

# Mediation in Interstate Disputes

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## Abstract

This commentary provides a brief summary of the articles in this special issue and emphasizes four questions raised by this research: 1) ways to define and measure mediators' strategies, 2) teasing out demand side factors from supply side factors in mediation, 3) capturing differences between states and international organizations as conflict managers, and 4) understanding the role of particular conflict management actors like the International Criminal Court.

## Keywords

mediation – supply – demand – international organizations – international courts

Mediation by individuals, countries or intergovernmental organizations (IGOs) in interstate conflicts and civil wars occurs frequently, yet we still have much to learn about the factors that promote the onset and success of such mediation efforts. The articles in this special issue of *International Negotiation* identify several factors that encourage outside actors to mediate including 1) higher levels of conflict intensity and salience (Wiegand), 2) mediators' bias or leverage (Melin; Lundgren & Svensson), 3) regional ties or power (Frazier,

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Owsiak, & Sanders), 4) action by international courts (Greig & Meernik), 5) mutually hurting stalemates (Liebel & Enterline), 6) selection and process effects (Gartner), and 7) unbiased positions for long-term commitments to mediation (Melin).

The articles in this issue help us understand how mediators can assist in resolving conflicts by providing information, overcoming commitment problems or providing carrots or sticks in the negotiation process. The articles also note that mediators may face distinct challenges in civil wars or counter-insurgency (COIN) wars compared with interstate conflicts given governments' reluctance to recognize rebel leaders as legitimate actors in negotiations. This research raises a number of questions about the conditions for successful third party conflict management including 1) ways to define and measure mediators' strategies, 2) teasing out demand side factors from supply side factors in mediation, 3) capturing differences between states and international organizations as conflict managers, and 4) understanding the role of particular conflict management actors like the International Criminal Court (ICC).

Several authors discuss strategies that third party conflict managers can employ to help disputing parties resolve ongoing conflicts including good offices, inquiry, conciliation, mediation, arbitration, adjudication, and multi-lateral negotiations. As Gartner notes, the mediation literature focuses on three major types of mediation strategies: communication-facilitation, procedural or directive (Bercovitch and Houston 2000). Communication-facilitation strategies involve third parties passing information back and forth between disputants, while procedural strategies help to structure future negotiations (for example, two sides agreeing to mediation by the Pope). Directive strategies are the most active that third parties can employ and involve mediators making proposals, providing incentives for settlement, and ultimately influencing the form of the peaceful agreement. The articles herein assert that directive strategies are best suited to helping the parties reach full settlements (Gartner) and most likely to be employed in highly salient and intense conflicts (Wiegand).

However, we must be careful to separate the legalistic method being employed in a given situation from what is being negotiated. Consider, for example, what law scholars term binding settlement techniques, such as arbitration and adjudication, where the parties are legally expected to comply with any judgment rendered. This approach to conflict management is considered binding because of the expectations for compliance that a legalistic settlement approach entails. It does not, however, specify the particular manner in which the court or arbitration panel will shape the outcome of the dispute. In some instances, such as the Gulf of Maine case adjudicated by the International Court of Justice, the court will play an important role in determining the ultimate boundary (in fact, one that neither Canada nor the United States proposed).

In other cases, the court or panel will interpret the facts in a way consistent with one of the litigants' positions, in essence deciding whose legal argument is more compelling. A judgment in 1991 by the International Court of Justice, for example, upheld the legitimacy of an earlier arbitral award between Guinea-Bissau and Senegal regarding delimitation of their maritime areas, with the court rejecting Guinea-Bissau's claims that the laws of international arbitration were violated. In these examples, while the technique of adjudication may be the same, the way in which the court's judgment influences the outcome of the disputed issue can vary dramatically. This is why scholars who collect data on mediation, such as Jacob Bercovitch, seek to identify the specific proposals that mediators make to get a handle on how their particular mediation strategies failed or succeeded.

