gains and promote voluntary compliance.

Third, actors are often ill-equipped to accurately evaluate other actors' interests, particularly when identity issues are involved. IDR emphasizes the need for actors to view a situation from multiple perspectives in order to reach an optimal outcome. This can be achieved through both empathy—seeing the other in oneself—and perspective-taking—understanding the other person's point of view. A recent study suggests that perspective-taking is the better approach for

205. See Central Intelligence Agency, CIA World Factbook—Burma, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html#Govt> (last visited Mar. 19, 2009).

206. FISHER & URY, *supra* note 88, at 97–103.

negotiation where the use of empathy may be preferable in a mediation setting, particularly when dealing with identity issues.²⁰⁷ IDR processes build in mechanisms that promote multiple perspective-viewing through the use of assessment tools like stakeholder assessments and conflict maps. A stakeholder assessment uses a neutral and authorized convenor to survey stakeholders in an effort that results in a comprehensive understanding of all the stakeholders' interests.²⁰⁸ When an identity issue is at play, the ability to see other parties' perspectives often becomes occluded, as described by the inattentional blindness concept previously mentioned. Hard bargaining tactics are frequently used to obscure an actor's true interests, resulting in reduced communication between stakeholders. Facilitation and mediation are designed to reopen the channels of communication when direct communication fails.

C. *IDR's Effect on State Compliance*

Assessing how IDR influences factors and tools that influence state behavior and understanding why IDR has the ability to influence states in distinctive ways offer important insights for the larger field of international legal process theory. The final aim of this Article is to analyze whether IDR can, in fact, advance these criteria in ways that foster greater state compliance with international law. Demonstrating this claim relies on two things.

First, the descriptive analysis above illustrates how IDR can encourage factors, like legitimacy, that have been linked to increased rates of compliance. As discussed in the Introduction, Tyler's work provides strong evidence as to why compliance requires establishing and maintaining conditions that lead the public to accept decisions, albeit in the domestic setting.²⁰⁹ This insight is critical because it suggests that states may be able to design international legal processes in ways that will induce compliance.

Second, although limited, empirical studies do suggest a link between IDR and increased rates of compliance with outcomes. Proving this claim requires further research and analysis, but it is important to consider the possibilities that such a claim raises. While the following examples are not direct evidence of the link between IDR and increased compliance, they do connect IDR processes with factors and tools that impact compliance. A 2005 study on international commer-

207. Editorial, *Angry China*, THE ECONOMIST, May 3, 2008, at 58.

208. See generally SUSSKIND ET AL., *supra* note 103.

209. TYLER, *supra* note 20, at 19.

cial arbitration cases reported a 74% rate of voluntary compliance with the outcomes.²¹⁰ This study demonstrates an example where the majority of participants, albeit not states, voluntarily complied with the outcome of the arbitration, even absent a formal enforcement. Studies of ADR use in the United States support the same premise. Susskind reported high rates of compliance with agreements formed using his consensus-building facilitation approach, including a San Francisco regional transit planning effort where a case study documented how processes using the consensus-building criteria were most effective in producing benefits.²¹¹ A housing mediation case reported that an agreement to create approximately 5000 affordable housing opportunities was intact and complied with by the majority of participants ten years later.²¹² A 2003 empirical study on U.S. court mediation programs found that higher participation rates led to higher rates of settlement agreements and satisfaction.²¹³ Another survey-based study on court mediation documented that on average, settlement and satisfaction rates were around 70%.²¹⁴ The study also found that

210. Naimark & Keer, *supra* note 135, at 95–98, presents results from a 2005 survey showing that in 118 international commercial cases (where claimant/filing parties won 100 cases and lost 18) 74 of the 100 awards were complied with in full, 4 achieved partial compliance, and 22 re-negotiated the post award to establish final settlement terms. These results, albeit for commercial arbitration cases, suggest a 74% rate of full-compliance absent formal enforcement mechanisms. The authors suggest that one significant reason for such compliance was the parties' need for finality—either to conserve costs or preserve reputations. In the limited cases of noncompliance, the reasons cited were bankruptcy, disappearance of losing party, non-response, and lack of court enforcement. The lack of a formal enforcement mechanism was one of many reasons cited for noncompliance and was not significant.

