

APPRECIATING ALTERNATIVE DISPUTE RESOLUTION'S GLOBAL ROLE WITH GOOD GOVERNANCE¹

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Introduction

Alternative dispute resolution's myriad potential for remedying our most pressing global concerns, while increasingly recognized by communities and a diverse array of professionals around the world, is still largely unrecognized by scholars. Its growing role with governance, the focus of this article, exemplifies. Good governance is arguably our most pressing global need.² One of the principal virtues of alternative dispute resolution³ (hereinafter "ADR") is its contribution to democratic capacity building.⁴ "Democracy building is an intrinsic part of conflict management, and vice versa."⁵ A recent article ambitiously asserts "(m)ediation⁶ as a catalyst for judicial reform" throughout Latin America.⁷ "Sustainable human development, economic growth, security, conflict prevention, and conflict resolution as well as good governance are all intricately intertwined."⁸

² Tom Farer's presentation, 2003. Annual Meeting, American Association of Law Schools. In the simplest terms, good governance is effective democratic culture. See <http://www.transparency.org>. Other attempts at defining good governance are presented in Section I of this article. See, e.g., JULIUS COURT, GORAN HYDEN and KEN MEASE, *ASSESSING GOVERNANCE: METHODOLOGICAL CHALLENGES* 4 (2002).

³ Alternative dispute resolution encompasses a broad continuum of response to conflict that falls between avoidance and escalation. LINDA SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* (1994). The response described here includes the most popular: mediation, arbitration, multi stakeholder advisory and decision making process, integrative, or collaborative, negotiation, negotiated rule-making, and the office of ombuds. Each process will be defined later in this article.

⁴ ALISON TAYLOR AND JAY FOLBERG, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICT WITHOUT LITIGATION* (1984) ("Using mediation to facilitate conflict resolution and encourage self-determination strengthens democratic values and enhances the dignity of those in conflict.") Section I elaborates values and variables commonly equated with "democratic."

⁵ International Institute for Democracy and Electoral Assistance at <http://www.idea.int/utindex.cfm> (last visited 9/3/04); see also Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons From South Africa and Israel*, 40 STAN. J. INT'L. L. 47, 56-57 (2004); JOHN DAVIES AND EDWARD KAUFMAN, *SECOND TRACK/CITIZENS' DIPLOMACY* 3 (2002).

⁶ Mediation is one form of ADR. Its process will be elaborated throughout this article. In the simplest terms, a third party, or mediator, assists parties negotiate resolution. See, e.g., John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. ST. U. L. REV. 839 (1997), citing CHRISTOPHER MOORE, *MEDIATION PROCESS*, 8, 41, 53 (2d ed. 1996).

⁷ Chief Justice Thomas J. Moyer & Emily Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America* 18-3 OHIO ST. J. ON DISP. RESOL. (2003).

One of the mediators interviewed for this paper, working throughout the Pacific Rim, believes that “sophisticated parties are now no longer willing to allow a third party to...make decisions that impact on matters fundamental to their personal and business lives.”⁹ These stakeholders want to control their own disputes. Development experts concur, contending that sustainability requires participation and local ownership. Excessive reliance on outside experts has not worked.¹⁰ Likewise, the United States Federal Mediation and Conciliation Service believes that conflict prevention now requires leveraging “a wider range of approaches by a broader set of actors than in the past.”¹¹ The growing popularity of global ADR, particularly arbitration¹² and mediation, is impossible to ignore.¹³

ADR is remarkable in its parallels to and provision of processes recommended for good governance. The ombuds¹⁴ role, for example, is one of Transparency International’s publicized approaches to combating corruption.¹⁵ International commercial arbitration, as structured through

⁸ United Nations Development Programme, Management Development and Governance Division, Bureau for Policy Development, *Promoting Conflict Prevention and Conflict Resolution Through Effective Governance* at <http://magnet.undp.org/Docs/crisis/mapexercise.htm>. (last visited 10/29/2003).

⁹ Nancy Erbe, *Survey Regarding ADR and Governance*, (Pepperdine University School of Law, 2004).

¹⁰ UNDP, *supra* note 8 at 5.

¹¹ Andrea Strimling, *The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention*, 2 PEPP. L. REV. 418 (2002).

¹² Traditionally, arbitration is a “private tribunal” created by contracting individuals to hear disputes in lieu of the courts. Proceedings may look like court litigation but are informal, bound by less rules and not protected in the same ways. For example, the right to appeal an arbitrator’s decision is more narrowly restricted than the right to appeal a judge’s decision within the United States. ALAN RAU, EDWARD F. SHERMAN and SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION* 600 (2002).

¹³ See, e.g., Centre de Mediation et d’Arbitrage de Paris, *Programme Grotius MARC 2000* at <http://www.cmap.asso.fr/>. (surveying ADR throughout Europe); Janet Murdock, *Forging New Frontiers: Spreading ADR in Brazil*, ACRResolution 26 (2003); Lynette Parker, Paper presentation, 2002. Third International Conference on Conferencing, Circles and Restorative Practices, Minneapolis, Minnesota; Sally A. Harpole’s presentation, 2002. Research Development Symposium, Barcelona Spain (Ad hoc arbitration outnumbers the cases referred to arbitral institutions in jurisdictions like Indonesia, Singapore and Hong Kong. Still, between 1994 and 2001, the number of cases submitted to the Hong Kong International Arbitration Commission more than doubled. The number submitted to the China International Economic and Trade Arbitration Commission almost doubled between the two years of 1992 and 1993 alone).

¹⁴ “(One) who investigates complaints and mediates fair settlements, especially between aggrieved parties such as consumers or students and an institution or organization.” at <http://dictionary.reference.com>.

¹⁵ Transparency International, *supra* note 2.

the New York Convention, “exports” rule of law and secures enforceability.¹⁶ ADR as a whole creates cross-cultural options that can be more impartial, fair and reliable than any one party’s courts. Some cultures appreciate informal opportunities to resolve disputes interpersonally rather than formally in adversarial forums, even when forums are trustworthy. The transnational corporate counsel interviewed for this paper has never encountered resistance to his contract provision that ADR be the exclusive mechanism for dispute resolution.¹⁷

This article argues that relationships between ADR and good governance deserve scholarly scrutiny and guidance---aspiring to encourage ADR’s best contribution and guard against abuses. “(T)here is a dearth of works that go deeply beyond the rhetorical and give practical guidance on ways that governance systems and structures can address power inequality.”¹⁸ At the very least, attempts must to made to evaluate and theorize ADR’s impact on good governance.¹⁹

This article aims to begin filling this gap through surveying literature and interviewing a group of ADR experts actually working internationally and capable of providing rich guidance. The group includes: 1) an academic expert in the North American Free Trade Agreement and international commercial arbitration, 2) ADR and law faculty consulting with business throughout Latin America, 3) a scholar from Northern Ireland with a focus on South Africa’s truth and reconciliation process, 4) the corporate counsel for a Fortune 500 transnational corporation, 5) a prominent entertainment lawyer, arbitrator and mediator with an international practice, 6) mediator working throughout the Pacific Rim, 7) published expert on multi

¹⁶ JACK COE, INTERNATIONAL COMMERCIAL ARBITRATION 19 (1997).

¹⁷ When discussing ADR, however, he showed a strong working knowledge of arbitration alone---an interest in learning more about mediation but little understanding of and no experience with mediation. Surprisingly, his standard ADR clause still provides for non-binding mediation before binding arbitration. Erbe, *supra* note 9.

¹⁸ UNDP, *supra* note 8 at 4.

stakeholder environmental process who consults with the United Nations (hereinafter “UN”), 8) the former head of ADR for one of the leading United States (hereinafter “U.S.”) bar associations who has consulted internationally, 9) an artist-mediator who was born in Israel and continues to work there, 10) the Secretary General for an international NGO, 11) a restorative justice practitioner working internationally, with her focus in Latin America, and 12) the International Development Policy Officer for a member-country of the European Union. Their perspective is integrated throughout this paper and shaped its organization.²⁰

To lay a foundation for future research,²¹ this writing begins to identify the many linkages, implicit and explicit, between ADR and good governance. It intends to further

¹⁹UNDP, *supra* note 8 at 4. (“(T)here is a very real need for a major text that synthesizes the disparate lessons of individual cases into some broad sets of conclusions.”)

