

Beyond the Award: Managing Geopolitics and Stakeholder Interests in Arbitration¹

**For Centre for International Law's Conference on
A New Era for IDR: Breaking the Stronghold of International Arbitration**

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1. Introduction

- a. Let me begin with 2 short stories.
 - i. 15 years ago, as a diplomat sent to the UN, I was chairing negotiations among 190+ countries and negotiating on behalf of the G77 (a coalition of 130+ countries). We concluded countless of agreements. However, I realised that our KPI² was to close the deal, and move on. My peers and I often had little sense of what was actually happening on the ground, and how our outcomes would help or hurt local communities.
 - ii. Fast forward to last year. In a refugee camp I visited, the refugees shared that they were very hopeful about an international court case that was being brought against who they saw as the perpetrator. They voiced the expectation that when the verdict was issued, it would be in their favor, and they would be able to return home. Realistically, we knew that the court case would not change the politics in their home country, nor cease the ongoing fighting that was taking place where their homes used to be. In short, they were unlikely to be able to return home even if the verdict was in their favor. What happens then, when their hopes are shattered? Who will be there to pick up the pieces? How could the IDR team have managed their expectations more effectively?
 - iii. I share these two stories because for much of my career in diplomacy and conflict transformation, I have been wrestling with the question of how can we produce better outcomes
 1. that can and will be implemented by the parties

¹ Special thanks to Loretta Malintoppi, Davinia Aziz, Natalie Morris, Danielle Yeow and Low Lih Jeng for their insights.

² Key Performance Indicator

2. that are sustainable
3. that do not create more problems for vulnerable populations
4. that actually put the dispute to rest once and for all.

2. *Definitions and aims*

- a. The goal of international dispute resolution (IDR) is to solve, or at least move stakeholders closer to solving, the dispute at hand.
 - i. By dispute, I am referring to a specific disagreement between parties. Such disagreements usually fall within a larger picture of diverging interests or conflict context. Especially when a state is involved, we can expect a whole gamut of larger interests at play, be they political, economics, or social.
 - ii. By IDR, I am referring to processes in Article 33 of the UN Charter, which includes negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, etc.³ While this session is on arbitration, I will also refer a lot to IDR as what I am speaking on is applicable to IDR-at-large.
- b. To solve the dispute, the IDR process needs to forge sustainable, implementable, and meaningful change. When the IDR team's focus is on fostering a more positive and trusted relationship between the disputants, one is more likely to see behavioral change and decision making that leads to durable peace.
 - i. Yet, we know of dispute resolution processes that focused on adopting a written agreement between the disputants, only for the agreement to fall apart after it was signed. The IDR outcome lacked in sustainability.
 - ii. At times, a ruling created further problems for communities who had little say in the proceedings. As the IDR process did not sufficiently consult stakeholders whose interests were directly affected, the IDR outcome faced implementation challenges.
 - iii. There are also parties who put much time, money and effort into a court or arbitration case. Unfortunately, the adversarial approach of the dispute resolution process drove a deeper wedge between the parties. The IDR outcome lacked in

³ "Repertoire of the Practice of the Security Council", 25th Supplement (2022), https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/25th_suppl_part_vi_advance_version.pdf#page=39.

forging trust and bringing meaningful change between the actors in dispute.

- c. So how can IDR do a better job of solving disputes, particularly those involving states?
 - i. I would like to share five guiding principles that IDR, including arbitration, teams could consider.
 1. How does IDR for this dispute fit into the overall resolution of the broader diverging interests or conflict at play?
 2. What IDR approach best enables sustainable, implementable, and meaningful change to this specific dispute?
 3. How are we applying the principle of "do no harm"?
 4. How can flexibility be built into the IDR process to creatively adapt as needed and foster buy-in for the outcomes?
 5. Are we considering "And then what?" – to identify next steps in the IDR process?
 - ii. I hope that these guiding principles bring us a step closer to settling international disputes.
- d. I also look forward to hearing your IDR approaches to forging sustainable, meaningful, and implementable change between actors in dispute.
 - i. Today, we are facing messy multi-party conflicts, as well as complex issues like climate change and health emergencies.
 - ii. There are increased expectations among those affected by conflict to meaningfully participate in its resolution.
 - iii. We need to work together to find better IDR tools. Otherwise, the settlement of conflict will likely be less durable and less just.

