

# Alternatives



TO THE HIGH COST OF LITIGATION

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**Kathleen A. Bryan**  
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**Susan E. Lewis**  
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**Editor:**  
**Russ Bleemer**  
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Editorial correspondence should be addressed to *Alternatives*, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: [alternatives@cpradr.org](mailto:alternatives@cpradr.org).

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# Alternatives

TO THE HIGH COST OF LITIGATION

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INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 27 NO. 8 SEPTEMBER 2009

## To End and Prevent Wars Between States: Negotiate, Don't Litigate

BY LINDA STAMATO AND SANFORD M. JAFFE

When conflicts reach across state borders, negotiations are far preferable to litigation as a way to produce solutions that work.

For land-use disputes, and the critical issues of access to and management of water resources—where regional cooperation can make a constructive difference—negotiations are essential. Court-imposed “solutions” rarely work because, with these issues, a public consensus is critical. Absent consensus, an arbitrary, win/lose decision, which seems coercive, is difficult to implement.

A forum for state-to-state negotiations is long overdue. Creating it, in our view, is a proper and necessary, if not traditional, role for the National Governors Association, a century-old bipartisan organization of state governors that, in its own description, “promotes visionary state leadership.”

### NEW JERSEY V. DELAWARE

Consider the contentious conflict that arose between New Jersey and Delaware over the Delaware River regarding the size and location of a liquefied natural gas facility. The case landed before the U.S. Supreme Court. Its history supports a good argument for negotiating, and against en-

gaging in litigation in such cases—here, the modern-day equivalent of going to war over the river. That argument was made, in fact, in several newspapers in New Jersey and Delaware. See, e.g., “Jersey and Delaware Needn't Resort to Court,” *Star Ledger* (Dec. 14, 2007), by the authors of this article.

Nevertheless, negotiations didn't happen.

The two states were fighting over New Jersey's attempt to use its riverbank for a natural gas storage and processing plant, a development that Delaware opposed. Delaware's position is that it believes it owns the river by virtue of a land grant to Quaker William Penn from King Charles II in 1682.

Accordingly, “property ownership” assertions dominated the discourse. Delaware claimed the natural gas project would violate its Coastal Zone Act and refused to issue a permit for it.

New Jersey argued that a 1934 Supreme Court decision recognizing “riparian rights”—the use of water by those who own land around it—allowed it to build a pier to make its property accessible, an exercise of “traditional riparian authority.”

Accordingly, New Jersey claimed it could build the 2,000-foot pier it needed in order to reach to the navigable part of the river, from New Jersey's shore, so that tankers could dock and unload at the plant.

Reconciling these positions, framed this way, was unlikely in an adversarial process. Indeed, a win-lose outcome was all but assured. Instead, the states should

CONSENSUS BUILDING

The authors are co-directors of the Center for Negotiation and Conflict Resolution at the Edward J. Bloustein School of Planning and Public Policy, at Rutgers, the State University, in New Brunswick, N.J.

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## Electronic Discovery

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ICDR Guideline 4 provides, "When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents in electronic form should be narrowly focused and structured to make searching for them as economical as possible. . . ."

The Advisory Committee notes to the 2006 amendments to Rule 34 also contain an interesting discussion of these issues. These include:

1) The producing party's "option to produce in a reasonably usable form does not mean that a responding party


is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation," and

2) "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

The courts also have considered the general problem of sanctions for failure to make the production in an appropriate manner. In *In re Seroquel Prod. Liab. Litig.*, 2007 WL 2412946 (M.D. Fla. Aug. 21, 2007), for example, the plaintiffs in a multidistrict product liability litigation sought sanctions for failure to produce documents in an accessible or useable

format, in addition to missing numerous deadlines. In awarding sanctions, the court cited the defendant's failure to discuss keyword search terms with plaintiffs, failure to include page breaks between documents it did produce, failure to produce usable single-page TIFF documents, omission of attachments and relevant emails, and purposeful sluggishness in making an effective production.

\* \* \*

*In Part II next month, Deborah Rothman and Thomas J. Brewer return with Points 3-6, covering the rest of the main areas of E-discovery disputes revealed in their survey of College of Commercial Arbitrators Fellows, and conclude with predictions for practices in dealing with E-discovery in arbitration.* 

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## Negotiate, Don't Litigate

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have taken an interest-based approach and framed the dispute not as contentions over who owns what, but, rather, how the natural asset—the river and its banks—can be managed in a way to meet the economic and environmental needs of both states, and the region as a whole.