²⁰ One interviewee notes that practitioners too often fail to share lessons learned. Erbe, *supra* note 9.

²¹Establishing ADR’s success in reducing systemic corruption, and otherwise building good governance, requires sophisticated longitudinal inquiry attempting to document less tangible macro change. Evaluating and measuring good governance alone is a complex undertaking. JULIUS COURT, GORAN HYDEN and KEN MEASE, *ASSESSING GOVERNANCE: METHODOLOGICAL CHALLENGES* 2, 4 (2002) (“Measuring issues of governance poses challenges that are not encountered in the economic or social development fields. While it is easier to provide firm indicators of such things as economic growth or primary school enrollment, it is much more difficult to find and agree upon indicators of a political macro development like governance....Perhaps because it is a broad and complicated concept, there exists no regular, systemic and cohesive data collection effort centered on the concept of governance.”) Measuring development shows parallel challenges. Analyses exist of failure, but “it is not easy to...determine which factors accounted for success.” United Nations Development Programme, Management Development and Governance Division, Bureau for Policy Development, *CAPACITY DEVELOPMENT FOR SUSTAINABLE HUMAN DEVELOPMENT: CONCEPTUAL AND OPERATIONAL SIGNPOSTS* 6 and 56 (July 1997) at <http://magnet.undp.org/cdrb/Techpap2.htm>. (“The process is non-linear. It is a learning and experimenting process in which people test ideas, gain experience, and feed back their experience into the process...”) Existing evaluation of ADR focuses on relatively straightforward disputes. *See, e.g.,* Naimark, Richard W. and Keer, Stephanie E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People* INT’L. BUS. L. 203 (2002). Simple studies offer valuable information and insight but only begin to tackle the challenges involved with correlating ADR and good governance. The article cited earlier exemplifies, providing persuasive argument for judicial reform throughout Latin America, but failing to establish that ADR is catalyzing change apart from providing alternative to corrupt process. This research gap may reflect barriers inherent in studying ADR. With arbitration and mediation, confidentiality agreements block collection of comprehensive data. Researchers are forced to rely on anecdotal selective reports by parties concerned. Fortunately, despite the challenges, research is beginning to analyze more complex multilateral negotiations. *See, e.g.,* Mary Jo Larson, *Low-Power Contributions in Multilateral Negotiations: A Framework Analysis*, 19 NEGOT. J. 133,139 (2003) (“An understanding of multilateral negotiations requires a comprehensive and systemic perspective, one that recognizes multilevel structures, a variety of processes and the different roles of different actors.”)

introduce ADR's international contribution to ADR academics and practitioners. Simultaneously, it aspires to benefit those instrumental to international development, through introducing the most evolved conflict process.

This article contends that the time is ripe for scholars to note trends and concerns with ADR and good governance. Part I defines good governance. Contemporary definitions acknowledge the many players and domains of governance that requiring coordination today. Overriding variables necessary to evaluate good governance across domains are identified.

Part II introduces the most important criteria for evaluating whether ADR is truly democratic. ADR's potential for either eroding or advancing good governance is recognized. The stakeholder responsibilities obligatory for good governance are outlined.

Part III further explores the relationships between ADR and democratic capacity building. Democratic ADR, where all concerned design, is reiterated. Naturally, truly inclusive process is "easier said than done," especially with power difference. Several pragmatic ideas are proposed.

Part IV tackles the challenge of motivating and monitoring transparency and responsiveness with those who hold most power. Citizens must have means to verify government responsibility, integrity and service. Specific accounts where ADR has increased transparency are described. ADR's inherent potential for crafting and ensuring responsiveness is also explored.

Part V heralds the role of multi-stakeholder process in convening the broad participation and voice of the many concerned, involved and impacted by a particular decision or dispute. It

names two examples of inclusive participatory process. It discerns several process challenges, with ideas for rectifying with real world decisions.

Part VI stresses ADR's capacity for mediating diverse interests, building relationships, and creating durable resolution. It cautions that prioritizing efficiency of dispute resolution can create rather than resolve problems. Somehow efficiency and relationships must be balanced for superlative partnering.

Part VII recognizes the central role played by law with good governance--- when enforced impartially. Several countries, however, lack assurance of neutral enforcement, and are turning to ADR, particularly mediation, arbitration, and arbitration-mediation, to create trustworthy forums. ADR, like formal legal systems, must be scrutinized to ensure impartiality in practice.

Part VIII reemphasizes the importance of independent oversight to ensure accountability, with a particular look at the ombuds office created by the International Finance Corporation (hereinafter "IFC") and the Multilateral Investment Guarantee Agency (hereinafter "MIGA"). All concerned must guard accountability. Embracing this seemingly endless challenge reaps critical rewards.

I. Good Governance Defined.

While the natural interpretation of good governance starts with the state of government around the world, in light of shifting international realities, good governance must encompass what former Ambassador McDonald coined “multi track diplomacy,”²² or the influence and role of NGOs,²³ professional and ethnic groups, business,²⁴ citizens, academia, activists, religion, philanthropy²⁵ and media, as well as government.²⁶ Negotiations between these key players²⁷ influence, and often determine, the state of good governance globally.²⁸

²² Davies and Kaufman, *supra* note 5 at 49. (“(Multi-track) diplomacy may be broadly defined as the bringing together of professionals, opinion leaders or other currently or potentially influential individuals from communities in conflict, without official representative status, to work together to understand better the dynamics underlying the conflict and how its transformation from violence (or potential violence) to a collaborative process of peace building and sustainable development might be promoted. It complements “first track” or official diplomacy...when official dialogue is blocked or constrained...(and) is increasingly recognized as an essential in a multilayered diplomatic process aimed at transforming the contentious power dynamics of complex, protracted conflict into processes of constructive engagement and joint problem solving.”)

²³ In a recent global survey, NGOs were ranked as the second “most publicly trusted group or organization,” second only to national militaries. Kumi Naidoo, *Civil Society, Governance and Globalization*, 2003. The World Bank Group Presidential Fellows Lecture Series, Wash. D.C.; *see also* <http://info.worldbank.org/etools/bspan/PresentationView.asp?PID=133&EID=63>.

²⁴ General Electric, as one example, is credited with promoting peaceful conflict resolution of the 2002 nuclear showdown between India and Pakistan. Timothy L. Fort and Cindy A. Schipani, ADAPTING CORPORATE GOVERNANCE FOR SUSTAINABLE PEACE 62 (2003).

²⁵ Philanthropy has great influence. Private funders supported international tribunals adjudicating Holocaust claims as one noteworthy example. Norbert Wuhler’s Lecture, 2003. Master’s Forum, Straus Institute for Dispute Resolution. On the other hand, poor coordination is judged as key to failure of donor-driven development efforts. UNDP, *supra* note 8 at 7. In one reported case, United States Aid for International Development funded a restorative justice dispute resolution process in Colombia. Yet when a restorative justice expert from the United States visited Colombia and asked about the program, no one had heard of it. Lynette Parker, *Restorative Justice: A Vehicle for Reform?*, paper presentation, 2004. Annual Meeting of Latin American Studies Association, Las Vegas, Nevada.

²⁶ Mark E. Warren, *Civil Society and Good Governance*, U.S. CIVIL SOCIETY PROJECT (1999); *see also* UNDP, *supra* note 8 (“Capacity development has concentrated on governments with little or no attention to the need to develop the capacities of the other...partners, whose contributions are critical for the success of national development programmes, such as civil society and the private sector.”)

²⁷ The UNES CAP acknowledges government as one formal actor along with many others, formal and informal, such as associations of farmers, political parties, labor unions, finance institutions, organized crime syndicates, and multinational corporations. Strimling, *supra* note 11 at 424.

²⁸ A recent World Governance survey proceeded accordingly, surveying government, academic, business, NGO, legal, media and religious “well-informed persons.” Court, Hyden and Mease, *supra* note 2 at 15.

