

**Explaining How Process Matters:
Integrating Dispute Resolution into International Law to Improve Compliance**

Anna Spain¹
aspain@international.ucla.edu

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ABSTRACT

A fundamental critique of international law is that its influence on state behavior is limited due to its inability to ensure compliance. This question strikes at the core of the debate about the extent of international law's influence on states and its limitations. Compliance is a foundational component of an effective international legal system and vast resources are spent on enforcement mechanisms. Yet, much of the compliance literature focuses on improving compliance ex-facto, or after the law is created. While many academic disciplines have furthered the knowledge about compliance and state behavior, understanding about how international legal processes can proactively shape and influence state interests remains limited.

At the same time, important developments in the field of international dispute resolution are providing fresh perspectives on the compliance question. Dispute processes such as conciliation, negotiation and mediation, which often lack formal enforcement mechanisms under international law, are being used at increasing rates to manage and resolve public and private international disputes. This trend poses important questions for international lawyers – why are states and non-state actors seeking out and complying with processes that are voluntary and often lack formal enforcement mechanisms; are these processes designed to promote compliance; and for which types of international conflicts are these processes best suited?

Despite the existing scholarship in this area, understanding about these important questions is limited. Foundational scholarship on transnational law and legal process suggests that process matters in international law. This article seeks to build upon this thinking by explaining a narrow question: how process design influences problem-solving and improves compliance with international law. Using a process-based approach, this article analyzes the framework of principles, factors and tools that motivate state behavior through an international dispute resolution perspective. Initial empirical studies and theoretical analysis suggest a compelling insight: that a process can be designed to improve compliance. By broadening the scope of thinking about process, this article challenges international lawyers to reconsider the methods by which we create international law.

*Assistant Director, UCLA Burkle Center for International Relations and Adjunct Professor, UCLA School of Law. 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.

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INTRODUCTION

In July of 2007, the Democratic People’s Republic of Korea (DPRK) under the direction of its leader, Kim Jong-Il, shut down four nuclear facilities at its Yongbyon nuclear site² and permitted International Atomic Energy Agency (IAEA) monitoring of those facilities. These events marked a critical moment in international relations - the proactive step by a “State of Concern”³ towards rejoining the international order and complying with its obligations under international law to disable and disarm its nuclear weapons program.⁴ This specific achievement, although only the beginning of a longer process, is significant in that it occurred in the context of the Six-Party Talks – a multilateral negotiation effort. The DPRK did not have to participate in these talks and international law exerted no direct pressure on the DPRK to partake in them. Not only did the DPRK participate, but it reached a decision to disarm and disable the Yongbyon site and voluntarily complied with that decision. This success was achieved after decades of failed attempts by the international community to reach the same outcome through the use of widespread political isolation and economic sanctions. While policy-makers lack complete knowledge about the precise factors motivating the DPRK’s decision regarding Yongbyon, it is apparent that this success was achieved through a collaborative based decision-making process.⁵ This event prompts questions about the relationship between process and outcome in this situation. For example, what changed DPRK’s interests leading to a new decision? Did the DPRK voluntarily comply with the decision to disable and disarm because it participated in making that decision? This event illustrates how the process used to make decisions, in this case collaborative negotiation, can affect state interests, decisions and compliance behavior.

² Press Release, U.S. Department of State, Remarks After Meeting With Deputy Foreign Minister Losyukov by Assistant Secretary for East Asian and Pacific Affairs Christopher Hill (January 11, 2008) available at <http://www.state.gov/p/eap/rls/rm/2008/01/99294.htm>.

³ The U.S. Department of State considers nations listed on its State Sponsors of Terrorism list as States of Concern. As of March 2008, there are five countries on the State Sponsors of Terrorism list including North Korea available at <http://www.state.gov/s/ct/c14151.htm>.

⁴ Nuclear Non-Proliferation Treaty, to which the DPRK became a member state in 1985 and subsequently strayed from in 1993 prompting the formation of the Agreed Framework Agreement in 1994 between the DPRK and the U.S. *Breach of Contract in North Korea*, Joseph Cirincione and Jon Wolfsthal, Carnegie Proliferation Brief, Vol.1, No.14 available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=110&prog=zgp&proj=znp>. See U.S. Institute of Peace, Working Paper Disabling DPRK Nuclear Facilities by David Albright and Paul Brennan, Institute for Science and International Security, October 23, 2007.

⁵ DPRK was encouraged to participate in the Six-Party talks in part due to its ability to have direct and private talks with the United States within the context of the Six-Party talks. DPRK initially did not want to participate because it wanted bilateral talks with the U.S. Source: Dr. Kantathi Suphamongkon, 39th Foreign Minister of Thailand, who negotiated this point with the DPRK. Statements made at a conference entitled U.S. Foreign Policy Toward Rogue States, UCLA Burke Center for International Relations, March 11, 2008, Los Angeles, CA.

DPRK's participation in the Six-Party Talks also raises important questions about the role of international law in this situation and its influence on DPRK. What were the DPRK's interests that led them to make this decision and how were those interests formed? Despite the prolific and diverse scholarship on compliance, international law still lacks a thorough understanding of these important questions, which ultimately asks not if but *how* international law affects states.

These questions inform the new research agenda for international legal scholarship.⁶ The debate stemming from Goldsmith and Posner's rationalistic critique of international law's traditional normative focus has exposed gaps in international legal scholarship. Goldsmith and Posner assert that states behave and make decisions based on rational perceptions of their own interests in relation to others, not normative-based notions about the value of obeying international law.⁷ They also suggest this is what states, particularly democratic nations responsible to their domestic constituents, should do. This rationalistic approach, although novel in international law, is not new to international relations.⁸ The basis for international law's normative approach to compliance largely began with international relations scholar Henkin's well-known theory that most states comply with most rules most of the time.⁹ Since 1968, international law and international relations have diverged from this common ground, following different paths that are now beginning to converge once again around questions of state interests, behavior and compliance.

Interests, decision-making, behavior and compliance are important topics in many fields today. Scholars from a range of disciplines have attempted to understand *why* actors comply with rules, agreements, obligations and norms. In international law, the classic focus of compliance literature begins at the point when law exists, having already been made through custom or express agreement.¹⁰ Once in existence, international lawyers turn to the question of compliance, arguing that international law motivates states in fundamental ways such as creating norms of authority, legitimacy and reputation that affect state decision-making and establish frameworks that encourage state participation in the international order.¹¹ International relations theory follows two predominant sets of

⁶ Oona Hathaway and Ariel Lavinbuk. "Book Review: Rationalism and Revisionism in International Law." 119 Harv. L. Rev. 1404 -05 1005-1006.

⁷ Jack Goldsmith and Eric Posner. *Limits of International Law*, 3 (---).

⁸ Oona Hathaway and Ariel Lavinbuk. "Book Review: Rationalism and Revisionism in International Law." 119 Harv. L. Rev. 1404 -05 1005-1006.

⁹ See generally, Louis Henkin. *How Nations Behave*, 2nd edition, Council for Foreign Relations by Columbia University Press (1968).

¹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory note, p. 18(1987).

¹¹ Chayes and Chayes (1993) theory of state compliance based on collective management of nonperformance¹¹ to arguments that enforcement is the key to compliance (Downs, 1998)¹¹ the prevalence of scholarship debating the compliance question illustrates its nature as a fundamental concept in international law. See also Franck (1988 and 1990) arguing that international law creates legitimacy, which is central to compliance. For a general overview of the major international legal and international relations theories on compliance see *Handbook of International Relations* edited by Walter Carlsnaes, Thomas Risse and Beth Simmons, Chapter 28: *International Law, International Relations and Compliance* by Kal Raustiala and Anne-Marie Slaughter, Sage Publications, 538-553 (2005).

arguments: realists, who assert that state behavior is motivated by rational choices based on state interests; and institutionalists, who believe that state participation in the international order brings about compliance. Thus, law becomes either a reactive enforcement tool, “a means of making governments behave,”¹² or a coordination tool. The focus in both approaches is retroactive, considering efforts to achieve compliance once law is formed.

These approaches miss an important point, described by international law and negotiations scholar Roger Fisher, who states that “[l]aw may not restrain governments from *doing* what they want but [it] can *influence* what they want.”¹³ Fisher’s perspective was informed by his understanding of international dispute resolution where the point of analysis starts at the beginning of a law-making or agreement formation process not after law has been formed.

This article starts from a similar point of analysis by looking at how process affects outcomes. Understanding process is the key to understanding international law’s influence on state behavior, whether through the lens of self-interests or obligations. A process-based approach reveals how interests, decision-making and compliance behavior are formed and, thus, how they can be influenced. A process-based approach also combines the best information from practice and theory to understand what actors *want* and influence what they *should* want. The core premise here is that process influences outcomes because it cultivates behavior-motivating factors and tools that enhance participation, satisfaction and compliance. Researching process questions furthers understanding about how interests and compliance behavior operate and ultimately how to design a process that can influence interests and induce compliance. These questions are explored through the lens of international dispute resolution (hereinafter “IDR”)¹⁴ because the norms, theory and practice of this field have consistently valued process considerations as a vital component of the overall outcome.

¹²Roger Fisher. *Improving Compliance with International Law*, pp. ?.

¹³Roger Fisher, Andrea Kupfer Schneider, Elizabeth Borgwardt and Brian Ganson. *Coping with International Conflict, A Systematic Approach to Influence in International Negotiation*, Prentice Hall 1997 pp. 245-246.

¹⁴For purposes of this article, international dispute resolution or IDR indicates a) collaborative-based ADR methods such as facilitation, negotiation, mediation, conciliation, good offices and conflict assessment and systems design tools; b) when applied to in international context defined as a situation involving two or more nations and non-state actors from differing nations or differing national identity groups; c) for the purposes of assessing, preventing, managing, or resolving relations and/or disputes or conflicts. Arbitration, although also included under the IDR umbrella, is typically considered to be an adversarial process – not a collaborative process. Use of arbitration is prevalent in international dispute resolution leading to a robust area of research and empirical studies. New hybrid methods of arbitration including “arb-med” have introduced collaborative thinking into arbitration. 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 Appropriate Dispute Resolution “ADR”. There is no 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.

