SYMPOSIUM

PANEL 2: PRACTITIONER INSIGHTS INTO INTERNATIONAL DISPUTE RESOLUTION

JOHN M. PETERSON

ATTORNEY, NEVILLE PETERSON LLP

John M. Peterson practices in the areas of international trade and Customs law. He is a graduate of Fordham University and the Fordham University School of Law, from which he received a Juris Doctor Degree in 1977. He regularly represents foreign and domestic clients before the United States Customs Service, the United States International Trade Commission, the United States Department of Commerce, the Federal Maritime Commission, the Foreign Trade Zones Board and the Office of United States Trade Representative, and litigates before the United States Court of International Trade and United States Court of Appeals for the Federal Circuit. He has extensive experience in antidumping and countervailing duty matters, and in related proceedings involving unfair or injurious foreign trade practices. He counsels clients on export control laws, and handles matters involving protection of intellectual property rights in international trade.

Mr. Peterson writes regularly for several publications, including The Journal of Commerce and The Exporter, and he lectures on international trade and Customs topics worldwide. He is a member of the Customs and International Trade Bar Association and the Federal Circuit Bar Association. He has served as a United States Panelist in binational dispute resolution proceedings under Chapter 19 of the North American Free Trade Agreement (NAFTA).

RUTH TEITELBAUM

SENIOR ASSOCIATE IN DISPUTES, FRESHFIELDS BRUCKHAUS DERINGER

Ruth specializes in international dispute settlement, including international commercial arbitration, investment treaty arbitration and inter-state dispute settlement. She also provides pro bono legal service to the Coalition Against Trafficking in Women.

Before joining Freshfields, Ruth served as a law clerk at the International Court of Justice, an assistant counsel at ICSID and as the Managing Editor of International Legal Materials at the American Society of International Law (ASIL). She is currently a deputy general editor of Arbitration International, a member of ASIL and the Advisory Board of the Center for International and American Law (ITA). She is a rapporteur for the Joint ICCA-ASIL Task Force on Issue Conflict in International Arbitration and a Vice-Chair of the ITA Young Arbitrators Initiative Committee.

SIMEON BAUM

PRESIDENT, RESOLVE MEDIATION SERVICES, INC.

Simeon Baum, President of Resolve Mediation Services, Inc., has successfully mediated over 1,000 disputes. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's $ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. He was selected for New York Magazine's 2005 - 2014 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011 and 2014, and for the International Who's Who of Commercial Mediation Lawyers 2012-14.

An attorney, with 30 years' experience as a litigator, Mr. Baum has served as a mediator or ADR neutral in a wide variety of matters involving claims concerning business disputes, financial services, securities industry disputes, reinsurance and insurance coverage, property damage and personal injury, malpractice, employment, ERISA benefits, accounting, civil rights, partnership, family business, real property, construction, surety bond defaults, unfair competition, fraud,

bank fraud, bankruptcy, intellectual property, and commercial claims.

Mr. Baum has a longstanding involvement in Alternative Dispute Resolution ("ADR"). He has served as a neutral for the United States District Courts for the Southern and Eastern Districts of New York Mediation Panels; New Jersey Superior Court, Civil Part, Statewide; Commercial Division, New York State Supreme Court, New York & Westchester Counties; U.S. Bankruptcy Court, Southern & Eastern Districts of New York; the New York Stock Exchange; National Association of Securities Dealers; the U.S. Postal Service, the U.S. Equal Employment Opportunity Commission, and CPR, and National Academy of Distinguished Neutrals (NADN), among others.

Mr. Baum's peers have appointed him to many key posts: e.g., Member, ADR Advisory Group, Commercial Division, Supreme Court, New York County; ADR Advisory Group and Mediation Ethics Advisory Committee, N.Y. State Unified Court System. Founding Chair of the N.Y. State Bar Association's Dispute Resolution Section, he was also subcommittee chair of the N.Y. State Bar Association's ADR Committee; Legislative Tracking Subcommittee Chair of the ADR Committee of the Litigation Section of the American Bar Association; Charter Member, ABA Dispute Resolution Section Corporate Liaison Committee; President, Federal Bar Association's SDNY Chapter, and Chair of the FBA's national ADR Section. He is past Chair of the New York County Lawyers Association (NYCLA) Committee on Arbitration and ADR. Besides serving on the NYCLA's Committee on Committees, he is past Chair of the Joint Committee on Fee Dispute and Conciliation (of NYCLA, ABC NY, and Bronx County Bar Associations), and is on the Board of Governors, NYS Attorney-Client Fee Dispute Resolution Program. He is also a Fellow of the American Bar Foundation. He is a Director for the New York NADN panel.

Mr. Baum has shared his enthusiasm for ADR through teaching, training, extensive writing and public speaking. He has taught ADR at NYU's School of Continuing and Professional Development, and he teaches Negotiation, and Processes of Dispute Resolution (focusing on Negotiation, Mediation and Arbitration) at the Benjamin N. Cardozo School of Law. He developed and conducts 3-day programs training mediators for the Commercial Division, Supreme Court, New York, Queens, and Westchester Counties. He has been a panelist, presenter and facilitator for numerous programs on mediation, arbitration, and ADR for Judges, attorneys, and other professionals. Mr. Baum is a graduate of Colgate University and the Fordham University School of Law.

CLAUDIA MUFFETONE

OUTREACH AND RECRUITMENT OFFICER, SOLIYA

Claudia Maffettone is the Outreach and Recruitment Officer at Soliya, leading outreach efforts for the creation of new partnerships with education institutions, universities, NGOs and CSOs in the MENA Region, Asia, Europe and North America. Claudia is a mediator and facilitator, and has trained at Soliya, the New York Peace Institute, and Harvard Law School among others. In the past 10 years, she has been working in the field of intercultural dialogue, serving on the boards of different international networks and implementing projects with NGOs in the UN System, the European Union and the Council of Europe. She is currently an Advisory Board member of the NYPI, and an active member of the ADR□GNY, Mediators Beyond Borders, and the international Human Dignity and Humiliation Studies Network. Claudia is also the president of LuX, a consultancy company that provides support to NGOs in the organization and implementation of projects and programs. She holds a BA in International Relations and Diplomacy with a focus on the Middle East.