The datasets used in the articles in this volume, however, do not always provide these kinds of nuanced distinctions. Wiegand's article considers any settlement attempt in the Issue Correlates of War (ICOW) dataset as directive if it covers part or all of the contested issue and if the technique is not procedural or communicative. This is problematic because it treats binding settlement techniques as a separate category (and they are arguably the most directive techniques)<sup>2</sup> and it conflates what is being negotiated with how it is being negotiated. Bilateral negotiations in the ICOW data (Western Hemisphere, Europe, and the Middle East), for example, include functional attempts (16.7%) that are designed to negotiate a related issue but not the core issue at stake (e.g. fishing rights in areas around the Falklands but not which country owns the islands), negotiations over part (4.4%) or all (51.8%) of the contested issue, and negotiations over procedures for future settlement (27.1%). One sees a similar distribution when considering mediation attempts (3.7% functional, 28.4% procedural, 5.2% part of the issue, and 62.7% all of the issue). In short, the particular conflict management tool that is employed can be distinct from what is being negotiated substantively in a particular settlement attempt. Furthermore, ICOW does not provide information about specific proposals that third party actors make in negotiations, making it difficult to discern the particular strategies (for example, directive or communicative) that were employed. Gartner utilizes the coding scheme in Bercovitch's International Conflict Management (ICM) dataset to capture the dominant negotiation strategy used in a particular mediation attempt, but it is unclear

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2 Mitchell and Hensel (2007) find that agreements to settle territorial disputes reached through arbitration and adjudication have nearly full compliance rates by all disputing parties. Gartner (in this issue) observes a similar pattern where the most directive strategies produce full settlements of the issues at stake.

what percentage of these cases involves negotiations of the disputed issue or some other functional or procedural aspect of the case. ICOW researchers often exclude functional and procedural attempts when evaluating the success of conflict management strategies because they are not designed to resolve the underlying issue at stake. When evaluating the long term success of particular mediation strategies, we need to be careful to distinguish the substance from the procedures of the conflict management attempts.

It is also important to connect conflict management attempts over time. Wiegand finds very strong effects for past settlement attempts (failed or successful) on the chances for future attempts. Melin separates cases where outside actors intervene only once in a conflict from cases where the mediators are more committed and willing to intervene repeatedly. Even when we consider dynamic patterns in conflict management, though, the empirics get very tricky. There are often multiple settlement attempts that occur simultaneously. Disputants might have a case being heard by a court, but at the same time, they may negotiate some issues bilaterally or with the help of a regional IGO. ICOW scholars code the presence of multiple types of conflict management efforts and then estimate separate models, such as looking for the presence of bilateral negotiations or third party attempts in a given dyad year, but analyzing those models independently (Hensel 2001; Hensel, et al. 2008). Dependence between attempts is often captured by clustering cases by claim or dyad, but this does not help us understand how the sequencing of events influences conflict outcomes or how the use of one conflict management tool influences the choice of other tools at the same time.

This relates to another issue, the separation of demand side and supply side factors in the study of third party conflict management. Mediation scholars often treat the external supply side market for mediation as constant, even though the actual supply of mediators may increase or decrease over a given time period. Melin notes in her article that lower barriers to entry for mediation might increase the chances for intervention, yet paradoxically reduce the chances for long-term mediation commitments. This is similar to Liebel and Enterline's argument that mediation may occur earlier in COIN wars than negotiations between combatants. Melin's measures for barriers to mediation focus on security (alliance) and economic (trade) ties as well as potential mediators' proximity to the conflict. However, the kinds of unbiased actors that she envisions for long-term mediation commitments may actually be increasing in stock. Consider that mediation attempts are more likely for dyads involved in disputes over land or water borders when the international system is more democratic and more populated with IGOs (Crescenzi, et al. 2011). While some of the more local factors that promote mediation may change (for example,

increasing trade), Melin's model does not fully capture changes in the global supply of potential mediators.

A similar issue arises in Frazier, Owsiak, and Sanders' analysis of conflict management by regional actors. They examine whether potential mediating states are in the same region as the disputants, what share of regional power they hold, and whether they are contiguous to the conflict. But they do not consider how the overall supply of regional mediators may have evolved over time. Regional organizations, especially those that promote peaceful conflict management between members, have increased over time and states are more likely to turn to third party mediation when they belong to such peace-promoting organizations (Shannon 2009). Regional trade agreements have also expanded dramatically in recent decades, increasing the costs for conflict in a region as a whole. Their findings show us the factors that might increase the potential for regional mediation in the short run, but as Melin points out, the long-term commitment and success of such conflict managers are questionable.