Part I reviews the classic compliance literature by providing an overview of the leading scholarship from the disciplines of international law and international relations. Part II describes IDR processes and theory before providing an historical overview that explains the interdisciplinary links between domestic ADR and international uses of dispute resolution. Part III explores the rise of IDR, defines compliance and notes incidents of voluntary compliance that have occurred in the context of an IDR process.¹⁵ Part IV asks whether outcomes can be designed through process and suggests a process-based methodology. Part V answers the question by analyzing how IDR theory and practices support factors and tools that lead to voluntary compliance. Case studies and quantitative empirical studies that illustrate IDR's process-based approach are included. Part VI presents common critiques and normative implications of these findings and argues that successful examples of IDR-induced voluntary compliance prompt reconsideration of international law-making.¹⁶ In doing so, this article seeks to place IDR in the broader context of international legal studies.¹⁷

I. Classic Views on the Compliance Question

As discussed in the Introduction, the compliance question in international law fundamentally breaks down into dialogue about how to achieve compliance and, absent enforcement, whether international law has any influence on nations. The legitimacy and effectiveness of the international legal system as a tool for global governance rests upon its ability to ensure compliance. Because making people obey the law is costly, difficult and often ineffective, finding ways to make people want to obey the law is a logical preference. Traditionally, international law has had little success at achieving long-term compliance through top-down approaches like the use of force and sanctions. For the vast majority of the areas that international law seeks to govern, organize, coordinate and serve, voluntary compliance is the optimal goal. Despite the rich and prolific

¹⁵ See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 38 (Oxford University Press 1999) noting the rise of mixed arbitrations since WWI, 39-40 describing new mechanisms for dispute prevention and management (not just resolution) created by the Organization on Security and Co-operation in Europe called the OSCE Dispute Settlement Mechanism in 1991 and 40 the Organization of African Unity's Mechanism for Conflict Prevention, Management and Resolution created in 1993. See also Christian Buhning-Uhle *Arbitration and Mediation in International Business*, Kluwer Law International 1996 330-34 discussing the reasons behind lack of IDR techniques, particularly mediation, in international commercial disputes. A survey asked participants to rank the hypothetical barriers of a) lack of information b) lack of legal framework (like the New York Convention) and c) no need according to relevance. Option b was considered to be the most relevant barrier among the majority of participants. Options a and c varied according to cultural group (German, American, other continental Europeans) and common law vs. civil law countries. Option a was regarded as a significant barrier among well-informed participants (those with exposure to commercial international dispute resolution such as in-house counsel)

¹⁶ See generally Roger Fisher, *Improving Compliance with International Law* (University Press of Virginia, Charlottesville, VA) (1981), which focused on the similar questions about legal process, compliance and enforcement.

¹⁷ See also Michael Banks, "The International Relations Discipline: Asset or Liability for Conflict Resolution?" at pp. 5-25 in Edward Azar and Michael Burton (eds.), *International Conflict Resolution*, Wheatsheaf Books, Sussex, first edition (1986) focusing on placing international conflict resolution in the wider context of international relations theory.

scholarship¹⁸ in this area, however, the focus has been on mandating compliance through enforcement mechanisms, monitoring, deterrence and other means. The following overview of classic compliance literature provides important background for understanding the debate about the limits of international law.

Discussions about state compliance with international law are varied in organizing principle and are characterized historically¹⁹ by disciplinary perspective, specifically those of international law, social science and international relations²⁰, as well as by analytical aim. For example, scholars have proposed arguments *of* compliance, such as Henkin's theory that most states comply most of the time²¹, arguments about *why and when* state's comply, delving into analysis of factors and tools that motivate and affect state behavior,²² and *entirely new theories* categorized as interest-based vs. norm-based²³ that redefine compliance and its relationship to international law by examining external factors such as rule-making processes, legitimacy and obedience.²⁴

¹⁸ See Handbook of International Relations, edited by Walter Carlsnaes, Thomas Risse and Beth A. Simmons, Chapter 38: International Law, International Relations and Compliance by Kal Raustiala and Anne-Marie Slaughter, Sage Publications (2005) pp. 538-545 for an overview of leading scholarship from the international legal and international relations disciplines.

¹⁹ Historical analysis starting with Cold War theorists (McDougal, Chayes, Henkin (1968), Shachter, Falk (1968), moving to 1980's regime theorists (Keohane (1988), Kratochwil (1989), Checkel (2000), Risse et al (1999), to 1990s focus on legitimacy theory, (Franck (1992), Hart (1994), Keohane (1997) and Koh's [related] theory of obedience arguing that states are motivated to comply because the transnational legal process causes states to internalize norms not due to the presence of enforcement, to 1990s-2000 focus on state compliance with decisions of international courts and tribunals, Raustiala and Slaughter (2002) 541-542.

²⁰For discussion of leading international legal scholarship see Chayes and Chayes (1993) establishing a general theory of compliance promoting international collaboration and collective management; Koh (1997) obedience theory discussing a transnational, as opposed to an international, view of the legal process. For a discussion of leading international relations scholarship see Kenneth Abbott, Modern International Relations Theory, 335 (Yale Law Sch., 14th ed. 1989) proposing a theory that states do comply with international law most of the time. See (Hathaway and Koh at 5) discussing regime theory proposing that state compliance is a function of interest-based rational decision-making assumptions that state actors make rational decisions as homogenous units based on self-interests under an international regime. For discussion of regime theory - constructivist schools emphasizing how internalized identities and norms of appropriateness affect state compliance see (Keohane, 1988; Kratochwil (1989); Checkel (2000); Risse et al (1999). For discussion of regime theory - rational choice school asserting that states obey international rules when those rules best-served a state's own interests see Koh at 18. See also, Downs, Rocke and Barssom (1998) enforcement theory of compliance proposing an direct causal relationship between increased state compliance to regime commitments and more stringent enforcement mechanisms of those commitments.

²¹ See generally Louis Henkin, How Nations Behave (1968) presenting a theory that most states comply with international rules most of the time.

²² See constructivists international relations theorists arguing that state behavior is motivated by internalized identities and norms of appropriate behavior; Keohane (1988); Kratochwil (1989); Checkel (2000); Risse et al (1999). See also Hathaway and Koh, Foundations of International Law and Politics, (2005) at 2-3 for a discussion about organizing the debate into norm-based vs. interest-based theories.

²³ Hathaway and Koh, *Foundations of International Law and Politics*, (2005) at 2-3.

²⁴ See Franck's (1992) theory of legitimacy arguing that perceptions about the legitimacy of rules directly impacts a community's motivation to comply with those rules, when that community is organized around rules [cultural identity surrounding the rules]. See also, Hart (1994) discussing how legitimacy plus the four characteristics of the "right process" lead to compliance.; Keohane (1997) critique of Franck's theory

For purposes of understanding the literature most relevant to this Article, analysis of the existing compliance literature is organized as follows: 1) factors, 2) tools, and 3) process. *Factors* motivating state behavior include: identity, interests, rights, preferences, benefits, obligations and reputation.²⁵ Liberal international relation theorists (Slaughter and Moravcsik) address how a state's identity, based on characterizations of its domestic legal system, determines its compliance with international legal rules.²⁶ Rational choice theorists (Keohane, Snidal and Young) address interests, arguing that state decision-making is motivated by rational perceptions about its short and long term interests.²⁷ More recently, Goldsmith and Posner advance the rationalist perspective by asserting that states are and should be motivated by interests, particularly democratic nations responsible for promoting constituents' interests.²⁸ McGuinness counters this, proposing that states can and do consider preferences when creating international law in the international human rights context.²⁹ Constructivists look at a blend of factors, addressing how state perceptions of identity, interests, norms and obligations join together to influence decision-making.³⁰

The literature focusing on the *tools* that are used to motivate state behavior discusses tactics like persuasion, coercion and acculturation, as well as concepts like participation and coordination. For example, sociological theorists Goodman and Jinks propose that states use acculturation, in addition to coercion and persuasion as tools of social influence to affect the decision-making of other states.³¹

from a international relations rationalist-instrumentalist perspective arguing that it is circular because event 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 [elaborate]. See Koh (1997) discussing a theory of obedience based on state internalization of norms occurring as a part of the transnational legal process.

²⁵ This is not an exhaustive list of motivating factors. It merely introduces the factors that are discussed in this Article.

²⁶ Supra note 22 at p. 18.

²⁷ *Id*

²⁸ Goldsmith and Posner at # arguing that international law should not determine state behavior. Based on rational choice theory from international relations, *Limits* argues that the usefulness of international law to bring about cooperation is limited thus international law is severely limited in its role and viability as a tool of global governance. [Would compliance mechanisms influence rational preferences and functional benefits??]

²⁹ McGuinness, Margaret E., *Exploring the Limits of International Human Rights Law* 34 Georgia Jour. of Intl & Comp. Law, [page #] 2006) available at <http://ssrn.com/abstract=874785> (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.).

³⁰ Hathaway and Koh at 18 discussing constructivism theory that norms created by the international order influence states who then comply out of a habit of obedience.

³¹ Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Right Law*, 54 DUKE L.J. 621 (2004). Professors Ryan Goodman and Derek Jinks have authored an important paper and have begun an important project: how the process of internalization of international law into national behavior transpires through the process of "socialization." That project continues their important joint work on the Institutional Theory of Sovereignty' by sketching an ambitious outline of an integrated model of social mechanisms that influence state behavior.

Along with the literature exploring *factors* and *tools* of motivation, a third approach to understanding compliance focuses on questions of *process*. The logic is that a more accurate framework for how law affects state behavior emerges out of a second generation of empirical international legal studies aimed at understanding the structural and design implications of the law's influence over states.³² There are three commonly accepted process-based theories about state behavior. Interests-based theory reasons that parties comply with legal duties or obligations when it serves their interests, thus justifying enforcement approaches aimed at deterring certain behaviors. Managerial theory argues that a management approach is more effective than an enforcement approach because the makeup of international systems has changed from sovereignty and interest-based to interdependency and cooperation.³³ Transnational legal process theory uses process-based analysis to consider horizontal and vertical relationships within the legal system, suggesting that these interactions ultimately affect behavior through norm-internalization.³⁴ All of these process-based theories incorporate considerations about the *factors* and *tools* previously discussed. For example, relationships and cooperation influence compliance behavior by increasing coordination within states.³⁵ If international law is a decision-making process by which state participation influences compliance with the outcome³⁶ or is “a process, a system of authoritative decision-making”³⁷ then a more nuanced understanding of how to design such a legal process is critical. If international law is going to function as “a process for resolving problems,”³⁸ then we must understand how to transform our legal process from one that merely creates order through rules and norms to one that solves problems.

The compliance literature on factors, tools and process are all relevant to understanding IDR and voluntary compliance. IDR theory and processes considers these concepts in its problem-solving design, albeit using its own vocabulary. As international legal scholarship looks to the future, it must expand its traditional thinking about compliance by supporting interdisciplinary research from related fields of study that focus on problem-solving and process design questions. While there are a handful of informative fields, this article focuses on integrating valuable information from international dispute resolution into international legal scholarship. Most international law compliance scholarship has not focused on the relationship between the design of the decision or law-

³² Goodman and Jinks at 624.

³³ Hathaway and Koh at 179-181.

³⁴ Hathaway and Koh at 191.

³⁵ Hathaway and Koh at 173.

³⁶ Handbook of International Relations. (Walter Carnlsnaes, Thomas Risse & Beth A. Simmons eds. Sage Publications, 2005) (142).

³⁷ Rosalyn Higgins. *Problems and Processes – International Law and How We Use It*, Clarendon Press, Oxford (2004) at Conclusion (there is no page #).