RUSSELL SEMMEL

ATTORNEY, NEVILLE PETERSON LLP

Russell A. Semmel is an associate attorney in the New York office of Neville Peterson LLP, a law firm practicing in the areas of customs and international trade, where he has worked since 2010. At Neville Peterson, Mr. Semmel represents domestic and foreign clients in customs litigation matters, and advises on U.S. and international trade litigation.

Mr. Semmel graduated in 2010 with a J.D. from the Benjamin N. Cardozo School of Law, where he served as Articles Editor for the Cardozo Journal of International & Comparative Law, and participated in the Human Rights and Genocide Clinic. During law school, Mr. Semmel interned in the United Nations Office of Legal Affairs and for the Honorable Timothy C. Stanceu of the U.S. Court of International Trade. He earned his B.A. in political science from the University of Florida in 2006.

Mr. Semmel is admitted to practice in the state of New York, The U.S. District Courts for the Southern and Eastern Districts of New York, and the U.S. Court of International Trade.

CARDOZO'S INTERNATIONAL DISPUTE RESOLUTION SYMPOSIUM-2014

PANEL 2: PRACTITIONER INSIGHTS INTO INTERNATIONAL DISPUTE RESOLUTION

MS. DANIELLA ISAACSON: Thanks, Matt and panelists that was excellent. Setting a good precedent for panel two. We're just going to get set up quickly, but as we get set up, I did want to point out that everybody here has feedback cards. Right? Evaluation cards and it's important for us to get feedback on the event, so both for panel one and panel two, if you don't mind to just fill those out, please. Just in the interest of time, we're going to start the second panel and hopefully if the people outside want to come in, they'll join us. Thanks again to Russell and the panel for taking the time to speak to their practitioner perspective on International Arbitration and Mediation. This should prove to be as interesting as the first, and I'm sure there's some competition between the panels, as to which will be more.

I'm just going to briefly introduce Russell and then I'll let the panel take over. Russell is an associate attorney in customs and international trade law in New York at the offices of Neville Peterson LLP. And he has worked there since 2010. He represents domestic and foreign clients in customs litigation. And he advises on U.S. and international trade litigation. He graduated in 2010 from Cardozo, where he was an article editor at the CJICL, so he has some experience with this. And he was also a participant at the Human Rights and Genocide Clinic. He's a member of the New York Bar and also the Court of International Trade, so I'm going to let him take over, thank you.

MR. RUSSELL SEMMEL: Thanks, Daniella; yes thanks for inviting me. As Daniella said, I'm a former editor, articles editor for the Journal, so it's really great to be able to participate in this symposium, four years later. As, Daniella mentioned, I'm a fourth year associate at Neville Peterson, I won't go too much into what the firm does, because the Peterson, Neville Peterson will be speaking shortly. And because there are four panelists and each topic is a little more independent from

the other, than for the first panel, I'll keep my remarks, very, very brief. We'll have questions at the end and I'll add a bit, if we have time.

So first up, we have John Peterson. John will be speaking about conflict resolution of legal disputes in the public international law area, drawing on his experience as a NAFTA dispute resolution panelists. Next, Ruth Teitelbaum, will be speaking about investment treaty arbitration. What is investment treaty arbitration and why do we need it. Simeon Baum will be speaking about mediating in the shadow of the law, we mediate in the shadow of the law, and where there's confidence in the fairness, neutrality, and stability of the legal system, it is easier to look comfortably for alternatives that offer further improvements, even on that. Where the surrounding system is not stable, people might see ADR as a preferred fresh alternative method. Finally, Claudia Maffetone, will be talking about cross-border and cross-cultural dialogue in conflict resolution, particularly innovative trends in this field, like using online platforms and research findings.

So we'll begin with John. John practices in the area of international trade and customs law. He's a two-time graduate of Fordham University, both undergrad and law school, from which he received his JD in 1977. He regularly represents foreign and domestic clients before U.S. customs and border protection, the U.S. International Trade Commission, Foreign Trade Zones Board, the office of the United States Trade Representative, and litigates before the court of International Trade, United States, Court of Appeals for the Federal Circuit. He has extensive experience in antidumping, countervailing duty matters, and in related proceedings involving unfair or injurious foreign trade practices. He counsels clients on export control laws and handles matters of the protection of intellectual property rights and international trade. He also writes regularly for several publications, including the Journal of Commerce, and the Exporter, and lectures on international trade and customs topics worldwide. One of those lectures will be right now, so take it away Mr. Peterson.

MR. JOHN PETERSON: Well thank you for having me here, I always think fondly of Cardozo Law School. I took my Bar exam here and I passed it. And I won't tell you how long ago it was, but I will tell you that nobody from Cardozo was sitting for the bar that year, because the school hadn't graduated a class yet. So anyway, I was one of the first folks, probably in the first class, to take my test here at Cardozo.

And I'm always glad to come back. We're talking about practitioners perspectives and the one I want to talk about, is really kind of interesting. It's sort of an amalgam of public and private international law, and it involves service on International Dispute Resolution Panels under the North American Free Trade Agreement. We call these NAFTA Panels or Article 19 Panels, and what they are, they're very, very interesting.

When we started our free trade agreement with Canada, way back in late '80s, one of the questions came up about, well we're going to have all these disputes come up about antidumping and countervailing duties. How are we going to handle them? Normally if you have an antidumping or a countervailing duty dispute here in the United States, and the parties are unhappy with the agency decisions, they litigate the cases in front of the Court of International Trade right downtown here. What they decided to do in the Canadian agreement was really interesting, they said, we're not going to have these disputes litigated in the courts of the member countries. We're going to have bi-national panels, composed of experts from the two countries involved in the dispute, sit in place of the national court and decide the dispute.