211. See generally SUSSKIND ET AL., *supra* note 103 (presenting research that suggests that processes meeting the criteria laid out in the CONSENSUS BUILDING HANDBOOK are most effective in producing benefits).

212. *Id.* at 798–99.

213. Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us about Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8, 8–10, concludes that higher participation in the mediation increases likelihood of reaching settlement, cooperative behavior among the lawyers and perceptions of fairness. Mandatory requirements that lawyers consider ADR as a part of their litigation plans gave lawyers more control over the logistics of the mediation, increased the use of mediation, and faced less opposition than court ordered mediation. Cases most likely to settle were those where the litigants' positions were closer together, issues less complex and/or liability less strongly contested; mediator experience was the most significant factor to achieving settlement over training or subject matter expertise. Of all mediation styles used, active facilitation and evaluative intervention (i.e. when mediators disclose their views about the merits of the case but not extreme like recommending a settlement) produced more settlements and heightened perceptions of procedural justice.

214. Jennifer Shack, *Efficiency: Mediation in Courts Can Bring Gains, but Under What Conditions?*, DISP. RESOL. MAG., Winter 2003, at 11, 11–14, discusses why and when mediation achieved

women were more likely to be satisfied with mediated results over adjudicated ones—with no difference for men’s satisfaction between the two processes, and Hispanics were more likely to be satisfied with mediation while whites were equally satisfied with either process.²¹⁵

Consequently, there is no direct empirical support that IDR induces state compliance. Yet state use of IDR processes are increasing, especially mediation, and the use includes hard cases involving high stakes political matters and violent conflicts. State participation in and compliance with IDR is voluntary, so, as Franck put the question, “why do powerful states obey powerless rules?”²¹⁶ The rise in IDR use suggests that states are seeking out IDR to create powerless rules, agreements, and decisions. Perhaps the reasons they do so is because power is not the only way to advance their needs. IDR offers states flexibility, discretion, confidentiality, face-saving benefits if efforts fail, and expediency, which is often required in crisis situations.²¹⁷ States may also be turning to IDR because it is effective. Defining effective is difficult and subjective.

In IL, state compliance is defined as “a state of conformity or identity between an actor’s behavior and a specified rule.”²¹⁸ This definition highlights the distinction between compliance and the related concept of obedience, “defined as behavior resulting from the internalization of norms.”²¹⁹ While a state may obey a person, rule, norm, or principle under this definition, states can comply only with a rule or obligation that is necessarily specific and pre-existing before the act. IL scholars

settlement and was perceived fair; dependent variables included whether parties participated in the mediation, whether settlement was achieved, demographic of litigants, perception about costs and willingness to try.

215. *Id.* at 13 n.4; see Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 788–94 (1996) (suggesting that self-perceptions of satisfaction by identity group may not reflect objective studies suggesting that women and minorities may fare less well in court mediation programs); see also Cohen, *supra* note 71, at 307.

216. FRANCK, *supra* note 19, at 3.

217. See Judith E. Innes, *Evaluating Consensus Building*, in CONSENSUS BUILDING HANDBOOK, *supra* note 103, at 631, 637–41 (discussing the challenge of evaluating consensus building because typical notions about success and failure do not apply); Bercovitch, *supra* note 85, at 262 (citing B.H. Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. IN ORGANIZED BEHAVIOR, 141–90 (1984) (listing twenty-one criteria for assessing intervention outcomes)).

218. See Raustiala & Slaughter, *supra* note 9, at 539 (citing ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 20 (1981) and RONALD B. MITCHELL, INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE 30 (1994)).

219. *Id.* (citing Harold Hongju Koh, *Why Do Nations Obey the Law*, 106 YALE L.J. 2599 (1997); FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS; THE CONDITION OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989)).

offer further distinctions between compliance with legal versus non-legal rules, which has been discussed elsewhere.²²⁰ Instrumental perspectives of compliance rely on understanding how actors shape their behavior in relation to the law,²²¹ while deterrence perspectives consider perceptions about the costs and benefits associated with following or breaking the law.²²² Normative perspectives examine compliance through the lens of how actors shape their behavior as a function of morality and personal beliefs about legitimacy.²²³ While offering detailed insight about concepts of compliance, these definitions primarily treat compliance as it relates to outcomes but not process.