³⁸ According to Higgins, international law is much more than the rules that govern relations between nations; it is a specialized social process that interacts with and changes because of the world.³⁸ Legal decision-making, which Higgins describes as decisions “made by authorized persons or organs, in appropriate forums, with in the framework of certain established practices and norms,”³⁸ then involves a process based on underlying normative principles, which together form a theory. Add the rules and the processes by which the rules are created, applied and changed together with the actors involved, and this describes the international legal order or framework.

making process and compliance with the outcome of that process.³⁹ This article explores this relationship by examining how the *process* used to create a rule or obligation can affect and achieve *compliance*, and in doing so, seeks to explain how a state like the DPRK could be motivated to voluntarily participate in making and complying with a decision to disarm.

II. Understanding International Dispute Resolution

IDR is a term used to describe the umbrella of theories and practices in the discipline of international dispute resolution. In international law, dispute resolution is commonly understood merely as concrete quasi-adjudicative processes that utilize an arbitrator or mediator to settle legal disputes. This conceptual approach can be attributed to international law's normative focus on interpreting law and ensuring global governance. In the field of international dispute resolution, the term IDR refers to much more. It is a proxy to represent theories and practices used to achieve conflict prevention, management, resolution and reconciliation. Scholars focus on understanding how conflict affects behavior in order better to achieve these goals. The normative focus is on problem-solving. The section below defines and describes theories and methods of IDR.

A. Defining and Describing IDR Processes

IDR refers to collaborative-based decision-making, problem-solving and dispute resolution processes used in an international context. These processes include conciliation, mediation and negotiation. Arbitration, which is the least collaborative IDR method, is also considered. Although definitions of these processes and others such as inquiry and fact-finding, shuttle diplomacy and good offices have been well-documented elsewhere,⁴⁰ the following review sets the stage for exploring connections between IDR and voluntary compliance.

To begin, it is helpful to understand the typical steps for most IDR processes. First, the parties or the third-party neutral would engage in an assessment process to identify the key stakeholders and their positions, interests, rights and identities; the desired goal(s) i.e. forming an agreement, preventing a conflict, etc.; the context (including geographical and cultural information), and emotional factors affecting the stakeholders. The conflict assessment stage is similar to discovery in a legal proceeding in that it provides information vital to assessing the various layers of conflicts or disputes at work. Tools that are commonly employed in conflict assessment include stakeholder analysis and conflict mapping.

³⁹ See generally Ginsburg stating that international alternative dispute resolution perspectives do offer valuable insights to realist and liberal compliance theories. The majority of the compliance literature deals with primary compliance with minimal focus on issues of secondary compliance with a court decisions or rule. Literature addressing state compliance in conjunction with or as a result of international alternative dispute resolution is less prolific.

⁴⁰ For a comprehensive overview of these processes including definitions and use see John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 19-35 (Oxford University Press 1999). See also J. L. Brierly, *Law of Nations* 373-76 (Sir Humphrey Waldock ed., Clarendon Press 6th ed. 1963) for discussion of arbitration, mediation, conciliation and good offices.

The second step in an IDR process is the process design also called dispute systems design. The purpose of this step is to take the information from the conflict assessment and strategically decide what IDR process or combination of processes would best achieve the desired goal(s) given the stakeholders, context and conflict(s). Direct negotiations may be the optimal approach with provisions for mandatory mediation should they fail. Many arbitration agreements now require that parties mediate first before turning to arbitration. The design phase is critical to achieving optimal results.

The third step is to engage in the process. Again, parties may decide to engage in negotiation, mediation, conciliation, arbitration or a hybrid of methods. Descriptions of these processes follow in the next section.

Once parties have worked through a process, it is important to conclude the process. Should parties reach an outcome, they need to formalize and document the terms and obligations set forth in that outcome. This can take many forms including both binding and nonbinding agreements. In IDR this fourth step is recommended even if the parties do not reach an agreement or resolution. It is important to conclude efforts in a manner that promotes good relations among the parties.

The final step in an IDR process involves implementation. Similar to international law, IDR recommends monitoring and reporting to ensure that parties uphold their agreements.

This outline is schematic and is meant only to highlight the general course of most IDR processes. Starting with assessment is critical to understanding the context of the situation and designing the best approach for dealing with it. Deciding on the appropriate IDR process requires discussing which method(s) will best achieve the outcomes desired by those involved. Careful consideration is given to designing the process because how the decision or rule-making process is designed directly impacts both the outcome and the long-term success of the effort. IDR outcomes can serve both to represent the collective will of the group and to coordinate opposing wills within the group. IDR seeks to develop inclusive processes that maximize stakeholder participation, building in incentives for voluntary compliance by understanding the interests, rights and identities of both those involved in making rules and decisions and those affected by them.

Conceptually, these ideas are supported by international relations scholars who have proposed similar theories. For example, Keohane theorizes that in international law process design directly affects participation and enforcement.⁴¹ When states create a rule they agree with, they internalize externalities. Any deterrents from following the rule conflict with preferences for following it, such as credibility, identity or ownership.

⁴¹ See Keohane at 496 proposing a two-optic model of state assessment- the instrumental optic and the normative optic. His instrumental optic is built upon the commonly followed view that states follow international law and support international institutions when it is convenient to them – when it serves their interests.⁴¹ On the contrary, his normative optic repackages the idea that international law is influential because compliance with it creates legitimacy.

While the battle between these poles may result in any number of outcomes, the fact that the process was designed in a way that creates poles – two options to choose from – is significant because it establishes an internal enforcement mechanism between two poles of interests. This design also incorporates the element of time, allowing parties to consider long-term obligations and other factors, like their reputation tempering states focused in immediate interests.

Understanding how a typical IDR processes might unfold provides a foundation for exploring the nuances of the actual processes themselves. There are many recognized IDR processes and new hybrid processes currently in use, including negotiation, mediation, conciliation, good offices, shuttle diplomacy and arbitration.⁴² For purposes of discussion, I analyze four main IDR processes: negotiation, mediation, conciliation and 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. Negotiations commonly involve bargaining. IDR supports the use of mutual-gains bargaining over traditional hard bargaining. The goal is to focus on the interests underlying positions in order to maximize the potential outcomes. Bargaining takes place in a culture of increasing the net gain to all sides. By coordinating through sharing information and preferences, parties can reach optimal outcomes that they would not obtain alone. IDR-based negotiation theory also aims to depersonalize the discussions by separating people from the problems. 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 from objective reality.⁴³ Negotiation theory addresses this phenomenon by educating participants about the dangers of assuming their perceptions of a situation are accurate. When participants accept that there is no one truth, they are more likely to engage in information sharing and other behaviors that lead to increased coordination. In addition to theories, the literature on negotiation addressing strategies, tactics, timing and context literature is vast.⁴⁴ When negotiations fail, parties can and often do turn to other IDR processes.

The next three IDR processes have one important factor in common. Mediation, conciliation and arbitration all employ third-parties to assist conflicting parties. Mediation is a process whereby an impartial third party intervenes to facilitate communication between parties in order to reach an agreement or outcome and repair

⁴² For a comprehensive overview of these processes including definitions and use See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 38 (Oxford University Press 1999).

⁴³ Simons, D. J., & Chabris, C. F. (1999). Gorillas in our midst: Sustained inattentional blindness for dynamic events. *Perception*, 28, 1059-1074. Authors conducted an experiment where people viewed a video of a basketball game were asked to count the number of passes made by one team. A woman in 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.

<http://www.telegraph.co.uk/connected/main.jhtml?xml=%2Fconnected%2F2004%2F05%2F05%2Fecfgorilla05.xml>

⁴⁴ Add citation.

relationships.⁴⁵ Related methods by which a third party will assist with a negotiation include shuttle-diplomacy and good offices.⁴⁶ The traditional hallmarks of mediation include voluntary participation and agreement by the parties, impartiality of the mediator, confidentiality and a right to self-determination. These elements are not practical or possible in every situation. There are several styles of mediation, including facilitative, elicitive, transformative and evaluative. Mediators choose to employ one or more styles depending on the context of the situation.

Mediation raises contextual variables (i.e. the nature of the dispute, parties and their relationships, and characteristics of the mediator) and process variables (i.e. strategies and tactics employed⁴⁷) that must be considered carefully. The identity of the mediators and the timing of the mediation are also important components. Studies suggest that powerful mediators who strongly desire that the parties reach an agreement enjoy the highest rates of settlement contradicting mediation ethics that suggest neutrality is best.⁴⁸ Another empirical study showed that US-led mediations in the Levant and former Yugoslavia resulted in increased cooperation where UN-led efforts correlated with increased conflict.⁴⁹ There is no general consensus by mediation scholars about the appropriate timing for mediation, particularly in international peacekeeping contexts.⁵⁰

Conciliation also involves a third-party neutral who intervenes to help facilitate communication between disputing parties. In conciliation, the neutral may shuttle back and forth between parties who are not in the same room during a joint session or over a period of time. Conciliation has historical roots 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.⁵¹ 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.⁵² In practice, the distinction between conciliation and mediation is often blurred as there is not globally accepted consensus on the differences between the two methods.

Arbitration is a formal process by which participants choose to turn over decision-making authority to a third party tasked with making a decision based on the legal and factual merits of a dispute. Because participants voluntarily give up the ability to determine their own outcomes, arbitration is classified as the least-collaborative of the IDR methods.

⁴⁵ For definitions of mediation and similar processes including good offices See the Hague Conventions of 1899 and 1907; UN Charter Article 33(1); Collier [add cite]; UN Handbook 33-40 covering good offices; 40-45 for mediation.

⁴⁶ See Collier 28-29 for instances where the Secretary-General offered his good offices and the UNSCR definition of good offices.

⁴⁷ Handbook of International Relations, Chister Jonneson 221

⁴⁸ Cite Favretto.

⁴⁹ A study based on existing WEIS-coded event data for the Levant and the former Yugoslavia measured the effect of third-party mediators on past conflicts and found that UN mediation efforts correlated with increased conflict, US efforts in increased cooperation and European efforts had no result. [Add cite.]

⁵⁰ Id at 222. See also (Zartmann 1985) promoting the use of mediation after parties have reached an impasse vs. (Bercovitch, 1996) who advocates for the use of mediation to prevent conflict.

⁵¹ Yasunobu Sato, Commercial Dispute Processing and Japan 280 (Kluwer 1999).

⁵² Id at 281

Arbitration commonly provides settlement but not resolution or reconciliation because it is not designed to elicit and address the identity or emotional aspects of a conflict. Domestically, arbitration is considered an alternative to litigation and is therefore classified as a form of ADR. This same logic does not apply in the international context, where arbitration has long been a part of the international legal system.⁵³ International arbitrations are often conducted through institutions that have preset procedures and structures like the International Chamber of Commerce and the UNCITRAL rules. The binding nature of international arbitration makes it an attractive option, especially to private entities because of institutionalized enforcement mechanisms like the New York Convention.⁵⁴ However, arbitration's design limits its utility, particularly for non-legal political conflicts between states.

These descriptions of the various forms and methods of IDR serve to illustrate how methods for conflict prevention, management and resolution operate under the framework of IDR theory. Ultimately, considerations of assessment, method choice, timing and application all affect the success of an IDR process.