The incentives for third party conflict management can also vary when considering individuals, states or IGOs as conflict managers. Many IGOs explicitly call for peaceful conflict management in their charters, calling for parties to negotiate contested issues peacefully, and oftentimes creating mechanisms to settle issues should bilateral negotiations fail. The United Nations Law of the Sea Convention (UNCLOS), for example, calls for peaceful settlement of disputed issues, but also articulates procedures for arbitration or adjudication under Article 287 of the treaty. The degree to which IGOs are designed for helping members resolve conflicts is important to capture when evaluating the success of those intervention efforts. Lundgren and Svensson consider intervention by IGOs in civil wars, discerning to what degree the members of the organization are biased in favor of the government, rebels or both. They also capture the leverage that the IGO may wield in a given intervention by considering the share of trade the civil war state has with members of the organization. They find that balanced IGOs with members that favor both sides of a civil war are more successful in helping the parties reach a negotiated settlement than intervention by neutral or biased IGOs.

However, this approach does not consider how the characteristics of IGOs influence their likelihood of serving as conflict managers. As noted earlier, the inclusion of peaceful conflict management strategies in the IGO charter increases the likelihood that the IGO will serve as a conflict manager when disputes arise between members (Shannon 2009). Some IGOs, like the European Union or the Organization of American States, actively protect democracy and human rights, giving themselves the ability to intervene when such rights are

threatened (for example, the OAS suspending Honduras after its coup in 2009). IGOs with higher institutionalization levels will have greater resources available for conflict management efforts and will become involved as mediators more frequently (Hansen, Mitchell and Nemeth 2008). The degree of relative bias is also important (Savun 2008), as IGOs may have different incentives when intervening in member states' civil wars versus non-members' conflicts. Biased IGOs could be effective if they are intervening outside of their regional area, such as the EU's intervention in Kosovo. The norm protecting state sovereignty will also push in the direction of bias towards the state in a civil war situation, unless massive human rights violations spur the international community into action.

We should also consider supply side issues when studying conflict management efforts by IGOs. The number of IGOs at the regional and global level has increased dramatically since World War II, increasing the overall supply of potential IGO mediators. We see a similar pattern in the growth of international and regional courts, with close to 100 courts today in existence or in the formation stages. These organizations are not only rising in supply, we see denser networks among them, reinforcing the likelihood of external interventions by IGOs in the most intractable conflicts. States belonging to IGOs can also experience liberalization (Pevehouse 2005) and increased foreign policy preference similarity (Bearce & Bondanella 2007) over time, suggesting that the relative bias of IGOs is not temporally constant. While we can measure things like external support by IGO members to governments or rebels in a civil war, we have a harder time capturing the interdependence of these decisions, whether they change over the life cycle of an IGO and whether the design of the organization affects member states' support for civil war actors. The supply of such mediators also varies considerably across regions.

Some IGOs and international courts may be in a better position to serve as conflict managers relative to other mediators. Part of the debate discussed in the Frazier, Owsiak, and Sanders article relates to the success of regional versus global organizations in the conflict management process. As the authors note, regional organizations might be advantaged as mediators because the members have more similar preferences on average, because they share cultural or historical traits that could increase the efficacy of their mediation strategies, and because they are more likely to directly bear the costs of conflict in the region. Traditional regional organizations (such as the OAS) and military alliances (such as NATO) have certainly played a role in helping to manage interstate and intrastate conflicts. Yet the rise of regional trade agreements has also generated new possibilities for conflict management, with many of these treaties including provisions for the management of natural resources or other

security issues (Powers and Goertz 2011). Regional actors may be getting more in the mediation game, as we have seen in the events surrounding the Syrian civil war, because there are more of these potential mediators in existence and because the density of connections and ties through these organizations improves the chances for multilateral cooperation.

A similar dynamic is playing out with the growth of international courts. While some regional courts like the European Court of Justice handle a wide range of disputes, we have also seen a significant increase in the number of more specialized courts focused on human rights and environmental issues. As Simmons and Danner (2010) argue, states can commit to powerful courts like the International Criminal Court as a signal to their domestic audience that they are committed to peace in the shadow of a recent civil war. Greig and Meernik show that actions by international courts can also have demonstration effects, with ICC arrests and warrants improving the chances for mediation in a civil war situation. Yet ICC actions in neighboring states reduce the chances for mediation and less costly actions by the ICC (such as investigations) are taken less seriously by civil war combatants. This shows that bargaining in the shadow of an international institution can alter bargaining outcomes (Mitchell and Powell 2011) but that the effect may vary across different circumstances.