The U.S. Supreme Court ruled for Delaware. It found that the state has veto power over developments that extend into its borders on the river—Delaware claims it owns the river bottom most of the way across the waterway. So the project proposed by New Jersey could not go forward.

But in the end, the outcome amounts to something considerably short of a win for Delaware. BP plc, which sought to build the \$700 million river terminal, has placed its plans on hold for at least two years. That ends, at least for the time being, the availability of enough liquefied natural gas to serve five million homes and meet rising energy demands. The natural gas that was expected to arrive at the proposed terminal would have been distributed around a region that needs it—enough to satisfy the energy needs of every home in New Jersey, Delaware, and four Pennsylvania counties,

according to a BP spokesman. The liquefied natural gas facility "is an important energy project for the nation and the region." Neil Chapman, "Delaware wins border battle over gas pier: Supreme Court upholds block on N.J. project," *Star Ledger* (N.J.) 15 (April 1, 2008).

### STATE DISPUTES

Disputes between states occur often enough. One of the better known involved the contending claims of New York and New Jersey over ownership of Ellis Island, a national landmark, which is discussed in detail below.

Another is the more recent dustup between Pennsylvania and New Jersey over the dredging of the Delaware River—a politically paralyzing dispute that cost the Delaware River Port Authority significant sums, and led a New Jersey legislator to threaten to send the decommissioned battleship U.S. New Jersey south to meet any hostile moves by Delaware. The Delaware House majority leader sponsored a measure authorizing the governor to call out the National Guard "to defend against encroachments."

Not unlike the Ellis Island fight, a bitter dispute between New Hampshire and Maine also reached the U.S. Supreme

Court, over the question of which state includes the Portsmouth Naval Shipyard, a federal installation that sits on islands in the Piscataqua River, and forms the state border between Portsmouth, N.H., and Kittery, Maine.

The states' competing claims date to the colonial period. New Hampshire claimed that what is now Maine was originally part of Massachusetts. Maine, citing a decree signed in 1740 by King George II, said that the states' boundary was set as a line that passes up the middle of the river. The U.S. Supreme Court held for Maine, granting its motion to dismiss New Hampshire's claim. *New Hampshire v. Maine*, 532 U.S. 742 (2001).

In the South, Georgia, challenging a century-old boundary, is attempting to move its border into Tennessee to gain access to water. This action, by the state's Legislature, is the latest on the national scene, occurring just as Georgia experienced a court setback in its fight with Florida and Alabama over the right to use water from Lake Sidney Lanier, which supplies drinking water to much of northern Georgia.

The Supreme Court let the existing Lake Lanier arrangement stand. Without a deal, there is no formal contract that requires any portion of the lake to be used

for Atlanta's water supply. The fight between Georgia, Alabama and Florida over the lake shifted to the federal courts, and in late July, U.S. District Court Senior Judge Paul Magnuson, of St. Paul, Minn., ruled that "nearly all Georgia's withdrawals from Lake Lanier are illegal because the lake was built for hydroelectric power, not to supply water." Greg Bluestein and Ben Evans, "3-year countdown begins for Atlanta's water future," *Associated Press* (July 21, 2009).

The ruling cuts off Atlanta's water supply in three years. Georgia's governor vowed to fight on in court, ruling out negotiations with his fellow governors, and raising the possibility of Congressional intervention. *Id.* See also Shaila Dewan, River Basin Fight Pits Atlanta Against Neighbors, *N.Y. Times* (Aug. 15, 2009) (available at [www.nytimes.com](http://www.nytimes.com)), and Larry Copeland, "Ruling Leaves North Georgia with Water Crisis," *USA Today* (Aug. 18, 2009) (available at [www.usatoday.com](http://www.usatoday.com)).

There's more. On March 30, the Supreme Court indicated that it would hear arguments in a dispute between the two Carolina states (*South Carolina v. North Carolina, 138 Original*) over water flows in the Catawba River. The Court is expected to hear the case in the term that begins next month, though no argument date had been set at press time.

There is an interim report in the case by a special master concerning whether to allow non-state parties to join an "Original case" before the Court as interveners, but it does not deal with the merits of the controversy over dividing up allotments of the Catawba's waters.

The dispute over intervention is sufficiently significant, however, that the U.S. Solicitor General has joined in the case as an amicus. The Court allowed South Carolina to file its suit on December 1, 2007. A web page with filings including briefs can be found at [www.scotuswiki.com](http://www.scotuswiki.com).

