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Remedy Without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process

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REMEDY WITHOUT DIAGNOSIS: HOW TO OPTIMIZE RESULTS BY LEVERAGING THE APPROPRIATE DISPUTE RESOLUTION AND SHARED DECISION-MAKING PROCESS

*Mariana Hernandez-Crespo Gonstead**

This Article aims to realize the untapped potential of the dispute resolution field beyond traditional understandings of access to justice for everyone's

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benefit. It argues that, by developing skills, citizens can significantly contribute to altering the course of history in our global economy, especially in Latin America and Venezuela. It introduces and familiarizes citizens with the knowledge developed in the dispute resolution field for the past fifty years. As a new field, dispute resolution is rapidly growing and evolving. Even though the knowledge produced is vital to help us interact more effectively, the materials are complex, dispersed, and, in some cases, expensive to acquire. To this end, this Article introduces some of the key concepts and analytical frameworks developed in the field, which take culture into account to more effectively address conflict and engage our differences.

The dispute resolution field, when used in the context of access to justice, is reduced to addressing a single dispute outside courts. However, the dispute resolution field has more potential. It can help all of us by providing analytical frameworks so that we can process our present and future experiences addressing conflict. Without these analytical frameworks, we cannot process our experiences and generate the necessary knowledge to enhance our interactions. The goals are to develop citizens' skills, help them gain awareness of the interdependent nature of our relationships, and equip them with the tools to better engage with conflict, thus maximizing their ongoing synergies.

Citizens must develop these skills on a daily basis at home and at work to more effectively face the complexities and challenges of interactions in the public square. Although these skills can be helpful for all, they are particularly relevant in countries and regions of the world where social conflict has reached unprecedented levels of volatility, such as Latin America and, more concretely, Venezuela. Governments alone cannot bring about stability to the sociopolitical arena. Only an organized civic society, equipped with conflict resolution and participatory capacity, can better stabilize and unlock the power of the whole.

Besides developing citizens' capacities in the Latin American context, representative democracies need to be supplemented with "collaborative governance," which assists the process of building the channels for citizen participation in the public square. The region can no longer wait—oscillating between revolutions and caudillos (strongmen) has proven to be futile. The time has come for all citizens to participate and move from "I have a dream" to "We have a dream." Only then will the world see what Latin America can achieve when it moves from the noise produced by all the instruments playing at the same time—or the limited power of a single instrument playing a solo—to the music created when all instruments play together, realizing the power of the orchestra.

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INTRODUCTION

Have you ever considered conflict¹ as a tool to more effectively engage with others? Conflict can be your best ally or your worst enemy.² Whether you acknowledge it or not, conflict will always be present;³ the process or design you select to address it can have a profound impact on your life, your relationships, and the broader community.⁴

Conflict is inevitable because we are unique individuals. The same differences that may bring parties together can also produce irreparable harm if the parties do not know how to leverage these differences. Therefore, the question is not whether there will be conflict but when and how it will be resolved.⁵ We must have established systems in place to make decisions together and address conflict before it escalates to a legal dispute.⁶ Otherwise, when conflict arises, its resolution may potentially be inadequate, affecting not only the parties and their relationships but also those around them.⁷

1. MICHELLE LEBARON & VENASHRI PILLAY, *CONFLICT ACROSS CULTURES: A UNIQUE EXPERIENCE OF BRIDGING DIFFERENCES* 12 (2006) (“Conflict, for our purposes, is a difference within a person or between two or more people that touches them in a significant way. We all constantly encounter differences within and between ourselves and others. Only those differences that . . . we perceive as challenges to something we believe in or need, or to some aspect of our individual or shared identities, become conflicts.”).

2. CATHY CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS*, at xiii (1st ed. 1996) (“Conflict is like water: too much causes damage to people and property; too little creates a dry, barren landscape devoid of life and color. We need water to survive; we need an appropriate level of conflict to thrive and grow as well.”).

3. MARK GERZON, *LEADING THROUGH CONFLICT: HOW SUCCESSFUL LEADERS TRANSFORM DIFFERENCES INTO OPPORTUNITIES* 1 (2006).

4. Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 115–19 (2000) (arguing that lawyers should take into account the impact of process selection on the emotional and mental well-being of their clients); see also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 11–12 (2000) [hereinafter Menkel-Meadow, *Mothers and Fathers of Invention*]; Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 909–10 (2000) [hereinafter Menkel-Meadow, *When Winning Isn't Everything*] (arguing that we should ask a broader set of questions about not only the parties but also the relationships and systems in which the parties operate).

5. William L. Ury, *Foreword* to CONSTANTINO & MERCHANT, *supra* note 2, at ix (“We cannot choose to eliminate this conflict—nor should we—but we can choose how we handle conflict. Conflict, after all, is like rainfall. Properly controlled, it can be a boon; too much at once and in the wrong place can cause a destructive flood. The challenge is to build a flood control system.”).

6. See generally, e.g., Roberto Echandi, *Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 270 (Roberto Echandi & Pierre Sauvé eds., 2013) (arguing that conflicts between foreign investors and host countries should be managed before they escalate and become legal disputes).

7. See *supra* note 5 and accompanying text.

Resolving Conflict: Courts as the Preferred Option

I never imagined that the stress of handling conflict through the court system could kill you. Growing up, I wanted to be a doctor. However, I realized that my job would have been futile because it would not matter if I made an accurate diagnosis if the patient did not have the resources to afford the treatment. I thought if I became a lawyer instead, with my brain and my pen, I could effectively make change. Yet, after I graduated from law school, I witnessed the atrocious consequences of mishandling conflict. For example, when a couple died leaving assets in different jurisdictions, I saw firsthand how the legal process successfully solved the problem but killed the family. This was a turning point for me; I realized that when we use the logic of rights, it erodes—and even destroys—relationships.

In the above inheritance case, the matter escalated into a lawsuit among the siblings. I watched one of the sisters, who was perfectly healthy, develop cancer and die during trial, leaving behind two children under ten years old to be raised by her husband. After this, I never saw conflict in the same way. Even though conflict can be resolved effectively through trial, the impact of the stress associated with litigation cannot be underestimated. At that time, I did not know how to effectively satisfy the client's needs⁸ and examine a broader range of alternatives beyond court.⁹

For the purpose of this Article, conflict illiteracy¹⁰ refers to the lack of formal education and training in effectively understanding and addressing conflict. As Mark Gerzon argued, conflict literacy can turn conflict from a liability into an asset.¹¹ This Article is for all those affected by conflict illiteracy.

Broadening Options: The Untapped Potential of Appropriate Dispute Resolution in Venezuela, Latin America, and Beyond

More recently, the situation in Venezuela has deteriorated to the point of complete destruction.¹² A once oil-rich country with a stable democracy is

8. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 40–62 (1st ed. 1991) (discussing the importance of listening skills). See generally Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 49 (discussing how lawyers focus mainly on legal issues and do not pay enough attention to the human aspect of the problem).

9. Frank E. A. Sander, Professor of Law, Harvard Univ., Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (Apr. 7–9, 1976), in 70 F.R.D. 111, 111–18, 120, 124–32 (1976) (suggesting a range of options of decreasing external involvement: adjudication—which includes court arbitration—administrative processes, ombudsmen, fact-finding/inquiry, mediation/conciliation, negotiation, and avoidance).

10. See GERZON, *supra* note 3, at 227 (arguing that “[we] are often taught virtually nothing about conflict”).

11. See *id.* at 227–28 (discussing the need to include conflict in curricula and the profound impact it could have).

12. See José Meléndez, *Venezuela, caos y duplicidad de poderes* [Venezuela, Chaos, and Duplicity of Powers], EL UNIVERSAL (Jan. 9, 2020, 4:11 AM), <https://>

now crumbling, and its citizens are escaping from hunger and repression in masses (4.5 million people in less than a decade).¹³ Most troubling is that, for the past two decades, efforts to advance the use of appropriate dispute resolution (ADR) have been largely linked to access to justice.¹⁴ As Jacqueline Nolan-Haley has alerted us, the ADR movement and the access to justice movement have merged.¹⁵ Now, the two are almost synonymous,¹⁶ which has caused the world to believe that ADR is mainly confined to helping us resolve single disputes outside the courtroom. This is extremely confining, and even harmful, because the dispute resolution field can do much more for families, organizations, communities, and, ultimately, countries like Venezuela and regions like Latin America¹⁷ with high levels of social volatility.¹⁸

Since 1998, when I met Frank Sander, one of the founders of the ADR field,¹⁹ at Harvard Law School, a new horizon opened up in front of my eyes. He helped me see that law was only one avenue to resolve conflict and that

www.eluniversal.com.mx/mundo/venezuela-caos-y-duplicidad-de-poderes [<https://perma.cc/V7F6-75HG>] (“The map of the institutional chaos of Venezuela shows two presidents of the government and two of the Parliament, with two legislative bodies of a unicameral system, two general prosecutors—one in exile—and two supreme courts of justice—one in the United States—with their respective leaders.” (author’s translation)).

13. *Venezuela Situation*, UNHCR, <https://www.unhcr.org/en-us/venezuela-emergency.html> [<https://perma.cc/AED9-9ZBQ>] (last visited Apr. 12, 2020).

14. See generally Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. (forthcoming).

15. *Id.*; see also Jacqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. ONLINE 78, 79 (2019) (“I argue that claims about mediation’s ability to provide access to justice should be more modest because mediation falls short on its original promise of being a voluntary process based on party self-determination. In what I label a ‘withering away of consent,’ courts and legislatures have pushed hard to sell mediation as an access to justice opportunity, often without regard for the consensual nature of the process. Too often, this hard sell has negative consequences for individuals with disadvantaged economic status who navigate the legal system on their own. These are the self-represented parties who seek access to justice in the formal judicial system but then find themselves in mediation, a different, informal system than what has been institutionalized in the courts. The extent to which they receive justice from either system is unclear.”).

16. See generally Nolan-Haley, *supra* note 14.

17. Mariana Hernandez Crespo, *30 Years of Dispute Resolution in Latin America*, DISP. RESOL. MAG., Spring 2015, at 48, 50–51 (arguing that in Latin America there is untapped potential for ADR to address social conflicts).

18. Daniel Zovatto, *Latin America: Political Change in Volatile and Uncertain Times*, IDEA (Sept. 17, 2019), <https://www.idea.int/news-media/news/latin-america-political-change-volatile-and-uncertain-times> [<https://perma.cc/M4DL-7SP6>]; see also Daniela Guzman, *Banks Navigate Latin America’s Turmoil, Protect Lending Relationships*, REUTERS (Nov. 14, 2019, 1:45 PM), <https://www.reuters.com/article/latam-turmoil/banks-navigate-latin-americas-turmoil-protect-lending-relationships-idUSL2N27U1AQ> [<https://perma.cc/5L8B-NUL3>].

19. ADR originally referred to alternative dispute resolution, but many experts now define it as appropriate dispute resolution. See *In Memoriam: Frank E. A. Sander ’52, a Pioneer in the Field of Alternative Dispute Resolution (1927–2018)*, HARV. L. TODAY (Feb. 27, 2018), <https://today.law.harvard.edu/memoriam-frank-e-sander-52-pioneer-field-alternative-dispute-resolution-1927-2018> [<https://perma.cc/HQA2-KADF>]; see also *Frank’s Legacy*, FRANKSANDER.COM, <http://franksander.com/legacy> [<https://perma.cc/S4J5-24G5>] (last visited Apr. 12, 2020).

the ADR field had an incredible toolbox to help us not only resolve conflict but also build together what we could not accomplish alone. He pointed me to Larry Susskind who, as the head of the MIT-Harvard Public Disputes Program²⁰ and the Consensus Building Institute,²¹ guided me further with his broad experience on citizen engagement in the public square.²² He suggested that I meet Archon Fung, who helped me realize that citizen participation was not only possible but indispensable.²³ So, in Fung's class, *Designing Democratic Innovation*, with his guidance and the advice of Sander and Susskind, I conceptualized what is now the International Dispute Resolution Research Network.²⁴

The goal was to lead participatory experiences.²⁵ However, it was going to take time and effort, so Sander suggested that I stay at Harvard with a fellowship. Even though I was able to secure a fellowship position, to pay for living expenses, we discussed house sitting for a professor on sabbatical. My parents did not like the idea of me staying in someone's home alone. With his problem-solving mindset, Sander thought of throwing people in,

20. *MIT-Harvard Public Disputes Program*, HARV. L. SCH.: PROGRAM ON NEGOT., https://www.pon.harvard.edu/category/research_projects/mit-harvard-public-disputes-program [<https://perma.cc/PG2S-B5W7>] (last visited Apr. 12, 2020).

21. See *Lawrence Susskind*, CONSENSUS BUILDING INST., <https://www.cbi.org/about/bio/lawrence-susskind> [<https://perma.cc/Q3HU-SDVF>] (last visited Apr. 12, 2020).

22. See *Lawrence Susskind*, MASS. INST. TECH., <https://lawrencesusskind.mit.edu/teaching-and-research> [<https://perma.cc/H9XX-2V2H>] (last visited Apr. 12, 2020) (“In the area of public involvement in governmental decision-making his emphasis has been on . . . the obstacles to expanding deliberative democracy, alternatives to Robert’s Rules of Order and majority rule in group decision-making, facility siting and land use disputes, and the use of interactive technologies to expand public participation.”).

23. See ARCHON FUNG, <https://www.archonfung.net> [<https://perma.cc/5H6G-PJEF>] (last visited Apr. 12, 2020) (“My research and teaching aim to understand how participation, deliberation and transparency can make contemporary public governance more fair and effective. Take a look at what innovative citizens, officials, and reformers are doing to improve public education, policing, public services, the condition of the environment in America and abroad. These ideas of participation and deliberation seem straightforward, but they are complex, even daunting, in both theory and practice. But the real virtues of democracy shine when citizens and leaders figure out how to practice democracy more effectively in their own corners of social and political life.”).

24. *International Dispute Resolution Research Network*, U. ST. THOMAS, <https://www.stthomas.edu/idrrn> [<https://perma.cc/DB2H-N7RS>] (last visited Apr. 12, 2020) (“The International Dispute Resolution Research Network (IDRRN) is a community of experts, stakeholders, and academics from all corners of the globe engaged in a partnership dedicated to sharing knowledge in the dynamic field of dispute prevention and resolution. We connect in a real-time forum that allows us to share culturally diverse perspectives in order to meet the unique challenges that each of us face. . . . Our purpose is to collectively generate knowledge to advance the field of dispute resolution. Our open dialogue allows us to share our varying experiences and engage one another in a participatory learning process with the goal of enhancing mutual understanding and exploring innovative options for problem-solving.”).

25. See, e.g., Frank Sander & Mariana Hernandez Crespo, Transcript, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-door Courthouse*, 5 U. ST. THOMAS L.J. 665, 673 (2008) (explaining the need to engage stakeholders); see also Mariana Hernandez Crespo, *Building the Latin America We Want: Supplementing Representative Democracies with Consensus Building*, 10 CARDOZO J. CONFLICT RESOL. 425, 470–76 (2008).

and suggested, “What about babysitting?” On graduation day, my father, who was shocked, decided to talk to the leadership of the international programs and asked, “What have you done to my daughter here?” I also remember him saying, “She is going to be the most expensive babysitter on earth. Ten years of legal education to babysit?”

Yet, my father knew that there was a lot at stake and there still is. He is now dead, and when I said goodbye to him during my last visit, we were both aware that I was not going to be able to go back for his funeral. To put it simply, the Venezuelan crisis had become inevitable. I then promised that I was going to speak up about Venezuela, which I had not done for the last twenty years.

Over the years, many have asked me professionally and personally what my thoughts are about the Venezuela situation. Even though I have not spoken directly about Venezuela, I have written extensively about the potential of ADR to alter the course of history for Latin America.²⁶ In particular, I have spoken about building channels in the public square for citizen participation that goes beyond voting, marches, and demonstrations.²⁷ My writing has been about supplementing representative democracies with collaborative governance in regions where the majority is currently disenfranchised. Essentially, I have suggested ways in which the government can share power with citizens at the local level regarding the decisions that directly affect their lives. Utilizing the works of Lisa Blomgren Amsler (formerly Bingham) on collaborative governance²⁸ and her work with Janet Martinez and Stephanie Smith on dispute system design²⁹ as a strong foundation, I have argued that without these higher levels of participation, any attempt to promote stability will not take root. Also, building from the scholarly work of Wallace Warfield, I have focused on relationships, decision-making, and culture.³⁰

26. See, e.g., Mariana Hernandez Crespo G., *From Noise to Music: The Potential of the Multi-door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335, 352 [hereinafter Hernandez Crespo G., *From Noise to Music*]. See generally ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 87–89 (2006); Hernandez Crespo, *supra* note 25; Mariana Hernandez Crespo G., *A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design (“SDSD”) to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551 (2017) [hereinafter Hernandez Crespo G., *A New Chapter*].

27. See sources cited *supra* note 26.

28. Mariana D. Hernandez-Crespo et al., *The Scathingly Brilliant Scholarship of Lisa Blomgren Amsler (Formerly Bingham)*, 12 NEGOT. & CONFLICT MGMT. RES. 343, 357 (2019).

29. See generally LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (forthcoming 2020).

30. See generally FROM CONFLICT RESOLUTION TO SOCIAL JUSTICE: THE WORK AND LEGACY OF WALLACE WARFIELD (Alicia Pfund ed., 2013); Wallace Warfield, *Public Policy Conflict Resolution: The Nexus Between Culture and Process*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 176 (Dennis J. D. Sandole & Hugo van der Merwe eds., 1993) [hereinafter Warfield, *Public Policy Conflict Resolution*]; Wallace Warfield, *The Implications of Alternative Dispute Resolution Processes for Decisionmaking in Administrative Disputes*, 16 PEPP. L. REV. 93 (1989) [hereinafter Warfield, *Implications of ADR*].

However, I realize that creating these channels for citizen participation is not enough. Building channels in the public square is like building swimming pools; although the pool is there for citizens to use, they need to learn *how* to swim in order to use it.³¹ In other words, citizens have to develop conflict resolution and participatory skills on a daily basis—at home, at work, and in their communities—to better engage in public decision-making. Without teaching citizens the *how*, it is impossible to maximize the potential of citizen participation in the public square.³² I hope that this Article makes accessible for citizens, especially Latin Americans, the tools to achieve the *how*.

Unlocking the Power of ADR: Developing Skills for Citizen Participation in Latin America

For the past two decades, I have worked in conflict resolution, primarily in the public sphere with governments and stakeholders. But the work I did and skills I used in the public sector were not enough to bring about development. For individuals to effectively participate in the public square, they need to practice these conflict resolution and participatory skills within their homes and workplaces. Only when they practice “effective” conflict resolution³³ and participation with those they love and work with will they be better prepared to effectively engage and address the complexity of the larger community in the public square. With these skills, we can optimize results. By engaging our collective potential, we can create together what we cannot create alone.

To develop conflict resolution and participatory skills, citizens first need access to the knowledge within the dispute resolution field. Within the field, there are three ways to solve conflicts,³⁴ each of which results in radically different consequences.³⁵ The first is through power³⁶: by crushing the other

31. *See, e.g.*, ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 73 (2004) (discussing the need for training of both citizens and professionals because “the difficulties associated with exercising the power of deliberative problem-solving were new to both”).

32. JOHN GASTIL, DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING, & COMMUNICATION 132 (2d ed. 2014) (“Democratic principles can shape formal group decision making processes, but they also can shape how we live every day. A democratic society is just that—a social world infused with democracy not just in its governance but in the lives its people lead.”).

33. Sander, *supra* note 9, at 111–18, 120, 124–32 (urging readers not to assume that courts are the obvious choice and instead to consider a plethora of rich processes and suggesting that in this way we can have a far more “effective” conflict resolution).

34. MARY PARKER FOLLETT, PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s, at 67–69, 75, 77, 79, 82, 84–86 (Pauline Graham ed., 1995) (arguing there are three ways of dealing with conflict: domination, compromise, and integration); *see also* BERNARD MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES 119 (2009) (arguing the need to expand the ways we deal with conflict and “stay” with it); WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 3–19 (1st ed. 1988) (arguing that there are three ways to resolve conflict: powers, rights, and interests).

35. URY ET AL., *supra* note 34, at 5–8.

36. *Id.* at 7–8 (discussing powers).

(e.g., war, strikes, demonstrations, coups d'état). The second is through rights³⁷ or industry norms.³⁸ Legal rights allow us to fight in the court system or privately through processes such as arbitration. The third is through the satisfaction of all parties' interests³⁹ in processes such as interest-based negotiation.⁴⁰ This can be accomplished by creating value for everyone,⁴¹ instead of merely relying on compromise. Compromise requires that at least one party gives up something, which diminishes satisfaction.⁴² Instead, value creation focuses on the generation of options that satisfy the interests of all.⁴³ Over the years, this category has expanded to include other facilitative processes, including learning how to productively “stay with conflict.”⁴⁴ Not all conflicts can be resolved quickly.⁴⁵ In fact, resolving conflicts requires a deep understanding of ourselves and others.⁴⁶ Learning about our differences is indispensable.⁴⁷ The question is, why are we not doing this yet? In part, the field is still in its early stages and the knowledge generated in the last fifty years⁴⁸ is still, to some degree, complex, dispersed, and expensive.

37. *Id.* at 7 (discussing rights).

38. Sometimes in adjudicative procedures, such as arbitration, the arbiter makes decisions based on industry norms rather than rights.

39. URY ET AL., *supra* note 34, at 5–7 (discussing interests).

40. *See generally* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

41. *Id.* at 3–15, 42–81 (arguing that to invent options for mutual gain, it is necessary to move from position bargaining to interest-based bargaining).

42. *Id.* at 3–15 (arguing the limits of compromise). *But see* Amy J. Cohen, *On Compromise, Negotiation, and Loss*, in *NOMOS LIX: COMPROMISE 100* (Jack Knight ed., 2018) (arguing that the theory and practice of ADR need to consider two conceptions: (1) compromise shaped by principles and (2) compromise shaped by constraints).

43. FISHER ET AL., *supra* note 40, at 3–15, 42–81.

44. *See generally* MAYER, *supra* note 34.

45. *Id.* at viii–ix (“I have come to believe there is an additional dimension to our challenge. The most significant conflicts people face are the enduring ones—those struggles that are long lasting and for which a resolution is either irrelevant or is just one in a series of partial goals in service of a long-term endeavor. . . . Constructive engagement requires disputants to accept the conflicts in their lives with courage, optimism, realism, and determination. It means learning to engage with both the conflict and the other disputants with respect for each person’s humanity, if not his or her behavior or beliefs. It means articulating the nature of the conflict in a way that opens the door to communication and understanding rather than slamming it shut. It means developing durable avenues of communication that will survive the ups and downs of a long-term conflict.”).

46. *See generally* Mariana Hernandez Crespo Gonstead, *A New Dance on the Global Stage: Introducing a Cultural Value-Based Toolbox to Optimize Problem-Solving, Innovation, and Growth*, 34 OHIO ST. J. ON DISP. RESOL. (forthcoming 2020).

47. *Id.*

48. Frank E. A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3, 4 (describing the different periods of ADR development: (1) 1975–1982, “Let a thousand flowers bloom”; (2) 1982–1990, “Cautions and caveats”; and (3) 1990–present, “Institutionalization”); Sander & Hernandez Crespo, *supra* note 25, at 671–72 (discussing how the ideas from the Pound Conference in 1976 were executed over the following decades); *see also* Jean Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 291, 293–94, 296, 299–301, 303–04 (2003) (discussing the debate about the proper role of ADR).

However, the world, especially Latin America and Venezuela, can no longer wait. In the words of Venezuelans fleeing the country, “We either try to make it to another country or we die What we’re doing in Venezuela is dying of hunger. How could we pay for a passport if we can’t even afford food? We’re not leaving—we’re escaping.”⁴⁹

It is time to realize the potential of the dispute resolution field in developing citizens’ capacities for “effective” conflict resolution and participation, both at the individual and collective levels.⁵⁰ Otherwise, in thinking about ADR mainly in the context of access to justice, when it comes to the developing world, there is too much waste. It underutilizes the breadth and depth of a field that can truly transform who we are and how we interact with one another. Moreover, it can unleash our collective potential and take our global economy to unprecedented levels of innovation and growth.

The Purpose: Teaching Citizens How to Realize the Potential of Dispute Resolution and Optimize Results by Leveraging Their Unique Differences

This Article demonstrates the untapped potential and accessibility of the dispute resolution field for each of us. It aims to synthesize a significant portion of the body of work produced in this discipline, so those outside this area of expertise can learn and use it. With this knowledge, we all can start developing conflict resolution and participatory capacity to eventually engage more effectively in the public square.

To this end, this Article first analyzes the systemic impact of conflict. It then explains why ADR as access to justice is a narrow use of the dispute resolution field in the Latin American context. It then suggests that, to address the current crisis in the region, it is critical to broaden the scope of what the dispute resolution field can do at individual and collective levels. This Article argues that the knowledge of the dispute resolution field can help citizens develop conflict resolution and participatory capacity. To accomplish this, it first proposes a “Comprehensive Framework for Conflict Resolution” to learn how to diagnose and select the appropriate process for resolution that takes culture into account.⁵¹ It also introduces a participatory approach and suggests how to use two tools to operationalize it: Dispute

49. Andrea Castillo, *Blankets, Canned Tuna and Faith in God—How Fleeing Venezuelans Survive*, L.A. TIMES (Jan. 16, 2020), <https://www.latimes.com/projects/venezuela-migration-crisis> [<https://perma.cc/8ZJE-9J3H>].

50. Cass R. Sunstein & Reid Hastie, *Great Teams Need Social Intelligence, Equal Participation, and More Women*, HARV. BUS. REV. (Dec. 16, 2014), <https://hbr.org/2014/12/great-teams-need-social-intelligence-equal-participation-and-more-women> [<https://perma.cc/4B2W-ZUD8>] (arguing that great teams need to develop participatory capacity).

51. LEBARON & PILLAY, *supra* note 1, at 13 (“Conflicts are always cultural, since we are all cultural beings. Yet the very definition of conflict is challenging because of our cultural ways of seeing.”); *see also* JESWALD W. SALACUSE, *THE GLOBAL NEGOTIATOR: MAKING, MANAGING AND MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY* 89–115 (2003) (identifying culture as the second special barrier to global dealmaking and describing culture as a silent language, as well as its impact on dealmaking); Jeffrey Z. Rubin & Frank E. A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOT. J. 249, 249 (1991) (arguing that culture is “a profoundly powerful organizing prism”).

System Design⁵² (DSD) and Shared Decisions System Design⁵³ (SDSD). Next, using Venezuela as an example, it points out the harmful consequences—for Latin America and the world—of not developing conflict literacy using the frameworks presented. It argues that it is indispensable to include the perspective of all stakeholders to accurately diagnose the current crisis. Only then will it be possible to select or design the appropriate process for a sustainable resolution. Finally, once a sustainable resolution has been reached, this Article proposes the use of collaborative governance⁵⁴ to supplement representative democracies and bring about the stability that the region needs.

This Article focuses on optimizing outcomes by leveraging our unique differences through ongoing synergies. It argues that the knowledge developed by the ADR field can help us to engage our differences, rather than ignore, suppress, or tolerate them, so that we can reap the following benefits: (1) maximization of individual potential by increasing the engagement necessary for peak performance; (2) increase in collective growth through improved cohesiveness to move forward; and (3) prevention of future conflicts and more accurate prediction of future decision-making by gaining the necessary knowledge about others' values to better understand what is driving their behavior.

A Detailed Roadmap

This Article reviews: (1) the systemic impact of conflict and the limited use of ADR; (2) how to tap into the potential of ADR to effectively manage conflict; (3) how to spark ongoing synergies through participation; and (4) an example of how conflict can destroy or recreate.

Part I examines the harm of leaving conflict unresolved and its systemic impact. It uses the metaphor of a house on fire and its potential to spread, which creates an urgency to act. It also suggests that higher levels of global interconnectivity have created extraordinary opportunities but have also elevated the risk of conflict by increasing proximity, interactions, and impact. In this context, Latin America is introduced as an example of the systemic impact of conflict. Yet despite decades of efforts to increase access to justice and ADR, the merger of both movements and the lack of a systemic approach have had unintended consequences with important repercussions for social

52. For some of the seminal pieces on DSD, see URY ET AL., *supra* note 34. *See generally* CONSTANTINO & MERCHANT, *supra* note 2; Lisa Blomgren Amsler et al., *Christina Merchant and the State of Dispute System Design*, 33 CONFLICT RESOL. Q. S7 (2015); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009). For some of the leading textbooks on DSD, see AMSLER ET AL., *supra* note 29 and NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013).

53. *See generally* Hernandez Crespo G., *A New Chapter*, *supra* note 26.

54. *See* Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 323–26 (showing that current legal frameworks are not drafted to encourage collaborative governing).

and political inclusion in the Latin American region. This Part concludes that to move forward and unlock the potential of ADR for the region, it is vital for citizens to gain access to knowledge to develop conflict resolution and participatory capacity. Equipping citizens for effective participation in the public square can alter the course of history for Latin America.

Part II argues that, like fire, conflict is a powerful tool that can kill or create. It suggests that, to realize the potential of the dispute resolution field, we, as citizens, need to become doctors of conflict and develop conflict literacy to accurately diagnose different types of conflicts.⁵⁵ It also suggests that we need to learn the broad spectrum of treatments to select the appropriate one for the resolution of the conflict at hand.⁵⁶ It distinguishes between different processes,⁵⁷ which can be (1) avoidance or violence, based on power⁵⁸ (logic of coercion); (2) adjudicative, based on rights⁵⁹ and industry norms (logic of persuasion); and (3) facilitative, based on interest⁶⁰ and other facilitative processes, including “staying with conflict”⁶¹ (logic of participation). Finally, this Part articulates the need to focus on facilitative processes and learn how to integrate the interests of the parties to move from a mere compromise to value creation.⁶² It stresses that compromise simply divides the pie, while value creation generates options that fully satisfy the interests of all.⁶³

Part III articulates the need to learn how to use our unique differences to spark ongoing synergies through participation. It compares this process to channeling the flames of the fire to ignite the collective creative process. To achieve this, this Part suggests shifting toward participation by moving beyond conflict, compromise, and common ground. It suggests that to develop participatory capacity, we need a participatory approach that includes knowledge of self and others,⁶⁴ a mindset of interdependence,⁶⁵ and

55. *Carrie Menkel-Meadow, Conflict Theory*, in *ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD* 323, 323–26 (Karen Christensen & David Levinson eds., 2003); *see also* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 61–62 (2d ed. 1996).

56. Sander, *supra* note 9, at 111–18, 120, 124–32.

57. Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 4, at 2.

58. URY ET AL., *supra* note 34, at 7–8 (discussing power).

59. *Id.* at 7 (discussing rights).

60. *Id.* at 5–7 (discussing interests).

61. MAYER, *supra* note 34, at 50.

62. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 14–17 (2004) (discussing how even though it is counterintuitive, the use of differences can create value and suggesting that differences in resources, relative valuation, forecast, time, and preferences present opportunities for value creation).