So this gets to be very, very interesting, now for those of you who don't know, antidumping disputes are these disputes that arise when one country says to another, "Hey, you're unfairly pricing your good into my market. You're undermining my interest with unfair pricing." And countervailing duty disputes arise when one country says to another, "Well you're hurting my industry by unfairly subsidizing your products and your exports to my country." So what they decided to do, is to take these disputes out of each country's court systems, and have these bi-national panels decide them. Only Mexico came along to form NAFTA a few years later, the system was expanded.

So, what happens? When there's a dumping or a countervailing duty to dispute and somebody's unhappy with the result, which is 100% of the time, a panel is formed, and it's usually five people drawn from the two countries. And we sit in place of the court that would normally hear the dispute. So, if the case arises under U.S. law, we're sitting in place of the Court of International Trade here in New York. If it arises under Canadian law, we're in Ottawa, and we're sitting in place of the Canadian International Trade Tribunal. If it's a Mexican case, we're sitting in Mexico City, in place of the Tax Court. Now here's what's

really unusual about this, you've got people who are not nationals of your country, and let's take the U.S. for a moment; you've got a Mexican and Canadian Nationals, people are not judges, they may be lawyers in their respective countries, but they're not lawyers here and you're being asked to come and apply the law of the United States.

Apply the rules of the United States. Now if I'm sitting on a panel involving a U.S. dispute, that's fine for me, I'm on home turf. But for when I'm sitting in Canada, now I've got to learn the Canadian rule; when I'm in Mexico, I've got to learn the Mexican rule. It's very, very unusual number one. Number two, it's not some sort of open mediation, it's not some sort of arbitration, it's reaching a legal decision, it's listening to legal arguments, reading legal briefs, and writing a legal decision as if you were the court you're substituting for. That's pretty unusual, and it's pretty intense, and it's pretty challenging when you're being asked to serve as a judge, essentially, in a country where you're not even a lawyer, and you're not even admitted. So, it's very interesting.

Now as I said, there's normally five panelists, usually two from one country, three from the other. We're on a roster, in this case, in the U.S. appointed by the President through the U.S. Trade Representative, and we have to work through rules of impartiality, no conflicts of interest, what have you. The pay stinks, but it's a very interesting experience to do. And you don't win popularity contests doing these things, let me tell you, okay because what you're going to have, is you're going to have the host country's government has just rendered a decision, they're proud of it, they want to defend it to the death. You've got the government of the other country, that thinks the host country's out of their minds. Then you've got all the private players, who are involved in the case. You've got the exporters, the United States manufacturers, the United States importers, all of whom are either delighted or appalled, to one extent or another, with the decision that you're going to have to render.

So you're not going to be real popular for doing these things and they can be very challenging and very detailed. Normally we just consider the administrative record that the agency put together. We're not doing trials, we're not doing evidence-type hearings, but we're listening to arguments from the parties often days on end. And going through administrative records and briefing, often shell-feet thick to try

to get to the dispute.

Now, what's kind of interesting, is you have to learn to be sensitive to the legal and political system to the other countries. And I'll give you an example. Years ago, I'm chairing a panel, and we're looking at a dumping dispute involving Portland Cement from Mexico. Now we've put dumping duties on Mexican cement. Cement industry's a big thing in Mexico, this is politically very sensitive. We get into the hearing, and the Mexican cement industry sandbags us, or cement bags us, however you want to put it. What happened was, previously, there had been a panel, this case, the antidumping order, that the U.S. imposed had been appealed to a panel of the general agreement on tariffs in trade in Geneva. And the GAT has said, it's illegal, the order was illegal. So the first thing the Mexican cement guy said to this panel is, they said, "We need you to set the dumping order aside, and to enforce the GAT decision." I'm thinking, oh my God, we got five people on a panel, three Mexicans, three votes, they've got it. And the problem is, that in the United States, we don't do things that way, and so we wound up having some really interesting discussions with our Mexican colleagues. And they said, "Well you know in Mexico if the GAF strikes a dumping order down, we incorporate that immediately into our law and we get rid of the dumping order."

And the American panelist explained, "Well we don't do that in the U.S., because under GAT, we have an option, either you implement the panel decision, drop your dumping order, or you don't implement it, and you face the possibility of trade sanctions from the other party." But in our system, the decision whether to implement or to face sanctions is made by the political branch of government; it's made by the President. Now, I'll tell you right now, if these three Mexican panelists had said, "We're going to revoke this order based in the GAT decision," I mean they would've gone home, they'd have been rock stars, okay they would've been getting parades, they'd have been getting wheeled around the - -. But to their great credit, they understood that operating in the American legal system; it wasn't something they could do.

And so we issued a decision, which regardless of what we did on the merits, did not overturn that GAT decision. Which was very important, because again, as I said before, you're dealing in another country's legal system, you're dealing in another country's political

system. You're being asked to be a judge of that country; you're not even a citizen of that country. So you have to be sensitive and you have to learn to what are the requirements of the system that you're dealing with. And a lot of these issues get very intense, they get very interesting, sometimes we have these week-long hearings, where everyone comes up and argues everything all over the place. You've got to take your notes, but when you go to make a decision, see in the U.S. courts, you have a single judge, the judge would hear the testimony, the judge would hear the arguments, and then retreat into chambers with a couple of law clerks and say, I'm going to come up with my decision.

But it's not like that in the bi-national panel setting. We've got five panelists, five judges, each of them has either one or two assistants, now you're talking 10 to 15 people, and the secretariat of each of the countries involved will have somebody in the room as a facilitator. So when you sit down to start discussing things, you've got like 17 people, five with votes, you want to hear everybody's views, you're trying to work toward a consensus, but at the end of the day, it's not a popularity contest, it's a rule of law. So there's a certain diplomacy that has to be done, that you don't find normally, if you're just a single judge sitting on a case, in a single country. So it's a very interesting and sometimes controversial proceeding, but my judgment, or at least my experience is, it's always worked out well.