There also is last spring's contretemps between New York and New Jersey over New York City Mayor Michael Bloomberg's congestion pricing scheme that would have added dollars to the tolls New Jersey commuters would pay to gain access. Litigious New Jersey threatened to file a suit to stop it.

The plan was expected to add \$13 billion to the New York City economy including time and fuel cost savings, and add \$354

million in federal mass transit aid, including 367 new buses. The plan also was expected to help improve air quality. See Peter Kostmayer, President, Citizens Committee for New York City, Letter to the Editor, *N.Y. Times* (April 8, 2008). New York City subsequently dropped its plan.

## CREATE FRAMEWORKS

Enough talk about economic sanctions, battleship diplomacy and military action, and direct flights to court. What is needed

and keep the discussions constructively focused on finding a way to treat the river as the regional resource that it is.

It's an obvious point: the high court decision rests on interpretations of an earlier compact between the states and historic boundaries. That decision doesn't solve the problem of how to provide a clean and substantial new energy source to meet fuel needs in the region any more than the decision with respect to Lake Lanier solves Atlanta's water supply needs. Those challenges remain.

## A FORUM TO FIT STATE-STATE DISPUTES

States need to adopt an interest-based approach that frames issues not as contentions over who owns what. The matter should address, for example, how a natural asset—a river and its banks—can be managed in a way to benefit the economic and environmental needs of contending states and the region as a whole.

And a forum to support this approach is needed, too.

What we have, though, is far short of what is needed. Indeed, it is unsettling to witness government at its least effective when regional collaboration is essential. And, it's not as though we don't have some good examples of the efficacy of cooperation. New York and New Jersey, through the Port Authority of New York and New Jersey, effectively manage common assets. New Jersey and Delaware also cooperate, for the most part, through the Delaware River Port Authority.

With boundary or border disputes, however, it's often a particularly difficult matter. When these issues are framed in property ownership terms, they are almost impossible to settle. Property ownership does not need to be determined if a settlement can be achieved; in the case of a river dividing two states it is clearly preferable to negotiate.

National—and international—experience shows the efficacy of regional collaboration for dealing with difficult, complex and costly public issues where legitimate positions are in contention and a resolution must be secured.

Consider, for example, the settlement that has been negotiated by federal offi-

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### States' Rights & Borders

**The issue:** Our local leaders are warring over boundaries and water rights.

#### World history before our eyes!

The modern-day version is that while military threats between states are rarer and (somewhat) less serious, these matters assure voluminous, expensive, taxpayer-funded litigation that provide ludicrous outcomes. In the U.S. Supreme Court!

**A better idea/process:** The governors or their reps should sit down and speak, instead of wasting our money and resources posturing.

is a combination of good faith and a conviction to work out equitable and environmentally sound results.

In the case of New Jersey and Delaware over the natural gas facility, for example, the governors of both states ought to have created a framework for negotiation, and appointed representatives to conduct the talks. Since disputes over the Delaware River have had such a protracted and emotionally fraught history—New Jersey and Delaware have appeared three times before the Supreme Court over fishing rights, oyster beds, and now a natural gas facility—the governors might have thought about using a mediator to help frame the issue,

## Negotiate, Don't Litigate

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cials and several states, including California, Arizona and Nevada. It's an unprecedented agreement on allocating water from the Colorado River that also puts in place measures to conserve and manage the two primary reservoirs, and provides financing for a third reservoir, that store the region's water.

In effect through 2026, the negotiated agreement forestalled the litigation that had been anticipated by all involved. Randal Archibold, "Western States Agree to Water-Sharing Pact," *N.Y. Times* A18 (Dec. 10, 2007). And, unlike a litigated result, it provides for monitoring, review, and modification, as necessary, by those who participated in the negotiations and who have, as a result, a relationship that allows for constructive dialogue to continue.

Negotiations have produced resolutions to such cross-border issues as highway location, rail-freight operations, watershed protection and restoration, port development, and power-generating plants.

Litigation has its limitations. Formal court proceedings frequently restrict the involvement of all the various interests. They are not the most efficient or effective way to resolve disputes or to produce decisions that can work. A key point, too, is that negotiated solutions, unlike litigated results, can allow for review and modification if circumstances and needs change over time—a critical dimension to negotiations that usually is undervalued.

For state boundary and border disputes, which often are about matters like water, infrastructure, environmental quality and energy needs, we need a framework for developing solutions that meet the regions' needs and interests.