There is a shift taking place in our understanding and practice of governance. Governance used to be principally about what governments do. Today, the concept is increasingly about balancing the roles, responsibilities, accountabilities and capabilities of different levels of government---local, national, regional and global; and different actors or sectors in society---public, private and civil society organizations and individual citizens.... In today's world this framework consists of a wide variety of mechanisms, processes, institutions and relationships (including partnerships).²⁹

ADR's natural overlap is undeniable. The United Nations Economic and Social Commissions for Asia and Pacific (hereinafter "UNESCAP") defines good governance as "the process of decision making and the process by which decisions are implemented...It is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations, and mediate their differences."³⁰

Eight interdependent characteristics are most often identified with good governance:

1) participation, by both men and women, directly or through intermediate institutions and representatives,³¹ with freedom of association and expression,³² 2) rule of law, including human

²⁹ The Prince of Wales Business Leaders Forum, 1996.

³⁰(emphasis added) United Nations Development Programme, *Reconceptualizing Governance* (1997); see also MARITA THORNHILL, JEREMY EVANS, ROD BULMAN and IAN SAMPSON, THE ENVIRONMENT AS CATALYST: UNDERSTANDING ENVIRONMENTAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT 2 at http://www.earth-info-net.com/2002_12_01_archive.html, citing Kooiman. ("All those interactive arrangements in which public as well as private actors participate aimed at solving social problems, or creating social opportunities, and attending to the institutions within which these governing activities take place").

³¹ UNDP, *supra* note 8 at 23.

rights,³³ enforced impartially with independence³⁴ and no corruption,³⁵ 3) transparency with those affected and media,³⁶ 4) consensus, or mediation of diverse interests, to decide the best interest of whole communities, with consideration of long term sustainability,³⁷ 5) equal inclusive decision making, 6) efficient effectiveness, or best use of resources, 7) responsiveness to stakeholders,³⁸ and 8) accountability.³⁹

Coordination among multiple stakeholders is fundamental to elevating good governance.⁴⁰ In 1992 the UN Conference on Environment and Development—the Rio Earth Summit, as one example, prioritized partnerships as central to achieving global sustainable development.

(O)nly with a comprehensive and widespread cross-sector collaboration can we ensure that sustainable development initiatives are imaginative, coherent and integrated enough to tackle the most intractable problems. Single sector approaches have been tried and proved

³² See, e.g., Gleditsch, Kristian S. and Michael D. Ward, *Double Take: A Re-examination of Democracy and Autocracy in Modern Politics*, 361-82 J. CONFLICT RESOL. 41 (1997); see also <http://www.cidcm.umd.edu/inscr/polity/index.htm#data> (measuring “autocracy” and “democracy” in most independent states).

³³ Minorities and the most vulnerable must be considered and optimally included in decision making. FREEDOM HOUSE, FREEDOM IN THE WORLD (2004); see also www.freedomhouse.org. (surveying human rights).

³⁴ UNDP, *supra* note 8.

³⁵ See, e.g., Luis Pasara, *Judicial Reform and Civil Society*, JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 83, (1998), cited by Moyer and Haynes, *supra* note 7.

³⁶ *Id.* (“(G)ood decisions require access to good information”).

³⁷ Focus on increasing the privilege of a few elite rather than the greatest well-being of many destabilizes.

³⁸ Stakeholder is broadly defined to include “any group or individuals who can affect, or is affected.” CAROLINE NELIGAN, INCREASING ACCOUNTABILITY THROUGH EXTERNAL STAKEHOLDER ENGAGEMENT 4 (2003).

disappointing. Working separately, different sectors have developed activities in isolation—sometimes competing with each other and/or duplicating efforts and wasting valuable resources. Working separately has all too often led to the development of a ‘blame culture’ in which chaos or neglect is always regarded as someone else’s fault.⁴¹

Once again, ADR’s contribution to good governance is palpable. ADR, at its best, inherently promotes effective partnering.

I. ADR Must Honor Minimal Criteria To Be Truly Democratic.

As various ADR processes from around the world are reviewed, themes emerge, illuminating the qualities necessary to advance good governance. ADR’s potential for either heightening or eroding good governance is linked to its conscious scrutiny of potential power abuse. Specific admonitions are provided throughout this article.

³⁹ Strimling, *supra* note 11; Paula Dobriansky, *Principles of Good Governance*, ECON. PERSP. (2003) (“Development cannot flourish where people cannot make their voices heard, human rights are not respected, information does not flow, and civil society and the judiciary are weak.”)

⁴⁰ Strimling, *supra* note 11 at 424.

⁴¹ University of Cambridge and International Business Leaders Forum, *Partnership Matters* 3 (2003).

First and foremost, credible organization of negotiating teams (mediation, ombuds and multi stakeholder) includes all important players.⁴² Some process must “ensure that no significant interest is left out or omitted.”⁴³

Once all are included, their input must be considered and respected regardless of external power. Attention must be paid to how decisions are made, “lest the powerful simply overrun the weak which may well be the large populace.”⁴⁴ If, on the other hand, authentic power-sharing occurs, heightened responsiveness to the populace, or good governance, naturally occurs.

Next, democratic ADR requires parallel information sharing, or transparency. True impartial oversight, through rule of law, or third parties like ombuds, ensures good faith accountability. Verified transparency secures ADR’s solid contribution to good governance.

Conditions are interdependent. ADR’s influence is necessarily complex. For example, transparency and accountability require participation. One World Trust combines several of these conditions in its Global Accountability Project, where it assesses the transparency and inclusive decision making of our most powerful international actors, including transnational corporations, intergovernmental organizations and NGOs.⁴⁵

Stakeholder relationship to ADR, as it influences good governance, will be explored throughout this article. The Cross-Sector Partnership Initiative posits civil society as instrumental to inclusive participation and accountability for the public good, the public sector, or government,

⁴² Unfortunately, a number of instances can be cited with no or weak attempts at such organization. Philip Harter, *A Plumber Responds To The Philosophers: A Comment On Professor Menkel-Meadow’s Essay On Deliberative Democracy*, N.L.J. (forthcoming).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Neligan, *supra* note 38.

as responsible for rule of law, including transparent access to information, and business as driving efficient effectiveness. All ideally provide service responsive to public need and interest.⁴⁶

Transnational corporations, however, have been involved, directly and indirectly, in the most violent and challenging of disputes, particularly in developing countries with oil, gas and mineral resources. In one instance, guerrilla groups extorted money from contractors in Colombia.⁴⁷ Oil and gas rents can support corrupt governance. Even though Shell invested more than \$33 million per year in community development for the Niger Delta, critics allege corrupt officials and contractors siphoned off much of the money and Shell aimed to “buy favors.”⁴⁸ In a related example, a 2002 lawsuit claimed several corporations and banks in effect aided and abetted South Africa’s apartheid government through their investments.⁴⁹

Thus developing civic society strong enough to weaken, or at least check, authoritarian government’s monopoly of power is key to preventing reversion to violence.⁵⁰ Democracy is advocated as “an efficient structural means of managing and preventing violent conflict.”⁵¹ Recent scholars go so far as to advocate the United Nations’ vision of the culture of peace, sounding much like good governance: “a society characterized by human rights, tolerance, free

⁴⁶ University of Cambridge, *supra* note 41.

⁴⁷ Business Partners for Development, *COMPANIES IN CONFLICT SITUATIONS: A ROLE FOR TRI-SECTOR PARTNERSHIPS?* (2001). Corporations risk accusations of human rights violations through the acts of contractors and acquiescence or other involvement.

⁴⁸ *Id.*

⁴⁹ Penelope E. Andrews, *Reparations for Apartheid Victims: The Path to Reconciliation?* 53 *DEPAUL L. REV.* 1155, 1163 (2004).

⁵⁰ Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda’s Gacaca Courts*, 79 *N.Y.U. REV.* 1934 (2004). Strong citizens are less likely to be manipulated by governments leading violence. Wierzynska cites Rummel’s study, concluding that “every instance of mass murder by a state against its own people has happened under authoritarian rule.” *Id.* Rwanda is a classic example, ripe for manipulation. Additional research provides striking correlation between corruption and violence. Countries ranked highest for corruption resolved disputes with violence sixty percent of the time, while countries ranked lowest used violence fourteen percent of the time.