There have been cases where panels will fracture along national lines, the Canadians will vote one way, the Americans will vote another way. It becomes extremely controversial and politically sensitive. I'm very happy to say that in every panel I serve on, we've always brought home a unanimous decision, which is really good, I mean I'm not taking credit, I'm just saying that's how it happened to break out. Because at least when the decision is unanimous, the two countries, the governments, and the people involved, are happy to deal with it.

While I'm on the topic of hearings, I'm going to give all of you young lawyers a really important tip, write this down. The robing rooms and the conference rooms behind the benches in appellate courts, federal appellate courts, they're mic'd, there's a microphone there, so if you're back in the robing room, you can hear what's going on in the courtroom. So, when you get to an appeal some day, and you see the names of the judges, and you're sitting at counsel table, don't do a big

long stage thing, saying oh, not that idiot, because that idiot's going to hear you in the back. Anyway that's the practical important part of the program.

But it's an interesting experience and it gives very complex, I'll give you the web site of the secretariat where all the decisions are posted, if you want to look at some. A lot of them go to 100's and 100's of pages, so I did not bring them here, but it's www dot NAFTA dash sec, S-E-C, dash Alena, A-L-E-N-A, dot org. And you can find all of the panel decisions there.

Now one last sort of practitioner war story, few years ago, a lot of you may remember, that there was this enormous trade fight between the U.S. and Canada over softwood lumber. So I get a call one day from the U.S. Secretariat saying, "John we want you to chair the panel on soft wood lumber, on all the technical antidumping calculation stuff." And I said, "Oh, you're kidding, that's going to be a crushing amount of work, it's going to be controversial," he's like, "Your country's asking you to do this." I said, "No, country's asking me to become a bi-national hacky sack here." But anyway we did the thing and it was an enormous case, the U.S. Government was holding $4,000,000,000 of duty deposits and it was a huge fight. It was between national economies, now we were very fortunate, we had five panelists, three Canadians, two Americans. The Americans were myself, a law professor from L.A., the Canadians were retired general counsel of GE Canada. A guy who'd been a member of the Canadian International Trade Tribunal was an economist, not a lawyer. And a guy who happened to be the Dean of the law faculty of the University of New South Wales in Australia. And this was all done just to make conference calls as difficult and uncomfortable as possible.

It was a really difficult case, it was a long hearing, we had to do about three remands, we came back unanimously, was a big issue. So one day we just about have our decision put together, and one of the other panelists calls me up, he says, "John," he says, "I didn't get to finish my part of the opinion, my five-year-old got sick last night and had a fever." I said to him, "Hey, no problem, as the chairman I can issue an order saying, we're going to extend our deadline four weeks." I do it, I sign it, send it in to the secretariat. This is like on a Tuesday, normally the decision would come out on a Wednesday. On Thursday, a friend of mine calls me up and says, "What's going on with that

panel?" I said, "What do you mean?" He says, "What's going on with that-?" "I can't tell you what's going on with the panel," He says, "I'm reading all about it in the papers," "I didn't see anything in the papers." He says, "Read the Canadian papers."

I go online, I get the Toronto Globe in the mail, and there, like half of the first business page, is like "Panel Delays Decision, Fears of Deadlock and Freshening on National Grounds." They've got quotes from Canada's Trade Minister, quotes from the head of the business—what's the speculation, what could this possibly be doing? It was amazing, I thought panel's fine, we're having drinks together, we send each other Christmas cards, and so then the guy calls me up. He says, "I just read this stuff," He says, "Everyone thinks we're about to start a trade war," he says, "A five-year-old got sick and threw up." He says, "You think we should tell them?" I said, "Hmm, naw it's more fun this way." And we came out with our decision later, so, and I always thought it was really funny, because on top of dealing with all the parties, you don't think of dealing with the press.

And we got all this press speculation about great international conflict going on, when it turned out nothing was going on. I just thought it's a sort of a, an interesting perspective, it's kind of a unique one, and I'm happy to discuss it more with any of you, of course.

MR. SEMMEL: Great. Thanks a lot, John. Next we have Ruth Teitelbaum, speaking about investment treaty arbitration. Ruth is a senior associate in disputes, at Freshfields Bruckhaus Deringer, where she specializes in international dispute settlement, including international commercial arbitration, investment treaty arbitration, and interstate dispute settlement. She also provides pro bono legal service to the Coalition Against Trafficking in Women. Before joining Freshfields, Ruth served as a law clerk at the ICJ, as assistant counsel at ICSID, and as the Managing Editor of International Legal Materials at the ASIL. She's currently Deputy General Editor, of Arbitration International, an IASL member and on the advisory board for the Center for International and American Law.

MS. RIGHT TEITELBAUM: I need to make that bio shorter, I almost want to say stop, but then I didn't want to be rude. Thank you.

MR. SEMMEL: I didn't finish it. [Laughs]

MS. TEITELBAUM: Thank you, and thank you to Daniella Isaacson for organizing this symposium. Now John's discussion made me think I should maybe raise one general point about international arbitration which I don't think came up so much in the previous panel, was that how many people have seen, My Cousin Vinny, the oldie but goodie? You know you love it. The same concepts apply—the reason why we have international arbitration is because of home court justice, these Brooklyn boys who get caught in this dispute in Alabama. The same concern applies to foreign investment all over the world, even among developing countries as John suggested, the Canadians don't want to be in a U.S. court for these trade problems.

And we have very nice courts in Canada and the United States, but very few countries do, this is the sad tale really, that very, very few countries have courts that are fair, reliable, I can't tell you how many countries I deal with where the new president comes in and fires every supreme court member. It's just a sad—and they're talented lawyers, that are just like you who live in this system, that just is not like ours'.

So, this is a major reason why we have international arbitration and particularly in the context of foreign investment. This is a key component. Now what is investment treaty arbitration? As we know it today, it's a form of international arbitration actually, Ank Santens described it where investors are allowed to bring an arbitration directly against a foreign country, a foreign government, either on the basis of a treaty, a contract, or sometimes a foreign investment law. Now, currently most of the investment treaty disputes are based on these treaties. And there are currently about 3,000 of them, and it's a controver—I would say, it's controversial, if you read the New York Times, it is one arbitration—type of arbitration that comes into play and there's a lot of controversy surrounding the new transpacific partnership agreements in.