3. A first guiding principle is: how does IDR for this dispute fit into the overall resolution of the broader diverging interests or conflict at play?

- a. In *The Art and Soul of Building Peace*, John Paul Lederach notes that - beyond trying to end the immediate and most pressing symptoms of the conflict, we need to sustain a platform capable of generating "adaptive change processes that address *both the episodic expression of the conflict*" and *the relational context that lies*

*at the epicenter of what generates the fighting (emphasis mine).*⁴ Zooming out, international arbitration is one adaptive change process among various processes in a conflict transformation platform. It is thus important that the IDR process for resolving the dispute at hand is not operating in silo and understands the overall conflict landscape.

- i. For example, to address the Somali piracy crisis, several adaptive change processes worked in concert. Courts, including in the Netherlands, France, and Germany, sentenced the pirates, while other adaptive change processes engaged other Somali stakeholders.
 - ii. Mediators working on the Black Sea Grain initiative had a deep understanding of the conflict context and the interests of the various key stakeholders. This enabled their IDR process to find constructive solutions to address the dispute over Ukrainian exports of grain, within the broader Russia-Ukraine conflict.
 - iii. In the case of the 2007-2008 Kenyan crisis, Kofi Annan understood that disputants may "forum shop" if given the opportunity. Hence, "Annan had conditioned his participation on his mediation being the "only game in town". (This was) in contrast to past regional crises, where several actors would attempt to mediate simultaneously and without coordination, leading to forum shopping by the conflicting parties (thereby making the situation worse). Indeed, the choice of Annan was partly in order to be able to unify international efforts in this manner. As a result, the Annan effort received full-throated public support from virtually all major international actors, greatly increasing the "muscle" of the mediation team."⁵
- b. In short, we need to understand how the dispute process fits into the larger set of diverging interests at play and the ultimate resolution of the broader conflict.

4. A second guiding principle is: what IDR approach best enables sustainable, implementable, and meaningful change to this specific dispute?

⁴ John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (Oxford University Press, 2005), 46-47.

⁵ "Kenya Short Mission Brief, Kenya - Tufts," African Politics, African Peace, accessed March 24, 2024, <https://sites.tufts.edu/wpf/files/2017/07/Kenya-brief.pdf>.

- a. For disputes involving a state, the solutions may lie beyond one sector, such as environmental or trade. In such cases, choosing an IDR approach that also enables relevant interests of the disputants to be factored in and builds ownership could strengthen the impetus for implementing the outcome as well as its durability. This is because identifying interests, the areas of alignment and divergence, and potential trade-offs can increase the overall value brought to the outcome.⁶
 - i. A case in point is the mediation of the conflict between the Philippine Government and the Moro Islamic Liberation Front. The mediation resulted in the Comprehensive Agreement on the Bangsamoro, which covers a breadth of interests from power sharing to revenue generation to maritime cooperation. We just celebrated its 10th Anniversary last month.
- b. Choosing an IDR approach that also verifies the facts and propose solutions *in a manner that builds buy-in (emphasis mine)* from the disputing parties can help improve the implement-ability and sustainability of the IDR outcome.
 - i. For example, in the Land Reclamation in and around the Straits of Johor case, ITLOS ordered Singapore and Malaysia to appoint a Group of Experts to conduct a study and to propose measures. Ad hoc Judges Hossain and Oxman chose to issue a joint opinion, which noted the utility of a “common base of information and evaluation regarding the effects of the land reclamation projects that can *command the confidence of both parties (emphasis mine)*.”⁷ Notably, then Foreign Minister George Yeo described the working relationship between Singapore and Malaysia officials as excellent and that this collegial spirit infected the group of international experts⁸ – this links to my next point that the IDR process should help foster trust between the parties.

⁶ From what I have heard, the use of proportionality analysis is one tool in the arbitration toolbox used to weigh tensions between competing values or interests when interpreting treaties.

⁷ “Case Concerning Land Reclamation by Singapore in and around the Straits of Johor, Order - Provisional Measures, Joint Declaration of Judges Ad Hoc Hossain and Oxman, 8 Oct 2003,” Case concerning Land Reclamation by Singapore in and around the Straits of Johor, July 4, 2003, <https://jsumundi.com/en/document/opinion/en-case-concerning-land-reclamation-by-singapore-in-and-around-the-straits-of-johor-malaysia-v-singapore-joint-declaration-of-judges-ad-hoc-hossain-and-oxman-wednesday-8th-october-2003>.