In the case of the ICC, however, it is important to differentiate the targeting of state leaders and rebel leaders in indictments and arrest warrants. Many of the early ICC cases targeted rebel leaders, giving government leaders more security in allowing for external mediation. Greig and Meernik make this argument theoretically, predicting that government leaders would be more likely to sabotage peace efforts if they were being targeted by the ICC. Empirically, they look only at actions by the ICC in general, rather than distinguishing who is targeted. Thus, we cannot see how government leaders might vary their responses to ICC actions depending on how they are prosecuting war crimes in a particular case.

In thinking through how states might join international courts or IGOs to signal their approaches in conflict situations, we also need to match that information more carefully to our conflict data sets. Ratifying the Rome Statute in the middle of a civil war is different than ratifying it several years before a war begins. Similarly, states can join international organizations prior to, during or after conflicts. Scholars have not fully teased out the dynamic effects of the timing of joining international institutions on the onset and success of conflict management efforts. Do IGOs have the greatest potential for preserving peace in the early years of formation, when the incentives that led to the IGO's creation are freshly in the minds of the originators? Or do IGOs have accumulative

effects, as we have seen in the case of the European Union and NATO, taking on conflict management roles later in their history that were not even considered at the time of IGO formation?

Countries involved in the negotiations to create an IGO or an international court may also reap benefits that later joiners do not enjoy (Gruber 2000; Mitchell and Powell 2011). In this regard, states at the negotiating table can influence the design of the IGO's conflict management provisions, which can improve their chances of agreeing to mediation by these organizations. Common law countries, for example, were able to embed a strong provision for arbitration in the UNCLOS treaty, reflecting their general preference for arbitration over adjudication (Posner & Yoo 2005). This has had an unintended benefit of common law countries agreeing to binding settlement through arbitration and the organization's court, the International Tribunal for the Law of the Sea (ITLOS). Given the growth in the number of IGOs and courts, the potential for countries to find a potential conflict management organization that they helped to design is growing. By embedding institutional design bias in the negotiation phases for these organizations, countries can influence the relative bias that IGOs and courts are likely to have in their conflict situations. Lundgren and Svensson tend to view bias as originating from IGO members' individual choices to provide support to rebel groups. But when we consider a broader range of conflict situations, it may be that such biases are already built into the process of who joins IGOs and what institutional features they possess.

This relates to Gartner's general call for scholars to focus more carefully on selection and process effects that arise in the study of conflict management. Selection effects occur because third parties do not randomly choose which cases to manage; they often go to the deadliest conflicts that are hardest to resolve (Fortna 2004). Process effects occur when conflict managers respond to events on the ground. The role of global IGOs, regional IGOs and international courts as conflict managers suggests that which organizations are created and what characteristics they have is also non-random. Countries often come together to create new institutions in the aftermath of very costly conflicts or they emulate the success of other groups. The increased prevalence of such institutions in world politics accounts for the increased prevalence of peacekeeping and peacebuilding efforts. When we seek to evaluate the relative success of IGOs as conflict managers compared with individual/state mediators or the disputants' own negotiation attempts, we need to be more creative in capturing the selection effects that generated these institutions and the

dynamic sequences that can unfold in terms of when in the conflict cycle they were created.

Finally, several articles in this issue point to differences in conflict management success when we consider short-term versus long-term time horizons. It is easier for third party managers to commit in the short run, but more difficult for repeated interventions. As Beardsley (2011) argues, mediators face a dilemma because the kinds of agreements they are likely to broker to end hostilities can result in time inconsistency problems, making peace more likely to fail in the future. Only agreements that are self-enforcing from the disputants' perspective are likely to succeed. Beardsley's research shows us that in addition to considering dynamic properties in the supply side and demand side factors that produce mediation, we must also consider the dynamic properties of the conflicts they are designed to resolve. Mediation efforts can occur early in a rivalry cycle and be effective (Greig 2001), but some attempts may happen early in a conflict but have little influence over the ending of a violent conflict. Liebel and Enterline show that the timing of mediation in counterinsurgency (COIN) wars has little relationship to the chances for successful settlements. Mediators must pay heed to the dynamics of the conflicts in which they intervene and select strategies that are optimal at the time of intervention and likely to produce long-term peace. This entails conflict management approaches that resolve the underlying issues and identify the dyadic characteristics that can lead states to back down from the war path.

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