B. Historical Overview

IDR has been in use throughout history to manage human relations and societies. Domestically, the field of alternative dispute resolution (ADR) emerged out of a desire to move away from America's competitive adversarial legal model.⁵⁵ Although this thinking predated World War II with early scholars like Mary Parker Follet writing about conflict resolution in the 1920s, alternative dispute resolution as a field of study is considered to have emerged in the 1980s.⁵⁶ The field of dispute resolution originated from a multitude of disciplines. Lawyers like Roger Fisher and Carrie Menkel-Meadow, anthropologists like William Ury, public policy scholars like Lawrence Susskind, international relations scholars like William Zartman and game theorists like Howard Raiffa were early contributors to the field of negotiation and dispute resolution in the U.S.

Around the same time, U.S. courts began to recognize and support the use of mediation, arbitration and other processes in conjunction with and as alternatives to litigation.⁵⁷ The American Bar Association along with other bar associations also embraced the growing ADR movement, forming the ABA ADR section in 1993,⁵⁸ promoting publications and

⁵³ See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 47 (Oxford University Press 1999) noting the creation of the International Chamber of Commerce in 1919, which has housed thousands of arbitrations supervised by the International Court of Arbitration.

⁵⁴ See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 45-46 (Oxford University Press 1999). See also Iran U.S. Claims Tribunal – enforcement through States' legal system via compliance with an international treaty Algiers Accord (technically not a formal treaty) at 82-83.

⁵⁵ Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections* Vol. no? NEGOTIATION JOURNAL 489 (2006).

⁵⁶ *Id* at 486.

⁵⁷ See Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice* Appendix C (2d ed. 1994) for a listing of state statues calling for mediation of disputes.

⁵⁸ About the ABA Section of Dispute Resolution available at <http://www.abanet.org/dispute/aboutsec.html>

hosting conferences in the field. Professional organizations and rosters for arbitrators and mediators began to appear as well.⁵⁹

Studies of international negotiation and diplomacy emerged much earlier, giving rise to scholarship in international relations such as game-theory and bargaining studies⁶⁰ from before WWII to after the Cold War.⁶¹ High profile cases of IDR use in international disputes are well-documented, particularly with apartheid in South Africa, the Indian-Pakistani conflict, the Arab-Israeli conflict and the Iraq-Iran Algiers Settlement.⁶² More recently, the United Nations, World Bank and other international organizations have developed, redefined and strengthened existing IDR efforts.⁶³ One prominent trend has been the exportation of U.S. and “western-based” ADR models to developing countries in conjunction with justice-based rule of law efforts led by development-oriented institutions.⁶⁴ These developments raise important questions about the role of ADR as a replacement for traditional rule of law programs and about the role of individual rights.⁶⁵ In part because of the explosive growth in international commercial dispute resolution, institutional and academic centers of dispute resolution are forming, especially in Asian countries like Singapore and Hong Kong that are aiming to serve as hubs for commercial dispute resolution in the region.⁶⁶

As the field continues to evolve, so does the scholarship. The first generation of U.S.-based dispute resolution scholarship⁶⁷ focused largely on emerging practices and methodologies of negotiation, mediation and arbitration. The normative focus has been on conflict resolution.⁶⁸ As the use of these processes increases and globalizes, the focus is shifting to a second generation of scholarship interested in empirical studies, process

⁵⁹ JAMS was founded in 1979 available at www.jamsadr.com/welcome/welcome.asp Outside of the U.S., similar fields of study were emerging, notably in Australia, South Africa and the U.K.

⁶⁰ Handbook of International Relations, Lilach Gilady and Bruce Russett ‘Peacemaking and Conflict Resolution’ 392-399.

⁶¹ See Peacemaking in International Conflict, Methods and Techniques, William Zartman and J. Lewis Rasmussen (ed.), U.S. Institute of Peace, Washington D.C.1997. Chapter 1: Peacemaking in the 21st Century by J. Lewis Rasmussen for an overview of theoretical changes and Chapter 2: The Development of the Conflict Resolution Field by Louis Kriesberg for historically organized developments in conflict resolution theory and practice and convergence between conflict resolution and international relations at 66-69.

⁶² See *International Mediation in Theory and Practice*, Touval, Saadia and Zartman, William (ed.), Westview Press (1985). See also *Coping with International Conflict, A Systematic Approach to Influence in International Negotiation*, Fisher, Schneider, et al, Prentice-Hall Inc. (1997).

⁶³ In 2008 the UN’s Department of Political Affairs created its own UN mediation roster for the first time, employing full-time mediators. The World Bank created its conflict resolution program in ---. [add cite]

⁶⁴ Amy Cohen. “Exporting ADR Nepal.” Harvard Negotiation Journal 2006

⁶⁵ See Sternlight at [#].

⁶⁶ Nicholas Fang. “Singapore aims to be arbitration hub for India” Straits Times, May 2008 available at <http://lwb.lawnet.com.sg/legal/lgl/rss/legalnews/56911.html>; see http://www.ssc.gov.sg/publish/Corporate/en/news/media_releases/2008/alternative_dispute.html noting development that will increase Singapore’s ability to serve as a hub for sports related dispute resolution. University of Hong Kong’s Program on Dispute Resolution.

⁶⁷ As opposed to scholarship emerging from international relations and political science.

⁶⁸ See generally Gabriella Blum. *Islands of Agreement*. Harvard University Press (2007) noting that resolution not management or prevention has been the focus of ADR scholarship.

design and systematic aspects of conflict. This is leading to new studies and practices in areas such as conflict assessment and dispute systems design. Scholars are looking at the relationship between processes and the role IDR plays in affecting behavior and decision-making. Thus, there are striking similarities developing between emerging IDR scholarship and international legal scholarship.

III. The Rise of IDR and Voluntary Compliance

Compliance literature has focused on how international law can make actors, whether states or individuals, comply with legal duties and obligations. The point of analysis typically begins after the law or obligation has been created. In IDR, there is no legal duty or obligation to participate in the process or comply with the outcome. Parties who do participate lack guarantees that other parties will ultimately comply with an outcome. Despite this environment of seeming uncertainty, IDR's use is on the rise around the world - in both international and transnational contexts. After reviewing applicable definitions of compliance, this section documents IDR's capacious growth and introduces specific cases linking IDR processes with high rates of voluntary compliance.

A. Defining Compliance

Before analyzing the relationship between IDR processes and compliance, it is helpful to first discuss definitions of that term. Traditional definitions of state compliance are understood as “a state of conformity or identity between an actor's behavior and a specified rule.”⁶⁹ This definition highlights the distinction between compliance and the related concept of obedience, “defined as behavior resulting from the internalization of norms.”⁷⁰ While an actor may *obey* a *person, rule, norm* or *principle* under this definition, an actor can *comply* only with a *rule or obligation* that is necessarily specific and pre-existing before the act. This conceptual definition of compliance does not distinguish between compliance with legal rules, or laws, from compliance with other kinds of rules, which has been discussed elsewhere.⁷¹

Compliance can also be understood conceptually from both an instrumental and normative perspective. The instrumental perspective of compliance rests on understanding how people shape their behavior in relation to the law.⁷² Deterrence behavior is based on individuals' perceptions about the costs and benefits associated with following or breaking the law.⁷³ The normative perspective examines compliance through the lens of how people shape their behavior as a function of their morality and personal beliefs about legitimacy.⁷⁴ That is, irrespective of potential punishment, individuals

⁶⁹Raustiala and Slaughter, *International Law, International Relations and Compliance*, in the *Handbook of International Relations*, 2002, edition, publisher reqd at 539 citing Fisher, 1981:20; Mitchell, 1994:30.

⁷⁰ Id. Citing Koh, 1997; Kratochwil, 1989.

⁷¹ See Raustiala and Slaughter, 544, discussing how Koh's (1996: 205) work taps into a widespread belief about the qualitative difference between compliance with legal vs. non-legal rules.

⁷² Tyler at 3.

⁷³ Tyler at 3.

⁷⁴ Tyler at 3-4.

choices to comply may rest on a belief that it is the right thing to do or because they respect the authority of the law-makers. These definitional concepts provide a layer of complexity necessary to understanding how IDR processes achieve voluntary compliance.

For purposes of this Article, voluntary compliance is understood as voluntary fulfillment with the terms and intent of an agreement, decision or other outcome created through an IDR process. Although the theoretical focus here is on state compliance, the data on incidents of IDR use and voluntary compliance includes examples from non-state actors, in part because empirical studies of IDR compliance in the public international context are limited.

B. The Rise of IDR

As the use of IDR processes of negotiation, mediation, conciliation and arbitration continue to grow, scholars must strive to understand how these processes are used in decision-making, dispute prevention, managing long-term relationships, and resolving disputes. This section documents the rise in IDR through both increases in the usage of IDR and the widespread geographic and substantive application of IDR.

An empirical study by Bercovitch documenting the increased use of available conflict management processes - multilateral conferences, referrals to international organizations, arbitration, negotiation and mediation – showed that all categories enjoyed overall increases in use between 1949-1995, the period of the study.⁷⁵ However, the more collaborative processes of negotiation and mediation enjoyed the highest increases in growth rates between 1966 and 1995, with mediation growing the most.⁷⁶ This study suggests that mediation and negotiation are the most preferred IDR methods for dealing with international conflict and that these processes have become significantly more popular over the past twenty years. Research of this kind comparing international uses of dispute resolution processes is rare.⁷⁷ Instead most studies focus on growth occurring within a single area of IDR, particularly arbitration and mediation, or for a specific type of dispute, i.e., international commercial disputes or political disputes.

⁷⁵ See Jacob Bercovitch, J. Fretter, *Regional Guide to International Conflict Management: 1945-2003*. Washington DC: *Congressional Quarterly*. 2004.

⁷⁶ *Id.*

⁷⁷ Common methods for evaluation of IDR processes include surveys and case studies. For example, in the U.S., studies evaluating the success of mediation have focused on reporting the number of cases resolved, financial savings to the parties, and participant satisfaction. See Cohen at 312 and fn 47 citing Anthony Wanis-St.John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 Harv. Negot. L. Rev. 339, 343 (2000). Whether through surveys or other empirical methods, most studies focus on one IDR process as used in a specific location for a specific substantive issue. Literature comparing different IDR methods applied in private and public settings across a variety of international contexts is rare. Thus defining and increasing studies that evaluate the success of IDR remain a challenge for the discipline. The complexities and resulting insufficiencies of research in the field of international dispute resolution have been well-documented elsewhere. See Handbook of International Relations, Lilich and Russett at 405 for a discussion of the limitations in international mediation and peacemaking research related to the study of violent conflicts.