IDR notions of success, compliance and enforcement are necessarily different. In IDR, success may be best measured by effectiveness—achieving the desired goal(s) or improving the problem.²²⁴ As states continue to use IDR more often, further research considering whether IDR does induce compliance is needed. Short of that, this analysis has illustrated how IDR can affect elements²²⁵ that do induce compliance such as legitimacy, coordination, and participation.²²⁶ As for any process, in order for IDR to be effective it must be used optimally by the right parties at the right time. The key is the process. Consensus building “needs to produce good solutions through good processes. When process criteria are met, stakeholders who have not achieved their goals may still support an agreement because they feel their voices were heard and their interests were incorporated as much as possible.”²²⁷ The power and influence behind IDR methods is located in the process and in the people that participate, not in a positive source of authority. IDR research shows that agreements by informed consensus are preferable to ones merely reflecting the “preferences of the powerful.”²²⁸

220. See *id.* at 544 (discussing how Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996) taps into a widespread belief about the qualitative difference between compliance with legal vs. non-legal rules).

221. TYLER, *supra* note 20, at 3.

222. *Id.*

223. *Id.* at 3–4.

224. See Raustiala & Slaughter, *supra* note 9, at 539.

225. Bercovitch, *supra* note 85, at 260 (providing Rubin’s six bases of resources for influencing behavior: reward, coercion, expertise, legitimacy, reference, and information).

226. FISHER ET AL., *supra* note 63, at 226 (arguing why credibility rests on compliance).

227. Innes, *supra* note 218, at 641.

228. See Raustiala, *supra* note 79, at 423.

V. CHALLENGES AND CRITIQUES

A. *Selection Problem*

A serious critique of IDR is that it works because states only choose to use it for easy problems.²²⁹ Another version of the selection problem is that states only make agreements that do not require much enforcement.²³⁰ A selection problem suggests that high rates of compliance can be explained because the types of disputes or decisions to which IDR processes are applied are most ripe for resolution. States seek out IDR processes to solve easy problems, thus accounting for successful outcomes defined by party satisfaction and compliance. This would suggest that states would not select IDR to deal with hard problems such as war crimes, nuclear nonproliferation, regime change, or genocide. A selection problem suggests that states self-select out of options that require in-depth cooperation and enforcement to succeed because IDR does not offer enforcement safeguards.

Notwithstanding these important considerations, it is also evident that while parties use IDR to form agreements that do not require enforcement, they also use IDR to form agreements that do. As the North Korea example demonstrates, sometimes states do seek IDR to deal with hard problems. A possible reason is because traditional options have failed to produce results and maintaining the status quo is not a viable alternative.

In the United States, empirical studies suggest that people who engaged in court-mandated mediation enjoyed the same rates of settlement as those who engaged voluntarily.²³¹ This suggests that the success of the mediation process in this study was not significantly dependent on user selection. Even if selection bias is present—either because IDR attracts issues that are easily resolved or parties that are highly motivated to reach a solution—it fails to overcome the benefit of studying the relationship between IDR process and state behavior.²³²

229. Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303–26 (2002) (arguing that dispute resolution clauses more likely in low stakes, multilateral agreements because out of 100 international agreements only 20 had mandatory dispute resolution clauses).

230. See Chayes & Chayes, *supra* note 16, at 184 (discussing selection problem defined as states only making agreements that don't require much enforcement).

231. McAdoo, *supra* note 214, at 8–10.

232. Ginsburg & McAdams, *supra* note 167, at 1239 n.22.

B. *Challenges of Interdisciplinary Study*

The second critique is an analytical one. Wilson states that “[i]nternational law provides a normative framework, an essential ingredient for the successful operation of any large and complex social arrangement.”²³³ However, frameworks—a skeleton upon which all norms, general principles and practices are supported by—are inconsistent in international law, IDR, and international relations. This diversity in theoretical structure makes it difficult to compare across disciplines.²³⁴ The cultural clash between fields can also result in the watering down of standards, criteria, and norms unique to each field.²³⁵ However important, these scholarly distinctions fade quickly when policy-makers and diplomats are faced with addressing an international crisis. The rise of IDR across many sectors suggests that it may be helpful to different actors for some of the same reasons. IL, IR, IDR, and other disciplines all attempt to address the same international problems and global crises. For these reasons, the costs of using a comparative framework must be balanced against the benefits of achieving interdisciplinary dialogue within fields that share common goals.