So you might read about this, so in my own opinion, which I will express, I think it is—the reason why it's controversial is also the reason why it is important and that's my position. But let's just talk a little bit about where it comes from. Obviously there's a long history of foreign investment, but I think a key period is the early '60s between 1957 and 1962, you suddenly have 30 new members of the UN, newly independent countries, mostly African countries. They also become members of the World Bank and this is a—and they're very poor, so the

World Bank and the UN, they're thinking how can we get foreign investors to go there? What are the major obstacles of foreign investment? And there's a 1961 report considering political risk barriers and they cite, not only expropriation, as a major factor, you don't want to have your investments expropriated.

But, also discriminatory tax demands, denial of import licenses or foreign exchange. The other major, of course it's the My Cousin Vinny, people don't want to be subject to these courts, where there's—they don't know how they'll be treated. And so these factors are on everyone's mind and what's going on now, you have some draft conventions, the first idea would there would be one international treaty governing all foreign investment, like the GAT. And those efforts, ultimately failed, and we don't have time to go into why they all failed, but one started in the '50s, another, the OECD started another in the '60s, it didn't finish until the 1997 and it was, and it failed because of NGO's and civil society thought that the OECD is a conspiracy of multinational corporations, basically.

So that effort failed, but in the meantime, you have thousands of bilateral investment treaties entering into force, especially in the '80s and the '90s. So we have now 3,000, in addition to NAFTA, which has a provision on investor state arbitration, chapter 11. In addition to ACEAN, which is a multilateral treaty among Asian countries, and we're going to see more. There are FTA's, Free Trade Agreements, there is now a Central American Free Trade Agreement, so that's where we are. In 1965, the ICSI convention came into force, so World Bank lawyers are saying how can we get foreign investors to take these risks, let's get countries to sign up for this convention, where they agree to enter into—they agree that they will arbitrate disputes arising under investment agreements. They will include ICSI clauses either in treaties, in foreign investment laws, foreign contracts.

So, that's the ICSI convention, that was entered into force in 1965. I worked at ICSI 1991 to 2001, there were maybe 30 or 40 disputes, now there are, I think, 200 or so. So it's grown tremendously. And it's not surprising that the World Bank would be involved in this, because even before ICSI came into force, the World Bank was actually acting as a mediator in a certain, very important disputes, like the Suez Canal crisis, they turned to the general counsel of the World Bank actually act as a mediator. The World Bank offered to act as a trustee, actually for

the funds. Same thing with the Anglo-Iranian Oil Dispute, which was a huge expropriation, a very famous historic expropriation case. So all of this happens. So now, to go to why I think it's controversial and necessary. It is an interference with sovereignty and it's—that is really the purpose of this dispute resolution. It is a check on government action that is in breach of these protections.

What are these investment treaties providing? They provide promises and protections to foreign investors, in order to create stable environment for investment. Now a typical investment treaty has a broad definition of investment, so all assets, for example, is a typical indirect investments. Contractual rights can be an investment, they typically provide that you cannot expropriate without due compensation. They also typically provide, and here's the more controversial, that you must afford fair and equitable treatment and there is controversy about what that means to be—'cause what's fair, I mean everything's fair, right.

But what arbitral tribunals have interpreted this to mean, is basically three things. One a state cannot induce a foreign investor to come and invest, we're going to give you a huge royalty break, a 1% royalty, come, and then renege, and then say, by the way—guess what, we changed our minds, that's a basic problem.

The other factor of fair and equitable arbitrator is that a state cannot use its superior government power to, basically rewrite a contract. And an example of this, that I've faced, is where you have a tax stability agreement, so no new taxes for this many years, no change in the tax law in the state, the government passes a law called a participacion, and even the congressional; everybody says, you know this is great, it's like we rewrote that contract, it was in the public debate. So that's the type, you're using your legislative power to say, we don't like this contract anymore and we're going to rewrite it, through our own law. Because the contract is under our law.

So the treaty fills in that grey area gap, which is not a fun place to be in, if you're a foreign investor with a contract governed by that host state's law. The other thing is, the state cannot create what is, a rollercoaster ride, for foreign investors, to the extent that, you can't even operate in a rationale way, and that can happen too. If they say, yes you need this license, no you don't, you need this, no I would say

having lived in D.C., the D.C. government can be a little bit like that. But no one has brought an - - so far against the local government, I have a business license too—just to be a landlady in D.C. you have to have a business license, not kidding. But that—the rollercoaster you cannot do. So the investment—the dispute resolution provision is a way for an investor to bring a claim against a state on the basis of these type of violations.

And let me give you an example of why I think it's both controversial and necessary. I think taxation is the classical example of a regulatory authority that is extremely dear to a country. It is the most dear tool that a government has to pay off its debt, to build schools, to build hospitals. At the same time, that the power to tax is the power to destroy. At the same time, it is an incentive given to foreign—it's the most common type of incentive given to a foreign investor to invest. It's—because it goes to your bottom line, it goes to your rate of return. 'Cause this is often done, please come invest, we'll give you a special rate. So let me give you an example of why I think this is necessary, in the context of tax disputes.

Let us say that you're a foreign investor and you've been operating in a foreign country for 10 years, the country has a self-assessment regime which is like what we have in the United States. You think you owe this much, you maybe get advice from an accountant, maybe you don't, you take these deductions, you send your tax return in, so this person's operating like this, 10 years he takes these deductions. And after 10 years there's a new regime in place and they say, "You've been taking wrongful deductions for the past 10 years." And for every wrongful deduction, we are going to penalize you with a 100% criminal penalty, 'cause we think this is willful evasion under our law. And so you say, "Well this is really extreme." You go to the tax authorities, you say, "Wait a second," they say, "No, if the United States can do this to Willie Nelson," we whatever the country of, make it up, developing country, "we can certainly do this to you." "So, sorry you're out of luck."