⁵¹ *Id.*

flow of information, non-violence, sustainable development, peace education, and equality of men and women.”⁵²

II. ADR’s Role In Transitional Emerging Democracies.

International experts increasingly advocate the processes of alternative dispute resolution, or “transformative party-driven...bottom-up” conflict work.⁵³ Some stress the importance of “allowing conflicts to be raised, fought over and resolved.”⁵⁴ Those interviewed for this article recognize training in dispute resolution skills as “premium.” They commend training in negotiation, cross-cultural communication, process awareness, strategic thinking, group facilitation, trust, and team-building.⁵⁵

A. ADR Fills Critical Global Gaps While Building Democratic Capacity.

Dispute leaders go so far as to contend that ADR plays an instrumental role in emerging democracies. In many parts of the world, radical new participatory institutions are needed to elevate good governance. Some communities assert that the practice of ADR is introducing a

⁵² Susan Opotow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, POST-CONFLICT JUSTICE (2002).

⁵³ Robert A. Baruch Bush, *Realizing the Potential of International Conflict Work: Connections Between Practice and Theory* 19 NEGOT. J. 97 (2003); A. Marco Turk, *Democratized Restorative Justice As A Lesson For Criminology: Cyprus 1997-2003* 29 CRIM. (2004) (though diplomatic elites appear to lack faith in civil society and constrain themselves to traditional legal and political process).

⁵⁴ UNDP, *supra* note 8 at 23.

⁵⁵ Erbe, *supra* note 9.

culture of peace into their violent societies.⁵⁶ The “nearly decade-old ‘Inter-Tajik Dialogue’ that moved Tajikistan ‘from civil war toward civil society’ exemplifies.⁵⁷

Post war reconstruction is also embracing facilitative process at the community level, with a focus on development.⁵⁸ Lebanon is one archetype. Intra-community and inter-religious dialogue is being used to elicit local views, guide expression in constructive ways, bring local and national leaders together on priority issues of shared concern, and create ideas for reconciliation.⁵⁹ Back channel negotiations have purportedly increased inter-communal understanding.⁶⁰ A community relations board is planned that will facilitate local dispute resolution.⁶¹

Collaborative approaches fill critical gaps in legal capacity. Consequently, international mediations have increased threefold over recent decades.⁶² Intra-national and cross-ethnic disputes often fall outside international authority. Without alternatives like those mentioned here, minority ethnic groups may see their only alternative as violent effort for independence, to form their own nation-states.⁶³

⁵⁶ Parker, *supra* note 25.

⁵⁷ HAROLD SAUNDERS, *A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICT* (1999). (The alternative, closed door decision making by a global elite exercising coercion rather than negotiation, is predictably criticized.)

⁵⁸ *See, e.g.*, INSTITUTE OF WORLD AFFAIRS, *COMMUNITY-BUILDING IN POST-WAR LEBANON: A PROJECT TO ENHANCE ETHNIC TOLERANCE AND CIVIC IDENTITY* (best citation available).

⁵⁹ *Id.*; Fort and Schipani, *supra* note 24.

⁶⁰ Institute of World Affairs, *supra* note 58.

⁶¹ *Id.*

⁶² Jonathan Wilkenfeld, Kathleen Young, Victor Asal and David Quinn, *Mediating International Crises: Cross National and Experimental Perspectives*, 47 J. CONFLICT RES. 285 (2003).

⁶³ Oliver P. Richmond, 1999. *Mediating Ethnic Conflict: A Task for Sisyphus?* International Studies Association, Wash. D.C. ; *see, e.g.*, Keith Swartzendruber, *Eliciting Peace: Mediating the Sandinista-Miskito Conflict* at http://www.geocities.com/keithswartzendruber/elciting_peace1.htm (2002) and the Carter Center description of its mediation in Sudan and Uganda at http://www.cartercenter.org/peaceprograms/showdoc.asp?program_ID=12&submenu+pea...

The international experts interviewed for this article stress proactive conflict prevention and transitional justice including local community leadership, particularly those representing the groups historically most excluded or marginalized in decision making.⁶⁴ “[B]efore...any consensus process...can claim democratic legitimacy, one must know among whom the consensus was struck and that it in fact represented the consent of those whose assent is necessary.”⁶⁵ ADR plays a foundational role in advancing good governance if the range of concerned, impacted and interested stakeholders design.⁶⁶ Baruch found the most satisfied parties to mediation reported the highest process control, participation in decision-making, as well as full expression.⁶⁷ Similar results are found with negotiated rule-making.⁶⁸ Consciously creating space for dialogue, communication and positive debate increases civil society buy-in, or ownership of dispute resolution and resultant responsibility for necessary change.⁶⁹ Both are essential to sustain reform.⁷⁰ “People are more ready to accept decisions that go against them if they have a part in the decision-making process.”⁷¹

To varying degrees, relative to the formality or informality of the process, arbitration, mediation and arbitration/mediation hybrids allow parties from different countries, cultures and legal systems to craft process that includes a variety of approaches to conflict and thus aims to respect all concerned.⁷² While facing difference can be difficult, those involved receive essential

⁶⁴ Erbe, *supra* note 9.

⁶⁵ Harter, *supra* note 44.

⁶⁶ *Id.* “[B]efore...any consensus process...can claim democratic legitimacy, one must know among whom the consensus was struck and that it in fact represented the consent of those whose assent is necessary.”

⁶⁷ R.A. Baruch Bush, *What Do We Need A Mediator For?: Mediation's 'Value Added' for Negotiators*, 12 OH. ST. J. DISP. RESOL. 1 (1997).

⁶⁸ Harter, *supra* note 42 at 7; Wierzynska, *supra* note 50 at 1942.

⁶⁹ Parker, *supra* note 27.

⁷⁰ *Id.*

⁷¹ Harter, *supra* note 42.

⁷² Coe, *supra* note 16 at 108.

opportunities to gain understanding, transform costly destructive attitudes,⁷³ build bridges and balance between rights and responsibilities, and create lasting resolution.⁷⁴

According to Susan Collin-Marks, South Africa's Peace Accords included everyone as equals. "In many cases the government became just another player, not a referee or participant with extra powers....One international observer...was astonished at the government's readiness to be equal partners at the table..."⁷⁵

Legal ethicists assert that rule of law alone does not and cannot create the virtues or character required for good governance.⁷⁶ ADR, in contrast, provides concrete opportunities for individuals to wrestle with ethical decision making, understand others' perspectives, express their own interests, and otherwise develop democratic capacities. When the mediator-arbitrator, for example, gives the parties an opportunity to mediate and reach their own agreement before sharing her arbitral award, all parties receive an equal and public opportunity to be heard and hear all concerned.

B. Toward Inclusive Power Sharing Required For Democratic ADR.

Even though the United Nations Economic Commission for Europe's (hereinafter "UNECE") *Convention on Access to Information, Public Participation in Decision-making and*

⁷³ Buck-passing, elitism and dogmatism are named as attitudinal barriers within Nigeria's government as one example. University of Cambridge, *supra* note 41 at 18.

⁷⁴ Erbe, *supra* note 9.

⁷⁵ Susan Collin Marks, WATCHING THE WIND: CONFLICT RESOLUTION DURING SOUTH AFRICA'S TRANSITION TO DEMOCRACY 18 (2000).

⁷⁶ Robert F. Cochran Jr., *Lawyers and Virtues: A Review of Mary Ann Glendon's A Nation Under Lawyers: How The Crisis In The Legal Profession Is Transforming American Society and Anthony's T. Kronman's The Lost Lawyer: Failing Ideals Of The Legal Profession*, 71 NOTRE DAME L. R. 720-723 (1996).

Access to Justice in Environmental Matter (hereinafter “AARHUS”) is noted for its allowance of NGOs as equal partners, it is critiqued for its apparent failure to identify all necessary stakeholders, particularly those representing the general public, the interests of economic and social development, and others affected by the process.⁷⁷ Environmental NGOs may have dominated the process, particularly “a handful of Western NGOs with a very clear agenda.”⁷⁸ The lawyers and academics present were aligned with these NGOs. It is uncertain whether business interests were involved at all.⁷⁹ NGOs may attempt to circumvent coordination of government and intergovernmental bodies, along with business, perceiving that well-coordinated government or business involvement dominates process and distorts outcomes.⁸⁰

The ombuds for the IFC and MIGA capture the challenge in their annual report describing multi stakeholder process.⁸¹ “The reality is that there is often a huge gap between the resources, power and cultures of the private sector companies which undertake IFC/MIGA projects and the communities which are impacted by them. One of our basic jobs is to help IFC and/or MIGA to bridge that gap.”⁸²

Recognized is the potential to threaten those with most power.