63. FISHER ET AL., *supra* note 40, at 58–81 (arguing that we can create options for mutual gain).

64. *See generally* Hernandez Crespo Gonstead, *supra* note 46.

65. STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE* 48–49 (2013) (introducing the “maturity continuum” that goes from dependence to independence to interdependence).

levels of integration.⁶⁶ To operationalize this participatory approach, this Part introduces two analytical frameworks, DSD⁶⁷ and SDS⁶⁸, as tools to allow us to manage conflict and share decision-making at a systemic level.

Part IV argues that conflict can be used as a tool to reignite Latin America. It presents Venezuela as an example of how conflict, like fire, can burn what exists or recreate a new reality and reignite Latin America. This Part first describes the consequences of conflict illiteracy, which results in millions of Venezuelans fleeing from the fire. Next, it examines the world's responses to the fire, which have led to inaccurate and incomplete diagnoses and thus competing and ineffective treatments. Finally, this Part argues that there is another way to channel the flame, which could lead to an alternative diagnosis, treatment, and wellness plan for a new Venezuela. This requires: First, a complete and accurate diagnosis that frames the issue from the perspectives of all stakeholders and then selects or designs the appropriate process(es) for sustainable resolution. Second, the adoption of collaborative governance⁶⁹ as a comprehensive model for citizen participation in public decision-making.

This Article concludes that when conflict is left unattended or mishandled, like fire, it can produce lasting damage. Yet conflict, as a powerful tool, can have a tremendous impact that could be positive or negative depending on our level of conflict literacy. If we learn to diagnose the conflict and select the appropriate process for resolution, we can capitalize on our differences. Furthermore, if we can engage those differences in our daily interactions, through participation, we can unlock the ongoing synergies necessary to maximize our collective potential and thereby experience the power of the whole.

This is not meant to be one more law review article. What follows is my best effort to share with all of you a synthesis of my colleagues' work and my own. I believe this knowledge is indispensable to assist the process of altering the course of history for Venezuela. It could also perhaps alter the course of life for those that today do not know how to effectively manage conflict in their families, workplaces, and communities.

I became a law professor to promote inclusion through participatory experiences. However, to analyze experiences, we need analytical frameworks to generate knowledge. By generating knowledge from experience, we are not only transformed in the process but we also transform reality. We unleash both our individual and collective potentials, which allows us to reach higher levels of innovation and growth. I hope that this Article broadens the discourse of what we consider possible. This is just one possible path to start the conversation.

66. JACQUELINE NOLAN-HALEY ET AL., *GLOBAL ISSUES IN MEDIATION* 94–96 (2019); Hernandez Crespo Gonstead, *supra* note 46 (introducing the “cultural value integration spectrum”).

67. *See supra* note 52 and accompanying text.

68. *See generally* Hernandez Crespo G., *A New Chapter*, *supra* note 26.

69. *See generally* Bingham, *supra* note 54.

I. WHEN YOUR OR YOUR NEIGHBOR'S HOUSE IS ON FIRE: THE SYSTEMIC IMPACT OF CONFLICT AND THE LIMITED USE OF ADR

The only way to avoid interpersonal conflict is to live in isolation. This is because when you share space, time, money, resources, tasks, or roles, you might also share decision-making power; with shared decision-making might also come conflict. The question then is not whether there will be conflict but when and how to address it.

This Part starts by explaining the transformative power of conflict and how our experiences shape our reactions.⁷⁰ Next, it articulates why we need to engage in others' conflicts because of their impact on our own path. It then presents an example of conflict's systemic impact by showing how Latin America "on fire" can have repercussions for our global economy. Finally, it addresses the efforts made by the international community to stop the fire in Latin America through ADR and access to justice.⁷¹ However, it also explains that this is a very limited use of what the field of ADR can do to address conflict. It argues that the region cannot wait any longer to realize the full potential of ADR.

A. *The Systemic Challenges of Conflict: The Global Impact of a Burning Region in an Interconnected World*

The world has never been as interconnected as it is today. Our global economy has increased interdependency to an extent never experienced before.⁷² While this has benefits, such as access to broader markets and access to services and products, it has also increased risks by making each part more susceptible to the fate of the whole.⁷³

This is particularly true when it comes to conflict. When conflict escalates from the local to the national and international levels, it can disrupt the entire global economy.⁷⁴ Therefore, without a clear understanding of how conflict operates, both at individual and collective levels, we cannot analyze the friction that may lead to fire. What follows is a brief explanation of the consequences of how we currently deal with conflict.

70. JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES 63–64 (1998) (“[Conflict] is constantly changed by ongoing human interaction, and it continuously changes the very people who give it life and the social environment in which it is born, evolves, and perhaps ends.”).

71. See generally Mariana Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91 (2008).

72. Hilton Root, Opinion, *Preventative Chaos*, U.S. NEWS & WORLD REP. (Feb. 21, 2018, 7:00 AM), <https://www.usnews.com/opinion/economic-intelligence/articles/2018-02-21/the-more-integrated-the-global-economy-the-more-vulnerable-it-is> [https://perma.cc/3QUJ-U9BY] (“Think of it this way: As national economies become increasingly integrated, the failure of one presents a risk to all, and mishaps in one economy can surge like an avalanche across the system.”).

73. *Id.*

74. *Id.*

1. The Transformative Power of Conflict: How Our Experiences Shape Our Reactions

We all react to conflict in many different ways.⁷⁵ Conflict inevitably produces a transformative experience⁷⁶ that can be positive⁷⁷ or negative.⁷⁸ For some, conflict should be avoided at all costs.⁷⁹ To them, conflict is nothing but a negative experience,⁸⁰ which produces, at best, waste and, at worst, harm. For others, conflict is an integral part of life. This group is used to persuading or compromising with the hope that conflict will go away.⁸¹ However, if parties engage with conflict, at the very minimum, they will grow because they will not be the same after attempting resolution.

Our individual reactions to conflict depend greatly not just on our personalities, preferences, and cultures⁸² but also on our previous experiences.⁸³ If we were harmed by our prior interactions with conflict, we will be more reluctant to engage with conflict today. However, our past experiences cannot be the only determinative factor. What worked before may not work now because the world is in constant change and so are we. Similarly, what did not work before might work now if we acquire new knowledge on managing the situation differently.

Our experiences with conflict can provide extraordinary amounts of information if we gain the necessary framework to analyze the information as raw material. Thinking about conflict without the appropriate frameworks for assessment might lead to erratic thinking and wrong conclusions.⁸⁴ If we

75. Warfield, *Public Policy Conflict Resolution*, *supra* note 30, at 176 (“Culture provides an interpretational lens for the origins of conflict, shapes the contours of how conflict will be processed and the expectations concerning outcomes.”).

76. BERNARD S. MAYER, *THE CONFLICT PARADOX: SEVEN DILEMMAS AT THE CORE OF DISPUTES* 1–23 (2015) (arguing that when engaging with conflict we must wrestle with the following paradoxes: competition and cooperation, optimism and realism, avoidance and engagement, principle and compromise, emotions and logic, neutrality and advocacy, and community and autonomy).

77. MICHELLE LEBARON, *BRIDGING CULTURAL CONFLICTS: A NEW APPROACH FOR A CHANGING WORLD* 3 (2003) (“Few people welcome conflict as an intriguing opportunity for learning and change.”).

78. LEBARON & PILLAY, *supra* note 1, at 89.

79. MAYER, *supra* note 34, at 61–62 (describing the ways in which conflict can be avoided).

80. *See generally* LEBARON, *supra* note 77.

81. BERNARD MAYER, *THE DYNAMICS OF CONFLICT: A GUIDE TO ENGAGEMENT AND INTERVENTION* 67 (2012) (“When we try to persuade others to change their behavior or approach to a conflict, we are exercising power.”).

82. John Paul Lederach, *Of Nets, Nails, and Problems: The Folk Language of Conflict Resolution in a Central American Setting*, in *CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES* 165, 165–66 (Kevin Avruch et al. eds., 1998) (discussing the different lenses that cultures put on conflict). *See generally* KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION* (1998) (discussing the importance of culture in conflict resolution).

83. LAURIE S. COLTRI, *ALTERNATIVE DISPUTE RESOLUTION: A CONFLICT DIAGNOSIS APPROACH* 62–90 (2d ed. 2020) (arguing the impact of our individual perceptions and interpretations on conflict).

84. AMSLER ET AL., *supra* note 29 (manuscript at 27) (referring to the work of Elinor Ostrom).

do not learn how to address conflict effectively in our own lives, we might walk away from relationships thinking that the other person is the problem, only to engage in, and end, a new relationship for similar reasons.⁸⁵ This would not only leave extraordinary opportunities to grow and create together unrealized but would perpetuate previous errors.

Usually, if we can live with the issue, it is easier to avoid engaging in conflict because engaging takes significant amounts of energy, attention, time, and mental power.⁸⁶ It can also be physically draining, emotionally exhausting, and intellectually challenging. However, if the issue is significant enough, then the inability to learn from conflict causes anxiety due to the inability to escape from inevitable disagreements. Like fire, conflict in one's life is hard to contain. By its own nature, conflict tends to spread.⁸⁷ What may start as conflict in one area of life may directly or indirectly affect our entire being. Therefore, reassessing how we deal with conflict and how much knowledge we gain from analyzing our previous experiences can be the first step in not only putting out a current fire but preventing future ones.

2. Why Engage in Others' Conflicts: The Systemic Impact on Our Own Paths

If your neighbor's house is on fire, it will affect you, directly or indirectly, because it is affecting the system in which you operate.⁸⁸ Similarly, conflict in our own lives, if not contained, will likely affect surrounding areas.

Not surprisingly, if we do not know how to effectively address conflict, we are unlikely to help others in their resolution processes, even though the consequences of not doing so can be countless. For example, not only can your own home catch on fire but, even if it does not, it can suffer from smoke damage, insurance premium increases, and maybe even a loss in value if the property next door is not repaired or the neighborhood is completely ruined. Also, surrounding neighborhoods can potentially suffer if there is displacement of the neighbors who lost their homes. The level of disruption can be unimaginable if the fire is not stopped. Therefore, doing nothing cannot be an option. At the very minimum, we should take some precautionary measures and make informed decisions about the extent to which we need to get involved.

85. LEBARON & PILLAY, *supra* note 1, at 90 ("People in destructive conflict begin to dehumanize their adversaries when the conflict polarizes relationships. The sense of 'we-ness' and 'theyness' escalates, where 'they' appear less worthy than 'we' are. People tend to see themselves as patient, generous, and open, while perceiving others as closed, unreasonable, and selfish.").

86. MAYER, *supra* note 34, at 37.

87. LEBARON & PILLAY, *supra* note 1, at 12 ("Conflict may also lurk beneath the surface and then become more difficult to address, especially when our core ideas or our shared sense of identity seems threatened through the actions, claims, or the very existence of others.").

88. *Id.* at 91 ("Conflict spreads as more people become involved. As people in conflict are increasingly convinced that they are right and their adversaries are wrong, they look for others to join their camp and discourage them from joining their adversaries' camps.").

There are strong reasons not to get involved in the conflicts of others. One of the most considerable is respecting the autonomy of those involved in the conflict.⁸⁹ Another reason is that getting involved may derail you from your own path.⁹⁰ However, if the conflict becomes disruptive, it will require your immediate attention.

When the conflict does not disrupt our paths, we may still get involved if we care enough about those who experience the consequences.⁹¹ Therefore, our engagement depends on, among other factors, the significance of the matter, its impact on us, and its impact on those we care about. We will be more or less compelled to seek resolution if we consider the matter relevant. However, recently, the game has changed. In our global economy, we are now all interconnected; we can no longer act as isolated and independent entities, but rather we must act as integral parts of one global landscape.⁹²

3. An Example of the Systemic Impact of Conflict: Latin America on Fire and Repercussions for the Global Economy

Unless we have internalized the inevitable and systemic nature of conflict in our own lives and within our families, workplaces, and communities, we will not grasp the complexity and intricacy of conflict in our global community.⁹³ Our global community is a system of systems, which are intertwined and some are nested within others.⁹⁴ As such, the high level of volatility in some parts of the world cannot be ignored or disregarded as if it

89. MAYER, *supra* note 34, at 28 (“One reason conflicts do not get readily resolved is that they reflect core concerns about meaning, community, intimacy, and autonomy . . .”).

90. *Id.* at 57.

91. MAYER, *supra* note 76, at 111 (“To avoid engaging thoroughly, it would seem useful not to care much about a conflict, relationship, or issue. And often that is the case—but not always.”).

92. Christine Lagarde, Managing Dir., Int’l Monetary Fund, Speech at the U.S. Chamber of Commerce: The Interconnected Global Economy: Challenges and Opportunities for the United States—and the World (Sept. 19, 2013), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp091913> [<https://perma.cc/3SQY-6NEX>] (“We all have a large stake in these interconnections. What happens elsewhere in the world—be it the success of recovery in Europe or the continued smooth functioning of supply chains in Asia—matters increasingly for the United States. The converse is also true. What happens here matters increasingly for the global economy.”). See generally OECD, INTERCONNECTED ECONOMIES: BENEFITING FROM GLOBAL VALUE CHAINS (2013), <https://www.oecd.org/sti/ind/interconnected-economies-GVCs-synthesis.pdf> [<https://perma.cc/86BL-PR43>].

93. See Veronica Boix Mansilla & Anthony W. Jackson, *Educating for Global Competence: Redefining Learning for an Interconnected World*, in MASTERING GLOBAL LITERACY: CONTEMPORARY PERSPECTIVES ON LITERACY 1, 19 (2013) (“Virtually every major issue people face—from climate change to national security to public health—has a global dimension. Information technologies ensure that news from every country reverberates around the world in minutes. With over 200 million migrants worldwide, migration and immigration are creating magnificently more diverse neighborhoods, communities, and nations. More than ever, people, cultures, and nations are interdependent, requiring the preparation of students capable and disposed to solve problems on a global scale and participate effectively in a global economic and civic environment. No longer a luxury for a few, global competence is a requirement for all.”).

94. AMSLER ET AL., *supra* note 29 (manuscript at 22) (introducing the idea of “nested” communities); see also Root, *supra* note 72.

is a problem that does not affect us.⁹⁵ Even though they might seem far apart, the fires of conflict, or their effects, no matter where they are, reach us sooner or later.⁹⁶

Despite the fact that there might be fires of conflict in several parts of the world, Latin America, given the abysmal disparities in standards of living for different social classes,⁹⁷ has reached unprecedented levels of sociopolitical volatility.⁹⁸ This level of instability can be damaging not only to the individual countries but to the region as a whole and the global economy.

The most striking example of the high levels of volatility is Chile. Until recently, Chile was considered one of the most stable countries in the region.⁹⁹ But in 2019, 4.3 million citizens held demonstrations to express their grievances.¹⁰⁰ The country was up in flames as protestors lit the subway,¹⁰¹ businesses,¹⁰² and churches on fire¹⁰³ and destroyed traffic lights.¹⁰⁴ Conflict had been boiling for a long time.

95. See Jorge G. Castañeda, Opinion, *The U.S. Should Act Before a Global Downturn Destabilizes Latin America*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/17/opinion/recession-latin-america.html> [<https://perma.cc/XNY4-WXBQ>] (arguing that unrest in Latin America will impact our global economy).

96. Rob Smith, *Conflict Costs the Global Economy \$14 Trillion a Year*, WORLD ECON. F. (Jan. 15, 2018), <https://www.weforum.org/agenda/2018/01/conflict-costs-global-economy-14-trillion-a-year> [<https://perma.cc/33LR-G4DM>] (stating that the economic cost of conflict and violence is \$14 trillion per year, equivalent to 12.6 percent of the global gross domestic product).

97. Alicia Bárcena Ibarra & Winnie Byanyima, *Latin America Is the World's Most Unequal Region. Here's How to Fix It*, WORLD ECON. F. (Jan. 17, 2016), <https://www.weforum.org/agenda/2016/01/inequality-is-getting-worse-in-latin-america-here-s-how-to-fix-it> [<https://perma.cc/4G4F-VPP4>] (“Although income inequality has fallen in recent years, Latin America remains the most unequal region in the world.”).

98. See Moisés Naím & Brian Winter, *Why Latin America Was Primed to Explode*, FOREIGN AFF. (Oct. 29, 2019), <https://www.foreignaffairs.com/articles/central-america-caribbean/2019-10-29/why-latin-america-was-primed-explode> [<https://perma.cc/XV84-SYGQ>].

99. *Chile Country Profile*, BBC NEWS (Apr. 12, 2018), <https://www.bbc.com/news/world-latin-america-19357497> [<https://perma.cc/KGM3-AH7Q>].

100. Cynthia Arnson et al., *Postcards from the Edge*, WILSON Q., <https://www.wilsonquarterly.com/quarterly/the-power-of-protest/postcards-from-the-edge> [<https://perma.cc/E77V-MEF8>] (last visited Apr. 12, 2020); see also Rachael Bunyan, *18 Killed as Hundreds of Thousands of Protestors Take to the Streets in Chile. Here's What to Know*, TIME (Oct. 25, 2019), <https://time.com/5710268/chile-protests> [<https://perma.cc/D6U2-RBDD>].

101. Naomi Larsson, *State of Emergency in Chile as Violent Protests Sweep Across Capital*, TELEGRAPH (Oct. 19, 2019), <https://www.telegraph.co.uk/news/2019/10/19/state-emergency-chile-violent-protests-sweep-across-capital> [<https://perma.cc/2RQW-KK2E>].

102. Aislinn Laing & Fabian Cambero, *Chile's Deadly Weekend of Fire as Youth Anger Ignites*, REUTERS (Oct. 21, 2019), <https://www.reuters.com/article/us-chile-protests-scenes/chiles-deadly-weekend-of-fire-as-youth-anger-ignites-idUSKBN1X009A> [<https://perma.cc/PD2Z-CRKA>].

103. Esteban Felix & Eva Vergara, *Church Looted by Vandals as Protests Rage in Chile's Capital*, AP NEWS (Nov. 8, 2019), <https://apnews.com/9bdf447abb634194a0229656309c70be> [<https://perma.cc/H98Y-H7AY>].

104. Natalia A. Ramos Miranda, *'Chile Awakened': Graffiti Across Shattered City Reflects Protest Intensity*, REUTERS (Nov. 26, 2019), <https://www.reuters.com/article/us-chile-protests-graffiti/chile-awakened-graffiti-across-shattered-city-reflects-protest-intensity-idUSKBN1Y018L> [<https://perma.cc/Y2GB-7KLV>].

This was not an isolated event. Similar social unrest plagues other countries in the region.¹⁰⁵ In 2019, indigenous communities took to the streets in Ecuador and paralyzed the country, demanding a change in economic measures.¹⁰⁶ In Peru, the president dissolved the congress and the people took to the streets.¹⁰⁷ In 2019, citizens also took to the streets in Bolivia, Colombia, and Haiti.¹⁰⁸ Of all the countries in the region, Venezuela stands out for enduring one of the most grueling crises¹⁰⁹ and for impacting the region the most.¹¹⁰

Some might argue that this is the product of an organized effort to destabilize the region.¹¹¹ However, the cause of dissatisfaction remains: the large majority of citizens are still disenfranchised.¹¹² The impact of civil unrest cannot be underestimated. Social issues in the Latin American region can no longer wait. Its future affects the whole world, but it affects the countries in close proximity even more directly.¹¹³ The crises are at a point where Latin America cannot remain the same. Latin America will either become a great asset or a massive liability for its neighbors and the world.¹¹⁴ Without a comprehensive approach to addressing these social issues, high levels of disruption will continue with no sustainable resolution.

105. Cynthia Arnson et al., *supra* note 100.

106. *Id.* (“The tumult blocked major highways, damaged businesses in rural and urban areas, and destroyed valuable public property. Major cities, particularly Quito, the capital city, looked and felt like war zones. . . . In the end, however, the government was compelled to cancel Decree 833 after reaching an agreement with representatives of the nation’s indigenous peoples.”).

107. Zarai Toledo Orozco, *Peru Dissolves Its Congress, Setting Up a Fight for the Political Future*, NACLA (Nov. 5, 2019), <https://nacla.org/news/2019/11/04/peru-congress-vizcarra> [<https://perma.cc/SG2E-3HXG>] (“In absence of representative political parties or social movements, demonstrations in Peru have become the main mechanism to denounce injustices and to voice political concerns often neglected in the chambers of power.”); *see also* Anatoly Kurmanaev & Andrea Zarate, *Peru’s President Dissolves Congress, and Lawmakers Suspend Him*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/world/americas/peru-vizcarra-congress.html> [<https://perma.cc/S2GA-SSLR>].

108. Cynthia Arnson et al., *supra* note 100.

109. Patricia Laya, *Venezuela’s Collapse*, BLOOMBERG (Jan. 23, 2019, 2:54 PM), <https://www.bloomberg.com/quicktake/venezuela-price-revolution> [<https://perma.cc/XEJ9-WEWM>].

110. *Response for Venezuelans*, R4V (Apr. 6, 2020), <https://r4v.info/en/situations/platform> [<https://perma.cc/ZRJ7-LVPX>] (showing “the [number] of Venezuelan migrants, refugees and asylum-seekers reported by host governments”).

111. *See, e.g.*, Lara Jakes, *As Protests in South America Surged, So Did Russian Trolls on Twitter, U.S. Finds*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/01/19/us/politics/south-america-russian-twitter.html> [<https://perma.cc/M49G-W982>].

112. *See generally* ESTANISLAO GACITÚA ET AL., SOCIAL EXCLUSION AND POVERTY REDUCTION IN LATIN AMERICA AND THE CARIBBEAN (2001); CARLOS SOJO ET AL., WHO’S IN AND WHO’S OUT: SOCIAL EXCLUSIONS IN LATIN AMERICA (Alejandro Gaviria et al. eds., 2002).

113. *See Response for Venezuelans*, *supra* note 110.

114. Walter Russell Mead, Opinion, *The Cold War Over Venezuela*, WALL ST. J. (Feb. 10, 2020), <https://www.wsj.com/articles/the-cold-war-over-venezuela-11581379011> [<https://perma.cc/6GL3-G2J9>] (discussing how countries such as Russia have strong interests in Venezuela’s future).

B. The Lack of a Systemic Approach: The Inability to Stop the Fire in Latin America Despite Decades of Access to Justice and ADR Efforts

There are many ways the global community engages in the conflicts of other countries and regions. Addressing social conflict in a particular region of the developing world requires an examination of the specific context¹¹⁵ and any past efforts. For the last few decades, the dispute resolution and the access to justice movements¹¹⁶ played prominent roles in trying to effectively address conflict and strengthen the rule of law¹¹⁷ in Latin America.¹¹⁸ Access to justice is considered “a basic principle of the rule of law.”¹¹⁹ It aims to ensure that people have a voice and can exercise rights, address discrimination, and assure accountability of decision makers.¹²⁰ Its guiding principles include eliminating barriers and fostering fairness and efficiency.¹²¹

Yet, despite these endeavors, Latin America’s instability continues.¹²² Given the systemic nature of the issues, the region faces high levels of social volatility.¹²³ To address this crisis effectively, isolated measures will not be enough. Without increasing the level of citizen engagement in public decision-making, these countries will not be able to achieve the stability that innovation and growth require.

115. Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 350 (emphasizing the need to pay attention to context).

116. Jacqueline Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT’L L. & COM. REG. 981, 986 (2012) (“The idea of access to justice is also part of a worldwide law reform movement described more than thirty-two years ago by Cappelletti and Garth in their international study of access to justice. These authors identified what they labeled as three ‘waves’ of reform: (1) making legal aid accessible to the poor; (2) developing procedural devices that would allow a single lawsuit to resolve multiple claims; and (3) promoting systemic reform of the legal system through ADR.”).

117. See, e.g., Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad*, 56 DEPAUL L. REV. 569, 586 (2007).

118. Hernández Crespo, *supra* note 71, at 109.

119. *Access to Justice*, UNITED NATIONS & RULE L., <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice> [<https://perma.cc/YZA9-69NC>] (last visited Apr. 12, 2020).

120. *See id.*

121. *See id.*

122. Moisés Naím, *The Coming Turmoil in Latin America*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/international/archive/2015/10/latin-america-economic-crisis-middle-class/409675> [<https://perma.cc/ZEU3-TQTY>] (“Unfortunately, many may soon discover that their economic advances are not as permanent as they think, and that their hard work is not enough to maintain the improved standards of living they attained when the region was prospering. That is why perilous years lie ahead for Latin America.”).

123. See James Bosworth, *2019 Has Been a Difficult Year in Latin America—2020 May Only Get Worse*, BUS. INSIDER (Nov. 25, 2019), <https://www.businessinsider.com/political-instability-protests-in-latin-america-may-intensify-in-2020-2019-11#1-most-countries-that-protested-in-2019-arent-done-yet-3> [<https://perma.cc/UXD7-PX2L>].

1. Three Key Issues with ADR and Access to Justice in Latin America

There are three key issues that, despite the significant amount of time that has passed, remain unaddressed: (1) power imbalances, (2) lack of a systemic approach, and (3) lack of citizen participation in system design. Given the heightened volatility and current state of the region, they have become more pressing than ever before. All three issues stem from a lack of deep understanding of the complexity of Latin America's social, political, and cultural contexts.¹²⁴

The first key issue is underestimating the local power dynamics.¹²⁵ As I have previously noted, “[g]enerally targeted at low-income communities, the mediation centers in these communities function under the dominant influence of the prevalent cultural norms, usually reflecting the interests of the powerful (i.e., drug traffickers, guerrillas, etc.)”¹²⁶ Therefore, when ADR and access to justice do not operate under “the shadow of the law,” it can lead to extreme injustice.¹²⁷ For example, in some Brazilian shanty towns, known as *favelas*, the de facto adjudicators might end up being the drug traffickers who control the area.¹²⁸

The second key issue is the lack of a systemic approach.¹²⁹ In this regard, I have previously written:

[T]he introduction of ADR into dispute resolution systems that lack functional and effective courts, which is the case for most Latin American countries, has had the unintended effect of exacerbating problems of access to justice by creating three tiers of justice: private arbitration, for those who can afford an arbiter; the justice system, for those who can afford a lawyer; and mediation centers, mainly for those in low-income communities who can afford neither.¹³⁰

Arguably, these three tiers of justice not only reflect the systemic exclusion that prevails in the region but also reinforce it.¹³¹

124. See Hernandez Crespo G., *From Noise to Music*, *supra* note 26, at 344–49.

125. See generally Hernández Crespo, *supra* note 71.

126. *Id.* at 109.

127. See *id.*

128. *Id.* at 101–02 (“Nowhere are the effects of a pale shadow of the law more evident than in the *favelas* of Brazil. In the vacuum left by an inefficient judiciary and the pale shadow of the law, drug traffickers operate as *de facto* adjudicators and provide their own shadow. Sociologist Corinne Davis Rodrigues observed that although ADR resources are available in the *favelas*, residents continue to turn to drug traffickers for dispute resolution, usually in criminal matters and occasionally for property disputes. In the *favelas*, drug traffickers are perceived as the highest authority, even superior to the traditional court system. Even if traffickers are not actively involved in a dispute, reference to their involvement was made at least once in the course of every form of dispute resolution Rodrigues witnessed. The threat to summon them is commonly used as leverage to resolve neighborhood and small-claims disputes. From this, it is clear that in some areas the drug traffickers themselves have become the shadow of the law.”).

129. See generally *id.*

130. *Id.* at 115.

131. See *id.*

The third key issue—and perhaps the most critical one—is the lack of citizen participation in designing the systems for dispute resolution.¹³² As is well established in the dispute resolution field, if citizens do not participate in the creation of the system to resolve their own conflicts, they will not have ownership of it.¹³³ Citizens have to be the protagonist in matters that directly affect their daily lives.¹³⁴ For example, no one would like someone to come into his or her home, interview him or her, and leave him or her with a plan for implementing a system to address his or her grievances. Giving input on the issue without having decision-making power in the design process eliminates ownership.¹³⁵ If we do not think this process is acceptable, why not increase the level of engagement of those left to implement and live in the system? When are we going to start engaging the representatives of the different sectors of society in the assessment and design of their systems for conflict resolution and shared decision-making?

It is naïve to believe that any efforts to address the rule of law, access to justice, and ADR will take deep roots without citizen participation and an inclusive, systemic approach. Latin Americans continue to show their desperation by rioting, fleeing, organizing guerilla insurrections, and engaging in drug trafficking or corruption.¹³⁶ Their hopelessness usually leads them to expect a better future, oscillating between revolutions and dictators¹³⁷ or rewriting constitutions.¹³⁸

2. Wrongfully Conflating Access to Justice and ADR: The Impact on Latin America

We cannot continue to conflate ADR and access to justice; there is no reason to believe that what has not worked for decades will somehow now work. Furthermore, the efforts have not only been ineffective but have also tainted the possibilities of what the dispute resolution field can offer to the crises in Latin America.

In the Latin American context, the access to justice and ADR efforts have not been as effective as they were designed to be, in part because of the complexity of the social landscape.¹³⁹ In a region with severely unmet social and political needs, these important endeavors have fallen short in the midst of a desperate situation. Even though both ADR and access to justice have

132. Hernandez Crespo G., *From Noise to Music*, *supra* note 26, at 411.

133. CONSTANTINO & MERCHANT, *supra* note 2, at 49–66 (arguing that it is critical to engage stakeholders in systems design).

134. Hernandez Crespo G., *From Noise to Music*, *supra* note 26, at 342.

135. *Id.* at 340.

136. *Id.* at 347.

137. Holly K. Sonneland, *Chart: The State of Democracy in Latin America and the Caribbean*, AM. SOC'Y: COUNCIL AM. (Dec. 12, 2019), <https://www.as-coa.org/articles/chart-state-democracy-latin-america-and-caribbean> [<https://perma.cc/KMX2-6RBR>] (illustrating the state of democracy in each country in Latin America in 2019).