C. *Limits of IDR*

This Article has largely focused on the benefits of IDR in theory. However, despite best intentions and design, IDR processes do not always work. One example is the Munich Pact of 1938.²³⁶ After two rounds of negotiation and mediation, the parties were unable to reach a lasting peace settlement to prevent World War II for the following key

233. See FOUNDATIONS, *supra* note 10, at 22 (quoting from Peter Wilson, The English School and the Sociology of International Law: Strengths and Limitations, (December 2003) (unpublished manuscript on file at the University of Leeds), available at <http://www.polis.leeds.ac.uk/assets/files/research/english-school/english-school-conference-papers.pdf>).

234. Raustiala & Slaughter, *supra* note 9, at 545.

235. Jay Rothman, *Identity and Conflict: Collaboratively Addressing Policy-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 128 (2006).

236. See generally Lionel D. Warshauer, Note, *The Munich Pact of 1938: ADR Strategies for Our Time?* 5 CARDOZO J. CONFLICT RESOL. 247 (2004). Other examples of failed IDR attempts include the UNSC’s mediation of the Kashmir Dispute, where early mediation efforts failed to develop a permanent resolution. See Sumathi Subbiah, Note, *Security Council Mediation and the Kashmir Dispute; Reflections on Its Failures and Possibilities for Renewal*, 27 B.C. INT’L & COMP. L. REV. 173 (2004) (suggesting that the UNSC’s failure to pay attention to the legal dimensions of the dispute ultimately caused the process to fail). Subbiah suggests that by avoiding the issue of whether accession was legal, the UNSC forewent an opportunity to use legal pressure to specify and enforce legal obligations.

reasons.²³⁷ British Prime Minister Chamberlain had a negotiation strategy based on building trust with Adolf Hitler, which failed. Key stakeholders (notably representatives from Czechoslovakia and the Soviet Union) were not involved in the process. Chamberlain conceded early to Hitler's demands regarding secession of parts of Czechoslovakia into Germany. Chamberlain's soft tactics failed to achieve cooperation when met with Hitler's hard tactics.²³⁸ Mussolini stepped in as the mediator, but was neither neutral nor fair. Chamberlain lacked a BATNA, and thus appeared desperate and yielded to pressure, not principles.²³⁹ There was an overall lack of good faith.²⁴⁰ Britain and France used the process to pressure Czechoslovakia into giving up land in order to prevent war—an outcome that was adverse to Britain and France's own interests. Finally, not all of the parties participated in good faith and Hitler, in particular, did not share an appreciation for IDR as demonstrated by his later statement that “[t]he enemy did not expect my great determination. Our enemies are little worms, I saw them at Munich Now Poland is in the position I wanted I am only afraid that some bastard will present me with a mediation plan at the last moment.”²⁴¹

This example raises the importance of understanding that IDR provides tools for preventing, managing, and resolving conflicts. These tools can be used well or used poorly. To avoid disastrous IDR outcomes it is vital to understand when IDR is most likely to work and why. This Article has focused on describing how IDR is used in the international context and how functional elements impact state behavior. Other IDR scholars have considered elements of IDR that contribute to success or failure, albeit largely outside the framework of international law and international relations. Some notable empirical findings suggest the following. The success of IDR depends on the stage of the conflict, implementation, disputant readiness, mediator behavior, ripeness, motivation to settle, resources and a host of other factors.²⁴² Bercovitch discusses the great importance of elastic interests, correct timing, identity of the mediator, and sufficiency of resources on

237. See generally Warshauer, *supra* note 241; ALLAN BULLOCK, HITLER AND STALIN: PARALLEL LIVES (1992); A.J.P. TAYLOR, THE ORIGINS OF THE SECOND WORLD WAR 1933–1939, 236 (1963).

238. *Id.* at 270–276.

239. Warshauer, *supra* note 237, at 272–74.

240. *Id.* at 275.

241. Adolf Hitler, Address to German Generals (Aug. 22, 1939) (in German), *available at* <http://www.ns-archiv.de/krieg/1939/22-08-1939.php>.