⁷⁷MINU HEMMATI, MULTI-STAKEHOLDER PROCESSES FOR GOVERNANCE AND SUSTAINABILITY: BEYOND DEADLOCK AND CONFLICT 122-124 (2002). (One NGO forecasts a future lawsuit).

⁷⁸ *Id.*

⁷⁹ Hemmati, *supra* note 77 at 123.

⁸⁰ Erbe, *supra* note 9.

⁸¹ “Multi-stakeholder processes are processes which aim to bring together all major stakeholders in a new form of communication, decision-finding (and possibly decision-making) structure on a particular issue. (They cover a wide spectrum of structures and levels of engagement, comprising dialogues and growing into processes encompassing consensus-building, decision-making and implementation, or partnerships.)” Hemmati, *supra* note 77. Pioneer businesses, civil society and government are even forming actual working partnerships. See *Developing Tri-Sector Partnership ‘Markers,’* 1999.

⁸² CAO, RESPONSE BY THE OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN TO THE EXTERNAL REVIEW, JULY 2003; see Business Partners for Development, *supra* note 47. (“Tri-sector partnerships that explicitly seek to prevent conflicts need to aspire to equal representation of all parties.”)

It is not easy for any major institution—be it a multinational corporation, a government agency, or a major financial institution---to become comfortable and proficient in doing business in a climate of escalating expectations regarding transparency, public trust, and accountability.... Senior management...will...contribute...best when there is sufficient sophistication within the corporate and on-site team to support healthy long-term enlightened self-interest.⁸³

One of the practitioners interviewed for this paper, a mediator working throughout the Pacific Rim, sees the greatest challenge with global dispute resolution as mediation's evolution "from an ad hoc process to a more institutionalized one, whether that be within large global corporations, state court systems, or government to government."⁸⁴

C. Building Optimal Conditions.

Despite the difficulties, attempting serious conversation and collaboration with tough conflict is necessary, particularly where a history and practice of community protest exists.⁸⁵ Prejudice that all civil society is uninterested in thoughtful dialogue needs to be examined.⁸⁶

⁸³DYSART, MURPHY and CHAVES, BEYOND COMPLIANCE? AN EXTERNAL REVIEW TEAM REPORT ON THE COMPLIANCE ADVISOR/OMBUDSMAN OFFICE OF IFC AND MICA iv. (2003).

⁸⁴ Erbe, *supra* note 9.

⁸⁵ Leopoldo Burguete, Humberto Celis and Luis Miguel Diaz, *Management Of Environmental-Social Conflicts in Mexico at <http://www.mediate.com/pfriendly.cfm?id=1394> (10/29/03).*

⁸⁶ Naidoo, *supra* note 23.

Corporations need closer coordination between government and community affairs. Having a designated senior level corporate and government visionary who are responsible for piloting and otherwise spearheading innovative efforts can be instrumental to whether dispute resolution and multi stakeholder process occurs.⁸⁷ Someone needs to have clearly defined responsibility for each designated step. Mandated participatory process, like IFC requirements, may be necessary.⁸⁸

Corporations can be guided in recognizing their interests in risk management, protecting local and global reputations. Seasoned business stakeholders do recognize that social license to operate is essential.⁸⁹ Respect for what each stakeholder can contribute and the reality that without collaboration needed end results cannot be achieved motivates.⁹⁰ One corporation found that inviting community participation moderates “escalating ...expectations of unconditional benefit.”⁹¹

Advances are also possible with dispute resolution process itself. First, as one corporate interviewee expressed, many are still unaware of process options, like mediation, and benefits. Education is needed.⁹² A realistic first step is attempting to measure progress with concrete process challenges. Assessment checklists can be developed.

To create integrity and lasting impact, process conflict must be reconciled before attempting substantive discussion. Advised is openly addressing process challenge to facilitate

⁸⁷ Business Partners for Development, KNOWLEDGE SHARING WORKSHOPS (2002) (reviewing several case study examples around the world).

⁸⁸ Business Partners for Development, INTERNAL ASSESSMENT (2001).

⁸⁹ University of Cambridge, *supra* note 41 at 33

⁹⁰ University of Cambridge, *supra* note 41 at 34.

⁹¹ Business Partners for Development, EMERGING LESSONS FOR TRI-SECTOR PARTNERSHIPS: A REVIEW OF FOUR CASE STUDIES (2000).

⁹² Erbe, *supra* note 9.

stakeholder clarity of expectation and risk.⁹³ Optimally all concerned will carefully define the desired role of dispute resolution, agree to ground rules for decision making, and design ADR to meet particular needs and interests.⁹⁴ Ownership grows with participation. Process loses credibility and legitimacy when a powerful stakeholder designs and imposes. Such attempts are dismissed as public relations.⁹⁵ All must be considered to ensure shared incentives.

To preserve credibility and garner support, ADR must somehow build genuine and inclusive collaboration that adequately considers power imbalance. Democratic process includes all necessary stakeholders and is careful not to lose those who lack time and resources.⁹⁶ Scholar Opotow, an expert on moral inclusion, proposes that inclusion must occur at all societal levels and across all subpopulations as aspired in South Africa.⁹⁷

Process inclusion must likewise occur across time, beginning prior to and continuing after process.⁹⁸ Community engagement is built into complex projects at the beginning. Recommended is starting with diverse representation, perhaps a coordinating group.

Additional suggestions include starting with common ground and easiest issues first to build trust and surface conflict.⁹⁹ One interviewee's top priority is ensuring competence and quality among mediators and facilitators.¹⁰⁰ Corporate users of mediation and public sector users of negotiated rule-making seek enforcement mechanisms like they have with arbitration and judicial

⁹³ University of Cambridge, *supra* note 41 at 32.

⁹⁴ *Id.*

⁹⁵ Hemmati, *supra* note 77 at 118.

⁹⁶ Erbe, *supra* note 9.

⁹⁷ Opotow, *supra* note 52.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Erbe, *supra* note 9.

proceedings.¹⁰¹ Otherwise, they are “forced” into a dual track process--- with court or arbitration necessary to enforce mediated agreements.

IV. ADR’s Role Increasing Transparency And Responsiveness .

To advance good governance in the face of corrupt systems, ADR must somehow encompass reform.¹⁰² Traditionally corruption has been defined as the abuse of public office for private gain. Fundamental institutional reform is arguably good governance’s most pressing concern.¹⁰³ In Latin America, for example, masses of citizens criticize the administration of justice as “slow, (and) tending to favor those in power.”¹⁰⁴

Espoused law does not advance good governance without impartial enforcement. Likewise, government initiated ADR must be scrutinized.¹⁰⁵ “Conflict is often resolved superficially, and the transformative potential of mediation, in imparting skills and engaging in structural change, is neglected...(M)ediation centers...are often perceived as government agents.”¹⁰⁶

A. Citizens Themselves Must Verify Transparent and Responsive Governance.

Governmental and intergovernmental bodies can be less than transparent in sharing how dispute resolution relates to official decision making.¹⁰⁷ Naturally promises made but not kept

¹⁰¹ *Id.*

¹⁰² UNDP, *supra* note 8 at 17.

¹⁰³ Thornhill, Evan, Bulman and Sampson, *supra* note 30 at 31.

¹⁰⁴ Pasara, *supra* note 35.

¹⁰⁵ Ngoh-Tiong Tan, *Community Mediation in Singapore: Principles for Community Conflict Resolution*, 19-3 CONFLICT RESOL. Q. 289 (2002).

¹⁰⁶ *Id.* Not surprisingly, government agents rate the quality of governance significantly higher than non-government agents. Court, Hyden and Mease, *supra* note 2 at 15.