Turning first to the least-collaborative of the IDR processes, data shows significant growth in international arbitration in recent years.⁷⁸ In fact, eleven major international arbitration institutions⁷⁹ reported that annual case filings doubled from 1,392 cases per year in 1993 to 2,628 cases per year in 2001.⁸⁰ 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 2007.⁸¹ 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.”⁸²

The success of international arbitration may be due in some part to the New York Convention, which provides a treaty-based enforcement mechanism. However, private parties and states are also drawn to arbitration for reasons beyond a promise of compliance. Arbitration offers some of the same benefits found in mediation and other IDR processes, such as increased participation and self-determination of the parties. Parties can exert some control over the process by customizing the contractual agreement to arbitrate, tweaking the procedural rules that will be followed and selecting the arbitrators. This increased participation in the process may lead to increased satisfaction and compliance with outcomes for the same reasons that we observe in other IDR processes. International arbitration is attractive because it can save time and money offering parties both efficiency and effectiveness. As the Restatement Third suggests, “[w]hereas arbitration was once viewed as an attempt to oust the jurisdiction of courts, international arbitration is increasingly seen as an effective way to secure impartial resolution of legal controversies.”⁸³

Despite extensive growth in international arbitration, parties engaged in international disputes are also seeking out more collaborative forms of dispute resolution. CIETAC (China International Economic and Trade Arbitration Commission) estimates that more than half of the international arbitration cases before the Commission are resolved through conciliation and in domestic arbitration cases, 88% are resolved through

⁷⁸ Richard W. Naimark and Stephanie E. Keer. “Post-Award Experience in International Commercial Arbitration” *Dispute Resolution Journal* Feb/Apr 2005 citing Klaus Peter Berger, *International Economic Arbitration* 8 & n.62 (Kluwer Law & Taxation Publisher 1993) [add page #].

⁷⁹ 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.

⁸⁰ Christopher Drahozal. *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*. 291 *Arbitration Int’l*, Vol. 22, No. 2 2006 299-300.

⁸¹ ICSID. News from ICSID, Winter 2007, Vol. 24, No. 2 page 20 -21 noting statements by Secretary-General, ICSID Ana Palacio noting arbitration’s increased role in public policy and international law matters.

⁸² See <http://www.iccwbo.org/iccbihfi/index.html>, March 5, 2008.

⁸³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 487 (1987).

mediation.⁸⁴ International mediation is commonly used for major international political disputes. Of 310 international conflicts occurring between 1945 and 1972, mediation was used in 82% of the cases.⁸⁵ Another study found that 45% of 94 post-WWII international disputes employed mediation, (further noting that 70% of the mediations resulted in partially successful outcomes).⁸⁶ A third study cites that mediation was used in 57% of 241 conflicts between 1945 and 1990.⁸⁷ Recent studies show that international and domestic uses of mediation have continued to increase significantly since the 1990s.⁸⁸ 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.⁸⁹ 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 Kofi Annan in the Kenyan crisis after the failure of negotiations and sanction-like mechanisms.⁹⁰

Use of mediation and arbitration continues to increase in the U.S., particularly in the context of pre-trial settlement for civil cases. The significant reduction in federal jury trials has been well-documented and attributed to the increased use of dispute

⁸⁴ Richard W. Naimark and Stephanie E. Keer. "Post-Award Experience in International Commercial Arbitration" *Dispute Resolution Journal* Feb/Apr 2005 citing Klaus Peter Berger, *International Economic Arbitration 8 & n.62* (Kluwer Law & Taxation Publisher 1993) *Id* at 835.

⁸⁵ Deborah J. Gerner and Philip A. Schrodt. "Analyzing the Dynamics of Mediation Processes in the Middle East and the Former Yugoslavia. (2001) available at www.ukans.edu/keds.

⁸⁶ *Id* citing Kal Holsti (1983) and Bercovitch (1997, 131).

⁸⁷ *Id* citing Bercovitch and Houston (1996).

⁸⁸ Stephen K. Huber, Esq. and E. Wendy Trachea-Huber. "International ADR in the 1990's: The Top Ten Developments" 1 *House. Bus. & Tax L.J.* 184, 219-220 discussing the explosive growth in international mediation defined broadly to include conciliation and other voluntary processes noting in footnote 196 the American Arbitration Association 1999 Annual Report (visited Feb. 20, 2001) at <http://www.adr.org> (reporting that its 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 *Metropolitan Corp. Counsel*, 29 (1998); Carmen Collar Fernandez & Jerry Spotter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, 53, *Aug., Dips. Resol. J.* 62, 68 (1998) (predicting the increasing importance of international mediation 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") at 1 *Hous. Bus. & Tax L.J.* 184, 223 fn 196.

⁸⁹ Geoff Sharp. UN News Centre. "UN Announces New 'On-Call' Mediation Team" March 10, 2008 available at www.mediate.com [find original source].

⁹⁰ CRS Report for Congress. Kenya: The December 2007 Elections and the Challenges Ahead. Feb. 15, 2008 at p. 2 available at <http://fpc.state.gov/documents/organization/101803.pdf> noting that 12 senior government officials and opposition members from Kenya have reportedly been banned from entering the U.S. by the State Department.

resolution.⁹¹ Similar trends are occurring in foreign jurisdictions. In Japan private parties prefer mediation and conciliation over traditional court-based mechanisms because, among other reasons, the former methods are perceived to be more fair and equitable.⁹² In China, there are over 6 million mediators and 950,000 People's Mediation Committees nationwide that resolve over seven million disputes annually.⁹³

As the use of IDR processes continues to grow, data about use will become more available. The information about IDR use in international public disputes is not as plentiful as in private disputes, in part due to the lack of international frameworks and institutions that support and facilitate the use of IDR for public international disputes (and hence keep statistics on them.) 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 to the growth of independent arbitral organizations like the WTO's Dispute Settlement Body and ICSID that collect and publish data. Reporting on international uses of negotiation and mediation is less common. Another reason for the lack of information in this area is attributable to vague notions about what constitutes success. Nations may form, sign and even ratify an agreement within their domestic constituencies, but defining long-term success and compliance is more difficult. Many public international disputes involve preventing or bringing an end to war. To say that absence of violence over the long-term equals compliance with an IDR agreement would be simplistic/overly-optimistic/unrealistic. The next section explores examples of IDR processes that have achieved long-term compliance and other measures of successful results.

C. Incidents of Compliance

The rise of IDR is evident. Its global use is becoming increasingly popular for public and private matters as well as domestic, transnational and international matters. However, questions remain about whether IDR is "working." The first dilemma is defining what "working" means. Definitions of a successful IDR process can be based on achieving participant satisfaction with the process, reaching an optimal outcome or exacting long-term compliance with that outcome. Although there is no consensus on what determines a "working" or successful IDR process, it would be politically helpful to establish that outcomes formed through IDR do result in high rates of post-outcome compliance.

⁹¹ Azar, David. "Conflict Resolution Reduces the Number of Federal Cases Decided by Juries. ACR available at http://acrnet.org/acrlibrary/more.php?id=P10_0_1_0_C. See also Glaberson, William. Los Angeles Daily Journal reporting on the decline of federal jury trials.

⁹² Frank Upham, Mythmaking in the Rule-of-Law Orthodoxy, in Promoting the Rule of Law Abroad, footnote 83, at 75, 91-98; see also John Owen Haley, The Politics of Informal Justice: The Japanese Experience, 1922-1942, in 2 The Politics of Informal Justice, supra note 90, at 125 (providing another account of the Japanese attempt to replace litigation with conciliation). Citing in 56 DePaul L. Rev. 569, 592 at n. 96- ?

⁹³ James Zimmerman, *China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises*, 2005 ABA SEC INTL. LAW 834 citing Civil Dispute Mediation Committees (BBC Summary of World Broadcasts and Monitoring Reports, October 19, 1991.)

This section explores whether IDR processes can be linked to high rates of voluntary compliance. Unfortunately, the research in this area is thin. Political scientists who study international conflict resolution are only beginning to conduct quantitative research on the long-term efficacy of mediated or negotiated peace agreements, treaties and other international arrangements. The initial results suggest that [add Bercovitch's results.] There are a small number of studies on IDR and compliance that provide early support for linking IDR processes to high rates of voluntary compliance.

The first study reviewed was based on an international arbitration. Due to its popularity and heavy use, the majority of studies about compliance with international agreements formed through IDR focus on arbitration. Although certain international arbitration agreements have formal enforcement mechanisms⁹⁴ and, thus are not true examples of voluntary compliance, certain studies are helpful with understanding voluntary compliance. A survey study conducted in 2005 showed that in 118 international commercial cases (where claimant/filing parties won 100 cases and lost 18) of the 100, 74 awards were complied with in full, 4 achieved partial compliance, and 22 renegotiated the post award to establish final settlement terms. These results, albeit for commercial arbitration cases, suggest a 74% rate of full-compliance absent formal sanctions/use of force.⁹⁵ 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.⁹⁶ This study shows that the majority of participants voluntarily complied with the outcome of the arbitration, even absent a formal enforcement. Furthermore, the lack of a formal enforcement mechanism was only one of many reasons cited for noncompliance.

Mediation is commonly used in treaty-formation where it successfully assists parties in reaching agreements that they then comply with absent formal enforcement mechanisms. Mediation was used in the following treaties: Pact of the League of Arab States, Charter of the Organization of African Unity 1964, Antarctic Treaty of 1959, Pact of Bogotá 1948. Joint mediation: Chaco War between Bolivia and Paraguay between Argentina, Brazil, Chile, Peru US, Uruguay 1935-37.

Mediation has also been used successfully in a case where arbitration failed. Beagle Channel dispute between Chile and Argentina – Pope mediated after an ICJ arbitral award favoring Chile which Argentina didn't accept.⁹⁷

Domestic reports of compliance with ADR outcomes support the same premise. Susskind reported high rates of compliance with agreements formed using his consensus-building facilitation approach. A case study conducted on the San Francisco regional

⁹⁴ Add information about New York Convention and enforcement of arbitration agreements under international treaty law.

⁹⁵ Richard W. Naimark and Stephanie E. Keer. "Post-Award Experience in International Commercial Arbitration Dispute Resolution Journal Feb/Apr 2005 [#]

⁹⁶ *Id* at 3.

⁹⁷ Collier and Low, *The Settlement of Disputes in International Law*, Oxford 27-28.

transit planning effort case study noted that processes using the consensus-building criteria were most effective in producing benefits.⁹⁸ In a mediation dealing with affordable housing, the goal of creating 5000 affordable housing opportunities was reached and the agreement was in tact and complied with by # of participants ten years later.⁹⁹ A 2003 study examining how the design of U.S. court-based mediation programs affected a) the likelihood of achieving settlement b) successfulness of institutionalizing mediation and c) perceptions of procedural justice provided by the court mediation program determined that participation in the process was key.¹⁰⁰ Higher participation rates led to higher rates of settlement agreements and satisfaction. Voluntary participation was not significant as mandatory mediation did not appear to adversely affect perceptions of procedural justice or settlement rates and actually triggered increased voluntary use of mediation. This suggests satisfaction, which is a critical factor in compliance, and is linked to participation. A survey-based study on the links between mediation conditions and increased rates of satisfaction showed that of all participants (who were involved in court based mediation programs in Illinois) the average settlement rate was 70% and the average reported satisfaction rate was similar.¹⁰¹ If there is a link between rates of settlement and satisfaction, it may be because the factors that achieve high rates in both areas (i.e. participation, self-determination, coordination) are the same.¹⁰² Distinctions in identity affected the results of this study, which found that women were more likely to be satisfied with mediated results than with adjudicated ones – with no difference for men’s satisfaction between the two processes; Hispanics were more likely to be satisfied with mediation while whites were equally satisfied with either process.¹⁰³ 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.¹⁰⁴ Even though these studies were conducted on domestic uses of IDR, they

⁹⁸ Innes et al 1994 research has shown that processes meeting the criteria laid out in the Consensus Building Handbook are most effective in producing benefits.