### NGA: A HOME FOR THE FORUM?

Is the National Governors Association (at [www.nga.org](http://www.nga.org)) a home for a forum?

Certainly it ought to provide a place for exploring a way through the thicket of state v. state disputes. After all, the NGA announces itself as the body that identifies priority issues and deals collectively with issues of public policy and governance at both the national and state levels.

Indeed, its Center for Best Practices focuses on state innovations and practices that

range from education and health to technology, welfare reform, and the environment. The association also provides management and technical assistance to governors.

The NGA, moreover, provides governors and their senior staff members with services that range from representing states on Capitol Hill and before the Executive Branch on key federal issues, to developing policy reports on innovative state programs and hosting networking seminars for state government executive branch officials.

Given the way it is currently organized and focused, though, it would require some fresh thinking if it were to offer to governors—and their staffs—a forum for constructive negotiations between and among them.

John A. Kitzhaber, who served two terms as Oregon's governor, understands that approaching conflicts of this kind is a challenge. In April 2007 remarks to a university-based network of researchers and local marine specialists, Oregon Sea Grant (see <http://seagrant.oregonstate.edu>), on economic and environmental conflicts, Kitzhaber said:

A large part of the problem here is that we have framed the apparent conflict between economic activity and environmental stewardship as a mutually exclusive one, creating an "us versus them" mentality—a sense of separateness and a politics of scarcity, which inevitably creates winners and losers but no pathway to a sustainable solution.

And this politics of scarcity is perpetuated not so much by the people engaged in the debate but rather by the institutions and organizational structures through which they are seeking to resolve their disputes.

To be sure, the NGA ought not to serve as an arbiter. It should be a facilitator to set up a forum for negotiations, even mediation, as well as a resource for expertise. It could provide a forum for states seeking to examine compacts that may need revision.

In the New Jersey-Delaware natural gas dispute, for example, two Democratic lawmakers from Gloucester County, N.J., where the terminal was proposed, said it was "time for the two states to revisit a

compact forged in 1905, which laid out policing powers, fishing rights and development rights."

Indeed, the two states cited different provisions of that agreement in their Supreme Court arguments. "We should not be making 21st century decisions based on a 103-year-old agreement based in turn on a three-century old map," says N.J. State Senator Stephen Sweeney. See, *supra* Chapman, *Star Ledger*.

Each successive NGA chair has identified an area of particular interest or action during his or her leadership year. For example, Gov. Tim Pawlenty, R., Minn., last year chose "securing a clean energy future" as his theme. The current chair, Pennsylvania Democrat Edward Rendell, has yet to make a choice. Perhaps creating a forum for state v. state issues could be his 2009-2010 theme? Given Pennsylvania's visibility recently in cross-border disputes, it could be a particularly fitting initiative for his term.

The NGA could turn to centers at universities for direct facilitation and mediation of cross-border disputes, like the Policy Consensus Institute's University Network for Collaborative Governance (see [www.policyconsensus.org/uncg/docs/brochure.pdf](http://www.policyconsensus.org/uncg/docs/brochure.pdf)), or to free-standing institutes like the Cambridge, Mass.-based Consensus Building Institute (see <http://cbuilding.org/>) for advice and assistance in managing negotiations between and among states. There is considerable skill and experience residing in these centers and institutes, and in the increasing number of mediators and facilitators in private practice.

For neutral scientific and technical expertise, the NGA also might turn to an existing institute, or contribute to the creation of an institute. One example, the International Boundaries Research Unit at Durham University in the United Kingdom (see [www.dur.ac.uk/ibru](http://www.dur.ac.uk/ibru)), has undertaken a series of activities "to assist boundary-makers and managers to develop effective strategies for turning river boundaries into assets rather than a source of friction between riparian states."

It provides practical expertise in boundary-making, border management and territorial dispute resolution. And it has a lot of work: Three-quarters of the world's international boundaries follow rivers for at least part of their course. While the reasons for choosing rivers as boundaries are

not hard to understand, river boundaries almost invariably generate a multitude of legal, technical and managerial challenges.

At the very least, the governors ought to talk about improving the ways states deal with cross-border disputes and manage regional assets, and what the NGA might do to assist discussions and negotiations.

Requests for comments sent to NGA Chairman Ed Rendell's office, and the NGA's communications office, at its Washington, D.C., headquarters, didn't receive a response.

## LOOKING ELSEWHERE FOR EXAMPLES

The NGA could begin to follow the European Union's lead.