Now; and I've seen cases where they actually have a tax stability agreement that says, no new taxes blah, blah, blah, for a certain amount of years, and the state instead imposes very arbitrary audits, as a way. So here's the problem, taxation always is some sort of a taking, it's always a money grab. We pay a lot of tax in New York, it's not an

expropriation, but where is this line where it's an abusive tax. And if you're a foreign investor you really have no remedy, because your state is not going to take up your claim before the International Court of Justice door, as a diplomatic protection case, it's just not—it's just too small. And it's always subject to political controversy. So the only remedy you really have, I believe, is investment arbitration for you, the individual investor.

And there have been two cases where arbitration rules have found that the tax authority can actually abuse the audits in violation of fair and equitable treatment and in violation, actually as an indirect expropriation. One was a Chinese investor in Peru, who had a fish/flower business and they found that he had taken wrongful deductions. They asked for his records, he gave them to him, they said, "You know, you don't have 100% records, therefore we're going to make up, basically, the basis of these audits." And it was very fishy, so basically the tribunal said, "This is arbitrary." They froze all of his bank accounts, he basically could not run his business. So had he not had access, I believe, to exit in this investment treaty he just would've been run out of town, out of Peru.

So another case, the Yukos [phonetic] cases are a very strong example of where the Russian Federation used tax audits as a pretext for confiscation, and the tribunals have found as much. And what they're doing, these tribunals, which is also controversial, but I think important, they're having to look at what these governments are doing, they're saying, "This really was not in good faith." And that's a very bold statement and it's a scary thing, if you think about it. It's scary, and it scares reporters in New York Times and people who think that this is scary, to think that this three panel, maybe even a sole arbitrator can decide whether the Peruvian tax authorities were right or wrong.

But, I would submit, it's the only real remedy you have, you might've changed the method you could have panels, like in the Chapter 19 panels, you could change this—the way this happens. You could have a single court for investment disputes, but you are going to have to have some sort of super national authority, as uncomfortable as it is. And I think it goes to all types of regulation, whether it's environmental, health, it's always controversial and it's always painful. But I have convinced when I practice that it is—does serve an important purpose and I'll end there, thank you.

MR. SEMMEL: Great, thank you very much, Ruth.

MS. TEITELBAUM: Did I make it on time? Kay, okay.

MR. SEMMEL: Next we have Simeon Baum, to discuss mediating in the shadow of the law. And he'll explain what that is in a moment. But Mr. Baum is the President of Resolve Mediation Services and he has successfully mediated just a few, over 1,000 disputes. As an attorney with 30 years experience as a litigator, he also has over 20 years of experience as a neutral in dispute resolution assuming the roles of mediator, evaluator, and arbitrator in a number of high profile cases, many of which I'm' sure he'll discuss, in pretty much every practice area I've ever heard. With that, I'll turn it over to Simeon.

MR. SIMEON BAUM: I'm pleased you didn't read the whole bio, it's been a long time. [Laughs] Well I've got my stopwatch, so I'll know when to stop. I can't talk as quickly as. . .

MS. TEITELBAUM: I'm sorry, it is a bad habit, let's talk about speaking habits, that's a don't, go on, sorry.

MR. BAUM: Look at all the information you got out there.

MR. TEITELBAUM: Doesn't matter, if you can't hear it, doesn't matter [Laughs] if you can't hear it.

MR. BAUM: So, as a mediator, one thing mediators like to do is to engage the people they're talking with, so naturally I've got some questions for you, before we get started. Just by a show of hands, how many of you have taken an ADR course here at Cardozo? Okay, so we've got a couple. All right and how many of you have actually participated in a mediation? Okay, so we've got four, at least, I think participating in the—okay, so what I'll do is very briefly, I think, before getting into some of the details, that you've described, let's just talk a little bit about mediation itself. You know in a law school setting, we learn law, we learn deliberation between facts number one and application and the reasoning and all of that. And you get accustomed to a way of thinking, and I look at legal thinking as somewhat Aristotelian, in its orientation. We've got rules of evidence, rules of exclusion, relevance and what we're doing is, we're helping through the legal process.

We're helping a decision-maker, make a decision so the fact in the law builds to a point and at the end there's a winner and a loser. It's like a pyramid structure. Mediation is very different, mediation is a process in which the mediator is a neutral party who helps the parties, to the matter, make their own decision. So the mediator doesn't make the decision for them and mediation's, to me, a beautiful process. You know in law we have to summon, you know marshal the facts, we dig through discovery, it can be very expensive because we're digging and digging for facts that are going to be persuasive to someone, to the decision-maker. And then we apply the law to them, so we hone it and shape it. In mediation it's much more of an open sphere, where all sorts of information can be useful, because what you're helping people do is think, think about what's important to them and what's important for people on the other side of the table, so that maybe they can make a deal.

That deal might actually be totally different from a deal that a court, or an arbitrator, or a panel might come up with. And so I was a litigator starting in the '80s and for 10 years, did that, but was frankly frustrated by how much time we spend looking into the past when it seems inevitable that eventually we'll be going to come to a deal. So why not let's get to it right away? And also where we're thinking about the law, but we're not necessarily thinking about what's important to those parties. And sometimes it's emotional things, and even in international, commercial setting, it's amazing how often, even emotion can have a role. So one thing the mediators can do, is we can convene a get-together of the parties, it's confidential, so the people can talk without being concerned what they're going to leave if they don't come to a deal and then somebody's going to say, "Well isn't it true in the mediation, you said X, Y and Z," and it's an admission and use it against them later in the arbitration or in the legal proceeding. So we make it confidential, so people are comfortable talking with each other.