⁹⁹ Consensus Building Handbook (798-799).

¹⁰⁰ “Institutionalization: What do empirical studies tell us about court mediation?”, Bobbi McAdoo, Nancy A. Welsh, and Roselle I. Wissler *Disp. Res. Mag.* Winter 2003 pp. 8-10 found that higher participation in the mediation increases likeliness of reaching settlement, cooperative behavior among the lawyers and perceptions of fairness. Other findings include: that mandatory requirements that lawyers consider ADR as a part of their litigation plans gave lawyer 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.

¹⁰¹ “Efficiency: Mediation in Courts Can Bring Gains, but Under What Conditions?”, Jennifer Shack *Disp. Res. Mag.* Winter 2003 pp. 11-14 discussing why and when mediation achieved 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 (12).

¹⁰² *Id* at 12.

¹⁰³ *Id* at 13.

¹⁰⁴ See Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *Law & Soc’ Rev.* 787, 788-94 (1996); See also Amy Cohen, *Debating the Globalization of U.S. Mediation*, 11 *Harv. Neg. L. R.* 295 at 307, fn 37 and 38.

still support linkages between IDR processes and high rates of settlement, satisfaction and voluntary compliance with outcomes

The empirical record linking use of IDR to high rates of compliance is clearly preliminary. However, initial findings do support the notion that IDR processes have design elements that may induce voluntary compliance. Further research needs to be undertaken in order to better understand the relationship between the use of IDR processes and voluntary compliance. At a theoretical level, our understanding of voluntarily compliance in existing international law literature remains incomplete.¹⁰⁵ Yet the IDR literature suggests that the answers may lie in understanding the complexities behind the theory and practice of these IDR processes.

IV. Linking Design, Process and Compliance

A. The Process Puzzle: Can We Design Compliance?

The rise of IDR informs the debate about compliance and the limits of international law. If IDR encourages voluntary compliance, then two important implications for international law follow. First, this would demonstrate that process affects outcomes, suggesting that international legal processes can be designed to induce voluntary compliance. Second, the possibility of designing international legal processes that could achieve voluntary compliance obviates challenges about the viability of international law while specifying how international law influences state interests.

Research linking IDR and voluntary compliance is inconclusive. However, close analysis of IDR processes demonstrates how it could induce voluntary compliance, providing support for claims of its efficacy. In this way, the larger question about how international law influences state behavior is considered. In considering process design and compliance, I depart from two common methods of analysis, the traditional normative approach and the revised rationalist approach,¹⁰⁶ to suggest a third: the process-based approach. A process-based approach examines state behavior by looking at how the methods used to form agreements, decisions and rules affects outcomes.

People distinguish between how decisions are made and the substance of those decisions.¹⁰⁷ Therefore, it is important to understand how process affects decisions. One assumption is that actors are more likely to comply with an arrangement to which they have willingly agreed. IDR methods elicit and modify interests in a manner that fosters desired agreements. 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

¹⁰⁵ Given that IR is both on the rise and increasingly successful at understanding and dealing with international conflict, the lack of empirical studies on compliance rates with IDR produced outcomes is surprising. The absence of literature in this area suggests that the scholarship is not responding to or tracking trends in practice thus presenting the classic disconnected ivory tower argument and underscoring the need for further empirical research, which many legal scholars are not trained to conduct.

¹⁰⁶ Cite to Hathaway again.

¹⁰⁷ Tyler, Tom. *Why People Obey the Law*, Princeton University Press (2006) at 5.

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. A second demonstration is a divorce mediation where both husband and wife assert that they want the house. The mediator helps the parties express underlying interests and emotional needs. Ultimately, the parties agree that the wife will live in the house, but that the house will belong to the husband's children from a former marriage. In this way, IDR not only explains how interests are formed, but can influence what actors want.

The puzzle is this: since process affects outcomes, can processes be designed to achieve specific outcomes like voluntary compliance? Answering this question requires examining how IDR understands and influences what actors want. This analysis requires examining both factors, like interests and identity, and tools, like coordination. IDR also addresses more complex behavioral components like emotions. The next section analyzes elements of IDR processes that may induce voluntary compliance from a process-based perspective. Absent a common theory, core principles of IDR are reviewed in order to understand the assumptions IDR makes about actors and how those differ from assumptions in international law. Motivating factors and tools¹⁰⁸ are examined along with other elements of IDR to consider how IDR design encourages voluntary compliance. This analysis strives to understand what motivates participation, agreement and voluntary compliance.

B. Explaining Voluntary Compliance as a Function of IDR Process Design

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. After describing these, this section explores how elements of IDR processes affect factors, tools and other considerations that influence behavior.

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

International lawyers often make a set of assumptions about actors and 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.¹⁰⁹ IDR methods are not based on these assumptions and, in fact, characterize many of them as flawed. Instead, IDR makes the following assumptions about actors:

¹⁰⁸ Motivating factors for state behavior include identity, interests, rights, preferences, benefits, obligations and reputation. Motivating tools for state behavior include both tactics like persuasion, coercion and acculturation; and concepts like participation and coordination.

¹⁰⁹ [Find an IL source for this.] See Keohane at 493 assuming 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 c) coordination and assurance situations are common.

First, actors' perceptions of reality often do not accurately reflect reality. Truth and reality are subjective. The concept of inattention blindness discussed in Part I helps to support this argument.¹¹⁰ 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 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 a) their perception of reality varies widely from others' perceptions of reality and b) their perception of an "objective" situation can be, and often is wrong. This illustrates a core principle in IDR theory - assumptions can be inaccurate and misleading, so actors must rely on information-gathering techniques to assemble accurate information. IDR processes utilize techniques like stakeholder assessment, conflict mapping and the "single text" approach during the assessment phase of a process to facilitate objective information gathering. This design enhances coordination within and among the parties, one of the key tools for motivating behavior.

Second, actors are not always good at assessing their own interests. IDR processes encourage informed and self-aware participants, and teach stakeholders that in order to achieve the best outcome they must understand their own interests, not just their positions. The concept of developing a BATNA, or Best Alternative to a Negotiated Agreement, prior to negotiating assists parties with understanding their own interests. The BATNA requirement compels actors to consider the point at which they are better served by not reaching an agreement *and* to analyze how to utilize their available assets to reach not just an agreement, but the optimal agreement.¹¹¹ This technique highlights the importance IDR places on self-assessment. This gains-maximizing design creates agreement-forming conditions that promote voluntary compliance.

Third, actors are often ill-equipped to accurately assess 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 negotiation where the use of empathy might be preferable in a mediation setting, particularly when dealing with identity issues.¹¹² 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 "convener" to survey stakeholders in an effort that results in a comprehensive understanding of all the stakeholders' interests.¹¹³ When an identity issue is at play, the ability to see other parties' perspectives often becomes occluded, as described by inattention blindness. Hard bargaining tactics are frequently used to obscure an actor's true interests, resulting in reduced

¹¹⁰ Simons, D. J., & Chabris, C. F. (1999). Gorillas in our midst: Sustained inattention blindness for dynamic events. *Perception*, 28, 1059-1074.

¹¹¹ Fisher and Ury, *Getting to Yes* at 97-103.

¹¹² See Economist – cite article in *Angry China* issue. Find original study.

¹¹³ Susskind et al, *Consensus Building Handbook*.

communication between stakeholders. Facilitation and mediation are designed to reopen the channels of communication when direct communication fails.

2. Core IDR Principles Support Factors and Tools that Motivate Compliance Behavior

IDR processes are based on a set of core principles that both relate to and diverge from those in international law. One important difference between the two is the focus. International law is often most concerned with promoting international order, whereas IDR is focused on problem-solving. International law commonly employs a top-down, authoritative approach as opposed to the collaborative, participatory approach common in IDR.

At a theoretical level, IDR induces the formation of outcomes in a manner that promotes voluntary compliance through its design. IDR processes are structured to maximize stakeholder engagement in appropriate decision-making methods that utilize and promote motivating factors and tools. Despite the variety of IDR processes, the field of dispute resolution lacks a well-defined and widely accepted theoretical foundation that connects all of them.¹¹⁴ 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.¹¹⁵ Even within the international law field there is no formal or broadly recognized “law of international ADR”.¹¹⁶ By necessity, practitioners have developed codes of conduct and best practices for international mediation and arbitration sparking debate about how much formal guidance is necessary and recommended.¹¹⁷ In the absence of a universal IDR theory and in an attempt to provide organization for the sake of analysis, I present the following widely-accepted core principles of IDR.

- Obligation to strive for peace and non-violence
- Right of self-determination
- Informed and voluntary participation¹¹⁸
- Confidentiality
- Duty to participate in good faith
- Neutrality/impartiality of the mediator, facilitator or other third party

¹¹⁴ See Handbook of International Relations, Chister Jonneson 212-226 introducing an overview of diplomacy bargaining and negotiation theory and scholarship and 227 documenting the lack of a generally accepted theoretical foundation.

¹¹⁵ Handbook of International Relations, Lillich and Russett at 394 citing Marieke Kleiboer 1996 and 1998 discussing the limitations of current research on international mediation and proposing a need for theory based on understanding international conflict and its management.

¹¹⁶ Id 343

¹¹⁷ See ICSID Rules, UNCITRAL Rules, IMCD Rules [add cites]

¹¹⁸ Sometimes states or other parties feel coerced to participate in a process because the consequences of not participating outweigh the costs of participation. This is particularly common in public international disputes between states where this principle is not widely followed.

- 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 the field of IDR. They appear in other disciplines by other names. For example, Slaughter proposes similar organizing principles for international relations.¹¹⁹ 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.¹²⁰ 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 duty to participate in good faith.¹²¹ 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 needs of the international community.

These core principles and related IDR literature propose insightful theories about how IDR processes elicit and promote motivating factors and tools, and how they may lead to voluntary compliance. Exploring these factors helps us to better understand when and why IDR processes work and how the elements of the process ultimately affect compliance behavior, providing a more complex understanding of how the design of a decision-making process can affect compliance.

3. IDR Processes Utilize Motivating Factors to Encourage Compliance

Motivating factors provide a framework for understanding the elements that influence behavior. Motivating factors include interests, identity, rights, preferences, expectations, benefits, obligations and reputation. Compliance literature has addressed international law's capacity to affect motivating factors.¹²² This section addresses how IDR affects some of these motivating factors, particularly given that its goals and interests often differ from those in international law. Since IDR is primarily used to solve problems and form agreements, considerations about process choice, design and implementation must affect motivating factors in a way that promotes these goals.

Interests

International law traditionally considers only 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

¹¹⁹ Anne-Marie Slaughter, *A New World Order*, pp. ?

¹²⁰ *Id* at ?