⁸ George Yeo, “SIGNING CEREMONY, SETTLEMENT AGREEMENT OF THE CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (MALAYSIA V SINGAPORE),” Welcome Remarks by Minister George Yeo, Signing Ceremony, Settlement Agreement of

- c. In cases where parties envisage a continuing relationship, choosing an IDR approach that also supports trust building between the disputants is particularly useful. Trust is key in forging sustainable, meaningful and implementable outcomes in dispute resolution. In fact, trust is a large part of the change we often hope to achieve between the disputants.
 - i. In PCA Case N^o 2016-10 – “In The Matter Of The Maritime Boundary Between Timor-Leste And Australia (The “Timor Sea Conciliation”)", the Commission considered that a number of steps taken in the course of the conciliation were instrumental in bringing about a constructive outcome. This includes “efforts throughout the proceedings to build the Parties’ trust in each other, in the Commission, and in the process” and “sustained, informal contacts with the Parties’ representatives and counsel at a variety of different levels”.⁹
 - d. In summary, when we take into account stakeholders’ interests, determine facts and propose solutions in a manner that builds ownership among the parties, and fosters trust between them, we are more likely to resolve the dispute.
5. A third guiding principle is: **how are we applying the principle of "do no harm"?**
- a. The principle of “do no harm” is an ethical guideline in various fields. It reminds professionals to consider the potential impact of our actions and to act responsibly to minimize harm. It can be applied by making a thorough analysis of the context to ensure that the intervention does not worsen the conflict but rather contributes to improving it.¹⁰ For example, in IDR processes involving natural resources, it is essential to consider whether the outcomes will do further harm on the environment or to vulnerable populations. Regular check-ins during the IDR process also help monitor intended and unintended impact of a team’s activities.
 - i. A case gone wrong was when a mediation team created a Women’s Platform to support ongoing peace talks, in

the Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore), April 26, 2005, <https://www.nas.gov.sg/archivesonline/data/pdfdoc/2005042602.htm>.

⁹ “PCA Case No 2016-10 in the Matter of the Maritime Boundary between Timor-Leste and Australia (The ‘Timor Sea Conciliation’),” Timor Sea Conciliation (Timor-Leste v. Australia), May 9, 2018, <https://pcacases.com/web/sendAttach/2327>.

¹⁰ Do no harm, accessed March 25, 2024, <https://inee.org/eie-glossary/do-no-harm#:~:text=An%20approach%20which%20helps%20to,conflict%20or%20risk%20of%20conflict.>

response to donor pressure. This Platform ended up directing resources, which were already very limited, away from existing women's networks that had been achieving positive results. It led to this women's group becoming siloed to the detriment of the overall IDR process. On hindsight, the team realised it should have done a thorough analysis of the context and considered possible implications before taking action.

- ii. In the WTO negotiations on "Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions", the principle to do no harm was included in the final agreement to balance states' concerns of unintended impact vis-a-vis the new measure that the WTO was adopting.¹¹

- b. It is concerning if the IDR process brings more harm to the overall context. It is thus important that we do not work in silo.

6. A fourth guiding principle is: how can flexibility be built into the IDR process to creatively adapt as needed and foster buy-in for the outcomes?

- a. Professor Sinisa Vukovic states that "Without a process that would inspire parties to internalise the change and own the solution even without the application of positive and negative inducements, the outcome may collapse in the long run."¹² Arbitrators, adjudicators and other IDR teams may thus wish to design the process so that the disputants and other stakeholders own the process and understand the terms of the eventual agreement reached.

- i. For example, a mediation team in Yemen supported the design of a ceasefire agreement and consulted with military as well as tribal actors to inform the terms of the agreement.
- ii. In the Jan Mayen case, the Conciliation Commission helped the parties build a common vision for the future beyond just focusing on the problems of the past, including through its recommendation that the parties adopt a joint development agreement going forward.¹³

¹¹ "MINISTERIAL DECISION ON WORLD FOOD PROGRAMME FOOD PURCHASES EXEMPTION FROM EXPORT PROHIBITIONS OR RESTRICTIONS," Ministerial Conference Twelfth Session Geneva, WT/MIN(22)/29 WT/L/1140, accessed March 24, 2024, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/29.pdf&Open=True>.