242. Pruitt, *supra* note 21, at 41–52.

successful mediation outcomes.²⁴³ Zartman and Touval suggest that international mediation is most effective when parties are maximally motivated to settle, e.g. when they are fed up with the conflict but are unable reach resolution on their own.²⁴⁴ Bercovitch's empirical research suggests that the best time to initiate mediation is half-way through the life cycle of the conflict after the parties' own efforts have failed.²⁴⁵ Touval argues that the combined use of threats (removing support) and promises (providing support) is more successful than promises alone.²⁴⁶ Pruitt suggests that successful mediators require muscle, based on a study of domestic mediation showing that when mediators have the authority to arbitrate, disputants become more motivated to resolve conflict.²⁴⁷

Although this literature provides a basis from which to draw prescriptive conclusions, more interdisciplinary analysis is needed. The cautious lesson is that the mere use of IDR does not ensure just or desirable outcomes. Skeptics of the benefits of IDR in interstate conflicts, particularly seemingly intractable ones, often point to failed attempts, lack of compelling national interest as weighed against the costs and risk of becoming involved, and a sense that vested conflicts do not pose a regional or global threat, only a national one. These have become justification for non-intervention in places like Darfur, the Korean Peninsula, and Zimbabwe.²⁴⁸ In the face of the many risks and concerns, it is easy to forget the success stories where IDR has brought about an end to violence and, in some cases, long-lasting peace. Cyprus, Northern Ireland, Angola, Namibia, El Salvador, and Cambodia provide solid examples. Although peacemaking is costly, conflict ultimately costs more. Only when states internalize the total costs of protracted conflicts—death, disease, loss of infrastructure, environmental damage, military expenditure, reconstruction—will an accurate perspective on the total cost of war emerge.

243. *Id.* at 50 (citing INTERNATIONAL MEDIATION IN THEORY AND PRACTICE, *supra* note 63).

244. Bercovitch, *supra* note 85, at 260–62.

245. Bercovitch, *supra* note 7, at 19 (citing Jacob Bercovitch, *International Mediation: A Study of the Incidence and Strategies of Successful Outcomes*, 21 COOP. AND CONF. 155–68 (1986)).

246. Pruitt, *supra* note 21, at 49 (citing Saadia Touval, National Research Council, Mediators' Leverage (1997) (unpublished)).

247. Dean G. Pruitt, *Process and Outcome in Community Mediation*, 11 NEGOTIATION J. 365, 367 (1995) (finding that in the U.S. domestic context, disputants are more likely to engage in problem-solving activity when they are working with a mediator empowered to arbitrate).

248. *Id.* at 4–5.

VI. CONCLUSION

This Article has presented the importance of international legal process theory in state behavior analysis. It has also introduced IDR as a form of international legal process that deserves attention. In describing how IDR affects criteria that influence states, the analysis has shown its distinctive advantages. It has demonstrated why IDR advances state compliance with international law by understanding that compliance is a function of the process. Recognizing how process can serve as a tool of influence,²⁴⁹ international law and negotiations scholar Roger Fisher described this relationship by stating that “[l]aw may not restrain governments from *doing* what they want but [it] can *influence* what they want.”²⁵⁰

A second contribution of this Article is its recognition of IL as a process rather than a result. This viewpoint adds to existing scholarship, including Higgins’ definitions of international law as a process that necessarily involves meta-legal considerations of policy and politics and Koh’s exploration of the ways that process—whether through participation, interaction, or norm-internalization—lead to institutional habits and patterns of compliance.²⁵¹ Raustiala addresses the reasons states care about international agreements by suggesting that they recognize how institutional design and process can affect outcomes.²⁵² This approach also builds upon existing scholarship such as Slaughter’s proposal that the international order needs to move toward a model where the criteria for defining who can be a player in the international system is not sovereignty, but who has the capacity to participate in transgovernmental networks in order to achieve more effective global coordination and problem solving.²⁵³

Third, considering compliance as an outcome of a process modifies the vision of international lawmaking. Compliance has been a cornerstone of IL and of any functioning legal system because “[t]o be authoritative, legal rules and decisions must affect the actions of those toward whom they are directed.”²⁵⁴ The concern is that pervasive and continual noncompliance with IL would undermine the institution of IL and thus the foundation of the international order. Common

249. See generally FISHER & SHAPIRO, *supra* note 173 (addressing similar questions about legal process, compliance and enforcement).