¹⁰⁷ Erbe, *supra* note 9.

trigger and escalate conflict. Governments further hinder sustainable dispute resolution through failure to make binding commitments. Recommended are clear links between dispute resolution and policy making.¹⁰⁸

Transparency must be consciously evaluated with alternative dispute resolution as well. Some ask for greater transparency with commercial arbitration given its primary adjudication role with international disputes.¹⁰⁹ It is important to distinguish good governance from “helpful to governance,” given ADR’s roots in addressing court overload, or judicial backlog.¹¹⁰ While not discounting the value of moving court cases forward or increasing access to affordable dispute resolution mechanisms, because the result is better, more responsive governance, the use of ADR to relieve congestion alone cannot be credited as good governance without evidence that parties evaluate the process and outcome as such. “It is of the highest moment that those who administer justice should always act under public responsibility, and that every citizen should be able to satisfy himself with his own eyes (that).. .a public duty is performed.”¹¹¹

Disputants alienated from corrupt legal systems and governments are demonstrating their faith in ADR. Some explicitly embrace alternative dispute resolution as creating “new spaces of transparency in the justice system.”¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ Michael D. Goldhaber, *Private Practices: As international arbitrations assume global economic importance, it’s becoming harder to keep details of individual cases secret. Should there even be an effort to do so?* FocusEuro at <http://www.americanlawyer.com/focuseurope/privatepractices.html> (2003) (an electronic supplement to the American Lawyer).

¹¹⁰ Emily Stewart Haynes, *Mediation as an Alternative to Emerging Postsocialist Legal Institutions in Central and Eastern Europe* 15 OHIO ST. J. ON DIS. RESOL. 257 (1999); *see also* Richard W. Naimark, *An ADR’s Professional’s Observations on Trends in Mediation and Arbitration at* <http://www.globalcenteradr.org> (2001);

¹¹¹ Goldhaber, *supra* note 110.

B. ADR Can And Does Result In Heightened Transparency.

ADR can incorporate formal commitment to greater transparency. The AARHUS Treaty mentioned earlier includes government commitment to “providing enhanced access to information....This will be used to produce a culture of greater openness so that decisions taken are more transparent.”¹¹³

Transparency was one of the criteria for negotiating South Africa’s transitional constitution.¹¹⁴ Meetings were open to the public.¹¹⁵ All materials were accessible through the Internet.¹¹⁶

Many companies and some intergovernmental organizations commit to transparency after suffering “untold reputational harm” from historic lack.¹¹⁷ Escalating civil society protest strategically and forcibly aims for transparency through public awareness campaigns.¹¹⁸ Likewise, global campaigns motivate governments to consider ADR.¹¹⁹

Corporations are free to adopt their own proactive policies and practices of full transparency, and have been so advised by NGOs.¹²⁰ Some establish independent community development funds with impartial oversight. A class action of African American employees

¹¹² L. Lynette Parker, *supra* note 25. Transparency must somehow be balanced with confidentiality. Optimally, disclosure of information does not materially harm business and competitive interest.

¹¹³ Hemmati, *supra* note 79 at 124.

¹¹⁴ Gross, *supra* note 5 at 54.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ CAO, *supra* note 83.

¹¹⁸ Neligan, *supra* note 38.

¹¹⁹ As one example, a letter writing campaign from a global network of prison ministries “created the space” for Brazilian officials to reinstate a highly successfully restorative justice approach to prison management. Parker, *supra* note 25 at 20.

¹²⁰ Global Witness and Human Rights Watch advised companies operating in Angola to publicize all payments. Business Partners for Development, *supra* note 47.

alleging discrimination at Coca-Cola illustrates mediated commitment to transparency. After ordered to mediation in the Northern District of Georgia, the resultant agreement created a taskforce to oversee implementation for a period of three years, as well as internal investigation of on-going complaints.¹²¹ Taskforce selection paralleled the selection of international commercial arbitration panels—three appointees nominated by Coca-Cola, three by the class counsel and one chairperson agreed to by both.¹²² All appointees needed to satisfy criteria negotiated in mediation.

C. ADR Facilitates Responsiveness to Stakeholder Needs And Higher Quality Outcomes.

All stakeholders, including government, are to free to craft arbitration and other ADR to be more responsive than formally established dispute resolution. Ideally, they will transform the “pursuit of privilege (power) into the responsibility for governance.”¹²³ Central to the best of governance is a “civil service that is strongly oriented and committed to service.”¹²⁴

Practically, however, private stakeholders are often best situated to respond to particular needs.¹²⁵ Negotiated rule-making¹²⁶ is advocated for creating more informed results because those impacted design.¹²⁷ Applied insight and information may not otherwise be available to government. Civil society groups are often more flexible than government bureaucracies, allowing them to act quicker and more creatively to newly arising issues and concerns. Civil

¹²¹ Abdallah, et. al. v. The Coca-Cola Company, U.S. District Court Northern District of Georgia, SETTLEMENT AGREEMENT (Nov. 16, 2000).

¹²² *Id.*

¹²³ ALEXANDER THEIR and JARAT CHOPRA, CONSIDERATIONS FOR POLITICAL AND INSTITUTIONAL RECONSTRUCTION IN AFGHANISTAN 8 (2002).

¹²⁴ UNDP, *supra* note 8 at 44.

¹²⁵ *Contra* Harter, *supra* note 42, citing argument that government alone should determine public interest.

¹²⁶ Negotiated rule-making is a public policy process where those impacted by the rules negotiate with the government officials mandated responsible for rule-making. E. FRANKLIN DUKES, RESOLVING PUBLIC CONFLICT: TRANSFORMING COMMUNITY AND GOVERNANCE (1996).

society is most often acknowledged for closeness to people.¹²⁸ Including civil society stakeholders in ADR process ideally enhances democratic legitimacy.

Civil society is admonished to maintain its legitimacy through practicing dispute resolution within, or using the approaches reviewed here to mobilize constituencies, develop shared platforms, and create internal democracy (rather than claim to speak for people who are not consulted or considered).¹²⁹ Uganda and South Africa have both initiated “Installing Codes of Conduct” for civil society organizations to ensure accountability.¹³⁰

To create optimal results, both civil society and government stakeholders must actively engage in negotiation. If a government agency decides to be relatively passive, it hurts its own interests as well as civil society (and vice versa).¹³¹

Restorative justice¹³² exemplifies ADR’s ideal of diverse, inclusive process. It is an international movement within criminal dispute resolution, promoted as more responsive, particularly to minority communities.¹³³ Government continues to oversee criminal justice but includes offenders admitting culpability, interested victims and community members in

¹²⁷ An analysis of two hundred thirty nine negotiated rule-makings confirms that decision making by consensus results in superior outcomes. Harter, *supra* note 42.

¹²⁸ Naidoo and Heinrich, *supra* note 23; *see also* Harter, *supra* note 42 at 10 [“(F)or the process to meet its goal of reconciling competing values and insights into a “public interest”---a vision shared by the populace and not just imposed by the bureaucracy---it must...be democratic and hence broadly representative.”] Gender is interesting in relationship to responsiveness. Depending on the cultures and personalities involved, certain criteria for measuring good governance, such as service or inclusive equal decision-making may be judged as unmanly or feminine and weak. Other cultures, however, will welcome and embrace.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Harter, *supra* note 42 at 8. Interestingly, case studies show that when government is passive, during all or part of negotiated rule-making, the other parties are challenged with determining their best alternatives to a negotiated agreement.

¹³² Restorative justice can be defined as “a theory of criminal justice that justifies restoration in the aftermath of crime on the ground that crime causes harm.” Lecture, 2004, Straus Institute for Dispute Resolution.

negotiating amends.¹³⁴ At its best, such collaboration shows promise of transforming relationships between communities and government and preventing the most horrific of conflict and crime.¹³⁵

V. Inclusive Multi-Stakeholder Process Presents Challenges ADR Is Prepared To Address.

Actors concerned with environmental and other priority international issues, such as ethnic conflict, are pioneering multi-stakeholder process¹³⁶ that meets several criteria for good governance.¹³⁷ Engaging a diverse range of participants, concerned and impacted, is highlighted.