138. Hernandez Crespo G., *From Noise to Music*, *supra* note 26, at 338.

139. *See generally* Hernández Crespo, *supra* note 71.

been used to try to address important issues, the lack of a systemic approach has hindered their effectiveness. As I have previously written,

[I]nternational organizations have often directed their efforts more broadly to strengthening the rule of law through ADR. To better understand these efforts, it is important to place them in the Latin American context, where judicial systems are typically overburdened and undermined by backlog, congestion, and corruption. The most prevalent objectives that have been pursued include improving efficiency while lowering costs and increasing access to justice for the groups that the formal system does not typically reach. To accomplish these objectives, institutions such as the World Bank and [United States Agency for International Development] have invested substantial resources in advancing legal and procedural reform, training judges, improving judicial infrastructure, and promoting ADR.¹⁴⁰

Since the rule of law, access to justice, and ADR have been the focus of the efforts to help the Latin American region, I have spent a significant portion of my scholarship analyzing them.¹⁴¹ The relationship between ADR and access to justice in the Latin American context has created unintended consequences for the future of the field in Latin America. Given its relevance, my first law review article was precisely about access to justice,¹⁴² and I have been writing about it since then. In fact, my entire line of scholarship has been about access to justice, if we define it broadly using a systemic approach.¹⁴³

140. Hernandez Crespo G., *From Noise to Music*, *supra* note 26, at 352.

141. *Id.*; see also Hernández Crespo, *supra* note 71, at 115. See generally RAFAEL ALVES DE ALMEIDA ET AL., TRIBUNAL MULTIPORTAS: INVESTINDO NO CAPITAL SOCIAL PARA MAXIMIZAR O SISTEMA DE SOLUÇÃO DE CONFLITOS NO BRASIL (2012), <https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/10361/Tribunal%20Multiportas.pdf> [<https://perma.cc/3MW6-D2AZ>]; Hernandez Crespo, *supra* note 17, at 48; Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 574–75; Hernandez Crespo, *Building the Latin America We Want*, *supra* note 25; Mariana Hernandez Crespo, *Capitalizando en la diversidad: Innovación sustentable basada en valores en negociación, mediación y construcción de consenso*, in ASPECTOS ATUAIS SOBRE A MEDIAÇÃO E OUTROS MÉTODOS EXTRA E JUDICIAIS DE RESOLUÇÃO DE CONFLITOS 283 (2012) [hereinafter Hernandez Crespo, *Capitalizando en la diversidad*]; Mariana Hernandez Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II 55 (Susan D. Franck & Anna Joubin-Bret eds., 2011) [hereinafter Hernandez Crespo, *From Paper to People*]; Mariana Hernandez Crespo, *From Problem to Potential*, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR 225 (Krista Nadakavukaren Schefer ed., 2013) [hereinafter Hernandez Crespo, *From Problem to Potential*]; Mariana Hernández Crespo, *Securing Investment: Innovative Business Strategies for Conflict Management in Latin America*, in 2 ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 457 (Arnold Ingen-Housz ed., 2011) [hereinafter Hernández Crespo, *Securing Investment*].

142. See generally Hernández Crespo, *supra* note 71.

143. *Id.* at 115; see also Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 574–75. See generally ALVES DE ALMEIDA ET AL., *supra* note 141; Hernandez Crespo, *supra* note 17; Hernandez Crespo, *Building the Latin America We Want*, *supra* note 25; Hernandez Crespo, *Capitalizando en la diversidad*, *supra* note 141; Hernandez Crespo, *From Paper to People*, *supra* note 141; Hernandez Crespo, *From Problem to Potential*, *supra* note 141; Hernandez Crespo, *Securing Investment*, *supra* note 141; Hernandez Crespo G., *From Noise to Music*, *supra* note 26.

I believe the knowledge developed by the ADR field can address the current level of high volatility produced by the widespread prevailing exclusion. It can also demonstrate what Latin America can do when the disenfranchised majorities become an integral part of the whole. The following Parts introduce the necessary framework to start realizing the potential of ADR to increase citizens' capacities for conflict resolution and participation. In the remainder of this Article, I also suggest that the ADR field is essential for creating channels to engage citizens in the public square.

II. FIRE AS A TOOL: LEARNING HOW OUR DIAGNOSIS AND TREATMENT OF CONFLICTS CAN KILL OR CREATE—A COMPREHENSIVE FRAMEWORK FOR CONFLICT RESOLUTION

The incredible amount of knowledge generated in the new field of dispute resolution has not yet percolated to the masses. Couples get divorced, business partners dissolve their business relationships, and countries go through tremendous turmoil without the tools to effectively address their challenges. The lack of knowledge is so prevalent that even the markets are not educated enough to distinguish between the types of experts they can hire to resolve their conflicts.¹⁴⁴ Currently, the average citizen knows little about the differences between the types of conflict and knows even less about the distinctions between procedures.¹⁴⁵ For example, most people cannot distinguish mediation from arbitration. To move forward, this Part aims to equip citizens with some of the fundamental premises required to develop the capacity for “‘effective’ conflict resolution.”¹⁴⁶

The first step to appropriately addressing conflict is to see conflict as a tool. Regardless of our previous experiences with conflict, we must recognize that, similar to fire, conflict is neither good nor bad but has extraordinary potential to harm or benefit us. If we were burned before, we may have an aversion to fire. Conflict is no different. The worse our past experiences, the harder it may be to engage with conflict again.¹⁴⁷ In fact, conflict can produce severe damage, even to the point of complete destruction or death.¹⁴⁸

But if fire is managed properly, its potential can instead produce countless benefits, like providing light, warmth, and protection; fusing metals; cauterizing wounds; blowing glass; cooking food; and providing

144. JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 1 (4th ed. 2013) (“The chief purpose of this book is to disabuse you of the ‘one size fits all’ litigation mentality and to help you understand and appreciate that more creative problem-solving is available through alternative dispute resolution (ADR) processes.”); *see also* CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION BEYOND THE ADVERSARIAL MODEL* 387 (2d ed. 2011) (“Imagine that you are a new associate at a law firm. One of the partners says ‘Hey kid, I understand you recently took a course in alternative dispute resolution. I have to admit, I am old school, I have never quite understood the difference between arbitration and mediation. Can you explain it to me?’ What would you say to the partner?”).

145. *See supra* note 144.

146. Sander, *supra* note 9, at 113.

147. *See supra* note 88 and accompanying text.

148. CONSTANTINO & MERCHANT, *supra* note 2, at xiii.

entertainment. Similarly, when conflict is effectively handled, it can produce extraordinary outcomes, such as better knowledge about ourselves and those around us, stronger relationships, and the ability to accomplish together what we cannot do alone, even to the point of producing benefits for the broader system.¹⁴⁹

To maximize our experiences addressing conflict, this Part introduces a Comprehensive Framework for Conflict Resolution. A framework allows us to analyze data or information from the knowledge generated in a specific discipline. For example, the framework for business analysis is different than the framework for legal analysis. In this sense, we must have a framework for conflict resolution analysis.

The first part of this framework provides a checklist to make an accurate assessment, similar to a diagnosis, which includes three essential factors to assess conflict: (1) the sources of conflict;¹⁵⁰ (2) the parties in conflict, the third parties affected, and their interaction with the broader system;¹⁵¹ and (3) the parties' mindsets and how they have affected the history of their relationship.¹⁵²

The second part of this framework provides an additional checklist to select the appropriate process, or treatment, for resolution, which includes three factors: (1) the levels of party self-determination and control over process and outcome;¹⁵³ (2) the satisfaction of parties' objectives;¹⁵⁴ and (3) the cultural implications of uniformity or unity.¹⁵⁵

Finally, this Part suggests that, when the type of conflict allows, we should go beyond "my way" or "your way"¹⁵⁶ and compromise¹⁵⁷ to "our way" to reach agreements that satisfy the interests of all.¹⁵⁸ This is important because

149. *Id.*

150. COLTRI, *supra* note 83, at 103–24 (identifying the sources of conflict).

151. Menkel-Meadow, *supra* note 115, at 342–43 (listing questions to ask when determining who the parties are and what the context of the conflict is).

152. Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4, at 920.

153. Sander, *supra* note 9, at 111–18, 120, 124–32; *see also* AMSLER ET AL., *supra* note 29 (manuscript at 42) (discussing a "spectrum [that] arrays process options from interest-based processes on the left to rights-based processes on the right" and listing that the processes "[s]hift from nonadjudicative to adjudicative," "[c]oncentrate more control in the hands of the third party," "[b]ecome more formal," "[u]sually become more expensive in terms of time, money, and damage to parties' relationship," and "[b]ecome less flexible in terms of outcomes"); MENKEL-MEADOW ET AL., *supra* note 144, at 22 (noting that besides this spectrum for the selection of process, other continua have been suggested for examining institutions that resolve conflict and disputes).

154. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 53 tbl.1 (1994).

155. Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 295–301 (summarizing the work of Edward T. Hall and Geert Hofstede and arguing that cultural values have a deep influence on processes); *see also* Hernandez Crespo Gonstead, *supra* note 46.

156. Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (articulating some of the reasons for positional bargaining).

157. FISHER ET AL., *supra* note 40, at 3–15 (arguing that positional bargaining leads to less than optimal agreements). *But see* Cohen, *supra* note 42, at 101.

158. FISHER ET AL., *supra* note 40, at 58–81 (discussing how we can create options for mutual gain).

value is often left at the bargaining table and, with it, a significant amount of potential is left unrealized.¹⁵⁹

Unless we utilize this Comprehensive Framework for Conflict Resolution to assess our daily interactions and analyze our past disagreements, we cannot develop the necessary skills to effectively engage in conflict with those around us. Only when we have mastered this capacity can we more effectively engage in broader systemic conflicts.

A. Becoming Doctors of Conflict: The Need to Develop Conflict Literacy to Accurately Diagnose Conflict

To overcome conflict illiteracy,¹⁶⁰ we must first recognize the importance of conflict assessment.¹⁶¹ Just as there are many different types of illnesses, there are many different types of conflict,¹⁶² and not all conflicts are equal.¹⁶³ Currently, when we have a conflict, we seek an attorney when the conflict escalates into a legal dispute.¹⁶⁴ Most attorneys are trained to be litigators. Some also have training in a specific process, such as negotiation, mediation, or arbitration.¹⁶⁵ Very few have training in ADR, which includes a broad variety of conflict resolution processes, and even fewer have training in DSD.¹⁶⁶

159. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 780–82 (1984) (“The danger of acting on such assumptions is that opportunities for better solutions may be lost . . . and that when one party behaves in this way, the other side may be more likely to reciprocate with competitive and manipulative conduct of its own.”).

160. See *supra* note 10 and accompanying text.

161. For a comprehensive review of conflict assessment, see THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 99–136 (Lawrence E. Susskind et al. eds., 1st ed. 1999). For a comprehensive review of conflict assessment for DSD, see AMSLER ET AL., *supra* note 29 (manuscript at 62–67). See also *id.* at 65 (“A [Conflict Stream Assessment] requires the designer to gather information about (1) the sources for conflict that makes their way into the steam, (2) how the conflict may evolve from the unperceived harm into a dispute and claim, (3) how context and culture influence the incidence of conflict, and (4) the opportunities that exist for changing the dynamic.” (footnote omitted)). The Conflict Stream Assessment (CSA) can include a series of questions asked through research, surveys, and interviews in each of the following categories: (1) What are the sources of the conflict? How do they give rise to the disputes?; (2) What are the conflict and dispute dynamics?; and (3) Where are the structural or organizational opportunities for preventing, learning from, managing, or resolving conflict? See *id.* at 65–66.

The process of assessment offers benefits in at least four ways: (1) It provides an important *map* of the conflict structure, (2) it *educates* stakeholders about what it takes to collaborate on addressing the conflict, (3) it builds a working *relationship* between the stakeholders and the assessor or designer, and (4) it develops a sense of *ownership* among the stakeholders for handling the dispute stream ahead. *Id.* at 65.

162. Carrie Menkel-Meadow, *supra* note 55, at 323–26; see also MOORE, *supra* note 55, at 60–61 (discussing the spectrum of conflict management).

163. COLTRI, *supra* note 83, at 103–24 (identifying the sources of conflict).

164. FOLLETT, *supra* note 34, at 22 (discussing how conflict becomes a dispute).

165. See, e.g., *Academic Programs & Faculty*, HARV. L. SCH.: PROGRAM ON NEGOT., <https://www.pon.harvard.edu/academic-programs-faculty/> [https://perma.cc/MLQ4-U6CC] (last visited Apr. 12, 2020).

166. See *supra* note 144 and accompanying text.

It is in this context that conflict assessment is indispensable. Otherwise, like the saying goes, if you are a hammer, you see everything as a nail.¹⁶⁷ We run the risk of preferring processes aligned with our training. For example, litigators tend to believe that the best process for resolution is litigation, while mediators tend to choose mediation, and arbitrators, arbitration. To ensure that we select the appropriate process for resolution, each of us needs to gain the basic skills to be doctors of conflict¹⁶⁸ and develop conflict literacy to discuss the options with attorneys and determine which conflict resolution experts to hire.

When making an assessment, we must pay attention to the cause of the conflict before we decide how to address it.¹⁶⁹ For example, if a patient comes to a doctor with a headache, the headache could be a product of dehydration, a migraine, or a brain tumor. Those are three very different possible causes. The diagnosis has a direct impact on the selection of appropriate treatment: giving the patient a glass of water, administering a pill for the migraine, prescribing chemotherapy, or performing brain surgery for the tumor. If you have an inaccurate diagnosis or if you choose a less than optimal treatment, the consequences can be grave. If you have a brain tumor and you are taking migraine pills, the treatment will be futile. Similarly, if you are dehydrated and have brain surgery, the incorrect treatment may cause irreparable harm.

Conflict assessment¹⁷⁰ may also have a critical impact on selecting the most appropriate resolution process.¹⁷¹ Litigation is usually expensive and invasive with irreversible consequences, such as the rupture of the relationship between parties.¹⁷² Negotiation could be equally detrimental if time is limited and resolution is critical.¹⁷³ Therefore, as doctors of conflict, it is necessary to take time to make an accurate conflict assessment or diagnosis to effectively decide the appropriate process for resolution.¹⁷⁴

If you are ill, merely determining you have an illness is insufficient. Instead, it is necessary to have a comprehensive framework that would help make an accurate diagnosis. As part of this framework, the first factor on the checklist is the type of illness you have and its source.¹⁷⁵ The second factor

167. See "TO THE MAN WITH A HAMMER . . .": AUGMENTING THE POLICYMAKER'S TOOLBOX FOR A COMPLEX WORLD 14 (Jan Arpe ed., 2016).

168. NOLAN-HALEY, *supra* note 144, at 3 (comparing law students that only study litigation to medical students that only study surgery).

169. AMSLER ET AL., *supra* note 29 (manuscript at 62–66).

170. See *supra* note 161 and accompanying text.

171. See generally Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4.

172. John R. Allison, *Five Ways to Keep Disputes out of Court*, HARV. BUS. REV. (Jan.–Feb. 1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court> [<https://perma.cc/8WFJ-4N54>] (discussing how damaging and expensive litigation is for corporations).

173. FISHER ET AL., *supra* note 40, at 108–29 (discussing how a party can delay negotiation by stalling or playing a tough game).

174. BINDER ET AL., *supra* note 8, at 40 (discussing the need for and importance of listening skills); see also Welsh, *supra* note 8, at 53.

175. COVEY, *supra* note 65, at 243 ("Although it's risky and hard, seek first to understand, or diagnose before you prescribe, is a correct principle manifest in many areas of life. It's the

is who you are, your goals, specific needs, and priorities.¹⁷⁶ The third factor is awareness of your mindset because your culture, namely the social norms of the group in which you operate, and your perception of the problem may also affect the treatment selection.¹⁷⁷ Similarly, to determine the appropriate process for conflict resolution, we use a comprehensive framework with three essential factors to assess conflict.¹⁷⁸

1. The Sources of Conflict

With regard to the sources of conflict,¹⁷⁹ there is a broad variety of types, and there might be more than one source given an issue's complexity. Some of the sources include conflict over resources (i.e., fighting over control or ownership), data type (i.e., disputes over facts or disagreements about the law or its interpretation), preferences and nuisances (i.e., actions that annoy others), communication difficulties (i.e., interpretation of language and behavior), differences in conflict orientation (i.e., how the parties perceive each other and deal with conflict), values (i.e., core beliefs and matters of critical importance), threats to self-conception and worldviews (i.e., cultural perceptions), structural interpersonal power issues (i.e., struggles over decision-making), differing attributions of causation (i.e., disagreements over the cause or source), displaced conflict (i.e., another issue that is not the root cause), and misattributed conflict (i.e., another person that is not a party to the conflict).¹⁸⁰ Identifying the source(s) brings clarity to the crux of the matter and will later help select the types of processes appropriate for resolution.

2. The Parties in Conflict, the Third Parties Affected, and the Interaction with the Broader System

The second essential factor for diagnosis of a conflict requires gaining an accurate and complete understanding of who the parties are, what their ultimate goals and values are, and how the selection of the process will impact them, their relationship, and the broader system in which they operate.¹⁸¹ To complete this inquiry, some factors to consider include: what the parties are trying to achieve (their positions), why they are trying to

mark of all true professionals. It's critical for the optometrist, it's critical for the physician. You wouldn't have any confidence in a doctor's prescription unless you had confidence in the diagnosis.”).

176. NOLAN-HALEY ET AL., *supra* note 66, at 82–84; Hernandez Crespo Gonstead, *supra* note 46 (discussing cultural value discernment and the need to move beyond positions and interests to reach the underlying values when problem solving to better understand what is important to the parties and what is driving their decision-making).

177. *See* Gold, *supra* note 155, at 295–301.

178. *See supra* notes 150–52 and accompanying text.

179. *See, e.g.,* COLTRI, *supra* note 83, at 103–24 (identifying the sources of conflict).

180. *Id.* at 104–08.

181. Menkel-Meadow, *supra* note 115, at 340–42.

achieve those goals (their underlying interests), and what is truly important to them (their values).¹⁸²

Once we have gained a better understanding of who the parties are, it is equally important to identify the third parties affected by the conflict and examine their goals, interests, and values. This is critical not only because it affects the relationship with third parties but also because third parties can also disrupt the agreement.¹⁸³ Finally, it is important to consider how the conflict and the different processes for resolution affect the parties themselves, their relationship, and the system (psychological, moral, ethical, legal, organizational, economic, political, and social) and to consider the benefits and risks of undergoing each particular resolution process.¹⁸⁴ Understanding the answers to these questions allows one to tailor the process to the specific goals, preferences, and values of the individual parties, their specific situation, and the context in which the conflict is taking place.

3. The Parties' Mindsets and How They Have Affected the History of Their Relationship

The third essential factor for diagnosis of a conflict requires examining the mindsets of those involved in the conflict, as well as those potentially affected by it.¹⁸⁵ Mindset, for the purpose of conflict assessment, means the internal terrains¹⁸⁶ or worldviews that shape how the parties perceive one another.¹⁸⁷ Understanding our mindsets and the mindsets of those engaged or affected by conflict is of critical importance because it directly impacts how we treat others.¹⁸⁸ This also impacts the effectiveness of the process selected for resolution.

Mark Gerzon, in his book *Leading Through Conflict*, suggests that we operate under three different mindsets when interacting with others.¹⁸⁹ We tend to see them as enemies, competitors, or indispensable allies.¹⁹⁰

182. NOLAN-HALEY ET AL., *supra* note 66, at 101–02; Hernandez Crespo Gonstead, *supra* note 46.

183. *See, e.g.*, LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* 41–60 (1st ed. 2006) (noting that in consensus building, it is important to consider who else should be at the table.).

184. *See generally* Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4.

185. *Id.*

186. MICHELLE LEBARON, *BRIDGING TROUBLED WATERS: CONFLICT RESOLUTION FROM THE HEART* 299 (2002) (discussing the inner exploration needed to assess conflict).

187. MICHELLE LEBARON, *BERGHOF HANDBOOK FOR CONFLICT TRANSFORMATION: TRANSFORMING CULTURAL CONFLICT IN AN AGE OF COMPLEXITY* 4–5 (2000), https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/lebaron_hb.pdf [<https://perma.cc/N2T4-F2DR>]; NOLAN-HALEY ET AL., *supra* note 66, at 94–96; Hernandez Crespo Gonstead, *supra* note 46 (discussing how “cultural value glasses” can be a useful tool to bridge the cultural gap between parties and suggesting that having co-mediators can assist in this process).

188. *See* GERZON, *supra* note 3, at 17–47 (describing three types of leadership when dealing with conflict).

189. *See id.*

190. *See id.*

Under the first mindset, when we perceive the other party as the enemy, our goal is usually to dominate or destroy them.¹⁹¹ Under the second mindset, when we perceive the other as a competitor, our goal is typically to prevail or win.¹⁹² In both cases, the other individual is considered an obstacle to achieving the desired goal. Under both mindsets, the assumption is that we are partaking in a zero-sum game driven by self-interest.¹⁹³ In other words, the game is defined by “power over”¹⁹⁴ the other. For example, one dollar in my pocket means one less dollar in yours.

The third mindset does not operate under the “power over” assumption, but instead it operates under the assumption of “power with”¹⁹⁵ the other individual. In this mindset, we perceive the other person as an indispensable ally.¹⁹⁶ Instead of playing a zero-sum game, the two parties consider themselves integral parts of the whole.¹⁹⁷ I have what you lack, and you have what I lack. This perception of complementarity,¹⁹⁸ not competition, is essential. The parties can accomplish together what they cannot accomplish by themselves.¹⁹⁹ Under this mindset, the name of the game is not competition but instead collaboration.²⁰⁰ The notion of “power with” is realized by expanding from self-interest, “you” and “I,” to mutual interests, “we.”²⁰¹ This “power with” mindset fosters cocreation.²⁰² However, cocreation requires a minimum level of disclosure and trust.²⁰³ Therefore, how we perceive the other person directly impacts our interactions with them.

The power of our mindsets cannot be underestimated. Carrie Menkel-Meadow explains that to *act* differently, we first need to *think* differently.²⁰⁴ This is what she refers to as gaining a “reflective” mindset²⁰⁵ instead of

191. *Id.* at 17–30 (discussing the characteristics of the leader as a demagogue).

192. *Id.* at 31–45 (discussing the characteristics of the leader as a manager).

193. *See, e.g.,* Menkel-Meadow, *supra* note 159, at 785 (describing the zero-sum mindset).

194. *See* MAYER, *supra* note 81, at 65–66, 111–92 (discussing the difference between integrative and distributive powers); Domènec Melé & Josep M. Rosanas, *Power, Freedom and Authority in Management: Mary Parker Follett’s ‘Power-With,’* 3 PHIL. MGMT. 35, 38 (2003). *See generally* MARY PARKER FOLLETT, *Power*, in DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 72 (Henry C. Metcalf & L. Urwick eds., 2014) (discussing power and power with).

195. *See supra* note 194 and accompanying text.

196. GERZON, *supra* note 3, at 47–58 (arguing the characteristics of the leader as a mediator).

197. *Id.* at 50 (noting that a leader “strives to act on behalf of the whole, not just a part”).

198. COVEY, *supra* note 65, at 263 (discussing how using our differences can lead to the creation of environments in which we all can develop our full potentials).

199. *See* GERZON, *supra* note 3, at 81–95.

200. Menkel-Meadow, *supra* note 159, at 780–82 (arguing that we need to move from the adversarial model to a problem-solving model).

201. JUDITH GLASER, *CREATING WE: CHANGE I-THINKING TO WE-THINKING AND BUILD A HEALTHY, THRIVING ORGANIZATION* 52–57 (2007).

202. *Id.* at 52–54.

203. *Id.* (arguing that cocreation is “a mutual partnership for shaping and crafting the future”).

204. *See generally* Menkel-Meadow, *When Winning Isn’t Everything*, *supra* note 4.

205. *Id.* at 909 (arguing that legal problem solving “requires . . . both conceptual or structural change and behavioral and processual change in how we conceive legal problems”).

having a “reflexive” mindset²⁰⁶ about conflict. To have a “reflective mindset,” we must gain awareness about how we perceive ourselves and others in making informed decisions.²⁰⁷ This awareness about our mindset enables us to see how our perception of one another has changed over the course of a relationship and what has caused it to change. With this awareness, we can make informed decisions about how to treat each other and the most appropriate process for resolution.²⁰⁸

Only once this assessment is complete can we more fully understand the conflict, the parties, those affected, the system, and the mindsets that are driving the parties’ interactions. At this point, we can examine the processes available for resolution and tailor them to meet the needs of the parties and address their specific conflicts.

B. Selection of the Appropriate Treatment: Distinguishing Between Power-Based (Coercion), Adjudicative (Persuasion), and Facilitative (Participation) Processes

When deciding how to resolve conflict, we tend to default to negotiation, in part because it is the process most readily available and we have used it since childhood.²⁰⁹ However, when negotiation fails, depending on what is at stake and the relationship, we either give up, walk away, or impose our will and assume the consequences. In some instances, when both the relationship and the matter at stake are equally important, we might try other options, such as having someone help mediate the impasse.²¹⁰ In other cases, when there is no relationship, or if the relationship no longer needs to be preserved after the conflict, we might choose to exercise our rights through the court system.

Yet, there are many more options besides negotiation, mediation, and litigation. For example, William Ury, in his book *The Third Side*,²¹¹ suggests a number of different roles that third-party neutrals can play beyond mediator.²¹² Among these roles are: provider (empowering through resource and knowledge sharing), teacher (developing capacity for addressing conflict), bridge builder (facilitating interactions despite differences), arbiter (adjudicating rights), equalizer (assisting with power distribution), healer (aiding in mending relationships), witness (alerting about escalation), referee

206. *Id.* at 906 (arguing that winning is based on the assumption of scarcity or a zero-sum game).

207. *Id.* at 909.

208. See generally Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999) (arguing that informed consent is critical to ensuring the notion of self-determination of autonomy).

209. FISHER ET AL., *supra* note 40, at 6 (“Like it or not, you are a negotiator. Negotiation is a fact of life.”).

210. JEFFREY CRUIKSHANK & LAWRENCE SUSSKIND, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 136–37 (1989).

211. WILLIAM URY, *THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP* 114–96 (2000).

212. *Id.* at 3–28.

(establishing limits of dispute), and peacekeeper (protecting).²¹³ Each of these roles requires a unique set of skills and the outcomes and consequences of each role differ greatly.²¹⁴ Therefore, it is necessary to assess each of these options with a framework that allows consideration of different factors to effectively weigh all the pros and cons of each process.²¹⁵

To this end, this Part introduces, as a component of the Comprehensive Framework for Conflict Resolution, a selection checklist with three factors: (1) the levels of party self-determination and control over process and outcome, (2) the satisfaction of parties' objectives, and (3) the cultural implications of uniformity or unity.

Table 1: The Levels of Party Self-Determination and Control over Process and Outcome

Systems	Power-Based	Rights-Based (+ Industry Norms, etc.)	Interest-Based (+ "Staying with Conflict," etc.)
Selection of the Process			
Types of Process	Avoidance or Violence	Adjudicative (Courts → Arbitration) (Hybrids)	Facilitative (Mediation → Negotiation) (Hybrids)
Level of Party Self- Determination	Minimal	Moderate	Maximum
Implications for Cultural Realm			
Mindset	Domination	Competition	Collaboration
Logic	Coercion	Persuasion	Participation
Cultural Process	Assimilation	Assimilation	Levels of Integration
Outcome	Uniformity	Uniformity	Some Level of Unity

213. *Id.* at 114–96.

214. BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 117 (2004) ("Ury has opened the door for a far broader and more creative concept of the roles we can play in conflict. I suggest we open that door even wider. We need to think of our roles in terms of Ury's broadly conceived third-side functions, but we also need to understand how we can assist conflicting parties from a nonneutral, non-third-party stance. . . . This means helping people to engage in conflict by serving as advocates, coaches, advisers, and representatives.").

215. *See generally* Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 4.

1. The Levels of Party Self-Determination and Control over Process and Outcome: The Spectrum of Processes for Conflict Resolution

Usually, we have decision-making power to resolve conflict in our own lives. In fact, our ability to do this effectively can be a determining factor for success in our personal and professional lives. However, when we hit a roadblock, the lack of training in conflict resolution makes the decision-making process more erratic because we do not have sufficient guidelines for decision-making in this arena. When it comes to the processes for resolving conflict with others, there is a lot at stake. Namely, we have to live with the final outcome. Therefore, the first consideration for determining the appropriate process for resolution is the level of party self-determination and control over process and outcome that the parties are willing to give away to reach a resolution.²¹⁶ For the purpose of this Article, I define self-determination as the process of “[giving] ownership of the conflict to the disputants”²¹⁷ and, therefore, making informed decisions about how much control the parties have over process and outcome.²¹⁸

It is important to note that power-based processes²¹⁹ (war, strikes, coercive measures) are not considered in this spectrum because of the minimal party self-determination and control over process and outcome.²²⁰ When the level of self-determination is considered as a factor for assessing the processes, there is a broad spectrum of choices for conflict resolution²²¹ that range from maximum to minimum levels of self-determination.²²² On one side, we have the facilitative processes, where the parties are the protagonists during the resolution process.²²³ On the other side, we have the adjudicative processes,²²⁴ where the parties give decision-making power to a third-party

216. See generally Nolan-Haley, *supra* note 15; Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277 (2005).

217. Nolan-Haley, *supra* note 216, at 277 (“The generic concept of self-determination relates to ideas of democratic governance and the Enlightenment belief that legitimate government depends upon the consent of the governed. As adapted to private mediation theory, the right of self-determination allows parties to participate in decision-making and voluntarily determine the outcome of their disputes. This understanding of self-determination is rooted in the philosophical principle of personal autonomy and is expressed through the legal doctrine of informed consent. The simple version of the normative story states that those who are affected by a dispute should voluntarily consent to the outcome of that dispute. In short, ‘party’ self-determination in mediation gives ownership of the conflict to the disputants.”).

218. This self-determination over the selection of process has been restricted by mandatory mediation. *Id.*

219. See URY ET AL., *supra* note 34, at 5–7 (discussing powers).

220. See generally AMSLER ET AL., *supra* note 29; MENKEL-MEADOW ET AL., *supra* note 144, at 22; Sander, *supra* note 9.

221. See *supra* note 220 and accompanying text.

222. See *supra* note 220 and accompanying text.

223. See *supra* note 220 and accompanying text.

224. See *supra* note 220 and accompanying text.

neutral who determines how the conflict should be resolved.²²⁵ In addition to these two broad categories, there is another category of hybrids, which include processes that combine characteristics of more than one process.²²⁶

Within the facilitative processes, negotiation lies on one extreme end of the spectrum.²²⁷ This process allows for the maximum level of party self-determination and control over process and outcome.²²⁸ In it, the parties have absolute protagonism, since they decide both the process and the outcome.²²⁹ Next on the spectrum is mediation.²³⁰ In mediation, the parties give away some of their power of self-determination because they give some control of

225. LON L. FULLER, *The Forms and Limits of Adjudication*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 101, 105–06, 108–09, 113, 126–28, 133 (Kenneth Winston ed., 2002) (discussing the nature of adjudicative processes).

226. See MENKEL-MEADOW ET AL., *supra* note 144, at 521–80 (describing the different categories); NOLAN-HALEY, *supra* note 144, at 269–90 (describing different hybrid processes). See generally Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 4 (discussing the need for processes that would use structural elements of other processes to accomplish a broader range of functions).

227. See *supra* note 220 and accompanying text.

228. See *supra* note 220 and accompanying text.

229. See *supra* note 217 and accompanying text; see also Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1251–52 (2009) (“Mediation consent has two elements: *front-end, participation consent* which should occur at the beginning of the mediation process and continue throughout the process; and *back-end, outcome consent* which should be present when parties reach an agreement in mediation. The rhetoric of mediation consent is couched in rights-infused terms such as autonomy and party self-determination. Mediation consent gives disputing parties ownership of their dispute and the right to decide its outcome. Consent theoretically guards against coercive behavior by third-party facilitators and honors party participation. Apart from its fairness, justice, and human dignity values, consent matters a great deal in mediation because of its instrumental value. Consent is linked to sustainability—it implies a commitment to honor one’s promise. . . . Even where parties voluntarily agree to participate in mediation, their consent may be uninformed. Consent is only as good as the disclosure that precedes it, and there is a growing recognition by thoughtful scholars of an opacity problem in mediation. Many aspects of mediation that should be disclosed are not.”)

230. Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 31–32 (2000) (“In this image one sees a figure sitting with the parties, her hands reaching towards each of them as if to support them in telling their tale or to caution them in listening to each other to weigh the matter more carefully. It is also possible that her outreached hands are pointing to the parties to remind them of their responsibility for dealing thoughtfully with their situation and each other, understanding the opportunities and risks inherent in various choices, and summoning their creativity in addressing the conflict. . . . Unlike the blindfolded lady, the mediator sees all that is offered unprotected by the formal procedures or rules of evidence.”); see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 45–46, 65–66 (rev. ed. 2005) (discussing the transformative approach, which places emphasis on the power and recognition of the parties); GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING, at xxvii–xxviii (2008) (discussing the understanding-based model in which lawyers provide knowledge of law and work together with the parties); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, ALTERNATIVES TO HIGH COST LITIG., Sept. 1994, at 111, 111–13 (defining the various mediation orientations, including evaluative, facilitative, narrow-problem definition, and broad-problem definition). See generally SARA COBB, SPEAKING OF VIOLENCE: THE POLITICS AND POETICS OF NARRATIVE IN CONFLICT RESOLUTION (1st ed. 2013) (discussing the narrative approach); GERALD MONK & JOHN WINSLADE, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (1st ed. 2000).

the process to a third party.²³¹ However, they remain the protagonists, as they have full control over the outcome.²³² In other words, the parties might engage in the process but still decide to walk away at any point or not sign the final agreement.²³³ There are many types of mediation that serve several purposes and vary in procedure, but what they all have in common is that the parties are the ultimate decision makers.²³⁴ Besides mediation, other facilitative processes fall within this segment of the spectrum.²³⁵

Next on the spectrum of party self-determination, under the umbrella of adjudicative processes,²³⁶ we find arbitration.²³⁷ In arbitration, the parties delegate power to a third party who makes the final decision about the dispute.²³⁸ However, the parties exercise their power in choosing the arbitrator or arbitration tribunal,²³⁹ as well as the procedural rules and the substantive law or industry norms.²⁴⁰ Also, within the adjudicative category, and at the other extreme of the spectrum, characterized by minimal control, lies the court system.²⁴¹ At trial, the parties delegate all decision-making

231. MENKEL-MEADOW ET AL., *supra* note 144, at 386 (discussing that in negotiation the parties keep control over the outcome and in mediation the parties are assisted by “an impartial professional charged with making the process constructive”).

232. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54–55 (1996) (“Mediation is thought to enhance parties’ self-determinative capabilities because it permits them to structure and consent to the outcome of the bargaining process.”); *see also* Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135–36 (2004) (“Citizens—not judges or attorneys or other professionals—would communicate and negotiate directly with each other, identify the issues to be discussed, determine the substantive norms that were legitimate and relevant (including the pursuit of harmony and reconciliation if they wished), create the options for settlement, and control the final decision regarding whether or not to settle and on what terms.”).

233. *See supra* note 229 and accompanying text.

234. *See, e.g.*, Nolan-Haley, *supra* note 216.

235. *See* Jacqueline N. Font-Guzmán, *Moving ‘Beyond Neutrality’ and Cross-Cultural Training: Using World Café Dialogue to Address End-of-Life Care Inequalities*, PEACE & CONFLICT STUD., Spring 2014, at 49, 50–51.

236. FULLER, *supra* note 225, at 105–06, 108–09, 113, 126–28.

237. Love, *supra* note 230, at 30 (“Wise, sophisticated, trusted, and honored in his community, the arbitrator is chosen by the parties who can agree that whatever such a person decides is just. The arbitrator does not wear blindfolds because the parties trust his discretion.”).

238. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION & OTHER PROCESSES 601–21 (5th ed. 2007); *see also* FRANK E. A. SANDER ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION & OTHER PROCESSES 303–12 (6th ed. 2012).

239. Love, *supra* note 230, at 29–31.

240. THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 1–10 (4th ed. 2017).

241. Love, *supra* note 230, at 29–30. Love discusses the image of a judge as a blindfolded woman hold[ing] up scales. . . . The matter is weighed on these scales in public view, and the balance resolves the matter. . . . This lady is accessible to all, rich and poor alike. . . . And if one party invokes her aid, the other must answer and counter-weight the scale, or risk an unfavorable verdict. [S]he must also risk the power behind this blindfolded figure—the power of the state to take and give property and liberty.

Id.

power to the government.²⁴² Not only do they not control the selection of the judge, but they also leave the procedural and substantive rules up to the government. The most the court system can give to the parties is the equivalent of a one-size-fits-all resolution.²⁴³ In some cases, there may be some important considerations that make the court system a preferred option, such as the significance of precedent.²⁴⁴ However, in many instances, the parties could be better off with a tailor-made resolution over which they not only have more control but also have greater satisfaction as the resolution can better address their needs.

Sometimes, neither the facilitative nor adjudicative processes fully meet the needs of the parties. To address this, dispute resolution experts have combined some elements of the procedures described in this section and created new ones. They are part of a category known as hybrids.²⁴⁵ The level of party self-determination and control over process and outcome in the hybrids varies significantly depending on the elements combined and the purpose for which the particular process was created.²⁴⁶ The next section examines some of the objectives that gave birth to this hybrid category.

2. The Satisfaction of Parties' Objectives

To select the appropriate process,²⁴⁷ another critical factor to consider is how the particular process satisfies the particular parties' objectives.²⁴⁸ Frank Sander and Stephen Goldberg suggest a number of competing goals to consider when assessing each process.²⁴⁹ According to Sander and Goldberg, there are eight objectives: "Minimize Costs," "Speed," "Privacy," "Maintain/Improve Relationship," "Vindication," "Neutral Opinion," "Precedent," and "Maximizing/Minimizing Recovery."²⁵⁰

242. *Id.*

243. See Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4, at 908 (describing the limits of the legal remedies).

244. See, e.g., Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

245. See NOLAN-HALEY ET AL., *supra* note 66, at 181 (discussing the issues with using arbitration and mediation separately and how those issues have caused a desire to combine them).

246. Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 4, at 29.

247. Sander & Goldberg, *supra* note 154, at 50–52, 66. To select a forum, it is important to first determine the disputants' goals and then determine if the disputants are willing to consider settlement, which would involve considering the obstacles that could prevent settlement. *Id.* Among the obstacles to consider are poor communication, the need to express emotions, different views of facts, different views of legal outcomes if settlement is not reached, issues of principle, constituency pressures, linkages to other disputes, multiple parties, different lawyer/client interests, the "jackpot syndrome," and the public perspective. *Id.* "[A] sophisticated ADR user might well ask: 'If these are my goals and my impediments, what kinds of third-party help do I need, and how can I design a procedure that provides that kind of help?'" *Id.*

248. Hernandez Crespo Gonstead, *supra* note 46 ("Tailored processes that are congruent with the values of all parties are essential in order to more fully engage the parties and gain a broader picture of the conflict and what matters the most to them.")

249. Sander & Goldberg, *supra* note 154, at 51.

250. *Id.* at 53 tbl.1.

The first objective is to minimize cost.²⁵¹ If cost is important to the parties, they may prefer facilitative processes because they may be less expensive than adjudicative processes.²⁵² The second objective is speed of the process.²⁵³ Similar to cost, facilitative processes are preferable²⁵⁴ to adjudicative ones, as arbitration and litigation usually last longer.²⁵⁵ However, good faith must be assumed for facilitative processes to work. Otherwise, they can be used as a delay tactic before moving to the adjudicative process.

The third objective is privacy.²⁵⁶ If confidentiality is critical, then the court system may not be the best choice since the process is often on the public record.²⁵⁷ In contrast, the majority of dispute resolution procedures outside the court system tend to be confidential.²⁵⁸

The fourth objective is preserving the parties' relationship.²⁵⁹ If the parties wish to prioritize their relationship, adjudicative processes may not be ideal because of their adversarial nature. Instead, facilitative processes require some level of collaboration, as the parties may have to work together to create a mutually satisfactory agreement and develop greater understanding of one another.²⁶⁰ Negotiation tends to be the better option when the parties have developed the capacity to create value together and have some level of mutual trust.²⁶¹ Facilitative mediation²⁶² tends to be a better option when the parties have not developed negotiation skills, do not trust each other to disclose confidential information, or have reached an impasse.²⁶³ In these cases, an expert can play a key role in facilitating the process.²⁶⁴ However, when considering facilitative mediation, it is important to be aware of the

251. *Id.*

252. *Id.*

253. *Id.*

254. See generally Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61 (2012).

255. See, e.g., Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 9–11 (discussing the similarities between arbitration and litigation in terms of cost and speed in the current practices).

256. Sander & Goldberg, *supra* note 154, at 53.

257. Nolan-Haley, *supra* note 254, at 69–70 (discussing the importance of confidentiality in the mediation process).

258. Sander & Goldberg, *supra* note 154, at 51.

259. *Id.* at 53.

260. See generally Carrie Menkel-Meadow, *Remembrance of Things Past?: The Relationship of Past to Future in Pursuing Justice in Mediation,* 5 CARDOZO J. CONFLICT RESOL. 97 (2004) (arguing that mediation can address not only the future but also the past).

261. See Sander & Goldberg, *supra* note 154, at 50.

262. See generally Carrie Menkel-Meadow, *Introduction to MEDIATION: THEORY, POLICY AND PRACTICE,* at xiii (Carrie Menkel-Meadow ed., 2001) (discussing some of the core functions of mediation as a consensual process, which is also voluntary, participatory, facilitative, and looks for solutions in terms of mutual agreement and mutual understanding).

263. JACQUELINE NOLAN-HALEY ET AL., *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* 97–98 (2005) (naming characteristics of disputes suitable for mediation, including a "continuing relationship with the other party," a need for "maintaining confidentiality," an "unskilled negotiator," and an interest in "developing creative remedies").

264. See Sander & Goldberg, *supra* note 154, at 51–54.

power dynamic between the parties.²⁶⁵ Other facilitative processes, such as World Café dialogues, may nurture greater understanding through information sharing.²⁶⁶

The fifth objective is vindication.²⁶⁷ If parties want to hold each other accountable, then adjudicative processes are preferable because they involve a third-party neutral who examines the case and enforces rights through an award in arbitration or a judgment in court.²⁶⁸ In contrast, facilitative processes are usually not well suited to enforce rights because they do not use a third party with adjudicating power.²⁶⁹

The sixth objective is neutral opinion.²⁷⁰ Similar to vindication, neutral opinions require the examination of facts and analysis of rights. Therefore, facilitative processes are generally not a good fit, since most focus on interests or understanding.²⁷¹ Instead adjudicative processes—such as arbitration, which can be made advisory, or hybrids (e.g., the minitrial, summary jury trial, and early neutral evaluation)—might be more appropriate.²⁷² Also, when a dispute involves technical issues, the parties may be better off having an expert adjudicate the case in arbitration. This is particularly relevant in fields such as construction, patents, and technology.²⁷³

The seventh objective is precedent.²⁷⁴ If the parties want their case to have an impact on the current law of their jurisdiction, then the court system might be one of their best options.²⁷⁵ This is particularly relevant in common-law jurisdictions, where precedent generally carries more weight than in civil law jurisdictions.²⁷⁶

The eighth objective is minimizing or maximizing recovery.²⁷⁷ If the goal is compensation for damages, then adjudicative processes may be the best option.²⁷⁸ However, facilitative processes can provide not only compensation for damages if the parties agree but also other means for

265. Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 282–87 (2012) (stating that a fair and just mediation requires that there “are no significant power inequalities between the parties”).

266. See, e.g., Font-Guzmán, *supra* note 235, at 50–51.

267. Sander & Goldberg, *supra* note 154, at 53.

268. See NOLAN-HALEY ET AL., *supra* note 263, at 98 (describing disputes driven by a desire for vindication as less suitable for mediation).

269. Sander & Goldberg, *supra* note 154, at 51–54.

270. *Id.* at 53.

271. Some might argue that evaluative mediation might be a good option for assessment. See, e.g., NOLAN-HALEY ET AL., *supra* note 66, at 13.

272. Sander & Goldberg, *supra* note 154, at 52.

273. *Id.* at 51–52.

274. *Id.* at 53.

275. *Id.* at 54.

276. *Id.*

277. *Id.* at 53.

278. NOLAN-HALEY ET AL., *supra* note 263, at 98 (concluding that mediation is less suitable for parties interested in “establishing precedent to guide future conduct”).

restitution that can better address the specific situation and possibly enhance understanding.²⁷⁹

In addition, there may be other objectives that are important to the parties. For example, if finality is a key objective, then adjudicative processes are preferable, since parties may not reach a final agreement through facilitative processes.²⁸⁰ Arbitration may be the best option because there is generally no opportunity to appeal an arbitration award.²⁸¹

Just as each tool in a toolbox serves a particular purpose, so too does each dispute resolution process.²⁸² If you are trying to open a hole, you can do it using the back of a hammer—but a shovel might be better. Similarly, no one dispute resolution process is better than the other, but the suitability of each depends on what the parties are trying to accomplish. The selection of the appropriate process for the specific dispute and the needs of the parties is what we call ADR.²⁸³ However, if you do not have the specific tool you need, you can create a new one, building from those that already exist or creating a brand new tool. This is called process design.²⁸⁴

Over the years, experts have designed a number of processes known as hybrids.²⁸⁵ For example, in “med-arb,” the parties mediate first and then arbitrate the case if they fail to come to a resolution through mediation.²⁸⁶ Further, med-arb is flexible in its administration: the same expert can act as mediator and then switch roles to arbitrator or, instead, a different expert or team of experts can facilitate each procedure. When the same person acts as both mediator and arbitrator, he or she not only leads the mediation process but also structures the arbitration award if the parties do not reach an agreement.²⁸⁷ This may be controversial because the potential that the mediator will assume the role of arbitrator may affect disclosure and the nature of the mediation process.²⁸⁸ One of the reasons med-arb came into existence was because it could provide the finality that mediation alone

279. See generally Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4.

280. MENKEL-MEADOW ET AL., *supra* note 144, at 386.

281. *Id.*

282. See generally Sander & Goldberg, *supra* note 154.

283. Schneider, *supra* note 4, at 123–24 (arguing that lawyers should take into account the impact of process selection on the emotional and mental well-being of their clients).

284. NOLAN-HALEY ET AL., *supra* note 66, at 12–15 (arguing that process design is critical to adapt the process to the values of the parties in the context of mediation in our global economy).

285. Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 4, at 29.

286. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ON ARB. & MEDIATION 219, 221–24 (2013) (discussing the structure for med-arb processes); see also NOLAN-HALEY, *supra* note 144, at 278–80.

287. Deason, *supra* note 286, at 221–24; see also NOLAN-HALEY, *supra* note 144, at 278–80.

288. Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1, 3–5 (1999) (discussing the issues with having the same neutral act as mediator and arbitrator); see also Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONFLICT RESOL. 777, 777–78 (2014) (arguing that “whether an arbitrator can and should act as a mediator in a pending arbitration is one of the most controversial issues in international arbitration”).

cannot.²⁸⁹ In addition, in cases where the mediator becomes the arbitrator, the award can account for not just the parties' rights but also their positions (what they want), their interests (why), and their values (why it is important to them).²⁹⁰

Another interesting example is "arb-med," where the arbitration process takes place first and then the parties go through the mediation process.²⁹¹ In arbitration, the parties argue their case and the arbitrators seal the arbitration award.²⁹² The parties then proceed through a mediation process knowing that if they do not reach an agreement, the arbitration award will become binding.²⁹³ This incentivizes full disclosure during mediation because there will be no other adversarial process afterwards.²⁹⁴

The last example we will discuss is the minitrial.²⁹⁵ The minitrial allows parties to consider the arguments that could be used in trial by the parties' lawyers but then gives back the power to the parties to negotiate an agreement with the help of an expert.²⁹⁶ This is particularly important because the legal answer to a problem may be very different than the business answer. This hybrid allows the parties to make an informed decision about their options for resolution.²⁹⁷ There are many other hybrids, each of them with a very specific purpose.²⁹⁸

Both selection and process design allow parties to tailor the process to meet their preferences and levels of self-determination and control over the process and outcome.²⁹⁹ However, the parties' perceptions of each other, the cultural norms affecting their behaviors, and the systems in which they operate also become important considerations when selecting and designing processes.³⁰⁰ The next section explains how this factor can enhance the Comprehensive Framework for Conflict Resolution.

289. Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole Which Is Less Than, Not Greater Than, the Sum of Its Parts?*, 6 CONTEMP. ASIA ARB. J. 249, 261–62 (2013) (discussing the use of arbitration laws in med-arb to provide enforcement for an agreement).

290. See generally Hernandez Crespo Gonstead, *supra* note 46.

291. Deason, *supra* note 286, at 221–22; see also NOLAN-HALEY, *supra* note 144, at 279.

292. See *supra* note 291.

293. See *supra* note 291.

294. Deason, *supra* note 286, at 221–22.

295. MENKEL-MEADOW ET AL., *supra* note 144, at 619–20; see also NOLAN-HALEY, *supra* note 144, at 269–76.

296. See *supra* note 295.

297. See *supra* note 295.

298. For a thorough discussion of hybrids, see GOLDBERG ET AL., *supra* note 238, at 601–21 and MENKEL-MEADOW ET AL., *supra* note 144, at 61–77.

299. Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 PENN ST. J.L. & INT'L AFF. 86, 95–96 (2012) (emphasizing the need to identify the key goals of the parties to select the process).

300. NOLAN-HALEY ET AL., *supra* note 66, at 12–13; see also DILYARA NIGMATULLINA, *COMBINING MEDIATION AND ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION* 21–22 (1st ed. 2018) (discussing how, when combining mediation and arbitration, parties need to be specific about what they want the hybrid to look like).

3. Cultural Implications of Uniformity or Unity: Distinguishing Between the Logic of Coercion, Persuasion, and Participation

When selecting the appropriate process for resolution, it is also important to examine how the process selected affects and is affected by culture.³⁰¹ As discussed earlier, there are three different systems to resolve conflict: power-based, rights-based, and interest-based.³⁰² The power-based system operates under the mindset of domination, utilizes the logic of coercion, and produces assimilation and, in turn, uniformity. The rights-based system operates in a mindset of competition, utilizes the logic of persuasion, and produces assimilation that leads to uniformity.³⁰³ The interest-based system operates in a mindset of collaboration, utilizes the logic of participation, and produces different levels of integration that lead to varying levels of unity.³⁰⁴ Even “staying with conflict”³⁰⁵ might increase the level of unity as parties are still engaged.

These are very different approaches to dealing with conflict. What is at stake is how each of these systems engages with culture.³⁰⁶ The parties’ values are at the core of culture.³⁰⁷ Therefore, when we are choosing a process or designing a new one, we are not only choosing a method but, ultimately, we are making a decision about whose values will prevail.³⁰⁸ If a process produces assimilation, which leads to uniformity, that means that one culture is going to dominate the other.³⁰⁹ However, if we choose a method that produces some level of integration, which leads to some level of unity, that means that there may be some integration of cultures.³¹⁰

While integrating cultures might be difficult, it is important to make an informed decision regarding the cultural implications for the parties.³¹¹ Values are not only at the core of culture but also at the core of who we are

301. See *supra* note 155 and accompanying text.

302. See *supra* Part II.B.

303. Lon. L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–09, 325–27 (1971) (noting “that the judge orders the parties to conform themselves to the rules”).

304. *Id.* at 308 (“[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.”).

305. MAYER, *supra* note 34.

306. Carrie Menkel-Meadow, *Exporting and Importing ADR: “I’ve Looked at Life from Both Sides Now,”* DISP. RESOL. MAG., Spring 2006, at 5, 6–7 (distinguishing between being culturally competent and actively shaping cultures).

307. NOLAN-HALEY ET AL., *supra* note 66, at 82–84. See generally Hernandez Crespo Gonstead, *supra* note 46.

308. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68–71 (discussing the impact of prevailing narratives in mediation).

309. NOLAN-HALEY ET AL., *supra* note 66, at 94–96. See generally Hernandez Crespo Gonstead, *supra* note 46.

310. NOLAN-HALEY ET AL., *supra* note 66, at 101–02. See generally Hernandez Crespo Gonstead, *supra* note 46.

311. Sanda Kaufman et al., *Should They Listen to Us?: Seeking a Negotiation/Conflict Resolution Contribution to Practice in Intractable Conflicts*, 2017 J. DISP. RESOL. 73, 95 (discussing the fact that we wrongly assume we understand each other’s cultures).

and our identities.³¹² Therefore, cultural implications play an important role in the selection or design of the appropriate process.³¹³

When there is a conflict of positions (what the parties want) or interests (why the parties want it), interest-based processes may be a good alternative because they allow the parties to create options that satisfy both of their interests.³¹⁴ When there is a conflict of values, those conflicts cannot be negotiated or mediated because values are generally nonnegotiable.³¹⁵ Instead, when there is a conflict of values, it needs to be adjudicated or put to a vote if it is in the public square and a decision needs to be made.³¹⁶ Also, when there are conflicting values, processes such as dialogue allow the parties to understand each other. Understanding is different than agreeing. A minimum level of understanding is necessary to coexist in the same arena.

With cultural implications, we conclude the factors for selecting the appropriate process for conflict resolution. In sum, to determine the appropriate process for resolution, we need to first review (1) the source(s) of conflict, (2) who the parties are, and (3) the parties' mindsets and their impact on the relationship. Once we have an accurate diagnosis, we then need to consider (1) the level of the parties' self-determination and control over process and outcome desired, (2) the different factors affecting the satisfaction of parties' objectives, and (3) the cultural implications of the processes selected.

C. When Possible, Focus on a Treatment That Satisfies the Interests of All: Interest-Based Processes to Move from Compromise to Value Creation

Having covered the Comprehensive Framework for Conflict Resolution, we will now focus on how to satisfy the interests of all when values are not in conflict. Generally, when there is no conflict of values but there is a

312. LEBARON, *supra* note 187, at 6–7, 9–10, 14 (exploring culture as a lens, a medium, and a relationship).

313. *See supra* note 300 and accompanying text.

314. FISHER ET AL., *supra* note 40, at 3–15, 42–81.

315. LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES 152–97 (1996); *see, e.g., Four Conflict Negotiation Strategies for Resolving Value-Based Disputes*, HARV. L. SCH.: PROGRAM ON NEGOT. (Mar. 21, 2019), <https://www.pon.harvard.edu/daily/dispute-resolution/four-negotiation-strategies-for-resolving-values-based-disputes> [<https://perma.cc/9G5H-YJ26>]; *Values-Based Mediation Simulations*, HARV. L. SCH.: PROGRAM ON NEGOT., <https://www.pon.harvard.edu/shop/values-based-mediation-simulations> [<https://perma.cc/8DHH-9SA3>] (last visited Apr. 12, 2020); *see also* JOHN FORESTER, DEALING WITH DIFFERENCES 59–91 (2009) (discussing value-based disputes and addressing them in participatory processes); Lawrence Susskind, *How to Negotiate When Values Are at Stake*, CONSENSUS BUILDING INST. (Oct. 2010), <https://www.cbi.org/article/2010/how-to-negotiate-when-values-are-at-stake/> [<https://perma.cc/R9K2-9SUX>]. *See generally* Hernandez Crespo Gonstead, *supra* note 46.

316. Susskind, *supra* note 315 (arguing that whenever there is a clash of values, they should be handled separately from interests); *see also* Tina Nabatchi, *Putting the “Public” Back in Public Values Research: Designing Participation to Identify and Respond to Values*, 72 PUB. ADMIN. REV. 699, 699–700 (2012) (discussing the need to identify and understand public values related to a policy conflict).

conflict of positions or interests—i.e., when two parties want something different or want something for different reasons—it is advisable for the parties to try an interest-based process, such as negotiation or facilitative mediation.³¹⁷ With these processes, the parties can reach agreements that fully satisfy the interests of those involved in the conflict and the third parties affected by it.³¹⁸ However, this requires a willingness to problem solve with others, as well as familiarity with the process of value creation.³¹⁹

Instead of reaching a mere compromise by meeting each other in the middle, the parties can generate options that enhance the whole before dividing it.³²⁰ Compromise is similar to dividing a muffin among as many parties that want it. Value creation involves creating options so that everybody will have an entire muffin. This is possible by moving from positions (what the person wants) to interests (why they want it)³²¹ and underlying values (why it is important to them).³²² If we stick to what the parties want, it is like having 100 percent and operating in a zero-sum game.³²³ So, for me to have 80 percent, you can only have 20 percent. Where we meet will depend on the amount of bargaining power we have³²⁴ or how much we need it, how much we value the relationship, or a number of other factors. But the result of compromise remains: for me to have it, you cannot.

When we create value, it is different. We both can have our interests fully satisfied because we are creating more options. So we are not only dividing

317. FISHER ET AL., *supra* note 40, at 3–15 (discussing how interest-based negotiation is also more efficient than arguing over positions and should produce a wise agreement that improves, or at least does not damage, the relationship).

318. Menkel-Meadow, *supra* note 159, at 794–801 (arguing that a problem-solving approach to negotiation focuses on finding solutions to the underlying needs and objectives of the parties).

319. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 171–75 (2002) (distinguishing between three types of attorneys: the true problem-solving negotiators who embrace integrative bargaining, the cautious problem solvers who do not fully realize the potential of problem solving, and the adversarial negotiators).

320. Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 697–705 (2004) (suggesting that to reach value-maximizing outcomes, it is necessary to enhance our creative thinking with training and also suggesting techniques to do so).

321. FISHER ET AL., *supra* note 40, at 1–95.

322. See Hernandez Crespo Gonstead, *supra* note 46 (“To this end, when the dispute occurs in the context of an ongoing relationship, it might be useful to incorporate the Cultural Value Discernment (CVD) tool into the problem-solving process. The Cultural Value Discernment (CVD) is the process through which each identified interest is connected to its underlying value by asking why it is important to that particular party. Learning why parties care about a particular interest opens the door to understanding what truly matters to them. Values are the driving force behind the parties’ articulated positions and interests that guide the decisionmaking process. These values are the core of who we are and the cultures to which we belong. Therefore, this additional inquiry is often worth the effort, as it can enhance understanding of the parties’ motivations.”); see also NOLAN-HALEY ET AL., *supra* note 66, at 82–83.

323. See Menkel-Meadow, *supra* note 159.

324. See, e.g., *BATNA Basics: Boost Your Power at the Bargaining Table*, HARV. L. SCH.: PROGRAM ON NEGOT. <https://www.pon.harvard.edu/freemium/batna-basics-boost-your-power-at-the-bargaining-table> [<https://perma.cc/34D6-DCWH>] (last visited Apr. 12, 2020).

the 100 percent but also generating alternatives.³²⁵ Understanding the underlying values and why the interests are important to the parties creates the necessary motivation to pursue alternatives that meet the needs of all involved.

For example, if one party wants a window closed and the other party wants a window open, a compromise would be to leave it open half of the time and closed the other half, or have it partially opened and partially closed.³²⁶ However, if we move from the positions to the interests³²⁷ and the values,³²⁸ we may come up with options that satisfy the interests of both.³²⁹ One party may want the window open for light or fresh air, while the other party may want the window closed for safety reasons. We may be able to keep the window open and put bars or a security system on the window for safety. Alternatively, we could close the window and put on the air conditioning or turn on a lamp. Even if the parties have conflicting interests, we can come up with mutually agreeable options. In this case, if one party wants light and the other wants darkness, which are conflicting interests, we can have one party wear an eye mask or have a directed lamp for the other party.

If we are able to connect at the value level, and we understand why the interests are important to the other person, we might be more incentivized to create alternatives³³⁰ to produce a sustainable agreement³³¹ that is better for the parties than the status quo. In these cases, the agreement is generally self-enforcing because the parties are better off with the agreement than without it.³³² Therefore, it is in their best interests to comply with their agreement.³³³ In contrast, in adjudicative processes, judgments or arbitration awards usually require the coercive power of the government to enforce them. The losing party usually will not voluntarily comply with the judgment or award. For one party to win, the other one has to lose, and this damages their relationship.³³⁴

To preserve the relationship, facilitative processes—more specifically in this case, interest-based processes—utilize the logic of participation, as opposed to the adjudicative processes which are persuasive in nature.³³⁵ Through the logic of participation, the parties are able to use their clashing differences to instead complement each other, creating new options that are

325. See FISHER ET AL., *supra* note 40, at 58–81.

326. *Id.* at 42; see also FOLLETT, *supra* note 194, at 32.

327. See FISHER ET AL., *supra* note 40, at 3–57.

328. See NOLAN-HALEY ET AL., *supra* note 66, at 101–02. See generally Hernandez Crespo Gonstead, *supra* note 46.

329. FISHER ET AL., *supra* note 40, at 58–81.

330. See generally Hernandez Crespo Gonstead, *supra* note 46 (arguing the need to connect at the value level to enhance understanding).

331. SUSSKIND & CRUIKSHANK, *supra* note 183, at 133–53 (arguing that it is possible to create a “nearly self-enforcing agreement”).

332. *Id.*

333. *Id.*

334. Menkel-Meadow, *When Winning Isn't Everything*, *supra* note 4, at 90–109.

335. See generally SUSSKIND & CRUIKSHANK, *supra* note 183.

mutually satisfactory.³³⁶ However, this requires that the parties shift their mindsets from domination or competition³³⁷ to collaboration³³⁸ to move from persuading³³⁹ each other to participating in a common experience of generating options together as integral parts of a whole.³⁴⁰

To operationalize this shift in mindsets to collaboration, Gerzon suggests eight tools to transform conflicts into opportunities for innovation and growth.³⁴¹ These tools include: integral vision (perceiving the whole),³⁴² systemic thinking (understanding the interdependent nature and interactions of the different parts),³⁴³ presence (capacity to fully engage),³⁴⁴ inquiry (curiosity to learn),³⁴⁵ conscious conversation (awareness of the choices of how to engage),³⁴⁶ dialogue (as a transformative process),³⁴⁷ bridging (building from differences),³⁴⁸ and innovation (creating new options).³⁴⁹ When used all together, they can provide an experience of collaboration that not only produces richer outcomes but also transforms the parties and their relationship. For these reasons, when the conflict assessment allows, we should try to create value through interest-based processes to satisfy the interests of all.

In sum, as doctors of conflict, we need to use the Comprehensive Framework for Conflict Resolution, which requires the consideration of the sources of conflict, the parties in conflict and the third parties affected, the interaction with the broader system, and their mindsets and the history of their relationship. Once we have the diagnosis, then the selection of the process requires determining the level of party self-determination and control over process and outcome, the satisfaction of the parties' objectives, and the cultural implications for unity or uniformity.³⁵⁰ Finally, when possible, it is important to focus on a treatment that satisfies the interests of all through interest-based processes that move from compromise to value creation, thus preserving the relationship and promoting inclusion.

336. MNOOKIN ET AL., *supra* note 62, at 14–17.

337. Goodpaster, *supra* note 156, at 370.

338. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 52–54 (1985) (explaining that even though operative negotiation may appear less viable than a competitive strategy, in practice, most people are cooperative in orientation and generally the competitive approach produces more distrust and impasses).

339. DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 29–30 (Tina Nabatchi et al. eds., 2012) (discussing persuasion as a way to influence others and warning that we should restrain from manipulative discourse).

340. FOLLETT, *supra* note 194, at 30–49.

341. *See generally* GERZON, *supra* note 3.

342. *Id.* at 61–79.

343. *Id.* at 81–95.

344. *Id.* at 97–117.

345. *Id.* at 119–39.

346. *Id.* at 141–65.

347. *Id.* at 167–87.

348. *Id.* at 189–206.

349. *Id.* at 207–24.

350. *See generally* Part II.

III. CHANNELING THE FLAME: LEARNING HOW TO USE OUR UNIQUE DIFFERENCES TO SPARK ONGOING SYNERGIES THROUGH PARTICIPATION

In the previous Part, this Article suggested that conflict, like fire, is a tool that can kill or create and, to use it effectively, we need to learn how to become doctors of conflict. When our differences are addressed within the conflict zone, we compare the conflict to an illness that needs an accurate diagnosis and treatment. For example, if we have brain tumor that goes undiagnosed or misdiagnosed and left untreated, it may lead to death.

In this Part, we will learn how our unique differences can be engaged on an ongoing basis.³⁵¹ Like channeling the flames of fire, the frictions produced by conflict can be utilized to spark ongoing synergies,³⁵² sometimes even before conflict occurs. This process is called participation.³⁵³ This Part compares the participatory process to a holistic wellness approach and plan, which focus not only on the prevention of illnesses but also on the promotion of peak performance of the whole body. For this reason, we expand the focus from merely treating a disease to instead developing the mindset and the habits necessary for a healthy life, allowing the body to thrive as a whole.

This Part provides the knowledge necessary to develop participatory capacity to maximize our individual and collective potentials. Through participation we can increase levels of unity and unlock the power of the whole. This is essential to overcome the fragmentation produced by the different parts of the body acting in isolation. Only a holistic, participatory approach³⁵⁴ will allow us to effectively interact as integral parts of the communities to which we belong.

To do this, this Part first suggests that we need to move beyond conflict, compromise, and common ground. More concretely, it proposes that conflict is not a liability but rather a tool for better understanding ourselves and others. It also proposes that we need to move beyond compromise to create

351. COVEY, *supra* note 65, at 265–69 (suggesting that we can have synergy in the classroom and in businesses).

352. *Id.* at 263 (“Synergy is everywhere in nature. If you plant two plants close together, the roots comingle and improve the quality of the soil so that both plants will grow better than if they were separated. If you put two pieces of wood together, they will hold much more than the total of the weight held by each separately. The whole is greater than the sum of its parts.”).

353. See Bingham, *supra* note 54 (examining the International Association for Public Participation’s Spectrum of Public Participation, Sherry Arnstein’s Ladder of Participation, and Archon Fung’s categorization of participation); Archon Fung, *Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 340 (2003); *IAP2 Spectrum of Public Participation*, IAP2, https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf [<https://perma.cc/2QPV-ZDSW>] (last visited Apr. 12, 2020). See generally Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC’Y 5 (2001) (examining the variety of programs designed to bolster participation).

354. Menkel-Meadow, *supra* note 159, at 754–59, 794–801 (discussing why using the word “approach” is preferable to the words “strategy” or “tactics” because it encompasses a specific orientation that leads to a mindset affecting behaviors and produces results).

value together and beyond common ground to integrate our differences and increase the level of engagement.³⁵⁵

With this new focus, this Part next argues that participatory capacity is comprised of three elements: knowledge, mindset, and discernment. First, with regard to knowledge, this Part emphasizes the need for a sense of self and others in order to be able to better combine our unique differences³⁵⁶ through shared decision-making. Second, it stresses the need for a mindset of shared decision-making that moves from dependence and independence toward interdependence.³⁵⁷ Third, it highlights the need for discernment regarding the different levels of integration (coexistence, collaboration, and complementarity), which can increase a sense of belonging.³⁵⁸

This Part then presents and compares two analytical frameworks for building participatory capacity: DSD and SDS. These two analytical frameworks have very different purposes. DSD allows us to manage conflict effectively and SDS better integrates our differences when making decisions together. SDS provides important considerations for making decisions together, including: who participates, the degree of participation, the procedural options, and additional elements for groups and organizations (areas and levels, goals and procedures, and timing). Finally, this Part argues that this participatory capacity needs to be developed on a daily basis,³⁵⁹ like a muscle. It contends that this is an essential capacity for reconciling our individual freedom with the greater good in our interactions at home, at work,³⁶⁰ and in the communities to which we belong.³⁶¹ When we develop this capacity to participate in the private sphere, we are better equipped for more complex interactions in the public square.

A. Unity Through Participation: Developing Participatory Capacity to Overcome Fragmentation and Maximize Our Individual and Collective Potentials

Currently there is too much wasted potential. Though the world is more interconnected than ever before, we have not developed the necessary

355. COVEY, *supra* note 65, at 263.

356. *Id.* at 261 (commenting that “valuing the differences is the essence of synergy”).

357. *Id.* at 48–49.

358. See NOLAN-HALEY ET AL., *supra* note 66, at 261–62. See generally Hernandez Crespo Gonstead, *supra* note 46; Evan W. Carr et al., *The Value of Belonging at Work*, HARV. BUS. REV. (Dec. 16, 2019), <https://hbr.org/2019/12/the-value-of-belonging-at-work> [<https://perma.cc/8SYY-2Y2H>].

359. See Albie M. Davis, *An Interview with Mary Parker Follett*, in NEGOTIATION THEORY AND PRACTICE 13, 17 (J. William Breslin & Jeffrey Z. Rubin eds., 2010) (“Perhaps the greatest of all obstacles in integration is our lack of training for it. In our college debates we try always to beat the other side.”); see also COVEY, *supra* note 65, at 263 (acknowledging how difficult it is “to apply the principals of creative cooperation, which we learn from nature, in our social interactions”).

360. See generally Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005) (arguing that dispute resolution should enhance, instead of diminish, core democratic values in the workplace).

361. See generally Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 42 (2002).

participatory capacity to integrate the unique talents of all people.³⁶² Unless we recognize and engage our unique differences, we will not be able to overcome fragmentation.³⁶³

In order to move forward, we first need to shift our focus from mere conflict to effective participation and then, through what I call a participatory approach, gain a systemic perspective, where the parts are integrated into the whole.³⁶⁴ The ultimate goal of developing participatory capacity is to increase the level of unity to combat fragmentation.³⁶⁵ Without it, there cannot be maximization of individual and collective potentials, as the parts cannot accomplish what only the whole can. For the parts to achieve their full potential, they need to fulfill their mission as integral parts of the whole.

1. Beyond Conflict, Compromise, and Common Ground: A Shift Toward Participation to Unlock the Power of the Whole

What we have covered so far is how to overcome conflict illiteracy. Developing conflict literacy is only the first step. The ultimate goal is to increase the level of unity. Unity requires knowing not only how to deal with conflict but also how to participate effectively in our daily interactions.³⁶⁶ Therefore, the next step is to shift from mere conflict to effective participation. This requires: (1) using conflict as a tool, (2) moving beyond compromise and instead creating value, and (3) moving beyond common ground to unlock the potential that can only be achieved when combining our unique differences.³⁶⁷

a. Using Conflict as a Tool to Better Know Ourselves and Others

As discussed above, conflict is inevitable and provides a great opportunity to discover what we and others deeply care about.³⁶⁸ If we do not care enough about an issue, there will not be a conflict. Therefore, it is imperative to embrace conflict as an extraordinary experience for growth at a personal

362. COVEY, *supra* note 65, at 16 (“The problem is, we live in an *interdependent* reality, and our most important accomplishments require interdependency skills well beyond our present abilities.”).

363. GERZON, *supra* note 3, at 83 (“Systems thinking is a critical tool because it potentially challenges *all* positions in a conflict.”).

364. COVEY, *supra* note 65, at 186–87 (“Unless we are willing to achieve real independence, it’s foolish to try to develop human relationship skills.”).

365. *Id.* at 318 (arguing that achieving unity or oneness is the “highest and best” experience and reminding us how fragile and “bitter and lonely” disunity can be); *see also* FOLLETT, *supra* note 194, at 71–94 (discussing integrative unity in the context of business). “Business cannot serve its maximum degree of usefulness to the community, cannot perform the service which it has, tacitly, *bound itself* to perform, unless it seeks an enlarged understanding of the practical methods of unifying business organization.” FOLLETT, *supra* note 194, at 71.

366. LEBARON & PILLAY, *supra* note 1, at 3 (“[W]e remember that unity is not uniformity or sameness, but harmony in the midst of diversity. Since diversity involves differences and some of those differences bring us into conflict, our shared goal is not the elimination of conflict, but finding ways to live well with it.”).

367. *See infra* Parts III.A.1.a–c.

368. *See generally* Hernandez Crespo Gonstead, *supra* note 46.

level and as part of relationships.³⁶⁹ Only when we embrace conflict can we assess and discern the level of integration depending on our shared values. If our perception of conflict does not change, and we do not become doctors of conflict, conflict will continue to be a daunting obstacle that prevents integration and deeply affects our sense of belonging.³⁷⁰

b. Moving Beyond Compromise to Create Value Together

The time has come to stop looking for compromise.³⁷¹ Instead we need to engage each other's differences, create value, and learn from each other. Only then will we fulfill our individual and collective potentials. There is a lot at stake. Unless we engage each other more deeply, we will not be able to unlock higher levels of innovation and growth.³⁷²

As noted earlier, compromise assumes zero-sum struggles, in which for one to prevail the other must be defeated.³⁷³ However, we need to move from compromise to value creation. This requires a shift of mindset from the logic of rights and persuasion (i.e., I am right and you are wrong) to the logic of participation that stops judgment and instead fosters curiosity to enhance understanding of our individual positions, interests, and values.³⁷⁴ The logic of rights is based on claims and demands based on self-interest.³⁷⁵ This logic destroys the unity of the "we." The logic of rights is either "my way" or "your way."³⁷⁶ Instead, the logic of participation encourages relationships by creating a new "our way" that integrates the unique gifts of "you" and "I" into a new whole "we."³⁷⁷ The "we" achieves harmony by integrating interests and values, resulting in unity.³⁷⁸ In contrast, the logic of rights achieves harmony through assimilation, resulting in uniformity.³⁷⁹ To move

369. *Id.* (arguing that we need to embrace conflict as a unique opportunity to know who we are through our values).

370. LEBARON & PILLAY, *supra* note 1, at 89 ("Conflict often escalates, polarizing human relationships, as opposing groups form.").

371. *See generally* FOLLETT, *supra* note 34, at 67–69, 75, 77, 79, 82, 84–86 (discussing how compromise requires giving something up with the end result of never being fully satisfied).

372. COVEY, *supra* note 65, at 264 ("This represents one of the great tragedies and wastes in life, because so much potential remains untapped—completely undeveloped and unused. Ineffective people live day after day with unused potential. They experience synergy only in small, peripheral ways in their lives.").

373. *See generally* Menkel-Meadow, *supra* note 159.

374. *See generally* Hernandez Crespo, *From Paper to People*, *supra* note 141.

375. URY ET AL., *supra* note 34, at 7.

376. *See generally* Hernandez Crespo, *From Paper to People*, *supra* note 141.

377. *See* LEBARON & PILLAY, *supra* note 1, at 6 ("Relationship-building as a central focus of intercultural conflict resolution implies a significant investment of time in conflict resolution efforts. Relationships are organic, evolving, and dynamic, and do not automatically follow a linear path. They arise as we work and play together, with a spirit of inquiry about differences, especially those differences that threaten us or our ways of working.").

378. *See generally* Hernandez Crespo, *From Paper to People*, *supra* note 141.

379. *See* COVEY, *supra* note 65, at 274 ("Insecure people think that all reality should be amenable to their paradigms. They have a high need to clone others, to mold them over into their own thinking. They don't realize that the very strength of the relationship is having another point of view. Sameness is not oneness; uniformity is not unity. Unity, or oneness,

beyond compromise, it is necessary to move from a mere conflict-centered approach to one that also focuses on relationships.³⁸⁰

c. Moving Beyond Common Ground to Increase the Level of Engagement

Once we master conflict as a tool and move beyond compromise to create value together, the next step is to move beyond common ground.³⁸¹ If we continue to connect on common ground, we will get nowhere.³⁸² Common ground is boring, predictable, and remains surface level.³⁸³ It does not allow us to know who we are or others around us.³⁸⁴ This leads to stagnation because we stick to what is familiar and what we agree with. Therefore, we leave a lot of value at the bargaining table by leaving our unique differences untapped.³⁸⁵

Searching for common ground is necessary³⁸⁶ but not sufficient. Once we have found common ground, it is essential to move beyond it to discover and experiment with our unique differences.³⁸⁷ This should be exciting and fun instead of scary and dreadful. Unless we engage our differences, we will not be able to know who we truly are or what we are uniquely suited to contribute.³⁸⁸ To realize the potential of our differences, we need to value them as much as we value our similarities.³⁸⁹

is complementariness, not sameness. Sameness is uncreative . . . and boring. The essence of synergy is to value the differences. I've come to believe that the key to interpersonal synergy is intrapersonal synergy, that is synergy within ourselves.”).

380. See generally Hernandez Crespo, *From Paper to People*, *supra* note 141.

381. COVEY, *supra* note 65, at 274.

382. *Id.*

383. See *supra* note 381 and accompanying text.

384. See *supra* note 379 and accompanying text.

385. GERZON, *supra* note 3, at 207 (noting that “true innovators are bridging between otherwise separate, insulated worlds in order to create breakthrough innovations”).

386. See LEBARON & PILLAY, *supra* note 1, at 21, 150.

387. See COVEY, *supra* note 65, at 274.

388. *Id.* at 128 (“Frankl says we *detect* rather than *invent* our missions in life. I like that choice of words. I think each of us has an internal monitor or sense, a *conscience*, that gives us an awareness of our own uniqueness and the singular contributions that we can make. In Frankl’s words, ‘Everyone has his own specific vocation or mission in life Therein he cannot be replaced, nor can his life be repeated. Thus, everyone’s task is as unique as is his specific opportunity to implement it.’” (quoting VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* 113 (Ilse Lasch trans., Beacon Press 4th ed. 1992))).

389. Davis, *supra* note 359, at 14 (“As conflict—difference—is here in the world, as we cannot avoid it, we should, I think, use it. Instead of condemning it, we should set it to work for us. Why not? What does the mechanical engineer do with friction? Of course his chief job is to eliminate friction, but it is true that he also capitalizes friction. The transmission of power by belt depends on friction between the belt and pulley. The friction between the driving wheels of the locomotive and track is necessary to haul the train. All polishing is done by friction. The music of the violin we get by friction. We left the savage state when we discovered fire by friction. We talk of the friction of mind on mind as a good thing. So in business, too, we have to know when to try to eliminate friction and when to try and capitalize it, when we see what works we can make it do.”).

Initially, this may be counterintuitive because we tend to value our own strengths in others.³⁹⁰ However, partnering with those that excel at what we can do equally well makes no sense, unless we are trying to expand our capacity. A team in which all the players are good at the same position is a weak team. Instead, we need to make a conscious effort to find what those around us can do better than us and also discover what we are uniquely suited to do better than most other people.³⁹¹ The appreciation of our differences is a prerequisite to engaging in participatory processes and unlocking the power of the whole.³⁹²

2. Participatory Approach: Knowledge, Mindset, and Discernment

Once we have shifted from mere conflict resolution to effective participation, the next step is to develop a systemic perspective³⁹³ through a participatory approach. This approach³⁹⁴ involves three steps: (1) gaining knowledge about self and others; (2) developing a mindset of interdependence; and (3) determining whether the level of integration in shared decision-making is coexistence, collaboration, or complementarity.

The steps of this participatory approach can be compared to the systemic perspective on the human body. Gaining knowledge of self and others is like each part of the body realizing what it is and what others are. Developing the mindset of interdependence³⁹⁵ is like each part of the body realizing it is part of a larger system. Finally, determining the level of integration is like each part of the body realizing the relationship that exists between them. For example, there is complementarity between the bones that make the finger, collaboration between the finger and the rest of the hand, and coexistence between the finger and the rest of the body.

a. The Need for a Sense of Self and Others: Combining Our Unique Differences Through Shared Decision-Making

No group is homogenous.³⁹⁶ Even in the most similar groups, there are differences among the members.³⁹⁷ The differences might be subtle, but it is

390. See Lynda Gratton & Tamara J. Erickson, *Eight Ways to Build Collaborative Teams*, HARV. BUS. REV. (Nov. 2007), <https://hbr.org/2007/11/eight-ways-to-build-collaborative-teams> [<https://perma.cc/Q5G4-2QM3>] (discussing how teams that perceive each other as similar tend to collaborate better).

391. See COVEY, *supra* note 65, at 385.

392. See Warren H. Schmidt & Robert Tannenbaum, *Management of Differences*, HARV. BUS. REV. (Nov. 1960), <https://hbr.org/1960/11/management-of-differences> [<https://perma.cc/8ALG-HFDS>] (discussing the need for managers to understand and address differences for the benefit of both the individual and the corporation).

393. GERZON, *supra* note 3, at 81–95 (discussing the need for systemic thinking).

394. Menkel-Meadow, *supra* note 159, at 754–59, 794–801.

395. COVEY, *supra* note 65, at 49 (“Dependent people need others to get what they want. Independent people can get what they want through their own effort. Interdependent people combine their own efforts with the efforts of others to achieve their greatest success.”).

396. See RONALD A. HEIFETZ, LEADERSHIP WITHOUT EASY ANSWERS 118–19 (1998) (discussing factions within groups).

397. *Id.*

important to recognize them to maximize the potential of the whole. If we overlook the differences within a group and mainly connect on similarities, we are not only underutilizing individual potential but also diminishing the capacity of the whole.³⁹⁸

To develop this participatory approach, we need to first gain a sense of self and then gain knowledge about others to combine our unique differences through shared decision-making.³⁹⁹ This starts with a recognition of the self as an irreplaceable part of the whole. Without a clear sense of identity, it is not possible to fully integrate into the whole. If we are unable to realize our unique gifts that maximize our potential, or what we are uniquely suited to do, it is impossible to figure out how we can best relate to others.⁴⁰⁰ These unique gifts go beyond functions that we are able to perform. They include our specific vocation.⁴⁰¹ If we are not able to figure out our unique nature, then it will be impossible to optimize our individual and collective performance and growth.

To develop a sense of identity, it is necessary to have opportunities to make individual decisions.⁴⁰² If we are told what to do at home, school, and work, this lack of opportunity for individual decision-making will delay the discovery of who we truly are. Only when we are allowed to make decisions are we confronted with freedom, choice, and consequences. Without freedom to choose on a daily basis, we are not able to determine what is truly important to us, namely our values.⁴⁰³

Values are the motivation that ultimately drives both a person's behavior and his or her decision-making.⁴⁰⁴ To fully understand ourselves, we need to become familiar with our values and what is important to us.⁴⁰⁵ Only then can we identify the values of others to fully understand them. When learning about the values of those around us, it is critical to approach them with authentic curiosity and humility to inquire about the differences that we are not able to understand.

A participatory approach requires knowing our values and the values of those around us. Without this knowledge, it is difficult to combine our unique differences through shared decision-making. Only when we

398. *See supra* note 392 and accompanying text.

399. *See generally* Hernandez Crespo Gonstead, *supra* note 46.

400. COVEY, *supra* note 65, at 187 (“The most important ingredient we put into any relationship is not what we say or what we do, but what we are.”).

401. *See supra* note 388 and accompanying text.

402. William D. Guth & Renato Tagiuri, *Personal Values and Corporate Strategy*, HARV. BUS. REV. (Sept. 1965), <https://hbr.org/1965/09/personal-values-and-corporate-strategy> [<https://perma.cc/Y6XW-Y4FF>] (discussing how decision-making allows one to determine what his or her values are).

403. HEIFETZ, *supra* note 396, at 22 (concluding that “reality testing is not a value-free process”).

404. *See generally* Hernandez Crespo Gonstead, *supra* note 46.

405. COVEY, *supra* note 65, at 217 (“As we clearly identify our values and proactively organize and execute around those values on a daily basis, we develop self-awareness and independent will by making and keeping meaningful promises and commitments. There’s no way to go for a Win in our own lives if we don’t even know, in a deep sense, what constitutes a Win—what is, in fact, harmonious with our innermost values.”).

understand the values that drive our behavior and the behavior of others are we better equipped to integrate our differences, thereby unleashing our individual and collective potentials.

b. The Mindset for Shared Decision-Making: From Dependence and Independence Toward Interdependence

When making decisions, our choices have consequences not only for ourselves but also for those we are in relationships with, and even for those that are not directly involved. Given the impact that decision-making has on personal, relational, and systemic levels, it is of critical importance that one operates in the mindset of interdependence.⁴⁰⁶ There are three mindsets under which we might operate for shared decision-making: dependence, independence, and interdependence.⁴⁰⁷ However, only interdependence can lead to unity.⁴⁰⁸

First, the dependence mindset⁴⁰⁹ leads people to prefer deferring to others to make their decisions. Depending on others to make decisions takes away responsibility for the consequences.⁴¹⁰ Therefore, this mindset is very comfortable and appealing, but it can be detrimental because it stunts both individual and collective growth;⁴¹¹ the individual is easier to control and becomes a mere agent with minimal decision-making power.⁴¹² Even though this might be more predictable and efficient, it also diminishes the individual's level of engagement.⁴¹³ The person is reduced to mere executive functions, becoming the hands and feet of somebody else.

Alternatively, the mindset of independence⁴¹⁴ recognizes the individual's need to control the decision-making process because of the potential consequences.⁴¹⁵ In making decisions, a person has to decide between options, which requires not only knowledge about the options themselves but also a clarification of which values to prioritize.⁴¹⁶ This process elevates the level of engagement, as a person needs to use their brain and heart in exercising decision-making power. Yet, this raises the problem of participation. When everybody has decision-making power, participation might lead to conflict.⁴¹⁷ Therefore, even though participation is necessary

406. *Id.* at 195–214.

407. *Id.* at 48–52.

408. *See supra* note 395 and accompanying text.

409. *See* COVEY, *supra* note 65, at 49 (stating that we all start life “dependent on others”).

410. *Id.* (“[D]ependence is the paradigm of *you*—*you* take care of me; *you* come through for me; *you* didn’t come through; I blame *you* for the results.”).

411. *Id.*

412. *Id.* (“Dependent people need others to get what they want.”).

413. *Id.* at 43.

414. *Id.* at 49.

415. *Id.* (“*Independence* is the paradigm of *I*—*I* can do it; *I* am responsible; *I* am self-reliant; *I* can choose.”).

416. *Id.*

417. INT’L ASS’N FOR PUB. PARTICIPATION CAN., CONFLICT MANAGEMENT AND PUBLIC PARTICIPATION 1 (2016), <https://iap2usa.org/resources/documents/research/white%20paper%20-%20p2%20and%20conflict%20management%20-%20nelischer.pdf>

to unleash the power of the whole, it is more complex than mere command and control.⁴¹⁸

Finally, the mindset of interdependence⁴¹⁹ recognizes that the capacity to decide has to be shared to move forward toward collective growth.⁴²⁰ Having individual decision-making power is necessary but insufficient to integrate the different parts of the whole.⁴²¹ Therefore, when sharing decisions, different participants need to take into account not just their self-interest but also the interests of those involved in and affected by the decision.⁴²² Failure to do so may have unintended consequences for some parts and, ultimately, the whole. Once we have knowledge of ourselves and others, and a mindset of interdependence that allows us to recognize the role we play in the system, then we are ready to examine the different levels of integration required for effective interaction.

c. Levels of Integration in Shared Decision-Making: The Sense of Belonging in Coexistence, Collaboration, and Complementarity

Table 2: Levels of Integration

	Coexistence	Collaboration	Complementarity
Interaction	Sharing Space	Sharing Goals	Sharing Life/Relationship
Relationships	Public Square	Work or Community	Family and Friends
Value Compatibility	Minimum	Moderate	Maximum

Because of our unique differences, our level of integration with others will vary depending on the purpose of an interaction. What this means is that we may not experience the same degree of belonging with every person. However, we need to experience a general sense of common identity with

[<https://perma.cc/L3HQ-ABNA>] (“Involving many different stakeholders with varying expertise and experiences ensures that a diversity of opinions is considered throughout the decision-making process, which results in a stronger conclusion with greater support. It is also the cause of conflict in these processes.”).

418. *See, e.g.*, SUSSKIND & CRUIKSHANK, *supra* note 183 (discussing how even though participation causes conflict, it is more sustainable).

419. COVEY, *supra* note 65, at 49 (“As we continue to grow and mature, we become increasingly aware that all of nature is *interdependent*, that there is an ecological system that governs nature, including society. We further discover that the higher reaches of our nature have to do with our relationships with others—that human life also is interdependent.”).

420. *Id.*

421. *Id.* (“*Interdependence* is the paradigm of *we*—we can do it; we can cooperate; we can combine our talents and abilities and create something greater together.”).

422. *Id.* at 211 (“Most situations, in fact, are part of an interdependent reality, and then Win/Win is really the only viable alternative Win/Lose is not viable because, although I appear to win in a confrontation with you, your feelings, your attitudes toward me and our relationship have been affected.”).

everyone, including those with whom we are not directly connected.⁴²³ Unless there is this sense of belonging in all the parts, produced by the different levels of integration, it will not be possible to move forward. This sense of belonging produces the necessary cohesiveness to move the whole in the same direction.⁴²⁴

To determine the level of integration, it is necessary to have a process of mutual discernment.⁴²⁵ This process determines the type of interaction, kind of relationship, and level of value compatibility.⁴²⁶ Levels of integration fall on a spectrum that goes from coexistence to collaboration to complementarity.⁴²⁷

The level of integration required for coexistence is that which allows us to share space in harmony.⁴²⁸ The types of relationships we have in the public square require a minimum level of value compatibility.⁴²⁹

The next level of integration, required for collaboration, allows us to share common goals, which is necessary when we are part of a workplace or community.⁴³⁰ This requires moderate value compatibility, as we have more in common with those we interact with than with those in the public square.⁴³¹ However, these parties are more fungible because what connects them is an external incentive, namely a common goal.⁴³²

The highest level of integration, required for complementarity, is the most difficult but most rewarding because what links the parties together is their

423. LEBARON, *supra* note 77, at 22 (describing how the common identity refers to interdependence and relational capacity and describing the South African experience).

424. See FISHER & SHAPIRO, *supra* note 26, at 52–71.

425. See NOLAN-HALEY ET AL., *supra* note 66, at 94–96. See generally Hernandez Crespo Gonstead, *supra* note 46.

426. LEBARON & PILLAY, *supra* note 1, at 6–7 (“Worldview differences—diverse ways of seeing our purpose, values, and relationships—can yield recurrent conflicts in which issues seem to change as conflictual dynamics escalate. These differences can best be resolved in the context of strong, resilient relationships.”).

427. NOLAN-HALEY ET AL., *supra* note at 66, at 94–96. See generally Hernandez Crespo Gonstead, *supra* note 46.

428. Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 555–57, 576–79 (2006) (“‘Understanding’ and ‘coexistence’ as aspirational values of peace give us some goals and end-states but do not tell us much about how to get there.”).

429. LEBARON & PILLAY, *supra* note 1, at 144 (“When we hold relationship at the center of our map, it reminds us that we are ultimately interdependent. Our relationships are carriers for our identities, passions, and meanings. Whether it is our conflict or we are helping others, we are always part of a relational system.”).

430. See, e.g., Rob Cross et al., *Collaboration Without Burnout*, HARV. BUS. REV. (July–Aug. 2018), <https://hbr.org/2018/07/collaboration-without-burnout> [<https://perma.cc/9SSK-PC7P>] (discussing the high demands of collaboration).

431. Patrick M. Lencioni, *Make Your Values Mean Something*, HARV. BUS. REV. (July 2002), <https://hbr.org/2002/07/make-your-values-mean-something> [<https://perma.cc/7HMX-ABAE>] (discussing the need for corporate values).

432. Given the high turnover rate for jobs, there are significant pressures on the workforce to become less fungible. See, e.g., Jacquelyn Smith, *17 Ways to Be Indispensable at Work*, FORBES (Sept. 5, 2013), <https://www.forbes.com/sites/jacquelynsmith/2013/09/05/17-ways-to-be-indispensable-at-work> [<https://perma.cc/D3D9-EGHZ>].

relationships.⁴³³ These are the kinds of interactions we have with our family and friends. Complementarity requires the maximum level of value compatibility because the parties become an integral part of a new whole, or the “we.”⁴³⁴ Therefore, the parties are irreplaceable, as what they can accomplish together they cannot accomplish with anyone else. The result of complementarity is not just harmony but optimal value creation and the highest level of unity.⁴³⁵

If the goal is increasing the level of integration,⁴³⁶ that means we need to move from merely “bonding” with those that are similar to “bridging”⁴³⁷ with those that are both similar and different from us.⁴³⁸ This focus on our unique differences allows us to discover who we are and what we are uniquely suited to do. Only then will we be able to combine the uniqueness of “you” and “I” into “we” and “all.” In this way, diversity’s potential is unlocked, producing higher levels of unity and allowing the parties to develop their full potential as integral, different parts of the whole.

B. Tools to Integrate the Power of the Whole: Analytical Frameworks for DSD and SDS

The next step could be seen as moving from the wellness approach to the wellness plan. To operationalize the participatory approach, we utilize DSD,

433. See *supra* note 421 and accompanying text.

434. COVEY, *supra* note 65, at 263 (“It means that the relationship which the parts have to each other is a part in and of itself. It is not only a part, but the most catalytic, the most empowering, the most unifying, and the most exciting part.”).

435. *Id.* at 264 (“You begin with the belief that parties involved will gain more insight, and that the excitement of that mutual learning and insight will create a momentum toward more and more insights, learnings, and growth. Many people have not really experienced even a moderate degree of synergy in their family life or in other interactions. They’ve been trained and scripted into defensive and protective communications or into believing that life or other people can’t be trusted.”).

436. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 23–26 (2000). Robert Putnam defined social capital [b]y analogy with notions of physical capital and human capital—tools and training that enhance individual productivity—the core idea of social capital theory is that social networks have value. Just as a screwdriver (physical capital) or a college education (human capital) can increase productivity (both individual and collective), so too social contacts affect the productivity of individuals and groups.

Id. at 18. However, he notes that the term was first used by L. J. Hanifan to explain the importance of community involvement for successful schools. See *id.* at 19; see also ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 83–120 (1994). But see Theda Skocpol & Morris P. Fiorina, *Making Sense of the Civic Engagement Debate*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 1, 14 (Theda Skocpol & Morris P. Fiorina eds., 1999) (arguing that “democracies were a product of organized conflict and distrust”).

437. PUTNAM, *supra* note 436, at 23–24; see also BRAM LANCEE, *IMMIGRANT PERFORMANCE IN THE LABOUR MARKET: BONDING AND BRIDGING SOCIAL CAPITAL* 27–30 (2012); PUTNAM ET AL., *supra* note 436, at 185 (“Building social capital will not be easy, but it is the key to making democracy work.”); Ackerman, *supra* note 361, at 50–52 (discussing the need for bridging).