And they can talk about how they feel, or their relationship, or their business, as well as talking about what might happen if the case doesn't get resolved, the outcome. So that's a little bit about mediation, itself. Now in the international arena, there are loads of places you can look to look for where you can do mediation. Mediation's still young, I think as far as its use in international legal disputes. But there are all sorts of disputes that have been solved internationally, even if they're being litigated in local forums, so when I think about how many, you

know of a 1,000 cases, how many of those cases were actually international, there's actually a number that we're, even though they were maybe pending in Supreme New York or pending in the Southern District, you know you have a German party and you've got U.S. parties, that's an international dispute. The issues, cultural issues and I know you're already addressing that, so those can come into play in those disputes.

But, if you're, I'm thinking, recently just in the last month, I had one mediation in my office and people flew in from Colombia, and France, it was a multi-national that had made an acquisition of the Colombian company. And there was some money that had been escrowed against the reps, and warranties being good, and sure enough when the time came for dispersing the escrow there were breaches of reps and warranties that the parties had to deal with. So in, I'm going to give you three quick examples of international mediations where unique things, things that are unique to international relations, can apply. In this example people say that in certain cultures, relationships matter more than others', so in certain business dealings, we Americans are theoretically supposed to be very direct, we just want to get down to business. Well in South America, Latin America, the belief is that people are more sensitive to relations and the importance of building, developing a relationship before you get to business.

So there I was when this matter was starting and I'd gone into the mediation room and people had been lined up and introduced around the table, and they actually, the principals knew each other. They started talking, they were talking about sports, they were talking about soccer, and talking about various family members, and friends, and people they knew, and you could, as a mediator, say, "Okay, let's commence," and I'll do my little mediation introduction and talk about the process and ask everybody to start talking about what's what from there and how to work it out, but I didn't do that. I just let the conversation go, all that time that was being wasted was really important, and so throughout the rest of that mediation, which in fact, went until 11:00 at night, we had periods where, we had parties altogether, we had periods where the mediator was in the room with a separate, with one group, we call that a caucus, and that's confidential too.

And I sometimes shuttled back and forth from group to group, with the lawyers and the parties for one side together in that room. But there

were other times where we brought the principals together without the lawyers and just with me in the room, so they could talk and we weaved in and out, so between this caucus's with counsel and parties together and the principal meetings and everybody was okay with that. And only because of that approach, I believe, the matter got resolved. There was one guy on one side, who was trusted by somebody on the other side, and their interaction really is what made the deal possible. So, that's relationships. The week before that mediation, I had a mediation that actually went until 3:00 in the morning, and that one they had actually started saying, "Let's have the principal speak first and I showed up, in my own office, and I showed up around noon to see where they were and they hadn't made a deal.

So we went from noon until 3:00 in the morning. Now in that one there was a Japanese-owned company and there was an Italian company, and they had a business relationship. And there was an open question whether they might have a future business relationship, and so we don't really think about that necessarily if you're in court. But, and to some degree, we do care about it even with arbitration because sometimes parties have arbitration clauses so that they can get past their disputes and move on and keep working together. But you definitely are attuned to it, when you're in mediation context, because you're in a deal-making context and you're sensitive, among other things, to future business and future relationships and those generate their own value and a potential for deal-making.

So in that example there was a different cultural issue that came up, and that was face. Now I in the '70s, did graduate work in the comparative study of religion, and went to Japan for a few months. And somehow Japanese stuck, so the president of the Japanese company was there, and when the time came, I was able to go off into a caucus room with him, and we spoke in Japanese, and I was quite anxious, because I thought that my Japanese was going to fail me at that time. But whether it was good or bad, what it did was, it established rapport. And rapport and trust is really essential in the mediation process and it's essential that mediators can help build rapport, you know with the parties and among the parties. So, in that discussion he said to me that he was offended, he was offended that these young guys from the Italian company who, and it was a family business that had been in business for a long time, but he had put them in a particular line of business, that they hadn't been in before. And he was very offended that they had

chosen to sue, instead of to just, essentially, not sue. And I say it that way, because it's not as if he was ready to give them what it was that they wanted, they were owed quite a substantial sum, because of a transaction, and he wasn't saying he was going to do that, but it was still offensive that they chose to sue.

And it was offensive to him because he looked at it globally, in terms of, the value that had been generated in the relationship, there was $100,000,000 worth of value that had been generated in that relationship and over a mere few million, these people were pissed off. They should've just taken the blows, he suffered in that transaction because of his side of the equation, which legally they had no responsibility for, and you know what maybe they should've suffered some of the pain along with him. And that was really awkward for him, so and he told me, he made a point of saying that he was from a long line, a Samurai line and he cared about - - and this code of honor and it had been offended. Now whether he was saying that to me, thinking, well this guy, he studied Zen in Japan and maybe I can persuade him or something like that, or whether he was being genuine, you know I'll never know, but it sounded genuine, it sounded like, on some level, he really was offended. When the deal, which was ultimately made, was made, certain moves that took into account the face issue were essential to getting the deal there.

So, part of it was my acknowledging the loss for him, part of it was giving him control, so that there were certain moves where he drew a line in the sand, he said, "We're going to pay X and we're not going to pay any more." And it was—and as the offer concession pattern of the negotiation went back and forth, it was clear that he was really kind of punishing these guys. He was going to stick with this number, and they came down, and he didn't, and they came down again, and he didn't, and this is very unusual. But he was having an opportunity to kind of make a statement to them, so at the end, what got us past, understand that this issue was happening, that was two things. There were repeated sessions where the young guys had a chance to effectively apologize, and there was a—one thing that's, in terms of practical tips, in negotiation, there's dollars, and then there's time. And time is an incredible thing for generating value in a dollar's-based negotiation, you know payment not once, but over time.

And it turned out that the Japanese party had cash-flow concerns,

and so at one point where the dollars were going to come on, let's say, a suggestion was made to frontload the dollar requirement, which of course led to a problem of cash-flow. And then he was, the Japanese party was willing to say, "Okay, I will pay more, but we have to do it over a long period of time." And that got them past, what would've been a snag and it would've been a snag based solely on his having to run a line in the sand and not being able to budge because of, essentially, a sense of dignity. So that's face, wow, that went way long, I didn't even get to the point that you said I was going to talk about. All right, well.