(E)thnic conflicts are often the product of regimes that promote feelings of exclusion with certain groups. If the purpose of transitional justice is to move toward greater egalitarianism, it is essential to overcome feelings of exclusion and ensure that decision making about basic rules will enhance feelings of participation and inclusion.¹³⁸

The results are promising.

¹³³ Monya M. Bunch, *Juvenile Transfer Proceedings: A Place For Restorative Justice Values*, 47 HOW. L. J. 909, 910 (2004).

¹³⁴ DANIEL W. VAN NESS and KAREN HEETDERKS STRONG, *RESTORING JUSTICE* (1997).

¹³⁵ Parker, *supra* note 112; Wierzyńska, *supra* note 50 at 1943.

¹³⁶ While arbitration is an increasingly popular method for global dispute resolution, “(t)he consensual basis of arbitration, and aspects of its basic format, make it an awkward method when the dispute in question involves more than two parties.” Coe, *supra* note 16 at 66.

¹³⁷ *Id.*

¹³⁸ Gross, *supra* note 5 at 53.

A. International Leaders Laud Exemplary Democratic ADR.

One of the most famous examples of inclusive participatory process was South Africa's negotiation of its Peace Accords, which included "political organizations and parties, civic organizations, minority groups, security forces, businesses, trade unions, churches and the government."¹³⁹ A media campaign on television, radio and Internet, meetings in communities lacking media access, and wide circulation of a draft Constitution for review, comment and objection actively solicited opinions of various groups.¹⁴⁰

Likewise, Kofi Annan praises the earlier mentioned AARHUS Convention Process as "the most impressive elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities."¹⁴¹

Fifty five countries of North America, Western, Central and Eastern Europe, and Central Asia participated.¹⁴² NGOs engaged from the very beginning of the process, acting as advisors to UNECE while designing the process.¹⁴³ This process is lauded, compared to other environmental treaties, for its focus on the process of decision making as well as outcome.¹⁴⁴ It is heralded as a model for multilateral policy-making, emulating democratization of global institutions.

¹³⁹ Collin-Marks, *supra* note 75.

¹⁴⁰ Gross, *supra* note 5 at 54.

¹⁴¹ Hemmati, *supra* note 77 at 121.

¹⁴² *Id.*

¹⁴³ Hemmati, *supra* note 77 at 122.

¹⁴⁴ *Id.*

Multi stakeholder process, by definition, increases participating stakeholders, listing UN agencies, other intergovernmental bodies, governments, NGOs, academics, farmers, business and industry, trade unions, indigenous people, technical experts, ethics specialists, professional associations, media, and affected people as examples.¹⁴⁵ The best of multi stakeholder process also somehow overcomes feelings of exclusion, engages diverse stakeholders and their opinions, and facilitates inclusive decision making. In tackling the toughest challenges, exemplary multi stakeholder process powerfully advances democratic self-determination.

B. Global Critique and Recommendation Stress The Need For Authentic Representation And Effectively Bridging Cultural Difference.

One World Trust has devoted much research to evaluating effective participation (“engagement”) in collaborative process.¹⁴⁶ The results emphasize once again the importance of linking micro and macro level decision making and including the most marginalized and affected groups. Sophisticated convening of dispute resolution undeniably ensures the presence and direct voice of a broad array of interests rather than simply those who are more organized or powerful.¹⁴⁷

Representatives claiming to speak for groups must be checked to ensure legitimacy. Representatives who lack close working relationships with their constituencies are a problem. They may not even attempt the ratification needed for broader buy-in.¹⁴⁸ Such representatives

¹⁴⁵ *Id.*

¹⁴⁶ Neligan, *supra* note 38. As a result, detailed questions have been designed to help participants structure effective process.

¹⁴⁷ Harter, *supra* note 42 at 2.

¹⁴⁸ Hemmati, *supra* note 77 at 117.

sometimes attempt to conceal conflict with vague language. Needless to say this approach is not sustainable.

Naturally challenges arise when participants bring basic assumptions and approaches quite alien to the collaboration necessary to find common ground and develop the shared platform and culture of communication and negotiation.¹⁴⁹ Bringing all contending forces “to the table” is easier planned than implemented when facing power inequity and ethnic tension.¹⁵⁰ Cultural difference requires in-depth consideration. Moreover, inevitable “clash of cultures,” or styles of problem-solving, surface, even without ethnic and power difference. Engineers, scientists and other experts are routinely acclaimed for individual achievement rather than partnering with those impacted by their findings.¹⁵¹ Business focus on “making a profitable deal” may challenge the government expectation of mandated top-down authority, along with politics that tolerate whatever means advance advocacy of special interests.¹⁵² Political culture can attract personalities who view authentic, open communication as foolish and promote manipulation and domination instead. Lobbyists are rewarded for advocating self-interest as competitively as possible. Likewise, activist culture may be feared as intent only on vilifying those with more privilege, while simultaneously facing accusations of being co-opted for participation alone. As a result, these groups are too often working at cross purposes, avoiding communication, and duplicating efforts.

Professor Naomi Roht-Arriza vividly captures the innate concrete conflict emerging from professional difference alone.

¹⁴⁹ *Id.*

¹⁵⁰ UNDP, *supra* note 8 at 4. (“(T)here is a dearth of works that go deeply beyond the rhetorical and give practical guidance on ways that governance systems and structures can address power inequality”).

¹⁵¹ *Id.*

Integrating post-conflict reconstruction and collective reparations seems...promising. Attempts to do so will, however, encounter difficulties based on differences in vocabulary, professional biases, restrictive mandates and ease of goals. Neither UNDP or the World Bank frames issues in terms of reparatory justice, law or rights, but rather in terms of repair of the consequences of conflict and economic growth....In part, this may be due to the predominance of lawyers in framing reparations issues and the predominance of economists and engineers in the development world. Post-conflict work... involves merging the different perspectives of conflict prevention, humanitarian assistance, human rights monitoring and traditional development cultures, each with its own "turf," time frame and policy prescriptions. Development aid involves different, often shorter term and more measurable goals than moral and social reconstruction. 'It is easier to rebuild roads and bridges than it is to reconstruct institutions and strengthen a social fabric of society.'... On the other hand, 'transitional justice' and... organizations focused on reconciliation, justice and rights... have often given short shrift to economic, social and cultural rights, and have tended to avoid confronting the complex economic development issues in favor of a political institution-building approach.¹⁵³

¹⁵² Erbe, *supra* note 9.

¹⁵³ Naomi Roht-Arriaza, *Reparation Decisions and Dilemmas*, 27 HASTINGS INT'L. & COMP. L. REV. 157, 172 (2004); *see also* University of Cambridge, *supra* note 41 at 32. ("(S)ustainability for the private sector has some relationship to cost recovery, for NGOs it has a bearing on empowerment and community voice, and for the public sector it generally means technically sound and thus not needing to be addressed

Fortunately ADR provides recourse. Negotiating different perceptions of risk and value, such as the worth of endangered species and thousands of jobs, or reduced infant mortality versus tons of ore,¹⁵⁴ as one instance, requires training in integrative bargaining.¹⁵⁵ Polarizing disputes by framing as simple “either/or” win-lose paradigms assumes traditional distributive bargaining with elementary linear logic. Integrative bargaining, on the other hand, understands complexity and interdependence. Naturally, expected and desired outcomes will differ according to stakeholder. Thus integrative bargaining reframes the conflict as a shared search for options that maximize satisfaction for all, without requiring any change in mandates or frameworks. Parties might ask, for example: how can we generate ore and protect infants simultaneously? A five year integrative partnering effort is currently being attempted by Rio Tinto, a multi-national mining company, and Bird Life International, a global network of environmental non-governmental organizations. They have developed objectives to reflect mutual benefit, focusing equally on biodiversity, mining operations and reputation.¹⁵⁶

A new conception of identity, the relational self, posits affinity, or “perceived resemblance to those with whom one has a common interest.”¹⁵⁷ Theorized is that the process of identifying shared interest changes identity. Arguably, alternative dispute resolution, by its inherent relational nature alone, bridges and transforms cultural identity.

Many stakeholders, however, benefit by being guided in broadening their decision-making approaches. Professional facilitators, agreed to and trusted by all parties, can be indispensable---

again in the future. These are not mutually exclusive concepts but they are significantly different starting points”).