438. See generally Xavier de Souza Briggs, *Social Capital and the Cities: Advice to Change Agents*, 86 NAT’L CIVIC REV. 111 (1997) (discussing the usefulness of social capital in communities).

which helps us with managing conflict at a systemic level, and SDSD, which goes beyond conflict to engage differences at the appropriate participation levels in relationships.⁴³⁹ Next, we explore the similarities and differences between DSD and SDSD. Finally, I argue for the need to develop participatory capacity and operationalize it through these frameworks on a daily basis. Utilizing frameworks to analyze our interactions can have significant implications and possibilities for the private and public sphere. Similar to developing a muscle, utilizing frameworks for analyzing our interactions can have significant implications and possibilities for the private and public sphere.

1. Introducing Tools for Building Participatory Capacity: DSD and SDSD

As doctors of conflict, we learn how to select the appropriate process for the specific conflict that the parties have. DSD uses logic and processes as building blocks for how to make decisions about managing conflict and resolving multiple disputes instead of just one.⁴⁴⁰ It can be used to navigate multiple parties or groups involved in a large conflict or dispute or to assess how a group or organization deals with conflict and to envision ways that they can do it better.⁴⁴¹

DSD has been defined as “the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict.”⁴⁴² To conduct this analysis and reimagine how a group or organization deals with conflict,⁴⁴³ all members need to be represented.⁴⁴⁴ The analytical framework includes: the goals of the system; the stakeholders; the context and culture; the processes and structure; the resources; and the ways to determine success, accountability, and learning.⁴⁴⁵ The process involves⁴⁴⁶: (1) the conflict stream assessment⁴⁴⁷ and (2) conducting the DSD process.⁴⁴⁸

DSD allows us to make decisions about how we are going to deal with conflicts or disputes when they occur or after they have occurred.⁴⁴⁹ Even

439. See Menkel-Meadow, *supra* note 115, at 344 (stressing the need to “develop more sophisticated theories about relationships”).

440. See AMSLER ET AL., *supra* note 29 (manuscript at 7–21) (explaining what DSD is).

441. See *id.*; see also ROGERS ET AL., *supra* note 52, at 1–10, 16–41.

442. AMSLER ET AL., *supra* note 29 (manuscript at 7) (footnote omitted).

443. See Mariana Hernandez Crespo G., *Introduction to the Symposium: Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017). See generally Symposium, *Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017).

444. See CONSTANTINO & MERCHANT, *supra* note 2, at 49–67 (engaging stakeholders).

445. See AMSLER ET AL., *supra* note 29 (manuscript at 22–38) (discussing the analytic framework for DSD).

446. See *id.* at 61–73 (providing an overview of the different design processes); see also CONSTANTINO & MERCHANT, *supra* note 2, at 69–186; ROGERS ET AL., *supra* note 52, at 13–45; URY ET AL., *supra* note 34, at 20–83.

447. See AMSLER ET AL., *supra* note 29 (manuscript at 62–67); see *supra* 161.

448. See AMSLER ET AL., *supra* note 29 (manuscript at 67–73) (listing the DSD process steps).

449. See *id.* at 61–73.

though DSD is a great framework for analyzing our interactions that cause conflict, we do not have a framework for analyzing our interactions on a daily basis after conflict has resolved. SDSD provides the guidelines for how we make decisions together.⁴⁵⁰ Building on Wallace Warfield's work, which focuses on relationships, decision-making, and culture, SDSD helps us make collective decisions.⁴⁵¹ It allows us to leverage our unique differences and create synergies that enable us to achieve together what we cannot accomplish alone.⁴⁵² Without it, we risk excluding those who may have knowledge, experience, and relevant information, as well as those who might be affected by a decision.⁴⁵³

SDSD can be defined as a tool for those with decision-making power to examine the optimal level of engagement with regard to who, what, and how decisions are made.⁴⁵⁴ It focuses on the relationship instead of mere conflict resolution.⁴⁵⁵ When two or more people share space, work closely together, or share their lives, it is not always clear which decisions have to be made individually or collectively. This is critically important because decision-making processes usually affect not just the ones making the decisions but also those closely related, and even the members of the larger community. In four steps, SDSD is implemented by: (1) discerning the appropriate level of participation, (2) designing a variety of processes with participants at multiple levels of the organization that match the challenges and opportunities the organization faces, (3) integrating the organization and periodically reassessing to meet the business enterprise's evolving needs, and (4) reevaluation.

DSD and SDSD are two powerful tools that can significantly enhance our participatory capacity. Unlike ADR, which generally focuses on a single dispute, similar to a static picture, DSD and SDSD, given their systemic nature, can assist in managing conflict and making decisions on an ongoing basis, similar to a motion picture. This is critically important when the parties share any kind of ongoing relationship.

450. See Hernandez Crespo G., *A New Chapter*, *supra* note 26.

451. See generally FROM CONFLICT RESOLUTION TO SOCIAL JUSTICE, *supra* note 30; Warfield, *Public Policy Conflict Resolution*, *supra* note 30; Warfield, *The Implications*, *supra* note 30.

452. See *supra* note 434 and accompanying text.

453. See, e.g., Hernandez Crespo, *From Problem to Potential*, *supra* note 141, at 225–40 (arguing that the communities, in the investor-state dispute context, have an essential role to play in promoting investment retention and expansion).

454. See Thomas H. Davenport, *Make Better Decisions*, HARV. BUS. REV. (Nov. 2009), <https://hbr.org/2009/11/make-better-decisions-2> [<https://perma.cc/X3CW-D7B4>] (“Organizations need to give managers the tools and assistance to ‘decide how to decide’ on an ongoing basis.”).

455. Hernandez Crespo, *From Paper to People*, *supra* note 141, at 55–62 (arguing that we need to move from focusing on conflict to focusing on relationships).

*a. Deciding How to Resolve Conflicts and Make Decisions Together:
Similarities and Differences of DSD and SDS*

Both DSD and SDS share a number of important similarities. First, they both require a systemic perspective.⁴⁵⁶ This is essential to effectively address conflict and maximize the potential of relationships. They require not only an integral vision⁴⁵⁷ but also a deep understanding of interdependence. In other words, they require an understanding of how the different parts interact with each other within the whole.⁴⁵⁸ Second, their participatory natures require that all parties or representatives involved be engaged in the assessment, design, and implementation processes.⁴⁵⁹ This is important because the parties are the ones with the knowledge and they ultimately use the system designed for conflict resolution⁴⁶⁰ or shared decision-making. Third, both DSD and SDS provide the analytical frameworks for assessing both current practices and designs of improved ones.⁴⁶¹

However, there are defining differences. First, DSD focuses on conflicts and disputes,⁴⁶² and SDS focuses on strengthening the relationship.⁴⁶³ Second, DSD focuses mainly on resolution,⁴⁶⁴ while SDS focuses on leveraging unique differences to spark synergies.⁴⁶⁵ Third, DSD designs systems to better meet identified goals⁴⁶⁶ for how conflicts and disputes should be resolved. Whereas, SDS, through the process of participation,⁴⁶⁷ increases the level of unity through different levels of integration

456. *See, e.g.*, CONSTANTINO & MERCHANT, *supra* note 2, at xiii–xiv (“Typically, organizational leaders do not view the management of conflict as systemically as they do information, human resource, and financial management systems. Rather, conflict in organizations is viewed and managed in a piecemeal, ad hoc fashion, as isolated events, which are sometimes grouped by category if the risk exposure is great enough but that are rarely examined in the aggregate to reveal patterns and systemic issues. In a sense, most organizations regard disputes as ‘local’ events. Viewing the management of conflict systemically provides unparalleled opportunities for an organization to learn critical information about its operations, its population, and its environment—that is, to achieve a more ‘global’ perspective.”).

457. *See* GERZON, *supra* note 3, at 61–79 (discussing the need for integral vision).

458. *See id.* at 81–95 (discussing the need for systemic thinking).

459. *See* URY ET AL., *supra* note 34, at 65–83; *see also* AMSLER ET AL., *supra* note 29 (manuscript at 29–30); CONSTANTINO & MERCHANT, *supra* note 2, at 49–66; ROGERS ET AL., *supra* note 52, at 145–77.

460. *See* CONSTANTINO & MERCHANT, *supra* note 2, at 49–66 (discussing the need for users of the system to participate in the process).

461. *See* AMSLER ET AL., *supra* note 29 (manuscript at 22–38). *See generally* Hernandez Crespo G., *A New Chapter*, *supra* note 26.

462. *See* CONSTANTINO & MERCHANT, *supra* note 2, at 3–18.

463. *See generally* Hernandez Crespo G., *A New Chapter*, *supra* note 26.

464. *See* CONSTANTINO & MERCHANT, *supra* note 2, at 33–48 (discussing the evolution of ADR and DSD). However, the goals of DSD have expanded. *See, e.g.*, AMSLER ET AL., *supra* note 29 (manuscript at 293–308); ROGERS ET AL., *supra* note 52, at 201–23.

465. *See* COVEY, *supra* note 65, at 262.

466. AMSLER ET AL., *supra* note 29 (manuscript at 25–29) (“Decision makers, who determine goals, can be one or more persons or entities with the authority to commission, approve, and implement the design.”).

467. *See generally* Hernandez Crespo G., *A New Chapter*, *supra* note 26.

(coexistence, collaboration, and complementarity).⁴⁶⁸ Fourth, while DSD focuses, primarily downstream (conflict management and dispute resolution),⁴⁶⁹ on deciding how we are going to resolve conflicts and disputes, SDDS focuses, upstream (rulemaking) and midstream (implementation),⁴⁷⁰ on deciding how we are going to make decisions together. Fifth, while the intended outcome of DSD is effective resolution,⁴⁷¹ the goal of SDDS is to create more inclusive policies, procedures, cultures, strategic planning, and implementation.⁴⁷² Sixth, the benefits of DSD include increased stakeholder satisfaction with the system that manages conflicts and disputes, less disruption, more preserved relationships, and increased efficiency.⁴⁷³ In contrast, the benefits of SDDS are higher sustainability, engagement, ownership, and synergies⁴⁷⁴ at every level of the organization. Seventh, the lack of DSD increases the risk that conflicts will escalate into legal disputes, causing disruption and inefficiency due to poor conflict management and increased cost in time and resources.⁴⁷⁵ However, a lack of SDDS increases the risk of exclusion, wasted talent, disengagement, resentment, and breakdowns of relationships.⁴⁷⁶

b. SDDS: A Tool to Leverage Our Unique Differences to Spark Synergies in Decision-Making

SDDS is a tool that can be used to maximize our collective potential when making decisions together. It originates from collaborative governance⁴⁷⁷ and DSD,⁴⁷⁸ and it puts the emphasis on relationships, decision-making, and

468. See generally Hernandez Crespo Gonstead, *supra* note 46.

469. DSD downstream focuses on resolving conflicts. See CONSTANTINO & MERCHANT, *supra* note 2, at 3–67; URY ET AL., *supra* note 34, at 1–84. But see AMSLER ET AL., *supra* note 29 (explaining that dispute processes can also be understood in the context of policy making and, in that context, they will include upstream, midstream, and downstream processes).

470. See Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 370–76 (relying on Bingham, *supra* note 54).

471. See CONSTANTINO & MERCHANT, *supra* note 2, at 227–29. Improving conflict management systems is necessary for effective resolution at all levels, from the local to the international. *Id.* “There are many other opportunities and possibilities to incorporate systemic conflict management into our lives and into our world. If we do—if we choose to become stewards instead of spectators, if we channel the waters of conflict instead of trying to dam them—we will free ourselves to be the instruments of peace.” *Id.* at 229.

472. See generally Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 370–403.

473. See CONSTANTINO & MERCHANT, *supra* note 2, at 29–30, 49–68 (arguing the need for stakeholders’ participation); ROGERS ET AL., *supra* note 52, at 193–218 (seeking justice, safety, reconciliation, change, personal and public understanding, and other goals).

474. See *supra* note 435 and accompanying text.

475. See URY ET AL., *supra* note 34, at 3–19 (arguing the need to move from distress to effective dispute resolution systems).

476. See generally Hernandez Crespo G., *A New Chapter*, *supra* note 26.

477. *Id.* at 580. See generally Hernandez-Crespo et al., *supra* note 28.

478. See Lisa Blomgren Bingham, *Opportunities for Dispute Systems Design in Investment Treaty Disputes: Consensual Dispute Resolution at Varying Levels*, in INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II, *supra* note 141, at 33 (arguing that DSD can be used at different levels ranging from global to community); see also SUSAN D. FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION 11 (2019) (distinguishing between adjudicative and nonadjudicative options and

culture.⁴⁷⁹ It was originally conceptualized as an integral part of the protocols for conflict management mechanisms (CMMs), developed by Roberto Echandi and implemented by the World Bank,⁴⁸⁰ in the field of foreign direct investment (FDI).⁴⁸¹ As an integral part of the problem-solving element of CMMs,⁴⁸² SDSD was initially conceptualized to provide a practical and analytical framework to manage investor-state differences,⁴⁸³ shifting the focus from investor-state disputes in order to strengthen their business relationships.⁴⁸⁴ The goal was not just to prevent conflicts from escalating into full-blown legal disputes but also to prevent divestment by promoting investment retention and expansion.⁴⁸⁵ In this regard,

to achieve this paradigm shift in natural resource-seeking investment, it is time to move from the old chapter that focuses on “sticks” created by [Bilateral Investment Treaties] and arbitration, to a new chapter that adds the missing “carrots” based on the incentives and rewards produced by a strong business relationship. In other words, rather than focusing on the narrow view of investor-State disputes at the international level, it proposes broadening the scope by, paradoxically, “zooming in on the microscope” to hone in on the local level to strengthen the investor, State, and community relationships. Through the use of what I have called Shared

formal and informal options). *See generally* Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007).

479. *See generally* FROM CONFLICT RESOLUTION TO SOCIAL JUSTICE, *supra* note 30; Warfield, *Public Policy Conflict Resolution*, *supra* note 30; Warfield, *The Implications*, *supra* note 30.

480. *See* Roberto Echandi, *supra* note 6, at 270–305 (pioneering a framework for CMMs).

481. *See* Roberto Echandi & Mariana Hernandez Crespo Gonstead, *Investor-State Conflict Management*, in ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW 337–38 (Thomas Cottier & Krista Nadakavukaren Schefer eds., 2017). Protocols of “Systemic Investment Response Mechanisms” (SIRMS) include the following elements: (1) “[s]tocktaking” or diagnosing the types of disputes experienced by a given state; (2) establishing a national lead agency; (3) “information sharing” among agencies; (4) “[e]arly alert mechanisms”; (5) problem solving methods including SDSD, which are used when participatory processes need to be established given the systemic impact of the decision-making process; and (6) “[p]olitical decision-making and enforcement.” *Id.*; *see* Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 574; *see also* WORLD BANK GRP., THE G-20 COMPACT WITH AFRICA 23 (2017), <https://www.compactwithafrica.org/content/dam/Compact%20with%20Africa/2017-03-30-g20-compact-with-africa-report.pdf> [<https://perma.cc/3V5Q-XPJY>] (discussing SIRMS).

482. *See* Echandi & Hernandez Crespo Gonstead, *supra* note 481, at 335–38.

483. *See* Jeswald W. Salacuse, *Is There a Better Way?: Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT’L L.J. 138, 138–43, 146–47, 154–56 (2007); *see also* Roberto Echandi & Priyanka Kher, *Can International Investor-State Disputes Be Prevented?: Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. 41, 63–65 (2014) (“[T]he significant—and growing—number of arbitration disputes settled at early stages of the proceedings reveals the potential for establishing mechanisms to enable States and investors to effectively manage their conflicts and find mutually agreed solutions before such grievances escalated into international arbitration.”). *See generally* UNITED NATIONS CONFERENCE ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010), https://unctad.org/en/docs/diaeia200911_en.pdf [<https://perma.cc/L2UT-GKG8>].

484. *See generally* Hernandez Crespo, *From Paper to People*, *supra* note 141.

485. *See* Roberto Echandi, *Investor-State Conflict Management: A Preliminary Sketch*, TRANSNAT’L DISP. MGMT., <https://www.transnational-dispute-management.com/article.asp?key=2083> [<https://perma.cc/V6VA-JHJG>] (last visited Apr. 12, 2020).

Decisions System Design (“SDSD”)—participatory processes put in place to promote public decision-making of systemic impact—civic society can be engaged, together with the foreign investor and host State, as active participants along the policy continuum: upstream (decision-making), midstream (implementation), and downstream (resolution/enforcement).⁴⁸⁶

Thus, in the FDI context, SDSD aims to empower a country’s lead agency to not only overcome impasses and deescalate conflict with investors but also to enhance daily interactions.⁴⁸⁷ To assist in this process, one must develop capacity to facilitate effective and intercultural participation with government agencies, foreign investors, and community leaders.⁴⁸⁸ Furthermore, SDSD seeks to assess the appropriate level of interaction among agencies by determining possible areas for information sharing, consultation, and shared decision-making.⁴⁸⁹ I have argued that “SDSD could take participatory engagement one step further. SDSD could facilitate an ongoing dialogue and consultation, rather than a one-time interaction.”⁴⁹⁰ SDSD is still in its nascent stage;⁴⁹¹ however, the integration of differences among government agencies, foreign investors, and, in some cases, the local communities cannot be underestimated. When conflict is the focus, we miss extraordinary opportunities for sparking synergies in collaboration.⁴⁹² Instead, focusing on the synergies can lead to higher levels of stability for the country and also greater economic growth.

Even though SDSD originated in the field of FDI to strengthen business relationships,⁴⁹³ it can be used more broadly. As an analytical framework, it provides guidelines for leveraging our differences in our daily interactions, thereby unlocking the potential of the whole. In fact, when I introduced it on a global stage at the 2016 Seoul International Conference on Public Conflict,⁴⁹⁴ during the keynote address, I emphasized its potential not only for FDI but also for densely populated cities like Seoul.

486. Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 556.

487. *See id.*

488. *See id.* at 614; *see also* Hernandez Crespo, *From Paper to People*, *supra* note 141, at 58.

489. SDSD has been part of the capacity building that I have conducted in Myanmar and Vietnam with the World Bank.

490. Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 594–95.

491. *See* Echandi & Hernandez Crespo Gonstead, *supra* note 481, at 337–38 (observing that SDSD is an integral part of conflict management in FDI).

492. *See* COVEY, *supra* note 65, at 274 (“The problem is that highly dependent people are trying to succeed in an interdependent reality.”).

493. Echandi & Hernandez Crespo Gonstead, *supra* note 481, at 335.

494. It was among the keynote presentations at the 2016 Seoul International Conference on Public Conflict, during which global trends focusing on the importance of conflict management were shared. It was sponsored by the South Korean government and attended by top government officials. Speakers included experts from the European Union, Japan, Singapore, and Australia. *See 2016 Seoul International Conference on Public Conflict*, SEOUL METROPOLITAN GOV’T, <http://english.seoul.go.kr/2016-seoul-international-conference-public-conflict> [https://perma.cc/E4FY-3864] (last visited Apr. 12, 2020).

To better understand how SDSD works when making decisions about participation, we can compare it to assembling a puzzle. We first need to have all of the pieces of the puzzle. Then we need to find where they fit. To this end, it is critical to understand how each piece is unique and how it connects with the whole. This analytical framework considers: (1) who should participate; (2) the degree of participation (information, consultation, shared decision-making); (3) procedural options; (4) organizational areas and levels; (5) organizational goals and procedures; and (6) timing for organizational decision-making processes.

i. Participants: Who Should Be at the Table?

The first element of this analytical framework allows us to determine who should be at the table. Using the analogy of a puzzle, which pieces are we trying to integrate? To this end, we will consider three questions: (1) Who will be impacted by the decision and what are their specific needs and preferences?; (2) Who has relevant information?; and (3) Who has relevant experience? Determining the participants is perhaps the most critical step in this framework because if the wrong people are at the table, the rest is futile.⁴⁹⁵ Equally important is ensuring that everyone who meets the criteria is at the table and the group is complete.⁴⁹⁶ Leaving one person out would be like leaving one piece of the puzzle out.⁴⁹⁷ We cannot underestimate the damage of exclusion.

To determine who should be at the table, impact is the principal factor because if a decision is going to have repercussions on someone's life, then they must have a say in the decision-making process.⁴⁹⁸ Failure to include those that are impacted may cause or escalate conflict because the decision affects their autonomy.⁴⁹⁹ The second factor is relevant information.⁵⁰⁰ It is impossible for one person to have all the necessary information required to make an informed decision. Without accurate and complete information, the decision-making process may be flawed.⁵⁰¹ The third and last question is

495. See SUSSKIND & CRUIKSHANK, *supra* note 183, at 41–60. See generally David Laws, *Representation of Stakeholding Interests*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 241.

496. See *supra* note 495.

497. See *supra* note 495.

498. See FISHER & SHAPIRO, *supra* note 26, at 72–93 (discussing how, when making decisions, it is important to avoid impinging on others' autonomy because it can produce strong negative emotions and to evaluate the impact a decision can have on individuals who should participate).

499. See *id.*

500. See Ed O'Brien, *We Use Less Information to Make Decisions Than We Think*, HARV. BUS. REV. (Mar. 7, 2019), <https://hbr.org/2019/03/we-use-less-information-to-make-decisions-than-we-think> [<https://perma.cc/69CG-TSAZ>] (describing tools for selecting the appropriate information for decision-making); see also Ron Carucci, *How Systems Support (or Undermine) Good Decision-Making*, HARV. BUS. REV. (Feb. 4, 2020), <https://hbr.org/2020/02/how-systems-support-or-undermine-good-decision-making> [<https://perma.cc/5KQ5-P6DK>] (discussing linking different groups that have relevant information to make better decisions).

501. See *supra* note 500 and accompanying text.

who has relevant experience and therefore may be useful to have at the table.⁵⁰² Experience allows for the generation of knowledge that can be critical when assessing information.⁵⁰³ If we exclude people with experience, we may reach less than optimal outcomes. Therefore, impact, information, and experience must be considered when deciding who should participate in the decision-making process.

ii. Types of Interaction: What Degree of Participation?

The second element of the SDSD analytical framework is the type of interaction.⁵⁰⁴ Once we have identified the participants at the table, we need to then determine the appropriate degree of participation for each individual. The possibilities include withholding information, informing, consulting, and negotiating.⁵⁰⁵ To make this determination, the critical factor to consider is the participants' values.⁵⁰⁶ On one extreme end of the spectrum is withholding information. This option presupposes that the other person has absolutely no interest in even gaining knowledge about the matter. Next, informing presupposes that the person cares enough about the matter to want

502. See Andrew Likierman, *The Elements of Good Judgment*, HARV. BUS. REV. (Jan.–Feb. 2020), <https://hbr.org/2020/01/the-elements-of-good-judgment> [<https://perma.cc/VK7N-4S9L>] (“Experience gives context and helps us identify potential solutions and anticipate challenges.”).

503. See *id.* (“Leadership shouldn’t be a solitary endeavor. Leaders can draw on the skills and experiences of others as well as their own when they approach a decision.”).

504. See Tiziana Casciaro et al., *Cross-Silo Leadership*, HARV. BUS. REV. (May–June 2019), https://hbr.org/2019/05/cross-silo-leadership?referral=03759&cm_vc=rr_item_page.bottom [<https://perma.cc/7S6K-DVZT>] (“Instead of holding one-way information sessions, leaders should set up cross-silo discussions that help employees see the world through the eyes of customers or colleagues in other parts of the company. The goal is to get everyone to share knowledge and work on synthesizing that diverse input into new solutions.”).

505. In both the private and public sectors, there is an increasing trend towards participation. See FISHER & SHAPIRO, *supra* note 26, at 87–89 (describing three buckets: inform, consult then decide, and negotiate joint agreements); Nabatchi, *supra* note 316, at 702 fig.1 (illustrating the increasing level of shared decision-making authority); see also Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS’N 216, 217 (1969) (describing increasing degrees of citizen participation); *The Participation Scale*, HARV. BUS. REV., <https://hbr.org/visual-library/2014/12/the-participation-scale> [<https://perma.cc/UR55-YQND>] (last visited Apr. 12, 2020) (arguing that “[p]eople have a growing capacity—and desire—to go far beyond a traditional, passive consumption of ideas and goods to shaping, funding, or even co-owning content or products” and illustrating the participation scale that includes consuming, sharing, shaping, funding, producing, and co-owning).

506. See *supra* note 322 and accompanying text; see also JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 28 (2001). The analogy of an iceberg can show how cultural differences manifest in social constructions. See BRETT, *supra*, at 28. The iceberg includes, above the water line, behaviors and institutions and, below the water line, values, beliefs, norms, and fundamental assumptions. *Id.*; Gold, *supra* note 155, at 298–301 (summarizing Edward T. Hall and Geert Hofstede); Jacqueline Nolan-Haley, *Teaching Comparative Perspectives in Mediation: Some Preliminary Reflections*, 81 ST. JOHN’S L. REV. 259, 264–65 (2007) (stressing the impact of dominant cultural values in the development of mediation practices).

to gain knowledge about it.⁵⁰⁷ Third, consulting assumes that the person has enough interest in the matter such that his or her voice should be considered when somebody else is making the decision.⁵⁰⁸ Finally, negotiating assumes that the person cares so much about the matter that they want not only a voice in decision-making but also decision-making power.⁵⁰⁹

In informing and consulting, the decision-making power remains with one party. Therefore, these are unilateral decision-making processes.⁵¹⁰ However, in negotiating, the decision-making power is shared by both participants.⁵¹¹ Ultimately, failure to give the participants the appropriate degree of participation can also lead to conflict and prevent peak performance.⁵¹²

iii. Procedure: Which Options?

The next step in the SDSD framework is selecting the procedure.⁵¹³ Procedure selection only applies when negotiation is necessary.⁵¹⁴ Here, the options include persuasion-based and participation-based processes.⁵¹⁵ Even though it is easier to convince others of our perspective, it is necessary to make a conscious decision when deciding which process to use. As explained in Part II, persuasive processes are sometimes necessary. However, only participatory processes allow for the integration of our unique differences. Similar to assembling a puzzle, both parties need to figure out how their differences fit together, moving from clash to complementarity when possible. Persuasive processes not only exclude what the other parties can contribute to the whole but also decrease the level of engagement and ownership.⁵¹⁶ Therefore, this element should be carefully considered.

507. See FISHER & SHAPIRO, *supra* note 26, at 72–95. See generally Hernandez Crespo G., *A New Chapter*, *supra* note 26 (discussing the role of information in the participatory process for SDSD).

508. See Hernandez Crespo G., *A New Chapter*, *supra* note 26, at 574–75 (arguing that consulting is an intrinsic part of SDSD in the context of FDI).

509. See *id.* at 595–600 (arguing that engaging communities through collaborative public management and participatory budgeting is critical in the context of FDI).

510. See *supra* note 505 and accompanying text.

511. See *supra* note 505 and accompanying text.

512. See *supra* note 505 and accompanying text.

513. See Lawrence Susskind, *An Alternative to “Robert’s Rules of Order” for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 3, 3–13, 20–35, 55–56. When making collective decisions, there are processes based on persuasion, such as the one that follows *Robert’s Rules of Order*, and there are procedures that promote participation, such as consensus building. *Id.*; see also SUSSKIND & CRUIKSHANK, *supra* note 183, at 174.

514. When informing or consulting, the decision-making is unilateral.

515. See *supra* note 513 and accompanying text.

516. See SUSSKIND & CRUIKSHANK, *supra* note 183, at 11–15 (discussing the power of the unhappy minorities who are not satisfied with the outcome and their potential to incite instability).

iv. Groups and Organizations: Which Areas and Levels?

The next element in the SDSD framework is necessary to consider when we are making determinations about who should participate in groups and organizations.⁵¹⁷ This element is used when we face the complexity of scaling up. Here, we need to take into account the first element of the SDSD framework—who will be impacted or have knowledge or experience—and apply it to the organization. To do so, we first ask which areas should be included (i.e., legal, finance, etc.) and at what level (i.e., national, state, local), and then we decide whether all the members of the organization should be included or just representatives.⁵¹⁸

v. Groups and Organizations: What Are the Organizational Goals and Procedures?

Once the areas and levels have been identified, the next step in the SDSD framework is to recognize and reconcile the goals of each unit and the goals of the organization as a whole.⁵¹⁹ This may require one to select a process for each unit before moving across units.⁵²⁰ The element's purpose is to recognize and incorporate the differences within and among the units and then align them with the organization's overarching goals.⁵²¹

vi. Groups and Organizations: What Is the Timing for the Organizational Decision-Making Process?

Finally, once the organization has determined the goals and procedures for shared decision-making within and across units, the last step is defining the

517. *See generally* Carucci, *supra* note 500 (arguing that even though there is a large body of research on decision-making, there is still significant frustration when it comes to decision-making at the organizational level).

518. *See id.* (“There are a couple of major factors to consider when deciding where to allocate decision rights. Initially, you will need to determine what *level* different types decisions [sic] should take place at. At the enterprise level, place decisions that will effect [sic] the company at large and need to be made centrally. At the department or business unit level, place decisions that must be discretely made for functions or geographies. At the local or individual level, place decisions that must be made with the uniqueness of employees and teams in mind.”).

519. *See id.* (noting that there are three types of decisions: “corporate, strategic, and operational”).

520. *See* Casciaro et al., *supra* note 504 (arguing the need for collaboration across boundaries and suggesting that redefining the formal organizational structure is “costly, confusing, and slow”).

521. *See id.* (“In today’s economy everyone knows that finding new ways to combine an organization’s diverse knowledge is a winning strategy for creating lasting value. But it doesn’t happen unless employees have the opportunities and tools to work together productively across silos. To unleash the potential of horizontal collaboration, leaders must equip people to learn and to relate to one another across cultural and logistical divides.”).

timing.⁵²² Timing includes the decisions that need to be made at the different stages of strategy and implementation.⁵²³

Unless all of the elements of the SDSD framework are considered when making decisions, we may risk leaving people out, producing exclusion, increasing the possibility of conflict, and diminishing peak performance.⁵²⁴

2. Developing the “Participatory Muscles”: Utilizing Analytical Frameworks to Reconcile Freedom and the Greater Good at Home, at Work, and in the Public Square

Now that we have covered the need to move from mere conflict resolution to effective participation, as noted earlier, this section argues that the DSD and SDSD analytical frameworks need to be used on a daily basis. If we practice the participatory approach and operationalize it through these analytical frameworks, we will be better equipped to develop the necessary capacity to unleash the potential of the groups to which we belong at home, at work, and in communities. This practice develops “participatory muscles” and will allow us to not only contribute our unique gifts but also integrate them with the gifts of others, thereby potentially increasing collective innovation and growth.⁵²⁵

To effectively participate in public decision-making, we need to start developing the participatory capacity on a daily basis at home, at work, and in our communities. Participating in the public square is complex because the interaction is among groups that do not necessarily share the same values.⁵²⁶ In addition, the decision-making power in the public square is commonly given to representatives of each group who need to take into account the interests of the members they represent. If citizens are going to share decision-making power with local governments involving decisions that directly affect their lives,⁵²⁷ then they will need to start training for it.