¹²¹ ---Holsti. *Taming the Sovereigns* at 174.

¹²² See generally *Limits of International Law Symposium Issue Emory L. Rev.* [add cite].

affect decision-making, such as emotional factors. The approach in IDR is different. During the conflict assessment phase, all stakeholders' interests are examined. Inclusion of traditionally-unrecognized actors allows for a more comprehensive and accurate assessment, 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 emotional needs, identity concerns and a host of other factors. IDR processes make space for the "touchy-feely" aspects of human nature that international law often ignores. IDR principles recognize 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 by design. IDR processes are structured to induce collaborative bargaining in order to achieve outcomes that provide mutual gains.¹²³ 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.¹²⁴

IDR processes also use techniques that elicit information about parties' interests. The role of a mediator or conciliator is to encourage parties to think beyond their original position to reach the underlying causes of the conflict. They can engage in reality-testing to help parties discover what they need in order to reach a solution. The impartial nature of the mediator, the confidential nature of mediations and the trust-building nature of caucusing are all tools that encourage parties to share this information. Mediators also use acknowledgement, re-framing and caucusing to facilitate more honest negotiation between parties and to move the dialogue beyond intellectual concerns to deeper emotional concerns that often block rational thinking.¹²⁵ Even direct negotiations can benefit from a third party who facilitates the exchange of information about positions and interests using tools such as the "single-text approach," interviewing and round-robin.¹²⁶ These examples illustrate how IDR considers interests in an informed and collaborative agreement formation process.

Identity

Identity considerations play an important role in influencing behavior. 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. 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 outcomes. Fact-finding and fact-sharing help parties become aware of how these elements are shaping others' outcomes. By doing so, a party that has shifted from interest-based decision making into identity-

¹²³ See Susskind at ---, Fisher and Ury at --.

¹²⁴ Discuss - Prisoners dilemma, Hawk Dove, etc.]

¹²⁵ Ken Cloke, *Mediating Dangerously* at ---

¹²⁶ See *Consensus Building Handbook* [at p#].

based can reengage in informed decision-making. This helps parties set expectations and promote satisfaction with the process - factors essential to motivating voluntary compliance.

Rights

Legal systems are based on rights. Conflicts are resolved by interpreting what parties' rights are according to the law and the facts of the case. The source of power in this system stems from law formed through customs, norms or express agreement. Those who create law also determine rights, while subjects of law do not have the option of participating in the creation process.

An IDR system promotes participation and protects rights. However, a tension can form between problem-solving and promoting rights and justice. For example, truth and reconciliation commissions are IDR mechanisms designed for the purpose of promoting forgiveness and healing. The purpose is not to adjudicate crimes or protect the rights of victims. However, IDR can provide participants with a sense that their rights are being protected. For example, Bangladeshi women who participated in IDR "believe that they receive better protection and more compensation ... than from the formal court system."¹²⁷

Reputation

Reputation is a strong behavioral-motivation factor.¹²⁸ 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. Sometime political pressure is needed to motivate parties to participate in a negotiation or peace process. Given the collaborative nature and problem-solving focus of IDR, parties may be encouraged to participate so they can enjoy the reputational benefits of being viewed as a team-player. 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. 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. Studies show that in low-stakes situations, parties often comply with outcomes because the reputation benefits outweigh the costs.¹²⁹

¹²⁷ IDR Practitioners' Guide, supra note 15, at 14 (stating that); Cohen, supra note 41, 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, ACRResolution, Summer 2006, at 20 (describing the use of rights-based community mediation in Nepal). 56 DePaul L. Rev. 569, 592 at n. 44

¹²⁸ 45 Wm and Mary L. Rev. 1229 at 4 n23. See also Andrew Guzman.

¹²⁹ [See Guzman - address link between reputation, compartmentalization and coordination.]

4. IDR Processes Use Motivating Tools to Promote Compliance

States, organizations and individuals use international law as a tool of governance and a means of making decisions and setting rules. “States use the rules of international law as instruments to attain their interests” because rules structure politics.¹³⁰ Tools that motivate state behavior include persuasion, coercion, acculturation, participation and coordination. IDR facilitates the use of these tools in ways that amplify agreement formation and promote voluntary compliance.

Persuasion

An agreement or rule-formation process involves negotiation about content and substance. Persuasion and coercion are both negotiation tactics that parties use to ensure that their positions and interests are represented. Negotiation puts a normative preference on persuasion over coercion. Persuasion is encouraged through the mutual-gains bargaining approach. If parties understand the interests underlying other constituents’ positions, they will be better able to persuade them to agree with a new position. Because IDR works by increasing the benefits of pursuing a course of action, it offers parties with more bargaining chips to use for persuasion.

Coercion

Although from a rationalist perspective coercion serves important functions in inter-state conflicts¹³¹, using coercion as a problem-solving tool is discouraged in IDR on the basis that agreements formed under coercion do not result in optimal outcomes for any party and decrease long-term chances of compliance. Coercion occurs when one party uses power over another party to achieve a desired result. It relies on a “weaker” party who is uninformed about tactics and options. IDR educates parties about coercion tactics so that they can recognize and call other participants on their use of such tactics, resulting in the reduction of coercion. BATNAs arm parties with power in a negotiation because they help parties to know their walk-away point.

Coercions rarely achieve long-term agreement and compliance. Sanctions are a common example. Sanctions use coercion to pressure a party to change its behavior. Sanctions work by “raising the cost to an adversary of pursuing a course of action”¹³² the other side does not like. Sanctions often fail because they create a situation where the coerced party becomes invested in the adversarial relationship. A coerced party can become entrenched in their opposing course of action, not motivated to change it.¹³³ A good example is a hostage crisis. When a government faces a threat by hostage holders, they may respond by bombing something they assume to be of value to the hostage holders, i.e., their buildings. Entrenchment occurs when the government starts to bomb buildings. Assume that there are twenty buildings, the tactic used is to bomb ten, see if the hostage-takers change course and if not bomb five more. At this point the hostage-takers conclude that if

¹³⁰ Keohane, Robert, *International Relations and International Law: Two Optics*, 38 Harvard Int’l L. J. 487, (Spring 1997) (comment) at 488.

¹³¹ [Add cite and examples.]

¹³² Fisher, *Coping with International Conflict*, 194

¹³³ Fisher 195-196

they have already lost fifteen buildings, they are not going to give up now to save five. This demonstrates how 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.¹³⁴ 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.¹³⁵

Acculturation

Acculturation is the exchange of cultures that takes place when groups interact. International relations scholars have argued that one way international law changes state behavior is through acculturation. For example, when states participate in the WTO or in other multilateral processes they enter into a culture that respects and consults international law. These international processes help to acculturate parties to consider international law when making decisions. Acculturation in IDR processes works much the same way. During a mediation or negotiation, parties can become highly motivated to reach an agreement due to IDR's cultural focus collaboration and problem-solving. The agent-principle problem illustrates how parties involved in a process have different perceptions 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.¹³⁶ 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 and between the UNCC Secretariat, Governing Council, representatives of claimants' countries and international organizations and representatives from Iraq. These four meta-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 decided thousands of claims and awarded over \$60 billion in compensation within just fifteen years. The efficiency of

¹³⁴ Fisher 195-196

¹³⁵ Fisher 196-197.

¹³⁶ UNSC adopted resolution under Chapter VII of the UN Charter – Resolution 687 (1991) finding liability of Iraq and delegating adjudication/fact-finding to a newly created sub body the UNCC. UNSC decisions are binding on Member States under Article 25 of the UN Charter. UNSC decided that Iraq was liable. Quasi-judicial functions, Secretariat vs. Governing Body vs. states affected vs. UNSC. Collaborative process particularly with F4 environmental awards.¹³⁶ Successful in several ways – number of claims settled in short time, cost-effective, resulted in collaboration between claimants (F4 environmental working groups). Approach is similar to lump sum settlement bodies – Federal Claims Commission; 9/11 Commission (instituting hearings allowing claimants to voice concerns). Alternative to reparations for damages/wars. What other international disputes can such a process be used for – critical element of clear liability – prerequisite or not?

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 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 into Kuwait. The UNCC awarded these claimants over \$1.1 billion in compensation. These claimants include certain Gulf nations who 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 nation's borders and required multilateral cooperation to successfully remediate the damage. Thus, 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 have formed an IDR process by which they reached agreements that they are now implementing. This took place within the UNCC – a culture that supported and promoted dispute-resolution 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. In order to reach an outcome to which parties will comply, all stakeholders must be invited to participate and have a sense of ownership of the process.¹³⁷ 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 determined by those affected by the process. Maximizing participation in the process increases the likelihood of achieving compliance over the long term. If parties find that they can not 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. For example, mediation was used to help form 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.¹³⁸ 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.

¹³⁷Susskind, CBH, p.62

¹³⁸ Khoti Kamaga. Some Constitutional Dimensions of East African Cooperation available at www.kituoachakatiba.co.ug

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. 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 outcome.¹³⁹ Coordination considers the complexities that nations face in organizing aligned and conflicting interests.

IDR processes are designed to serve as coordination mechanisms. Negotiation, mediation and conciliation all 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 assist parties in cooperating 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. 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 suggest that states comply with international rules that can not be enforced (through sanctions) when international courts rule on state obligations to comply (and when the situation involves a coordination context) because 1) courts clarify ambiguities, and 2) courts provide signals that cause parties to update beliefs about facts that both affect decision-making and influence behavior.¹⁴⁰ Mediators, conciliators and other third-party neutrals provide these same functions supported by IDR's normative focus on problem-solving.¹⁴¹

Trust and Accountability

International law lacks centralized authority, but centralized authority is not the only way to achieve trust.¹⁴² IDR provides tools that build trust, which increase persuasion, participation and coordination. IDR also builds accountability into the process, creating feedback loops where parties monitor and rely upon each other. Improved accountability helps to build trust and establish credibility, improving the legitimacy of the parties and the process. These factors improve coordination between the parties by promoting dialogue, communication and collaboration.

¹³⁹ 45 Wm and Mary L. Rev. 1229 at 5 n35.

¹⁴⁰ Ginsburg, Tom and McAdams, Richard H., "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution." William & Mary Law Review, Available at SSRN: <http://ssrn.com/abstract=475982>.

¹⁴¹ Blum at ?

¹⁴² Raustiala, at 23-24.

6. IDR Addresses Emotions

IDR has the capacity to address both intellectual and emotional factors present in a problem or conflict. Every dispute has a negative emotional element. IDR encourages parties to understand what is producing negative emotions.¹⁴³ Typically, identity issues involving ego, reputation, trust and respect are present. In law, emotional concerns are channeled into intellectual ones. In legal systems, behavior change 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 does not solve the overall or underlying problem.