MR. SEMMEL: Well perhaps in the question period. We'll find a way to thread it in. Thank you Simeon, so we've seen three different settings of, three different ADR settings, John discusses quasi-judicial setting. Ruth's discussing arbitration setting, and Simeon discussed mediation. And the common theme, I believe, is that ADR is more sensitive to cross-cultural differences, that's something we've heard each of our panelists speak about so far, which leads perfectly into our final panelist, Claudia Maffetone, who will discuss cross-border and cross-cultural dialogue. Claudia's currently the outreach and recruitment officer at Soliya, pronounce it Soliya, leading outreach chapters for the creation of new partnerships with Universities and NGO's in the Middle East and North Africa region, Asia, Europe and North America. She's also the president of Flux, a consultancy company that provides support to NGO's, the organization and implementation of projects and programs. Claudia.

MS. CLAUDIA MAFFETONE: Thank you so much, and thank you so much Daniella for organizing this panel and inviting me. So, I believe that to speak a little bit about cross-cultural and cross-border conflict resolution I want to take another step back from the specificities of ADR, and so arbitration and mediation, as they've been discussed on the panel up until now, and just approach the topic of conflict resolution from a more educational standpoint. And also sort of looking at how do we dismantle, in a sense, how do we tackle the issues that have to do with prejudice and preconceived notions about what the other is bringing to the table or what the other is and believes. So, the idea at Soliya is that we address skills and attitudes. So we work on how, again, how young people perceive the other, and their own value set, and the other's value set and we focus, specifically, on the relationship between the U.S., Europe, and Middle Eastern countries, or

predominantly Muslim societies.

We do so through a program called the Connect Program, which focuses on bringing together students from different universities, in these different countries, to have conversations on our online platform about a variety of issues, revolve around the relationship between the west and predominantly Muslim societies. On the other hand, we run a training, which is a facilitation training, which basically means to deliver basic concept resolution skills, that serve the purpose of helping younger generations develop a sense and the right skills and the right tools to lead intercultural discussions and dialogues, both in the setting of our programs, but to prepare them also for a very multicultural professional setting. So, in the context, well the opportunity given by online—the online tools such as social media and the internet itself, is to reach and to put into communication a number and a variety of students and people that wouldn't necessarily be able to connect.

And so what we wish to do is really offer a deep intercultural opportunity to as many young people as possible, in the hope that going forward they might be able to develop an awareness, and again, the skills and the tools to interact with others' in a constructive way. So, we've also—to measure if there's a real impact in bringing together people online, versus setting them—having them come together physically in the same space, we have engaged in research with MIT to measure the impact of these online programs. And so what MIT has done, is they've compared a set—a group of participants in the Connect Program, in any given semester, with a control group of students that were exposed, pretty much, to the same international news, to the same—they were observing the same things of anybody else was observing but not taking part to the program, not having un-international intercultural experience.

And so what came out of this research is that there is a significant difference between the level and perception of the other four students that were having this intercultural dialogue experience and the ones that weren't. And in particular, the spring 2013 groups that were also exposed to the Boston Marathon bombings, revealed that basically perceptions of similarity, for instance, between Muslims and Americans decrease and control Americans, but increase significantly in participants these online groups. Individual overlap with Muslims did not change in control Americans, but increase significantly in the

participants to the program. Control Americans felt significantly more threatened by Islam, while Soliya participants did not and so on and so forth.

So basically all the findings, show that even if we don't necessarily come together physically, but we do it on an online platform, with the help of facilitators, which I will talk about in a second, that the barriers and the prejudice can be dismantled. And as, in the words of, the researcher who was following this particular research, they said coming online shows—or this type of program shows that a natural tendency to assign bad acts of individuals to a group as a whole, can be counteracted. And this particular dynamic where bad accident of a specific individuals are assigned to a group, seems to be one of the processes that escalate into group conflicts the fastest. So, if we find a way to interact with one another, once again, that sort of dynamic is dismantled.

Now, facilitation which we spend a great deal of efforts in, is basically having a neutral in these discussions who facilitates the conversations and sort of digs a little bit deeper into controversial statements, or questions of culture and local reality, that can remain unaddressed if nobody is there playing that role. And so in this sense, facilitation, I believe, is—can position itself at the very basis of a pyramid of ADR practices where basically what you learn to facilitate is what will serve you as a mediator, as an arbitrator, things like asking open-ended questions, reframing, summarizing, and being neutral and giving space to all the parties involved, are all things that are offered by facilitation that can be reproduced at different levels of complexity and process complexity in other ADR practices.

So I guess that what we really want, at Soliya at least, what we really want to focus on more than specific, what is appropriate, what is specific in any given cultural context, is really coming back to the basics of ADR. So once again, listening, keeping an open attitude, being able to ask questions that don't contain, in themselves, either an answer or a bias. And so, or being multi-partial where we cannot be neutral, we can at least be multi-partial and bring into the conversation different dynamics and different perspectives that are not necessarily present, but that are able to stir the conversation and bring it to a more safe space, but also more challenging one for all the people involved.

And with that, I think, I'm done. [Laughs] Thank you.

MR. SEMMEL: Thank you, Claudia. So, yeah that was a perfect way to conclude what I've identified, at least, as the common thread among everything our panel has discussed here, which is cross-cultural disputes can be uncomfortable sometimes. They can take you out of your comfort zone, perhaps, whether with dealing with people with whom you may have not dealt before, laws with which you may have not dealt before. But that's perhaps a reason why many people prefer ADR as opposed to a traditional litigation, oftentimes. We're; how long do we have for questions?

FEMALE: Perhaps we can wrap it up and do the questions outside in the lobby?

MR. SEMMEL: Panels? Maybe we'll find an opportunity to fit in mediating in the shadow of the law point, when we get into the, out in the lobby. So, okay, in that case, panelists, thank you for your time, thank you for your insights. [Applause]