522. *See id.* (discussing that a common error is to believe that “the collaboration process will take care of itself” and instead arguing the need for periodical inquiry regarding the process of collaboration).

523. *See* Davenport, *supra* note 454 (“Having narrowed down your list of decisions and examined what’s involved in making each, you can design the roles, processes, systems, and behaviors your organization should be using to make them. The key to effective decision interventions is a broad, inclusive approach that considers all methods of improvement and addresses all aspects of the decision process—including execution of the decision, which is often overlooked.”).

524. Jim Whitehurst, *Decisions Are More Effective When More People Are Involved from the Start*, HARV. BUS. REV. (Mar. 15, 2016), <https://hbr.org/2016/03/decisions-are-more-effective-when-more-people-are-involved-from-the-start> [<https://perma.cc/BZH3-LCMX>] (“And the more you practice, the more you’ll find your organization getting into a rhythm where, over time, slower decisions will truly lead to faster results.”).

525. *See supra* note 32 and accompanying text.

526. *See generally* Hernandez Crespo Gonstead, *supra* note 46 (explaining that these differences are even more pronounced in the context of foreign investors interacting with local governments and communities); Warfield, *Public Policy Conflict Resolution*, *supra* note 30, at 176–93.

527. *See* ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 5 (2003) (noting that the

Similar to those training for a marathon who have to run regularly, citizens have to develop their “participatory muscles” or they will not have the necessary capacity to effectively participate in public decision-making.⁵²⁸

IV. REIGNITING LATIN AMERICA: VENEZUELA, AN EXAMPLE OF HOW CONFLICT CAN BURN WHAT EXISTS OR RECREATE A NEW REALITY

This Part uses a current example to demonstrate the necessity of the frameworks introduced in Parts II and III. The failure to utilize the Comprehensive Framework for Conflict Resolution, as explained in Part II, and DSD and SDS, as explained in Part III, to address conflict and its consequences may potentially lead to complete ruin. But if these frameworks are used, they can provide guidelines for rebuilding or reigniting the entire region of Latin America.

Using Venezuela as the case in point, this Part first argues that conflict illiteracy caused Venezuelans to flee the country and the international community to get involved, which led to multiple failed attempts to address the crisis. To move forward, this Part proposes that the situation must be assessed by first bringing all stakeholders’ representatives to the table. Then, using the Comprehensive Framework for Conflict Resolution, the stakeholders’ representatives, guided by experts, can assess and select the appropriate process or, if necessary, design a process to address the conflict.

Finally, this Part argues that once a sustainable solution is reached, citizens will need to develop the participatory capacity daily, at home and at work, to effectively participate in the public square. In addition, new avenues for effective conflict management and participation need to be built. Currently, the main methods of participation for Venezuelans consist of voting, demonstrating, or striking. This Part suggests that collaborative governance, guided by the principles of DSD and SDS, can be used to supplement representative democracies by engaging citizens and governments in the decision-making process about the matters that affect their lives. This is one way for Latin America to find the stability it desires.

A. Millions Walking Away from Venezuela’s Fires: The Consequences of Conflict Illiteracy for Latin America

Venezuelans have shouted, and continue to shout, a loud and clear message to the world; they are longing for the opportunity to take the pen and write the stories of their own lives. Their massive departure from their

empowerment participatory governance reforms “are participatory because they rely upon the commitment and capacities of ordinary people to make sensible decisions through reasoned deliberation and empowered because they attempt to tie action to discussion”). One example of empowerment participatory governance is the participatory budget of Porto Alegre in Brazil. *Id.* (“Brazil enables residents of that city to participate directly in forging the city budget and thus use public monies previously diverted to patronage payoffs to secure common goods such as street paving and water services.”).

528. See GASTIL, *supra* note 32, at 32–170 (arguing that democracy should be practiced in daily life, both in the private and public spheres).

homeland,⁵²⁹ under the most extreme circumstances, demonstrates that they no longer believe there is a way forward as part of that society.⁵³⁰

They have all departed, leaving everything behind—family, friends, and their possessions. The most affluent left first by plane, the middle class left next by bus, and now the poorest of the poor are leaving by foot.⁵³¹ Many are enduring the extreme cold of the high mountains in the region,⁵³² walking across countries, with only the hope of a better life.⁵³³ To date, more than 4.5 million Venezuelans have decided to leave⁵³⁴—some have gone all the way to Chile, while others have gone to Peru, Colombia, or other nearby countries.⁵³⁵ The consequences of conflict illiteracy for Latin America are palpable. This is a desperate cry for opportunities and the possibility to develop their individual potentials. It is hard to imagine something worse for a country than losing its human capital.

It is shocking that this is happening in Venezuela,⁵³⁶ a country with the largest oil reserves in the world⁵³⁷ and which used to be a rich country with the most stable democracy in the region.⁵³⁸ Some blame economic policies.⁵³⁹ Currently, it is difficult to access basic food, medication, and even electricity.⁵⁴⁰ Others blame the political system.⁵⁴¹ It is undeniable that

529. See *Refugees and Migrants from Venezuela Top 4 Million: UNHCR and IOM*, UNHCR (June 7, 2019), <https://www.unhcr.org/en-us/news/press/2019/6/5cfa2a4a4/refugees-migrants-venezuela-top-4-million-unhcr-iom.html> [<https://perma.cc/B2XH-88JV>].

530. See Castillo, *supra* note 49.

531. See, e.g., *id.*

532. See, e.g., *id.* (describing some Venezuelans' journeys by foot).

533. See Oscar Medina, *Escaping Venezuela: They Travel—on Foot—as much as 5,000 Miles to Flee the Misery Wrought by Nicolas Maduro's Regime*, BLOOMBERG (Mar. 29, 2019, 6:00 AM), <https://www.bloomberg.com/news/features/2019-03-29/venezuelans-are-walking-thousands-of-miles-to-flee-maduro-s-regim> [<https://perma.cc/3Y7T-MESJ>].

534. *Venezuela Situation*, *supra* note 13.

535. *Response for Venezuelans*, *supra* note 110.

536. See *Another Lacklustre Year of Economic Growth Lies Ahead*, ECONOMIST (Jan. 1, 2020), <https://www.economist.com/graphic-detail/2020/01/01/another-lacklustre-year-of-economic-growth-lies-ahead> [<https://perma.cc/A95B-BUA7>] (demonstrating that Venezuela is ranked number one in the list of worst-performing economies, expecting a 20.5 percent decline in economic growth).

537. Jessica Dillinger, *The World's Largest Oil Reserves by Country*, WORLDTLAS (Jan. 8, 2019), <https://www.worldatlas.com/articles/the-world-s-largest-oil-reserves-by-country.html> [<https://perma.cc/83VM-X8D7>] (showing that there are 300,878 million barrels of proven oil reserves in Venezuela).

538. See generally, e.g., Ana Julia Jatar, *Deciphering Venezuela: A Historical and Contemporary Perspective*, REVISTA, Fall 2002, at 54.

539. See, e.g., Kenneth Rapoza, *Socialist Venezuela Falling Apart as President Maduro Shockingly Blames Party*, FORBES (Aug. 1, 2018), <https://www.forbes.com/sites/kenrapoza/2018/08/01/socialist-venezuela-falling-apart-president-maduro-shockingly-blames-party> [<https://perma.cc/MC32-W54H>].

540. See Castillo, *supra* note 49.

541. See José Ignacio Hernández G., *Venezuela's Presidential Crisis and the Transition to Democracy*, CSIS (Jan. 25, 2019), <https://www.csis.org/analysis/venezuelas-presidential-crisis-and-transition-democracy> [<https://perma.cc/PD4D-HWMC>]. For a chart demonstrating the state of democracy in each country in Latin America in 2019, see Sonneland, *supra* note 137.

those who dissent suffer the consequences.⁵⁴² Even at the Caracas airport, the customs X-ray machines had a large label that read, “Here you do not speak bad about Chávez.”⁵⁴³ Some blame both economic policies and the political system.⁵⁴⁴ However, the question that is left unaddressed is, why did Venezuela end up with these economic policies and this political system? Those that focus on merely fighting what has been called “21st century socialism”⁵⁴⁵ and those that focus on merely fighting a totalitarian regime⁵⁴⁶ fail to analyze the root cause of the conflict.⁵⁴⁷

This conflict illiteracy of mainly blaming economic or political systems, as well as economic or political actors such as Nicolás Maduro, Hugo

542. *Venezuela: Human Rights Violations Indicate ‘Policy to Repress’—UN Report*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Aug. 30, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22007&LangID=E> [<https://perma.cc/6H7Q-NUM9>]; see also *Crackdown on Dissent: Brutality, Torture, and Political Persecution in Venezuela*, HUM. RTS. WATCH (Nov. 29, 2017), <https://www.hrw.org/report/2017/11/29/crackdown-dissent/brutality-torture-and-political-persecution-venezuela> [<https://perma.cc/VX2P-NSWM>]. This might require additional processes outside the scope of this paper. See, e.g., DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND APARTHEID LEGAL ORDER* 1–6, 25–35, 178–83 (2003); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007); see also Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 3.

543. Orlando Avendaño, “*Aquí no se habla mal de Chávez*”: *El cartel que ordenan coocar en Ministerios de Venezuela*, PANAMPOST (Jan. 26, 2017), <https://es.panampost.com/orlando-avendano/2017/01/26/aqui-no-se-habla-mal-de-chavez-el-cartel-que-ordenan-colocar-en-ministerios-de-venezuela> [<https://perma.cc/9SF9-K7P6>] (explaining that the former president of the National Assembly stated that the government workers should report those that do not place the sign in government buildings); see also *Venezuela: “Aquí no se habla mal de Chávez,”* LA PRENSA (Jan. 26, 2017), <https://www.laprensa.com.ni/2017/01/26/internacionales/2172386-venezuela-aqui-no-se-habla-mal-de-chavez> [<https://perma.cc/CU3U-X9AC>].

544. See Max Fisher, *A Short, Simple Primer on What’s Happening in Venezuela*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/world/americas/noticias-venezuela-protests-maduro-guaido.html> [<https://perma.cc/FGD5-6EAP>] (“The short version: Venezuela’s government has overseen the destruction of its democracy and its economy. Public outrage is coming to a head.”).

545. Jorge G. Castañeda, Opinion, *The Bankruptcy of 21st Century Socialism*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/2018/06/02/opinion/cuba-venezuela-socialism.html> [<https://perma.cc/26H8-9UQC>]. For more information on twenty-first century socialism, see Pedro Campos, Opinion, *Maduro’s Betrayal of Chavez and Socialism of the 21st Century*, HAVANA TIMES (May 8, 2017), <https://havanatimes.org/opinion/maduros-betrayal-of-chavez-and-socialism-of-the-21st-century> [<https://perma.cc/52DM-55PR>]. See generally Álvaro Andrés Hamburger Fernández, *El socialismo del siglo XXI en América Latina: Características, desarrollos y desafíos*, REVISTA DE RELACIONES INTERNACIONALES ESTRATEGIA Y SEGURIDAD, Jan.–June 2014, at 131; Margarita López Maya, *Populism, 21st-Century Socialism and Corruption in Venezuela*, 149 THESIS ELEVEN 67 (2018).

546. See Enrique Krauze, Opinion, *Stop Totalitarianism in Venezuela*, N.Y. TIMES (June 28, 2017), <https://www.nytimes.com/2017/06/28/opinion/venezuela-maduro.html> [<https://perma.cc/2QLN-MJHX>].

547. See, e.g., Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 8.

Chávez,⁵⁴⁸ or the elites⁵⁴⁹ and foreign powers,⁵⁵⁰ has already caused enough damage. The time has come for us to look at the issues from the stakeholders' perspectives to get a complete picture. Put simply, the exclusion of the disenfranchised majorities can no longer be ignored.⁵⁵¹

No one could have predicted that Venezuela's situation would reach this point. Yet, this crisis is not unique to Venezuela. In fact, a number of countries in Latin America have begun shouting that the situation is unbearable for them as well.⁵⁵² As discussed earlier, Chile, which was considered one of the most stable countries, has become a prominent example of how high levels of volatility cannot be underestimated.⁵⁵³

Nonetheless, Venezuelans cannot be blamed for not trying. For the past twenty years, Venezuelans have been trying everything possible before fleeing their country. They banged on their pots and pans, they marched very long distances, they went on strikes, and some even resorted to violence.⁵⁵⁴ Yet not much has changed. The only result was students and political leaders being killed, imprisoned, or exiled.⁵⁵⁵ Unable to achieve results, Venezuelans next tried to call the world's attention to their message: Venezuela SOS.⁵⁵⁶ However, the world's response to date has not produced significant change, and the Venezuelans that remain at home do not have much hope left.⁵⁵⁷

548. See, e.g., Daniel Garza, *Why All the Blame for Venezuela's Woes Falls on Chavez and Maduro*, DAILY SIGNAL (Apr. 5, 2019), <https://www.dailysignal.com/2019/04/05/why-all-the-blame-for-venezuelas-woes-falls-on-chavez-and-maduro> [<https://perma.cc/9NBN-DZZ9>].

549. See Moisés Naím, *Nicolas Maduro Doesn't Really Control Venezuela*, ATLANTIC (May 25, 2017), <https://www.theatlantic.com/international/archive/2017/05/maduro-venezuela/528003> [<https://perma.cc/QKV5-VKH8>].

550. See Kenneth Rapoza, *Maduro Blames Trump for Venezuela's Great Depression*, FORBES (Feb. 15, 2019), <https://www.forbes.com/sites/kenrapoza/2019/02/15/maduro-blames-trump-for-venezuelas-great-depression> [<https://perma.cc/PT7C-5495>].

551. See JOHN BURTON, CONFLICT: RESOLUTION AND PREVENTION 276 (1990) (arguing that conflict resolution requires critical thinking and cannot be confined to "the preservation of existing institutions" and "treatment of symptoms").

552. See, e.g., Arnson et al., *supra* note 100.

553. See *id.*

554. *Id.*

555. *Id.* ("Hundreds of protesters were killed."); see also Andreina Aponte & Leon Wietfeld, *Factbox: Venezuela's Jailed, Exiled or Barred Opposition Politicians*, REUTERS (Feb. 19, 2018), <https://www.reuters.com/article/us-venezuela-politics-factbox/factbox-venezuelas-jailed-exiled-or-barred-opposition-politicians-idUSKCN1G31WU> [<https://perma.cc/R6VE-89JE>] ("Venezuela's most popular opposition leaders are almost all sidelined from the country's April 22 presidential election—jailed, in exile, or disqualified from holding office.").

556. SOS Venezuela (@sosVenezuela2014), FACEBOOK, <https://www.facebook.com/sosVenezuela2014> [<https://perma.cc/T7HQ-7GKE>] (last visited Apr. 12, 2020). See generally LAUREANO MÁRQUEZ, SOS VENEZUELA: A BRIEF STORY OF A WRECKED COUNTRY (Joshua Farley trans., 2018) (Venezuela SOS became a slogan for Venezuelans at home and abroad).

557. See, e.g., Angus Berwick & Mircely Guanipa, *Disappointed Venezuelans Lose Patience with Guaido as Maduro Hangs On*, REUTERS (July 1, 2019), <https://www.reuters.com/article/us-venezuela-politics-analysis/disappointed-venezuelans-lose-patience-with-guaido-as-maduro-hangs-on-idUSKCN1TW3ME> [<https://perma.cc/Y5FZ-NL7S>]. But see, e.g., Arelis R. Hernández & Mariana Zuñiga, *Short of Electricity, Food and Water, Venezuelans Return to Religion*, WASH. POST (Apr. 13, 2019), <https://www.washingtonpost.com/news/energy-environment/wp/2019/04/13/short-of-electricity-food-and-water-venezuelans-return-to-religion/>.

More recently, since the beginning of 2020, the Maduro government has engaged in “drastic economic liberalization”⁵⁵⁸ that has helped alleviate food shortages.⁵⁵⁹ It has also stimulated investment in the economy.⁵⁶⁰ This has exacerbated the divide between social classes.⁵⁶¹ Those that have savings in American dollars or have family members that can send dollar remittances can resume their lives with some level of normalcy.⁵⁶² Those that have no access to American dollars have become even more dependent on the government’s programs.⁵⁶³ There are two pernicious effects: it placates the discontent of the middle and upper classes and it perpetuates already existing barriers for those in poverty.⁵⁶⁴

B. The World’s Response to the Fire: Lack of an Accurate and Complete Diagnosis and Competing Treatments for Venezuela

The important question to ask here is, why has the world’s response⁵⁶⁵ to the Venezuelan crisis⁵⁶⁶ not produced substantial change? The answer requires, first, identifying the different procedures advocated for by the involved countries and, second, examining the procedures using the Comprehensive Framework for Conflict Resolution introduced in Part II of this Article.

With regard to the responses, there are two groups advocating for competing treatments for this conflict.⁵⁶⁷ The first group has sided with the

www.washingtonpost.com/world/the_americas/short-of-electricity-food-and-water-venezuelans-return-to-religion/2019/04/12/aa32c36a-594c-11e9-98d4-844088d135f2_story.html [<https://perma.cc/5UVX-V3QR>] (arguing that Venezuelans have turned to faith to cope with their dire circumstances).

558. See Anatoly Kurmanaev & Isayen Herrera, *Venezuela’s Capital Is Booming. Is This the End of the Revolution?*, N.Y. TIMES (Feb. 1, 2020), <https://www.nytimes.com/2020/02/01/world/americas/Venezuela-economy-dollars.html> [<https://perma.cc/KR4G-ZKMC>].

559. *Id.* (“The transformation also brought some relief to the millions of Venezuelans who have family abroad and can now receive, and spend, their dollar remittances on imported food.”).

560. *Id.* (“And while the country’s economy continues to contract overall, the declining regulations have encouraged companies serving the wealthy or the export market to invest again.”).

561. *Id.* (“The new free market economy completely excludes the half of Venezuelans without access to dollars.”).

562. *See id.*

563. *Id.* (“But about half of all Venezuelans have no access to dollars. Most of them live in the provinces, where they barely survive on government handouts of devalued local currency and subsidized food . . .”).

564. See Anatoly Kurmanaev, *Rural Venezuela Crumbles as the President Shores Up the Capital and His Power*, N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/world/americas/Venezuela-collapse-Maduro.html> [<https://perma.cc/P9AF-BD6P>].

565. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* 431 (Peter B. Evans et al. eds., 1993) (discussing the entanglement between domestic and international politics).

566. *Venezuela Crisis in 300 Words*, BBC NEWS (Jan. 6, 2020), <https://www.bbc.com/news/world-latin-america-48121148> [<https://perma.cc/AW7T-7QP7>].

567. See *Maduro and Guaidó: Who Is Supporting Whom in Venezuela?*, BBC NEWS (Feb. 5, 2019), <https://www.bbc.com/news/world-latin-america-47053701> [<https://perma.cc/>]

Maduro government.⁵⁶⁸ This camp includes Cuba,⁵⁶⁹ Russia,⁵⁷⁰ China,⁵⁷¹ and a few other countries,⁵⁷² and some of them have been advocating for mediation, dialogue, or negotiation.⁵⁷³ The Vatican and, more recently, Norway have advocated for and led the mediation efforts.⁵⁷⁴ The second camp has sided with the Guaidó government, or the opposition,⁵⁷⁵ and has been advocating for “cessation of usurpation, transitional government and

WWV8-JP75]; see also Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 119 (2000) (“In a heterogeneous society, this form of self-insulation can create serious deliberative trouble, in the form of mutual incomprehension or much worse.”).

568. See *Maduro and Guaidó*, *supra* note 567.

569. See, e.g., Angus Berwick, *Special Report: How Cuba Taught Venezuela to Quash Military Dissent*, REUTERS (Aug. 22, 2019), <https://www.reuters.com/article/us-venezuela-cuba-military-specialreport/special-report-how-cuba-taught-venezuela-to-quash-military-dissent-idUSKCN1VC1BX> [<https://perma.cc/7FQV-GU7G>].

570. See, e.g., Solrun F. Faull, *Russia Will Assist Norway with Venezuela Mediation*, NOR. TODAY (May 28, 2019), <https://norwaytoday.info/news/russia-will-assist-norway-with-venezuela-mediation> [<https://perma.cc/N8P4-UK5G>]; see also Anatoly Kurmanev, *Why Is Russia Helping Venezuela?*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/world/americas/russia-venezuela-maduro-putin.html> [<https://perma.cc/QSX3-DU7M>] (“These interests range from Venezuelan oil projects and military contracts held by Russian state firms to the geopolitical value of having an anti-American ally in the Western Hemisphere.”).

571. See, e.g., *China Welcomes Norway’s Mediation on Venezuela Issue*, XINHUANET (May 17, 2019), http://www.xinhuanet.com/english/2019-05/17/c_138067139.htm [<https://perma.cc/5N9Y-SQ4U>]; see also Milton Ezati, *How Will China Take Its Venezuela Lesson?*, FORBES (May 8, 2019), <https://www.forbes.com/sites/miltonezrati/2019/05/08/how-will-china-take-its-venezuela-lesson> [<https://perma.cc/MG2V-N4CW>] (“When China began its effort on this side of the world, Venezuela must have seemed an ideal point of entry. It has enormous oil reserves, something China always needs, and its left-leaning, anti-U.S. government, first under Hugo Chavez and then under his successor, Nicolas Maduro, had a natural sympathy with China’s communist system and the challenge China presented to Washington’s power.”).

572. See, e.g., *‘We Are with You’: CELAC Backs Venezuela Against Imperialism*, TELESUR (May 2, 2017), <https://www.telesurenglish.net/news/We-Are-With-You-CELAC-Backs-Venezuela-Against-Imperialism-20170502-0013.html> [<https://perma.cc/369N-F6M8>]; see also *Cuba Shows Support for Venezuela in 18th ALBA Political Council*, TELESUR (May 21, 2019), <https://www.telesurenglish.net/news/Cuba-Shows-Support-for-Venezuela-in-18th-ALBA-Political-Council-20190521-0013.html> [<https://perma.cc/NXC4-VRSE>]; *Países afectados por medidas coercitivas unilaterales solicitan acciones urgentes de Bachelet para su eliminación*, VENEZOLANA DE TELEVISIÓN (Apr. 21, 2020), <https://www.vtv.gob.ve/paises-solicitan-acciones-bachelet-medidas-coercitivas> [<https://perma.cc/324W-ML6N>] (demonstrating that Cambodia, Iran, Nicaragua, North Korea, Syria, and Zimbabwe signed a letter and sent it to the United Nations High Commissioner for Human Rights Michell Bachelet asking for a stop to U.S. sanctions against Venezuela).

573. See, e.g., *The Latest: China Says Dialogue Only Way to Venezuela Peace*, AP NEWS (Feb. 8, 2019), <https://apnews.com/3913319813ef4e6b9804179c2ecec3653> [<https://perma.cc/H7CJ-3JVK>].

574. See generally Emma Altheide, *Vatican Mediation and the Venezuelan Crisis*, 2018 J. DISP. RESOL. 249; *Mediation in Norway Aims to Resolve Venezuela Crisis*, NBC NEWS (May 16, 2019), <https://www.nbcnews.com/news/latino/mediation-norway-aims-resolve-venezuela-crisis-n1006631> [<https://perma.cc/7AF4-BLV6>].

575. See *Maduro and Guaidó*, *supra* note 567.

free elections.”⁵⁷⁶ This camp includes the United States,⁵⁷⁷ Canada,⁵⁷⁸ the European Union,⁵⁷⁹ most Latin American countries,⁵⁸⁰ and more than fifty other democratic countries⁵⁸¹ worldwide.

576. *Guaidó: Cessation of Usurpation, Transitional Government and Free Elections Is Not a Slogan, but a Constructed Route Ratified by Parliament*, REPÚBLICA BOLIVARIANA DE VENEZ. ASAMBLEA NACIONAL (Oct. 2, 2019), <https://presidenciave.com/en/presidency/guaido-cessation-of-usurpation-transitional-government-and-free-elections-is-not-a-slogan-but-a-constructed-route-ratified-by-parliament> [<https://perma.cc/525R-BWRZ>] (“Cessation of usurpation, transitional government and free elections, is not a slogan, but a route built and ratified by Parliament. It is a route that we have worked, that all Venezuelans have built, the President in charge, the National Assembly, all sectors of the country, with the support of the world.”).

577. *See U.S. Government Support for the Democratic Aspirations of the Venezuelan People*, U.S. DEP’T ST., <https://www.state.gov/u-s-government-support-for-the-democratic-aspirations-of-the-venezuelan-people> [<https://perma.cc/K57L-9VLB>] (last visited Apr. 12, 2020); *see also U.S. Relations with Venezuela: Bilateral Relations Fact Sheet*, U.S. DEP’T ST. (July 8, 2019), <https://www.state.gov/u-s-relations-with-venezuela> [<https://perma.cc/78WA-P8R>]; *Venezuela Crisis: US Bans Top Officials from Entering Country*, BBC NEWS (Sept. 26, 2019), <https://www.bbc.com/news/world-latin-america-49837350> [<https://perma.cc/HA4B-WV5Y>].

578. *See, e.g., Evan Dyer, Canada Considers New International Push to Oust Venezuela’s Nicolas Maduro*, CBC (Jan. 13, 2020), <https://www.cbc.ca/news/politics/canada-venezuela-maduro-1.5418058> [<https://perma.cc/7Q3V-2Y5F>].

579. *See Venezuela: The Council’s Response to the Crisis*, EUR. COUNCIL (Apr. 3, 2020), <https://www.consilium.europa.eu/en/policies/venezuela> [<https://perma.cc/7DTN-KXUT>]; *see also European Union Supports Venezuelan Refugees and Host Communities in Countries Most Affected by the Crisis*, EUR. COMMISSION (Sept. 12, 2019), https://ec.europa.eu/fpi/news/european-union-supports-venezuelan-refugees-and-host-communities-countries-most-affected-crisis_en [<https://perma.cc/CD2H-D2LC>]; *Venezuela: European Parliament Calls for Additional Sanctions*, EUR. PARLIAMENT (July 18, 2019), <https://www.europarl.europa.eu/news/en/press-room/20190712IPR56948/venezuela-european-parliament-calls-for-additional-sanctions> [<https://perma.cc/HV9C-UWZ2>].

580. Some Latin American countries, Canada, and the United States belong to the Lima Group. *See Canada to Host Lima Group Meeting on Venezuelan Crisis Next Week*, STAR (Feb. 12, 2020), <https://www.thestar.com/news/canada/2020/02/12/canada-to-host-lima-group-meeting-on-venezuela-crisis-next-week.html> [<https://perma.cc/UNC6-Q9Y5>]; *see also OAS Member States Issue Joint Statement on Venezuela*, U.S. MISSION ORG. AM. STATES (Jan. 24, 2019), <https://usoas.usmission.gov/oas-member-states-issue-joint-statement-on-venezuela> [<https://perma.cc/9R68-ABNU>] (reporting that the delegations of Argentina, the Bahamas, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Panama, Paraguay, Peru, and the United States stated, “We reaffirm the illegitimacy of the presidential elections of May 20, 2018 because they lacked the necessary guarantees to be a free, fair, transparent, legitimate and credible process, failing to meet the minimally accepted international standards”).

581. *More Than 50 Countries Support Venezuela’s Juan Guaidó*, SHAREAMERICA (Nov. 15, 2019), <https://share.america.gov/support-for-venezuelas-juan-guaido-grows-infographic> [<https://perma.cc/CB3T-QCBE>].

With regard to the first treatment, mediation,⁵⁸² there have been several efforts to date. The Vatican led the first effort⁵⁸³ and Norway led the latest one.⁵⁸⁴ However, neither of them have been successful.⁵⁸⁵

With regard to the second treatment, “cessation of usurpation, transitional government and free elections,”⁵⁸⁶ the efforts have focused on the first step, cease the usurpation. To this end, economic sanctions⁵⁸⁷ and a call to the military to support the opposition have been used.⁵⁸⁸ Yet these efforts too have been unsuccessful.

To understand why the efforts from both camps have not been effective, it is important to note that both camps do not seem to have paid much attention to the robust body of knowledge produced by experts in the dispute resolution field.⁵⁸⁹ To analyze what has happened and move forward, I suggest using an analytical tool, such as the Comprehensive Framework for Conflict Resolution. As mentioned previously, the framework requires us to first

582. See COLUMBIA SCH. OF INT’L & PUB. AFFAIRS, *MEDIATION IN VENEZUELA: ASSESSING OPTIONS FOR ADVANCING A POLITICAL SOLUTION* (2018), <https://sipa.columbia.edu/academics/capstone-projects/mediation-venezuela-assessing-options-advancing-political-solution> [<https://perma.cc/S6LZ-KC87>] (suggesting mediation as one of the mechanisms for resolution and proposing specific recommendations).

583. See generally Altheide, *supra* note 574 (noting that when the first mediation effort took place, these were the Vatican’s reasons.).

584. See *Mediation in Norway Aims to Resolve Venezuela Crisis*, *supra* note 574.

585. See, e.g., *Venezuela’s Opposition Says Norway-Mediated Dialogue with Maduro “Is Finished,”* REUTERS (Jan. 15, 2019), <https://www.reuters.com/article/us-venezuela-politics/venezuelas-opposition-says-norway-mediated-dialogue-with-maduro-is-finished-idUSKBN1W100J> [<https://perma.cc/HGZ3-AZ56>]; see also Christopher Sabatini, *Mediation in Venezuela Is Doomed to Fail*, FOREIGN AFF. (July 7, 2017), <https://www.foreignaffairs.com/articles/venezuela/2017-07-07/mediation-venezuela-doomed-fail> [<https://perma.cc/A88Q-J97Q>]; *The Latest: Norway Mediation Effort in Venezuela Stalls*, BUS. INSIDER (June 7, 2019, 10:29 AM), <https://www.businessinsider.com/the-latest-norway-mediation-effort-in-venezuela-stalls-2019-6> [<https://perma.cc/6YEA-8XX6>] (“[O]pposition leader Juan Guaidó will announce the decision not to attend future meetings sponsored by Norway at a rally Friday in the central city of Valencia.”).

586. The second treatment uses economic sanctions and military support.

587. See Tom O’Connor, *China and Russia Say U.S. Has Failed in Venezuela, Now It’s Time to Give Up*, NEWSWEEK (Aug. 7, 2019), <https://www.newsweek.com/china-russia-say-us-failed-venezuela-1453165> [<https://perma.cc/3HQ3-XJ4Y>] (describing the discontent of China and Russia with the U.S. economic sanctions).

588. See Vivian Sequera et al., *Venezuela’s Guaido Calls for Uprising but Military Loyal to Maduro for Now*, REUTERS (Apr. 30, 2019, 6:37 AM), <https://www.reuters.com/article/us-venezuela-politics/venezuelas-guaido-calls-for-uprising-but-military-remains-loyal-to-maduro-for-now-idUSKCN1S60ZQ> [<https://perma.cc/D8SL-VGRF>] (arguing that Maduro still has the military with him).