Dispute resolution not only recognizes emotional elements, it also provides techniques for constructively dealing with them as elements of conflict. Conflict and cooperation involve emotional factors, so dealing with them is essential to achieving compliance. An IDR approach seeks to understand the emotional need behind the behavior. For example, if a child runs across a busy street, most parents react by yelling at the child. The parents' goal is to prevent the child from doing the same thing in the future by causing the child to associate such behavior with anger and pain. The parent is afraid of the pain, grief and loss he or she would suffer if the child were to be hit by a car. However, this technique often fails years later when the child becomes a teen because the teen realizes that the parent is using anger to mask fear. This type of IDR analysis provides a fuller understanding of the multiple layers of any conflict, allowing for superior problem-solving. Also, the ability to resolve disputes is maximized when both parties feel acknowledged and understood.

Summary

Understanding common assumptions and core principles in IDR, along with its affect on behavior motivating factors and tools illustrates the ways in which IDR processes can be designed to induce compliance. Mediation makes parties want to comply because it promotes creative problem-solving, legitimacy, cost savings, more complete and durable solutions, and improved reputations.¹⁴⁴ 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 cease fire, which parties complied with because the demand came from the UN.¹⁴⁵ Mediation also reduces barriers to forming

¹⁴³ See Roger Fisher and William Ury, *Getting to Yes* 30 (Penguin Books 2nd ed. 1981).

¹⁴⁴ The success of mediation depends on cooperation of all parties and ability to finalize agreements.¹⁴⁴ Empirical studies on international mediation show that effectiveness turns on disputant motivation to settle/resolve, mediator opportunity and skill,¹⁴⁴ power parity between parties (Young 1967), and absence of ideological issues from the mediator's perspective, (Bercovitch and Langley 1993). Timing of the mediation also impacts effectiveness. Bercovitch suggests that international mediation is ripe halfway through the life cycle of a conflict and after parties own efforts have failed because the motivation of the parties is high (Bercovitch 1986).¹⁴⁴ There is a positive association between high rank and successful mediation outcomes¹⁴⁴ and directive mediation styles tend to be more effective.¹⁴⁴

¹⁴⁵ Fisher 235-36 discussing Suez Canal UNSC decision that ---- Egypt refused to comply and supported its decision by using the [threat] of a neutral – saying its decision was subject to review by the ICJ – we are

agreements. Mediation overcomes uncertainty by providing structured information exchange, balancing power dynamics and ensuring a fair process.¹⁴⁶ Even when mediations fail, they still facilitate fact finding for subsequent processes and improve understanding between parties.¹⁴⁷

Negotiation uses coordination and acculturation to shape interests and form outcomes with which parties want to comply. Negotiation has even 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 the award until the matter was raised during trade negotiations with the UK.¹⁴⁹

IDR processes can be designed to achieve compliance. IDR provides an environment for creating outcomes with which parties want to comply. Promoting voluntary compliance requires increasing credibility,¹⁵⁰ coordinating common interests by providing signals and clarifying ambiguities, maximizing participation, building accountability, and creating fair, inclusive and legitimate processes.¹⁵¹ As Susskind states, "good solutions [are reached] 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."¹⁵² 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."¹⁵³

V. Common Critiques

In the absence of strong empirical data linking high rates of voluntary compliance with outcomes produced through IDR, I have attempted to illustrate at a theoretical level how IDR processes are designed to encourage and promote compliance. Using a process-based approach, this analysis argues that incidences of noncompliance can be limited by focusing on process design. Before discussing the implications and benefits of this finding, three critiques shall be considered.

right and if you think we are wrong, take us to court.] Other cases icnlde: US military aid to Greece and Turkey 1987 – US military intervention legitimized by clause that if UNSC asked US to get out – it would. US military intervention in the Dominican Republic could have been legitimated in such a way – was not.

¹⁴⁶ Buhning-Uhle Table 6: Factors Influencing the Achievement of Settlement III 336

¹⁴⁷ Id 337-38

¹⁴⁸ John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* 264 (Oxford University Press 1999).

¹⁴⁹ Collier and Lowe 264. See also, *Lena Goldfieds* [find case citation]

¹⁵⁰ Fisher 226 (really saying credibility rests on compliance)

¹⁵¹ Id. at 641

¹⁵² Susskind, CBH 641

¹⁵³ Raustiala, *Redefining Limits* p. 3

First, I consider whether IDR has a selection problem.¹⁵⁴ While parties may use IDR to form agreements that do not require enforcement, they also use IDR to form agreements that do. In court-ordered pre-trial mediations, parties who do not engage voluntarily have the same average rate of settlement as parties who voluntarily participate in mediation - 65-75%.¹⁵⁵ A second kind of 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. For example, where IDR might achieve voluntary compliance with positive rules, it will fail in deterrence cases. While it is clear that IDR is not right for every situation, such as prosecuting war crimes¹⁵⁶, it does work in many instances. 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 specifically clarify elements that make IDR work.¹⁵⁷ Thus, it is vital to develop a more complex understanding of how the design of IDR processes affects its impact on compliance.

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.”¹⁵⁸ However, frameworks – a skeleton upon which all practices are supported by and system of norms – general principles upon which all methods/tools are based are inconsistent across international law, IDR and international relations. This diversity in theoretical structure makes it difficult to compare across disciplines.¹⁵⁹ This article has used a process-based approach to analyze IDR that may be compared to processes used in international law. Ultimately, the two disciplines share some of the same principles and goals. While adding a new label does not merge the fields, it can help coordinate between them at a conceptual level.

The third consideration focuses on IDR. In spite of the best intentions and design, IDR processes do not always work. Good theory and design still require good implementation. The Munich Pact of 1938¹⁶⁰ involved two rounds of negotiations and mediations, but the parties were unable to reach a lasting peace settlement in Europe for the following key reasons.¹⁶¹ The facilitator assumed that a negotiable solution existed. British Prime Minister Chamberlain had a negotiation strategy based on building trust with Adolf Hitler, which failed. Key stakeholders (notably Czechoslovakia) were not present at the negotiating table. Chamberlain conceded early to Hitler’s demands regarding secession of parts of Czech into Germany. Chamberlain’s soft tactics failed to achieve cooperation

¹⁵⁴ See generally Koh, Hathaway Foundations at 184 discussing selection problem defined as states only making agreements that don’t require much enforcement.

¹⁵⁵ See ABA Dispute Res Mag article June 2007.

¹⁵⁶ Although, South Africa did employ IDR-like process in its Truth and Reconciliation Commission.

¹⁵⁷ 45 Wm. And Mary L. Rev. 1229 at 4 and n. 22

¹⁵⁸ Hathaway and Koh at 22, quoting from Peter Wilson. The English School and the Sociology of International Law: Strengths and Limitations, (unpublished manuscript) (December 2003).

¹⁵⁹ Slaughter and Raustiala at #.

¹⁶⁰ Lionel D. Warshauer. “The Munich Pact of 1938: ADR Strategies for Our Time?” 5 Cardozo J. Conflict Resol. 247 Spring 2004, Note

¹⁶¹ Id at 247-49.

when met with Hitler's hard tactics.¹⁶² Mussolini stepped in as the mediator, but was neither objective nor fair, and instead promoted Hitler's positions. Chamberlain lacked a BATNA, and thus appeared desperate and yielded to pressure, not principles. There was an overall lack of good faith. 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. The cautious lesson is that just because IDR is implemented does not ensure just or good outcomes.

VI. Normative Implications for International Law

A. Reconsidering International Law-Making

Limited empirical studies and process-based theoretical analysis suggest that IDR can be designed to encourage voluntary compliance. Considering compliance as an outcome of a process changes the way we should consider international law-making. 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 law-making 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."¹⁶³

B. Bridging the Gap between International Law and IDR

Whether IDR and international law represent two distinct disciplines or one, it is clear that each inform the other. IDR enhances the effectiveness of international law. Over the past decade, IDR efforts in Africa have increased knowledge of and respect for international law.¹⁶⁴ Today the continent enjoys a strong commitment by African leaders to peace building and conflict prevention. Resources have been developed and pledged. Mediation processes have become standard as more mediators have been trained. These IDR efforts help build hope, trust and credibility in an international system and in the rule of law at the same time traditional international law is working to do the same. International criminal tribunals in Rwanda and Sierra Leone along with sanctions banning conflict diamonds are supported by these IDR methods.

The growth of IDR around the world continues to blur the lines between legal processes and non-legal dispute resolution approaches. Lawyers are becoming increasingly aware of how mediation, negotiation and arbitration inform their practice. IDR professionals are learning about the legal implications of mediating disputes and facilitating agreements. As these areas of practice continue to merge, particularly in the international section, the distinctions that segregate the fields of scholarship in international law, ADR and international relations only become more obtuse. The challenges of integrating these

¹⁶² Id at 270-276.

¹⁶³ Blum at 44.

¹⁶⁴ Ken Maenkhaue. "New Trends and Solutions in Africa and The Middle East?: A "Sudden Outbreak of Tranquility:" Assessing the New Peace in Africa." 28 Fletcher F. World Aff. 73 pp. 85-87 Summer 2004.

disciplines are largely lingual and cultural not conceptual. The benefits of interdisciplinary scholarship allow for combined approaches that provide insights and solutions that neither 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.

CONCLUSIONS

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 operates, not assume it has power”¹⁶⁵ or limits, then we must shift our scholarly focus to improving our international legal process. Part of that effort focuses on achieving compliance. This article has explored the ways that IDR processes support and induce voluntary compliance and has transferred these findings into normative suggestions about international law.

DPRK's participation in the Six-Party Talks presented a highly visible example of how process can inform decisions and shape outcomes. In IDR, design elements are having a strong effect on shaping behaviors in ways that support agreement formation and voluntary compliance. Arguments that process can be designed to achieve outcomes, particularly compliance. A process-based approach was used to analyze how IDR achieves this. A few empirical studies also support this link. These findings suggest that outcomes are not arbitrary, they can be designed through process.

In considering how to address the complexities of achieving state compliance with international law leading scholars agree that voluntary compliance is the way forward.¹⁶⁶ 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.

The success of IDR and its rising popularity suggest that these processes achieved desired results and maximize satisfaction. Mediation, negotiation, conciliation and arbitration offer unique techniques to achieve this. Although distinct, they are connected by common IDR assumptions and principles. The changing global landscape requires processes that include non-state actors and consider a broad array of interests and identities in order to promote global cooperation and reduce conflict. International law has an important role to play and lessons from IDR can and should inform legal process. Problem-solving at its

¹⁶⁵ Raustiala at 64-65.

¹⁶⁶ Koh, *Why Do Nations Obey the Law*, 106 *Yale Law Journal* 2599 (1997) noting that both Franck and the Chayes' ultimately agreed on a preference of voluntary over coerced compliance. (reprinted in book at 195).

best requires taking in multiple viewpoints drawn from different disciplines in order to achieve an accurate perspective. In the quest to understand and develop global governance, the discipline of international law can benefit from a reminder that such a complex effort will lean on information and insight from multiple disciplines. I conclude with a thought - if we were creating the international legal system today for the first time, how would we design it; who would participate; and what would we want it to achieve? The field of IDR provides important answers to these questions and suggests as Roger Fisher did that “[t]he best way to improve the game is to play the game in ways that make it a better game to play.”¹⁶⁷

¹⁶⁷ Fisher *Improving Compliance* Contents 351