The EU recently moved to encourage the voluntary mediation of cross-border disputes. The Parliament and Council of the European Union reached agreement on a directive promoting and encouraging mediation use for cross-border legal disputes—civil and commercial—on April 23, 2008. See "European Union Strongly Backs Cross-Border Mediation," 26 *Alternatives* 119 (June 2008).

Similarly, diplomats from the five countries bordering the Arctic Ocean adopted a declaration in late May 2008, aimed at defusing tensions over the likelihood that global warming will open northern waters to shipping, energy extraction and other activities. (See [http://benmuse.typepad.com/arctic\\_economics/2008/05/the-ilulissak-declaration.html](http://benmuse.typepad.com/arctic_economics/2008/05/the-ilulissak-declaration.html)).

The five-state cooperation didn't start out that way. Indeed, one of the participating countries, Russia, had earlier planted a titanium flag 14,000 feet beneath the shifting sea. It provoked a frenzied activity of countries vying to demonstrate their polar hegemony with a mix of rhetoric and military maneuvers—the kind of grandstanding that produces the submarine voyage to the seabed at the North Pole that planted the flag.

Some months later, however, these nations—the United States, Canada, Russia, Norway and Denmark—reached an agreement to use existing international laws, like the Law of the Sea Treaty, to resolve disputes. They agreed to work "more cooperatively to limit environmental risks attending more Arctic shipping and com-

merce and to coordinate potential rescue operations." Andrew C. Revkin, "5 Countries Agree to Talk Over the Arctic." *N.Y. Times* A10 (May 29, 2008),

Issues remain, and there are some hesitations. But the key point is made by Denmark's foreign minister, Per Stig Moller: "We have politically committed ourselves to resolve all differences through negotiations and thus we have hopefully, once and for all, killed all the myths of a 'race to the North Pole.' The rules are in place. And the five states have now declared that they will abide by them."

## THE CHALLENGE OF CONFLICT RESOLUTION

The National Governors Association chairman, along with the association's

There are significant incentives to try negotiation. It is way past time to find a better way to manage disputes between the states.

executive committee, should consider providing a constructive means for states and their leaders to work cooperatively to advance regional goals. Not only can a forum to facilitate discussions lead to results that work, but also, the process of producing them will improve overall relationships between the states. The process can help avoid the fallout that can often come from unresolved conflict, and, indeed, from win/loss outcomes that can fuel tensions and prevent cooperation on other matters.

Recall that in the recent iteration of the disagreement between New York and New Jersey over Ellis Island—the conflict is at least 160 years old—relations between the governors, who at the time were both Republicans, Christine Todd Whitman of New Jersey, and New York's George Pataki—reached an all-time low: Port Authority projects for both states were thwarted. Regional efforts to cooperate on meeting the needs of homeless people on both sides of the Hudson River—which an earlier negotiation, prior to the litigation, on sharing tax revenues had produced—were put on hold. There was much counterproductive posturing by both governors in the press.

Indeed, in May 2000, relations were so bad that the *Star Ledger* of Newark, N.J., published a full-page editorial ("A Whitman-Pataki Summit," (May 22, 2000)) recommending a meeting of the governors to end their squabbling, offering to provide a ferryboat, anchored in the mid-Hudson River over the state boundary line as a neutral site. To advance its argument, the editorial drew from all former governors from both New York and New Jersey, who uniformly joined together to insist that then-current governors cut it out:

It is ludicrous to think that what is built in New Jersey benefits only New Jersey, that what is built in New York solely helps New York. The jurisdictions are economically joined at the hip.

In the end, the "victory" for New Jersey—it now "owns" most of Ellis Island—has not led to the development, nor generated the income, that was anticipated. Although Finn Caspersen, chairman of the N.J. Governor's Advisory Committee on the Preservation and Use of Ellis Island, a group appointed to oversee the island's preservation and development, asked for New York's cooperation, it was not forthcoming.

Given the acrimony the case generated, this result was predictable. No citizens from New York were asked to join the committee, despite the observation by Caspersen that he expected to work closely with New Yorkers in planning the island's future. "We can't draw a line down the island and say, 'This is ours and that is yours.' It has to operate as a whole." "New Jersey; Ellis Island Official Says No to Development," *N. Y. Times* (October 6, 1998).

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After years of false starts, in 2000, the National Park Service and a New Jersey-based preservation group renewed multimillion-dollar plans to turn the most harrowing part of the Island for immigrants into a tourist attraction, figuring it could take at least five years to raise the money needed to save 30 buildings that had withered from neglect, salt air, and vandalism. A group created in 2000, Save Ellis Island (see [www.saveellisland.org](http://www.saveellisland.org)), launched a fundraising effort in partnership with the National Park Service, with only modest success.