589. See generally Dana Lansky, *Proceeding to a Constitution: A Multi-party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARV. NEGOT. L. REV. 279 (2000) (discussing how the framers of the United States Constitution addressed the issues of multiparty negotiation); James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 324 (Richard J. Zeckhauser et al. eds., 1996) (discussing the need for “strategic sequencing” when building coalitions in multiparty negotiations); Lawrence Susskind et al., *What We Have Learned About Teaching Multiparty Negotiation*, 21 NEGOT. J. 395 (2005) (describing the complexity and challenges of multiparty negotiation); Leigh L. Thompson, *Multiparty Negotiations*, in THE MIND AND HEART OF THE NEGOTIATOR 221 (4th ed. 2009) (explaining multiparty and coalition building).

consider all the factors (sources of conflict; who the parties are, the third parties affected, and the parties' interaction with the broader system; and the clients' mindsets and how they have affected the history of their relationship) for an accurate and complete conflict assessment and then consider the elements for selection of the appropriate process for resolution (desired level of party control over process and outcome, satisfaction of parties' objectives, and cultural implications of uniformity or unity).

In this case, those advocating for mediation have concluded that this process was needed mainly because the parties should be able to resolve the conflict in a peaceful way.⁵⁹⁰ It is not surprising that the process chosen, namely mediation, has not only failed to deliver the desired outcome but also has arguably been used as a tool to asphyxiate the country.⁵⁹¹ It is well established in the dispute resolution field that mediation is a problematic choice when there is a power imbalance.⁵⁹² In this case, the regime has both financial resources from oil and political and military power.⁵⁹³ It is hard to imagine how citizens and students can sit at the table with a regime that has plenty of money, bullets, and tanks and somehow reach a fair agreement.

Furthermore, the mediation efforts have taken place in the midst of a humanitarian crisis that continues to worsen. This situation gives a strategic advantage to the regime.⁵⁹⁴ While time is of the essence for those suffering

590. See, e.g., Moisés Naím, *Political Dialogue in Venezuela: Naïve or Inevitable?*, EL PAÍS (May 23, 2019), https://english.elpais.com/elpais/2019/05/23/inenglish/1558605347_061582.html [<https://perma.cc/95HY-PC4H>] (“The Chinese government has also insisted that ‘Venezuela’s affairs should be resolved . . . through peaceful dialogue and political means.’” (quoting a Chinese government official)); see also Tom Balmforth, *Russia Calls on Venezuela’s Opposition to Start Talks with Maduro*, REUTERS (Jan. 30, 2019, 5:37 AM), <https://www.reuters.com/article/us-venezuela-politics-russia-mediation/russia-calls-on-venezuelas-opposition-to-start-talks-with-maduro-idUSKCN1PO16K> [<https://perma.cc/3DFL-CUAQ>].

591. See Naím, *supra* note 590 (“The result? ‘Dialogue’ ends up strengthening the government and weakening the opposition.”).

592. See Shapira, *supra* note 265, at 282–87 (2012); see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1585–86 (1991). See generally Fiss, *supra* note 244; Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009).

593. See Nan Tian & Diego Lopes da Silva, *The Crucial Role of the Military in the Venezuelan Crisis*, SIPRI (Apr. 2, 2019), <https://www.sipri.org/commentary/topical-background/2019/crucial-role-military-venezuelan-crisis> [<https://perma.cc/JSV9-JK3S>] (discussing the military power); see also Cristina Guevara, *China’s Support for the Maduro Regime: Enduring or Fleeting*, ATLANTIC COUNCIL (Jan. 13, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/chinas-support-for-the-maduro-regime-enduring-or-fleeting> [<https://perma.cc/BLU5-G575>] (“A powerful ally, China has continued to provide the Nicolas Maduro regime with economic and political support.”).

594. Mediation is supposed to be a voluntary process. However, it is questionable whether we can talk about the notion of self-determination in the midst of a humanitarian crisis. See Nolan-Haley, *supra* note 254, at 68–70 (discussing how mediation requires self-determination and participation from the parties, especially voluntary participation). In addition, the deteriorating circumstances exacerbate the imbalance of power and this affects the mediation process. See Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls’ Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391, 413–14 (2016) (“Thus, while code authors are concerned that mediators not dominate or usurp party discussions, they

precarious conditions, similar to an oxygen tank running out, the regime can prolong the process without any consequences.⁵⁹⁵ In fact, the mediation process can be used as a strategy to consolidate the power of the stronger party.⁵⁹⁶ Using it as a delay tactic can exhaust the weaker party's resources. When the people revolt in Venezuela because the conditions worsen, a new mediation and/or dialogue effort begins.⁵⁹⁷ It is hard to believe that mediation has been used for anything other than placation of a country that is desperate for a better life.

Even if it could be argued that mediation, due to its participatory nature, is the best option for Venezuela, it is vital to recognize that in mediation the parties negotiate under what has been termed the shadow of the law.⁵⁹⁸ This means the parties are bargaining under the presumption that the resolution provided by the regulatory system is a viable alternative.⁵⁹⁹ For a country ranked last in the World Justice Project Rule of Law Index,⁶⁰⁰ to be clear 126 out of 126, it is naïve to believe that mediation can work given these circumstances.

Those advocating for “cessation of usurpation, transitional government and free elections” have also jumped to conclusions without much conflict resolution analysis.⁶⁰¹ This group believes that removing the current regime and free and fair elections is the best option for resolving the Venezuelan crisis.⁶⁰² Regarding cessation, the military still supports the Maduro regime.⁶⁰³ Its loyalty has not shifted to the opposition despite economic sanctions.⁶⁰⁴ Instead, these measures have been perceived as an integral part of what has been called an economic war.⁶⁰⁵ Furthermore, these efforts are

remain uncomfortable with the threat that power imbalances, or other antecedent inequities, will turn the mediation setting into one of exploitation and abuse.”)

595. See Mark Landler & Julian E. Barnes, *With Maduro Still in Power, Questions About the U.S. Role in Venezuela*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/us/politics/trump-venezuela-maduro-guaido.html> [<https://perma.cc/JC8X-SJT3>].

596. See *supra* note 591 and accompanying text.

597. See Naim, *supra* note 590 (“It is not surprising, then, that dialogue has a bad reputation among Maduro’s opponents. So far, talks have only served to strengthen the government, divide the opposition, and defuse popular protests.”).

598. Hernández Crespo, *supra* note 71.

599. *Id.*

600. *Venezuela*, WORLD JUST. PROJECT RULE L. INDEX, <http://data.worldjusticeproject.org/#/groups/VEN> [<https://perma.cc/N7RE-C3Y3>] (last visited Apr. 12, 2020).

601. They frame the issue as a lack of democracy when, in fact, the issue requires a more complex analysis using the frameworks explained in Part II.

602. See *supra* note 576 and accompanying text.

603. See Rosalba O’Brien, *Guaido vs Maduro: Who Is Backing Whom in Venezuela?*, REUTERS (Apr. 30, 2019, 3:06 PM), <https://www.reuters.com/article/us-venezuela-politics-support-factbox/guaido-vs-maduro-who-is-backing-whom-in-venezuela-idUSKCN1S62DY> [<https://perma.cc/2ZMK-PDKC>] (“The top brass of Venezuela’s military has shown no sign of leaving Maduro’s side, although there have been some low-level defections. Defense Minister Vladimir Padrino said on Tuesday that the armed forces would continue to defend the constitution and ‘legitimate authorities’ and that bases were operating as normal.”).

604. See Kurmanaev & Herrera, *supra* note 558.

605. Steve Hanke, *The U.S. Declares Economic War Against Venezuela*, FORBES (Jan. 29 2019), <https://www.forbes.com/sites/stevehanke/2019/01/29/the-u-s-declares-economic-war-against-venezuela> [<https://perma.cc/B975-BPE5>] (“For some time now, the United States has

being used to galvanize the military against the so-called American empire.⁶⁰⁶

Even if a transitional government were established, the free and fair elections by themselves could not bring the stability that Venezuela needs.⁶⁰⁷ In fact, right now there are two groups: the Guaidó government has put together the *Plan País*, which translates to country plan,⁶⁰⁸ and the current supporters of the Maduro government have put together the *Mesa de Diálogo*, which translates to table of dialogue.⁶⁰⁹ It is interesting to note that legitimate representatives have not been able to effectively engage with the opposing group. As explained earlier, persuasive processes, such as elections, inevitably lead to exclusion due to their adversarial nature. For one to prevail, the other must lose. Therefore, regardless of who prevails in the so-called free and fair elections, Venezuela will not reach a sustainable resolution that satisfies the interests of all.⁶¹⁰

Therefore, to move forward, it is necessary to first have an accurate and complete diagnosis. Then, and only then, can selection of the appropriate process for resolution be done. Furthermore, without the engagement of all stakeholders' representatives at the diagnosis stage, it would be impossible to accurately frame the issue. Therefore, a remedy without a diagnosis is, simply put, futile.

been using Venezuela's vulnerabilities to engage in a low-grade economic war. Instead of military action, the U.S. has imposed selected economic sanctions against certain Venezuelans. These have amounted to slaps on the wrist, with threats of worse to come. But, as of January 28, 2019, the U.S. has declared a full-scale economic assault. Indeed, it declared an embargo against *Petróleos de Venezuela (PDVSA)*—the country's state-owned oil company that controls the world's largest oil reserves and produces virtually all of Venezuela's foreign exchange.”)

606. Multimedio VTV, (*Hoy en 2006*) *Chávez: Imperio Yanqui, Go Home*, YOUTUBE (Sept. 20, 2014), <https://www.youtube.com/watch?v=W3jMggCzbTE> [<https://perma.cc/5MUA-REFG>]; see also Tom Phillips, *Reports of Secret US-Venezuela Talks to Oust Maduro Draw Skepticism*, GUARDIAN (Aug. 19, 2019), <https://www.theguardian.com/world/2019/aug/19/reports-of-secret-us-venezuela-talks-to-oust-maduro-draw-skepticism> [<https://perma.cc/3JLH-Z3XQ>].

607. See *supra* note 576 and accompanying text; see also “*International Mediation in Venezuela*,” U.S. INST. PEACE, <https://www.usip.org/publications/international-mediation-venezuela> [<https://perma.cc/4RDT-3MF3>] (last visited Apr. 12, 2020) (“The Carter Center began its work in Venezuela in July 2002 at the invitation of the Venezuelan government to help facilitate a national dialogue following a failed coup. It found a society deeply divided and a potentially violent social and political crisis threatening governability of the country. The roots of the crisis lay in the long-term social and political exclusion of large sectors of the population, the struggle for political control and redistribution of national resources and the concomitant clash of development strategies, and the confrontational style and strategy of the Chavista movement led by President Chavez.”).

608. See generally PLAN PAÍS, REPORTE FINAL PLAN PAÍS 2018 (2018), <https://www.planpais.com/uploads/1/0/9/1/109152103/pp-2018-boston-reporte-final.pdf> [<https://perma.cc/8EUR-VJVF>].

609. *Mesa Nacional*, VENEZOLANA DE TELEVISIÓN, <https://www.vtv.gob.ve/wp-content/uploads/2019/09/MESA-NACIONAL-16SEP19-DEFINITIVO.pdf> [<https://perma.cc/N64S-5TLM>] (last visited Apr. 12, 2020) (noting that none of the key leaders of the opposition signed the document).

610. See *supra* note 576 and accompanying text.

C. *Another Way to Channel the Flame in Latin America: An Alternative Diagnosis, Treatment, and Wellness Plan for a New Venezuela*

Venezuela is not an isolated case. In fact, it may be argued that Venezuela can set precedent for the Latin American region. Therefore, this can be considered a turning point not only for a country but also for an entire region. To have an alternative diagnosis, treatment, and wellness plan for a new Venezuela, it is necessary that we take a participatory approach. This approach requires us to first identify representatives of all stakeholders and then engage them in framing the relevant issues.⁶¹¹ With a complete picture that includes the perspectives of all, the representatives can then explore the broad range of options to select or design the appropriate process for a sustainable resolution. Once a sustainable resolution is reached, then the last step is to build the processes for ongoing shared decision-making through collaborative governance in order to integrate the social and political actors in the public square.

1. A Sustainable Resolution: Conflict Assessment for the Appropriate Selection or Design of a Process That Integrates the Perspectives of All

After more than a decade of failure, it is time to try more inclusive methods of conflict resolution and bring together all stakeholder representatives⁶¹² to use the Comprehensive Framework for Conflict Resolution presented in Part II. Guided by experts,⁶¹³ Venezuelans themselves can make a complete and accurate diagnosis and then select or design the appropriate process for a sustainable resolution. Some may argue that these participatory efforts will be time-consuming and complex, but a crisis of this magnitude has proven to be impossible to resolve with the input of just a few.⁶¹⁴ Without engaging all stakeholders,⁶¹⁵ the assessment will not be accurate and complete and the

611. See Lawrence Susskind & Connie Ozawa, *Mediating Public Disputes: Obstacles and Possibilities*, 41 J. SOC. ISSUES 145, 147–48 (1985) (articulating some of the challenges of representation and stressing that decisions about legitimacy need to be made collectively).

612. See William Zartman, *The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments*, in CONTEMPORARY PEACEMAKING: CONFLICT, PEACE PROCESSES AND POST-WAR RECONSTRUCTION 22, 22 (John Darby & Roger Mac Ginty eds., 2003) (“Parties resolve their conflict only when they are ready to do so—when alternative, usually unilateral means of achieving a satisfactory result are blocked and the parties feel that they are in an uncomfortable and costly predicament.”).

613. See generally Michael L. Poirier Elliot, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 199; Jane Mansbridge et al., *Norms of Deliberation: An Inductive Study*, 2 J. PUB. DELIBERATION 1 (2006) (describing the role of facilitators as maintaining and nurturing a good group atmosphere and, at the same time, helping the group make progress on the task at hand).

614. See SUSSKIND & CRUIKSHANK, *supra* note 183, at 154–59 (arguing that even though a consensus building process may be more time-consuming, it produces results that satisfy all parties).

615. See Hephzibah Levine, *Mediating the War of Olives and Pines: Consensus-Based Land-Use Planning in a Multicultural Setting*, 21 NEGOT. J. 29, 36 (2005) (“Cultural differences between the stakeholders greatly affected both the conflict and the consensus-building process.”).

resolution will not meet their needs. Furthermore, they will not have ownership of the resolution.⁶¹⁶

This participatory approach is not only possible but necessary to move forward. And it has already been proven to work. Brazil is the fifth most populated country in the world and, despite its magnitude, it was able to learn and implement these frameworks.⁶¹⁷ In fact, Brazilians representing different sectors of society (e.g., business, government, students, nonprofit, low-income communities, academia, and lawyers) demonstrated that with the necessary training and channels, consensus can be built across sectors without compromising.⁶¹⁸ Instead, they were able to reach agreements that reflected the interests of all.⁶¹⁹ In a piece titled “Building the Latin America We Want,” examples of these agreements demonstrate how representatives of stakeholders were able to participate in the framing of issues and the generation of options and strategies for implementation.⁶²⁰ The know-how has been developed.⁶²¹ What is missing is the political will to make it happen.⁶²²

616. See *supra* note 614 and accompanying text; see also Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 61, 65–66 (arguing that parties’ participation is essential).

617. Fung, *supra* note 353, at 339–40; (introducing the notion of mini-publics, which were used in the project carried out in Brazil).

618. SUSSKIND & CRUIKSHANK, *supra* note 183, at 18–35 (explaining the consensus-building process and clarifying that “consensus building is not about achieving unanimity”); see also Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 369 (2004) (stating that “[t]he advantage of some of these forms of consensus building is that they are flexible, but structured, drawing on their own ground-up developed procedural rules and substantive rules of decision and grounds for substantive enactment”). See generally William R. Potapchuck & Jarle Crocker, *Implementing Consensus-Based Agreements*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 527, 527–55 (discussing the skills and strategies necessary for implementation); David A. Straus, *Managing Meetings to Build Consensus*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 161, at 287 (suggesting guidelines for planning and running effective meetings in consensus-building processes).

619. See Hernandez Crespo, *Building the Latin America We Want*, *supra* note 25, at 470–90; see also ALVES DE ALMEIDA ET AL., *supra* note 141.

620. See generally ALVES DE ALMEIDA ET AL., *supra* note 141; Hernandez Crespo, *Building the Latin America We Want*, *supra* note 25.

621. See generally Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66 (2006) (discussing a framework for the institutional options for public participation, which includes three dimensions: participant selection, participant’s communication and decision-making, and the link between discussions and policy or public action).

622. See Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513, 521 (2015) (“The challenge, then, for those who seek justice through participation is, in the first instance, a political challenge rather than an institutional design problem. They must create the political conditions under which powerful organizations and leaders are motivated to advance social justice. Only then will those leaders be interested in learning whether and how greater citizen participation can increase justice.”).

2. A System for Ongoing Shared Decision-Making: Collaborative Governance as the Comprehensive Model for Thriving in the Public Square

Once the Venezuelan crisis has reached a sustainable resolution with the participation of all stakeholders, the dispute resolution field can also contribute to rebuilding a new Venezuela.⁶²³ As previously argued in Part I, focusing on the rule of law, access to justice, and ADR might be too narrow. While necessary, it is insufficient to address the systemic and pressing issues in the developing world, namely, exclusion.⁶²⁴ It is difficult to center the discourse on access to justice in countries where the majorities are part of the “informal sector,” essentially invisible to the formal system.⁶²⁵ That said, it is in this context that it is vital to expand the definition of justice. Lisa Amsler has proposed that the many different ways of defining justice are critical for the conflict resolution field and especially critical when designing systems for dispute resolution.⁶²⁶

To this end, I have suggested that the rule of law, access to justice, and ADR can be integral parts of collaborative governance.⁶²⁷ In this way, collaborative governance can address social justice issues and promote inclusion in policy making.⁶²⁸ Lisa Amsler defined collaborative governance as “the integration of reasoned discussions by the citizens and other residents into the decision-making of public representatives, especially when these

623. Menkel-Meadow, *supra* note 428, at 557–58 (“Most recently, a movement and plea for ‘deliberative democracy’ harkening back to Aristotelian notions of participatory democracy and argument have inspired much writing on how we can achieve legitimate and fair consensus and good decisions at all levels of human interaction and conflict, even when we have deep conflicts about facts and values. These recent efforts seek to provide a legitimating and explanatory framework for how to seek fair and ‘just’ outcomes in highly conflictual situations and disputes, conflicts, policy, and law-making. It is my hope to marry this work on deliberative democracy to conflict resolution theory and practice so that we might seek peace and justice . . .”). *But see* DEMOCRACY IN MOTION, *supra* note 339, at 8 (examining a variety of efforts of deliberative civic engagements, which “share a common denominator—respectful and rigorous communication about public problems”); Carrie Menkel-Meadow, *Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, LAW & CONTEMP. PROBS., Summer 2011, at 1, 30 (reminding us that “our efforts to scale up deliberative democracy in dispute resolution remain a work in progress”).

624. *See* Jacqueline N. Font Guzmán, ‘For Whom the Bell Tolls’ in the Legal System: Access to Justice and Conflict Engagement, 5 CREIGHTON J. INTERDISC. LEADERSHIP 20, 24 (2019) (“The push for the change in the legal system needs to come from the people at the margins of the law. Only then can the bell toll for all.”).

625. HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM 3–128 (2002).

626. *See generally* Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008).

627. *See generally* Hernandez Crespo G., *From Noise to Music*, *supra* note 26.

628. *See generally* JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY & PUBLIC CONSULTATION 50–51, 135–37, 172–75, 209 n.24 (2009) (discussing the importance of deliberative polls for democracy); THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY (John Gastil & Peter Levine eds., 2005).

approaches are embedded in the workings of local governance over time.”⁶²⁹ As part of her proposal for collaborative governance, Amsler suggests a policy continuum of citizen participation.⁶³⁰ The continuum can be analogized to different parts of a river: upstream (policy rulemaking), midstream (policy implementation), and downstream (policy enforcement and dispute resolution).⁶³¹ In these stages, community members engage with local governments in addressing the issues that affect their lives.⁶³²

If we were to place access to justice and ADR along the river continuum, they would fall at the downstream stage, focusing on the court system and dispute resolution more broadly.⁶³³ It is evident this narrow approach neglects significant issues that disenfranchised majorities face upstream and midstream along the continuum.⁶³⁴ Imagine a country where the majority is homeless. If asked, do you believe that they would say they care about access to justice? Would access to justice, narrowly defined within the downstream stage (resolving a single dispute), be a critical issue to them?

As Jacqueline Nolan-Haley points out, access to justice is “a global reform movement that encompasses a wide range of meanings.”⁶³⁵ The concept, already expanded on by Mauro Cappelletti and Bryant G. Garth,⁶³⁶ continues to expand to what is considered a still-evolving third wave.⁶³⁷ Perhaps, the third wave of access to justice needs to continue evolving to encompass Amsler’s different varieties of justice⁶³⁸ with respect to designing systems and expanding to include the entire policy continuum.

To grasp the relevance of collaborative governance to the Latin American region,⁶³⁹ it is critical to acknowledge the back and forth between the two extremes that shape the political and social landscape:

Historically, many Latin American countries have oscillated from dictatorships and revolutions to democracies and then back to revolutions and dictatorships. Writing new constitutions and significantly modifying old ones is considered normal. In this context, it is necessary to create structures that channel citizen participation. That way, organized

629. Bingham, *supra* note 54, at 274 n.28 (quoting Interview with Terry Amsler, Program Dir., Collaborative Governance Initiative (Nov. 28, 2009)). See generally Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67.

630. Bingham, *supra* note 54, at 287 (“There is no fixed boundary for each of these stages on the policy continuum.”).

631. *Id.*

632. *Id.*

633. *Id.*

634. *See id.*

635. Nolan-Haley, *supra* note 14, at 3.

636. See generally Bryant G. Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978).

637. See generally Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010).

638. See generally Bingham, *supra* note 626.

639. See generally RAFAEL ALVES DE ALMEIDA, GOVERNANÇA COLABORATIVA EM POLÍTICAS PÚBLICAS (2016).

stakeholders will be able to gain the civic power necessary to control political power *ex ante*, rather than *ex post facto*.⁶⁴⁰

Attempting to address this systemic instability, I have suggested that [t]he next chapter for Latin America requires new processes to allow citizens to write their own history together with their elected officials. In a region dominated by “*caudillo*” (strongman) mindsets, the checks and balances of power will not suffice to prevent authoritarianism. Only civic power will be able to control political power.⁶⁴¹

However, to accomplish this, writing constitutions,⁶⁴² voting,⁶⁴³ marching, and protesting cannot be the only means of participating in the public square. As I wrote a decade ago:

It is an urgent task to engage Latin American citizens in the political decision-making process. . . . To wait is to continue to waste human lives, time and value. Since the majority is affected, participation is the key to any kind of reform in Latin America. “To work for participation” says Bernardo Kliksberg, “is, without question, to do so in order to restore a fundamental human right to the disadvantaged of Latin America, one which frequently had been silently trampled.”⁶⁴⁴

If the focus of access to justice continues to be narrow, then the entire system will continue to struggle. To reverse the course of action, it is necessary to take a systemic approach that empowers citizens, such as collaborative governance.

It is up to the decision-makers in positions of power to take the risk of charting a new, inclusive direction. The proposed model or another systemic approach with a participatory methodology can help Latin America write their own future, their own history. “Community participation is a potent instrument,” Kliksberg goes on to say, “but this should not obscure the fact that it is also an end in itself. Participation is

640. Hernandez-Crespo et al., *supra* note 28, at 357 (internal citations omitted).

641. *Id.*

642. See Thamy Pogrebinschi, *Deliberative Democracy in Latin America*, in THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 829, 832 (André Bächtiger et al. eds., 2018) (discussing how “Latin American constitutional processes inscribed deliberation both as a principle and as an institutional design feature of the new legal orders”); *id.* at 839 (warning that “the institutionalization of deliberation into constitutions and laws may not ensure that deliberative practices take place, but it reinforces a deliberative culture and increases the chances that deliberative processes impact on political decisions and produce social outcomes”).

643. See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 159 J. INSTITUTIONAL & THEORETICAL ECON. 199, 200–01, 219 (2003) (arguing that parties not included in a coalition may be worse off); Thompson, *supra* note 589, at 221–27, 230–36 (arguing that voting and majority rule do not acknowledge the “strain of individual preferences” and do not foster integrated trade-offs among matters). See generally Howard Raiffa, *Voting*, in NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 450 (2007) (analyzing the complexity of voting and stating that there are “no ideal solutions”).

644. Hernández Crespo, *supra* note 71, at 129 (quoting BERNARDO KLIKSBERG, *Six Unconventional Theses About Participation*, in TOWARDS AN INTELLIGENT STATE 31, 49 (2001)).

part of human nature.” The question remains, however, of who will lead the path to develop the participatory institutions needed to produce the stability that Latin America desires.⁶⁴⁵

Venezuela currently stands out as an example of how conflict can destroy a country. However, the channels for citizen participation in the public square can be put in place using collaborative governance, assisted by the guidelines of DSD and SDS. In this way, Venezuelans will be able to engage in public decision-making about the issues that affect their lives.⁶⁴⁶

At this point, whether abroad or in their homeland, Venezuelans can start developing the “participatory muscles” at home and at work to be ready to unlock the power of the whole once the country reaches a sustainable resolution. Even though this might not be an easy path, without inclusion⁶⁴⁷ and participation, Venezuela and other Latin American countries will not be able to move forward. They will continue to oscillate from dictators and revolutions, similar to the music of a solo instrument or the noise produced by all instruments playing on their own. Only with participation will the world see what Latin America can do when it taps into the potential of the full orchestra.⁶⁴⁸

CONCLUSION

This Article aims to realize the untapped potential of the dispute resolution field if we move beyond traditional understandings of access to justice. It argues that by developing skills, citizens can significantly contribute to altering the course of history in our global economy and, more specifically, in Latin America and Venezuela. To optimize results when working together, this Article argues that it is necessary to leverage our unique differences in our daily interactions. Even though we have been able to create value with each other, we need to master the skills for “effective” conflict resolution and collective decision-making to reach higher levels of innovation and growth.

Unless we can fully integrate our unique contributions, we will not be able to move from clash to complementarity when conflict arises and will leave significant value at the bargaining table. Nowhere is this opportunity to create value from our differences more prevalent than in our global economy.

645. *Id.* (quoting BERNARDO KLIKSBERG, *Six Unconventional Theses About Participation*, in *TOWARDS AN INTELLIGENT STATE* 31, 49 (2001)).

646. *See generally* TINA NABATCHI & MATT LEIGHNINGER, *PUBLIC PARTICIPATION FOR 21ST CENTURY DEMOCRACY* (2015) (discussing public participation in decision-making and problem solving).

647. *See generally* OECD, *ENHANCING SOCIAL INCLUSION IN LATIN AMERICA: KEY ISSUES AND THE ROLE OF SOCIAL PROTECTION SYSTEMS* (2017), <http://www.oecd.org/latin-america/regional-programme/Enhancing-Social-Inclusion-LAC.pdf> [<https://perma.cc/F4RD-V9YX>].

648. *See* LEBARON & PILLAY, *supra* note 1, at 3 (“Individuals in an orchestra are all different, they have a common interest—playing beautiful music together. The music is most beautiful when everyone is working together, playing diverse instruments that contrast with and complement each other.”).

We are more interconnected than ever before. However, the underdeveloped capacity to effectively address conflict can elevate the level of risk not only at the local level but also at the national and international levels.

This Article has suggested that, like fire, conflict cannot be ignored. It will spread and potentially damage not only those in direct proximity but also the system as a whole. Therefore, how conflict is addressed in different regions of the world, such as Latin America, will directly or indirectly affect us all. To date, the international efforts to advance access to justice and dispute resolution have not been as effective as they could be due to the lack of a systemic approach. The focus of attention has been on resolving individual conflicts, in or outside the courts in regions of the world where large disenfranchised majorities are excluded.

To move forward, this Article has suggested that it is imperative that we have a systemic approach that promotes inclusion. This systemic approach requires: (1) building the necessary capacity for “effective” conflict resolution and participation, and (2) designing and implementing the necessary processes to manage conflict and engage in collective decision-making. This systemic approach should first take place at home and at work, so that citizens are ready to then engage in more complex interactions in the public square. The goal is to help citizens gain awareness of the interdependent nature of our relationships and equip them with the tools to better engage with conflict, maximizing their ongoing synergies.

To learn how to build the capacity for resolving conflict effectively, this Article proposed a Comprehensive Framework for Conflict Resolution to accurately assess the conflict at hand and then select the appropriate process for resolution, taking culture into account. Next, to learn how to build the capacity for effective participation at a systemic level, this Article suggested a shift from conflict, compromise, and common ground to leveraging our unique differences and unlocking the power of the whole. To achieve this, it recommended a participatory approach, which includes gaining knowledge of self and others, having a mindset of interdependence, and discerning the appropriate level of integration. Only then will we have the necessary systemic perspective to effectively engage in participatory processes.

To operationalize this participatory approach, this Article uses two analytical frameworks, DSD and SDSD, as critical tools for conflict management and collective decision-making at a systemic level. These frameworks provide guidelines for managing streams of conflict and determining who should participate, the degree of participation, and the selection of the process. These frameworks are essential not only to build capacity but also to design and implement the necessary processes for conflict management and decision-making at home, at work, and in the public square.

Using Venezuela as a case in point, this Article illustrated how conflict can destroy opportunities in the entire Latin American region and significantly affect the global community. Therefore, it advocates the use of the proposed Comprehensive Framework for Conflict Resolution. This would allow us

first to accurately assess Venezuela's conflicts, with representatives of all stakeholders, and then select the appropriate processes for a sustainable resolution.

Once a sustainable resolution is reached, the country will still need to develop systems for ongoing conflict management and collective decision-making that goes beyond the system of representative democracy. To this end, this Article advised the use of collaborative governance as a comprehensive model for engaging citizens and the government in the public square. Assisted by the guidelines of DSD and SDS, collaborative governance can enhance citizen participation in the public square. Governments alone cannot bring about stability to the sociopolitical arena. Only an organized civic society, equipped with conflict resolution and participatory capacity, can better stabilize and help unlock the power of the whole.⁶⁴⁹

Venezuela is currently a powerful example of the devastating consequences of conflict illiteracy. However, if citizens learn how to develop conflict resolution and participatory capacity at the individual and collective levels, they will be able to channel the flames of conflict and alter the course of history by engaging their unique differences and accomplish together what they cannot do alone. Mastering these skills will allow individuals to not only develop their full potentials but also unlock the power of the whole in families, organizations, and communities. Furthermore, mastery of these skills provides a competitive advantage in our global economy. Therefore, inclusion is not only a right but also a vital requirement for increasing the level of collective innovation and growth.

The region can no longer wait. Oscillating between revolutions and caudillos has proven to be futile. The time has come for all citizens to participate, moving from "I have a dream" to "We have a dream." Only then will the world see what Latin America can do when it moves from the noise produced from all the instruments playing at the same time, or the limited power of a single instrument playing a solo, to all the instruments playing together, realizing the power of the orchestra.

649. PUTNAM ET AL., *supra* note 436, at 182 ("Tocqueville was right: Democratic government is strengthened, not weakened, when it faces a vigorous civil society.").