¹² Siniša Vuković, "The Many Faces of Power in Diplomatic Negotiations," *SAIS Review of International Affairs* 40, no. 1 (2020): 45–57, <https://doi.org/10.1353/sais.2020.0004>.

¹³ "Background Paper," Working Conference on Conciliation, accessed March 24, 2024, <https://cil.nus.edu.sg/wp-content/uploads/2017/10/Conciliation-Background-Paper-1.pdf>.

- b. Creating tracks, e.g. through amicus curiae, so that other key stakeholders relevant to the dispute can be brought into the process is also useful. Information flowing from these tracks will allow the IDR team to make decisions that are more informed. It may also create greater buy-in for the outcomes. Expanding the tent is particularly important for complex conflicts involving multiple stakeholders.
 - c. In short, we need to engage stakeholders in an ongoing dialogue so that issues can be identified and addressed as they arise. This will also foster greater buy-in for the outcomes
7. A fifth guiding principle is: **"and then what?" – to identify next steps in the IDR process.**
- a. Lady Catherine Ashton, whose team mediated between Kosovo and Serbia, coined her book "And then what" as she would ask colleagues this question to get the team thinking beyond the immediate crisis. She states, "it was very difficult to see what might happen, but unless we defined our commitment as extending beyond the short term and planned accordingly, the chances of longer-term success were significantly lessened."¹⁴
 - i. What would be the longer-term success if key stakeholders involved in cases like Tethyan Copper Company Ltd v Pakistan¹⁵ asked "And then what?" from the start? Toby has shared the impact of this case in the important CI Arb lecture he gave.
 - ii. In the refugee camp I mentioned, one of the refugees shared that she was called to provide testimony to this international court case and travelled to a third country for this. When criminal gangs in the refugee camp found out that she had travelled abroad, they assumed that she had money and kidnapped her child for ransom. What will happen when she realises that the court case she has made huge sacrifices for is not going to live up to her expectations in enabling her to go home?
 - b. In short, we should ask ourselves "And then what?" from the start to think through the impact of the IDR process.

¹⁴ Baroness Catherine Ashton, *And Then What?: Stories from Twenty-First-Century Diplomacy* (Elliott & Thompson, 2023), xxiii.

¹⁵ Toby Landau KC C.Arb FCI Arb, 'International Investment Arbitration and the Search for Depoliticisation', CI Arb Alexander Lecture 2023, <https://www.ciarb.org/media/27352/alexander-lecture-transcript.pdf>

8. Conclusion

- a. I hope that the five guiding principles can guide arbitrators and other IDR teams in considering best approaches to dispute resolution and to forge more sustainable, implementable, and meaningful change in the field.
- b. Returning to Lederach's concept - of sustaining a platform capable of generating "adaptive change processes that address both the episodic expression of the conflict" and the relational context that lies at the epicenter of what generates the fighting¹⁶ – I believe that different IDR processes and approaches ultimately need to work together in concert to resolve the dispute at hand and the larger set of diverging interests.
 - i. We need to re-look what a "win" looks like in IDR. The "scars" that local communities have – as mentioned by Toby – they are real.
 - ii. It is heartening that Singapore's Courts are adopting a multi-disciplinary approach, including therapeutic justice, mediation, and other legal tools for its cases. This approach does not usurp important legal principles, such as the rule of law, procedural justice and due process. Nor does it turn judges and lawyers into counsellors or psychologists. Instead, it asks legal actors to be conscious that underlying problems do exist and to intentionally think of how these problems can be resolved. As Singapore's Chief Justice highlighted, to effectively navigate the challenges that confront our societies, our role cannot be limited to a purely adjudicative setting.¹⁷
 - iii. I hope that these positive changes that our Singapore court system is making will inspire improvements to arbitration, the IDR system and our discussions today.

¹⁶ Lederach, *The Art and Soul of Building Peace*, 46-47.

¹⁷ Rachel Chia, "How Singapore Courts Are Evolving and Promoting Access to Justice for All," *The Straits Times*, October 2, 2023.