The Supreme Court took five years on the case, generating 2,000 documents. In his majority opinion, Associate Justice David H. Souter ruefully noted the "succession of legal fees and expenses arising from interstate boundary disputes."

The litigation undoubtedly cost New Jersey taxpayers far more than can be recouped from the state's claim to a portion of the sales tax revenue generated by Ellis Island's gift and snack shops. And consider the challenge of attending to injuries, crime, and other matters that arise in a space that has divided jurisdiction.

And also consider the outcome: The boundary, set by the Supreme Court, is now a legal fault line running not only across the island but through many of its facilities and structures, including the main immigration building. New York was granted jurisdiction over 4.68 acres, an area that includes most of the main immigration building, and parts of the administration, baggage-handling, and dormitory buildings.

New Jersey received jurisdiction over the island's remaining 22.8 acres, which not only surrounds New York's territory, but literally includes sections of buildings and facilities under New York's jurisdiction, plus the entire southern half of the island.


A more complicated boundary is hard to imagine. Souter's majority opinion indicates why:

[T]hese drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite. See *Texas v. New Mexico*, [462 U. S. 554, 567, n. 13 (1983)] (noting that litigation of disputes between States "is obviously a poor alternative to negotiation between the interested States"). A more convenient boundary line must therefore be

"a matter for arrangement and settlement between the States themselves, with the consent of Congress." *Indiana v. Kentucky*, [500 U. S. 380 (1991)]; see *Minnesota v. Wisconsin*, 252 U. S. 273, 283 (1920) ("It seems appropriate to repeat the suggestion . . . that the parties endeavor with consent of Congress to adjust their boundaries").

*New Jersey v. New York*, 523 U.S. 767, 811 (1998)(Footnote omitted.).

On all these counts—the litigated result's cost, the challenge to implementation, and the sour effect on state-to-state relationships—rest significant incentives to try negotiation. The Ellis Island case, particularly, provides a solid argument for the proposition that it is way past time to find a better way to manage disputes between the states.

The National Governors Association ought to heed the Supreme Court's reasoning. The NGA should take a giant step toward advancing effective governance by creating a capacity to assist the negotiations of cross-border disputes between member states. 

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## ADR BRIEFS • ADR BRIEFS • ADR BRIEFS

### SONIA ON SETTLING: THE NEW JUSTICE EMPHASIZES AGREEMENT

BY ANDREW GANGE

In her July confirmation testimony before the Senate Judiciary Committee, new U.S. Supreme Court Justice Sonia Sotomayor briefly emphasized her view on driving cases toward settlement, rather than protracting litigation processes.

President Barack Obama's first U.S. Supreme Court nominee—confirmed, 68-31, on Aug. 6., and sworn in as the Court's newest justice on Aug. 8—highlighted some of the benefits of early case resolu-

tion when she was grilled at the Senate hearings on her lengthy track record as a federal judge, which included 11 years as a Second U.S. Circuit Court judge. The statements on settling resulted from the Judiciary Committee members' focus on her judicial philosophy.

Settlement wasn't a major part of the hearings. But in some of Sotomayor's answers and in her written responses to post-hearings questions by the Senate committee members, as well as in significant court rulings, she assessed the importance for justice—and the importance for her own career—of resolving cases creatively, minimizing conflict, and managing cases to drive toward settling.

Sotomayor's references to resolving cases during the hearings included the following:

1) On July 15, the third of four days of hearings, in an exchange with Sen. Ted

Kaufman, D., Del., about the judge's early legal career as a prosecutor and commercial lawyer, Sotomayor discussed how she began to recognize cost savings for parties engaged in pre-litigation settlement and dispute resolution:

SOTOMAYOR: I worked on real estate matters. I worked on contract matters of all kinds, licensing agreements, financing agreements, banking questions. There was such a wide berth of issues that I dealt with.

KAUFMAN: And how did that practice help you on the district court and then on the court of appeals?

SOTOMAYOR: Actually, one of the lessons I learned from my commercial practice, I learned in the context, first, of my grain commodity training. But in my work, as it related to all commercial disputes, there was one main lesson. In business, the predictability of law may be

The author was a 2009 CPR Institute summer intern. He is a 2009 graduate of the LLM program at the University of Missouri-Columbia School of Law's Center for Dispute Resolution.