250. FISHER ET AL., *supra* note 63, at 245–46.

251. See Koh, *supra* note 31, at 196–97.

252. See Raustiala, *supra* note 79, at 436 (citing Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 762 (2001)).

253. SLAUGHTER, *supra* note 46, at 34–35.

254. See TYLER, *supra* note 20, at 19.

understandings of how best to achieve state compliance with international law rely on mandatory and formal enforcement mechanisms like sanctions, monitoring and reporting or use of force. Rules and decisions are generally created to govern human behavior.²⁵⁵ Laws are both negative, preventing actors from doing something, and positive, requiring actors to do something. Compliance has been framed through deterrence methods, or sticks, and incentive approaches, or carrots. This structure has dominated compliance efforts in the IL model, a system that lacks many of the enforcement mechanisms present in domestic legal systems.²⁵⁶ Where enforcement mechanisms do exist they can be both expensive and unreliable. Absent such enforcement mechanisms, voluntary compliance becomes not only ideal but necessary. This Article presents an alternative way to think about compliance. If compliance is no longer retroactive to a rule but becomes a part of how the rule is made, then it stands to reason that rule-making processes can influence state behavior. Reconsidering international lawmaking in this way addresses many of the challenges raised about the limits of international law. IDR can inform how to revisit the process by which international rules and agreements are formed. The “mere existence of the rule does not in itself suffice to promote the interests of the party wishing to rely on it.”²⁵⁷ Such a transformation is recommended if international law is going to keep up with the demands of our shifting global landscape. Much has been written about the dimensions of this new international system, from the changes in security law and terrorism to the rising importance of non-state actors to the blurring line between transnationalism and internationalism.²⁵⁸ In light of these changes, views about how to achieve state compliance must shift as well.

Fourth, this Article has demonstrated the need to consider IDR within the larger framework of international legal studies, while also appreciating the features that make IDR unique. Whether IDR and IL represent two distinct disciplines or subcategories of one, it is clear that each informs the other. The growth of IDR around the world continues to blur the lines between legal processes and non-legal dispute resolution approaches. IDR enhances the effectiveness of international law. Over the past decade, IDR efforts in Africa have increased knowledge

255. *Id.*

256. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, introductory note (1987) (stating that “[t]here is no executive power to enforce the law”).

257. BLUM, *supra* note 74, at 44.

258. See generally SLAUGHTER, *supra* note 46.

of and respect for international law.²⁵⁹ In these ways, IDR works concurrently with IL to build faith, trust, and credibility in an international system and in the rule of law. The challenges of integrating these disciplines are outweighed by the need for interdisciplinary scholarship to provide insights and solutions that no one approach could achieve on its own. The timing for integration is ripe as international legal scholars are currently reshaping international law's future research agenda and as IDR scholarship is beginning to grow. As demonstrated above, IDR is a part of the toolkit, along with international law, for dealing with international disputes and for managing international relationships.

In conclusion, international legal scholars have long been preoccupied with proving the merits of the discipline. However, if our aim is to "critically examine how international law works, rather than to assume its power"²⁶⁰ or limits, then we must shift our scholarly focus to improving our international legal process. North Korea's participation in the Six-Party Talks offers a highly visible example of how process can inform decisions and shape outcomes. In considering how to address the complexities of achieving state compliance with international law, leading scholars agree that voluntary compliance is the way forward.²⁶¹ Attempting to enforce international law through force or coercion is costly and ineffective in the long term. If international law's goal is to achieve compliance, then international legal processes must be designed in ways that maximize participation, promote credibility, coordinate interests and consider emotions.

This Article has demonstrated how IDR enhances the explanatory power of international legal process. IDR offers methods that achieve results through collaboration not enforcement. Such increased collaboration, problem-solving and relationship-building are ever more essential as our world becomes more connected. As Roger Fisher advised "[t]he best way to improve a game is to play the game in ways that make it a better game to play."²⁶² Perhaps, following this counsel, IDR can serve as a catalyst for achieving such a change.

259. See Ken Menkhaus, A "Sudden Outbreak of Tranquility:" Assessing the New Peace in Africa, 28 FLETCHER F. WORLD AFF. 73, 85–87 (2004).

260. Raustiala, *supra* note 79, at 443.

261. Koh, *supra* note 220, at 2645–56 (noting that both Franck and the Chayes' ultimately agreed on a preference of voluntary over coerced compliance) (*reprinted in* FOUNDATIONS, *supra* note 10, at 195–96).

262. FISHER, *supra* note 219, at 351.