¹⁵⁴ Erbe, *supra* note 9; Business Partners for Development, *supra* note 47 at 12 (reviewing Tampakan Copper in Philippines).

¹⁵⁵ *Id.*

¹⁵⁶ Jonathan Stacey, *A Global Partnership with a Mining Multinational: Exploring and Realizing the Capacity for Strategic Biodiversity Conversation*, PARTNERSHIP MATTERS 26 (2003).

¹⁵⁷ CLAYTON SUSAN and OPOTOW, SUSAN (editors), *IDENTITY AND THE NATURAL ENVIRONMENT* (forthcoming).

assisting with face-saving by, for example, fielding tough questions that participants truly do not know how to answer in the moment, such as how government officials can honor mandate while participating in uncertain process.¹⁵⁸

VI. One Of ADR's Primary Contributions Is Mediating Diverse Interests For Common Good.

ADR is routinely lauded for cost efficiency---time and financial--in contrast to litigation.¹⁵⁹ Once again, however, cost efficiency by itself cannot be automatically equated with good governance.

A. Stand Alone Efficiency Can Backfire.

Isolating cost efficiency may actually hinder good governance.¹⁶⁰ Rewarding quick disbursements, for instance, discourages participatory process. Pressure for cost efficiency can curtail work with the most marginalized.¹⁶¹ Law and economics' concern with efficiency has potential to dominate dispute resolution process at the cost of abandoning deliberation and wisdom.¹⁶² Efficiency may also mask ineffectiveness with apparent success. Even when none of

¹⁵⁸ See, e.g., Kinga Goncz & Sandor Gesko, *Ethnic Minorities in Hungary: Democracy and Conflict Resolution*, ANNALS AM. ACAD. POL. & SOCI. SCI (1997) (describing how Partners for Democratic Change successfully facilitated meetings between government and the Roma regarding complaints of police discrimination); see also SPIDR Environment/Public Disputes Sector Critical Issues Committee, *Guidelines for Using Collaborative Agreement Seeking Processes at* <http://www.mediate.com/articles/bestpracticespiderC.cfm> (2004).

¹⁵⁹ Coe, *supra* note 16 at 19. Cost efficiency cannot be assumed, however. Arbitration, for example, can cost more than litigation.

¹⁶⁰ UNDP, *supra* note 8 at 29.

¹⁶¹ Naidoo and Heinrich, *supra* note 23.

¹⁶² Cochran, *supra* note 76 at 710-711.

the above is true, the most efficient of process risks being seen as competitive and self-interested.¹⁶³

Early intervention in conflict ideally contain costs. Prevention does. Attempts to maximize self-interest with mere lip service to collaboration, however, predictably ventures broken trust and backlash.

B. Relationships And Goals Must Be Balanced For Durable Dispute Resolution.

Eradication of poverty and attracting foreign investment are top priorities in most countries.¹⁶⁴ Much evidence shows that governance generally improves with wealth.¹⁶⁵ Espoused rule of law, no matter how progressive, is not enough without the resources needed to actualize. South Africa's current constitution exemplifies. Despite the constitution's transformative potential and strong judicial support,¹⁶⁶ little tangible impact is evident in the lives of those whose rights have been upheld. "Laws and rulings are not enough without committed officials, budgets and money allocations."¹⁶⁷

Professor Antonio Mendoza believes that mediation, collaborative negotiation and similar "less efficient" process are central to foreign direct investment, specifically, joint ventures requiring horizontal relationships.¹⁶⁸ While the agreements negotiated will likely contain some rule of law provisions, such as arbitration clauses agreeing to vertical authority in the event of

¹⁶³ See, e.g., UNDP, *supra* note 10 at 4.

¹⁶⁴ Harpole, *supra* note 13 at 10.

¹⁶⁵ D. KAUFMAN, A. KRAAY and P. ZOIDO-LOBATON, GOVERNANCE MATTERS (1999).

¹⁶⁶ CCT 11/00 *Government of the Republic of South Africa v. Grootboom* SALR 46 (CC) is considered "a breakthrough for social rights. Gross, *supra* note 3 at 60. Yet unfulfilled promise raises fears that the constitution will somehow legitimize a society unable to actualize its laws. *Id.*

relationship break-down, unlike mere sale of goods, joint ventures by foreign governments and private investors require cooperative relationship building.¹⁶⁹ While investment agreements exist that preference those with the most power and resources, the required accommodation by those with less clout risks eroding relationship durability and goodwill.¹⁷⁰ Furthermore, there are cultures and countries, like Japan, who simply wish to avoid adversarial proceedings, including arbitration.¹⁷¹

Dr. Kishan Khoday concurs, asserting that relationships, not rules, have “emerged to manage conflicts between the mandates of public agencies, the interests of business and the values of civil society groups in defining the rules and boundaries of the new global economy.”¹⁷² While some formal rule of law has emerged, most law is “de facto...being developed and overseen by a diverse configuration of social relationships.”¹⁷³

Support of local authorities can be pivotal to whether international adjudicative dispute resolution is able to proceed.¹⁷⁴ The reverse is also true. As a result, in conversations with counsel for multinational corporations with presence in Asia, one researcher found that lack of confidence in courts’ enforcement of arbitral awards and role with interim measures frequently results in mediation or conciliation.¹⁷⁵ “(M)ediation cuts through a great deal of bureaucracy and can allow parties to face each other and resolve their differences in an informal way.”¹⁷⁶ Most

¹⁶⁷ Gross, *supra* note 5 at 67.

¹⁶⁸ Interview with Professor Antonio Mendoza, Pepperdine University School of Law, Fall 2003.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Harpole, *supra* note 13 at 13.

¹⁷² Dr. Kishan Khoday, *Partnership as Governance Reform: Negotiated Rule-Making in the New Economy*, Partnership Matters 23 (2003).

¹⁷³ (emphasis added). Khoday, *supra* note 172 at 24.

¹⁷⁴ Wuhler’s Lecture, 2003. Master’s Forum, Straus Institute for Dispute Resolution, Pepperdine University School of Law (discussing Balkans property claims).

¹⁷⁵ Harpole, *supra* note 13 at 12.

¹⁷⁶ *Id.*

importantly, mediated agreements create party acceptance of the terms mediated.¹⁷⁷ At its best, mediation results in durable resolution---the outcome sought by all dispute resolution.

In a study of sixty major corporations, eighty one percent of respondents judged mediation as more satisfactory than litigation, with fifty nine percent highlighting the preservation of relationships.¹⁷⁸ Mediation was the most popular corporate ADR choice, with arbitration, mediation-arbitration, in-house grievance and fact finding, peer review, and ombuds intervention as the next preferences—in that order.

Optimal conflict resolution embraces the interest of efficiency as well as increased participation and cooperation. In the Philippines, for instance, mediators are rated highly for communication and relationship, as well as problem-solving, skills. Specifically they are commended for: 1) ability to identify problems and issues, 2) patience, 3) sensitivity, 4) listening with no pressure to settle, and 5) impartiality.¹⁷⁹

Interviews conducted for this paper likewise rank cost-effectiveness and efficiency among ADR's benefits, along with the ability to preserve important relationships and proceed confidentially.¹⁸⁰ Those interviewed further value the ability to custom design creative resolutions and preserve reputations.

¹⁷⁷ See Harter, *supra* note 42.

¹⁷⁸ DAVID B. LIPSKY AND RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998).

¹⁷⁹ Belle Abaya, *The Philippine Mediation Experience: From Community Justice to Judicial Reform*, ACRESOL. (2003).

C. Collaborative Process As The Most Efficient Approach To Resolution.

In the face of contentious conflict, collaborative process is likely to prove the most efficient of all options. “Defensive posturing,” “political wrangling” and judicial review can prolong conflict for years, with no necessary benefit.¹⁸¹ Negotiated rule-making, for example, is sometimes the only way to move forward, with conflicts so contested that government agencies are otherwise at impasse.¹⁸²

Critique of complex dispute resolution “from the field” includes these proposals and observations. On-going process, rather than one time meetings, improves success.¹⁸³ Some multi stakeholder process takes five to ten months. Other may run for two years or more.¹⁸⁴

Credible process includes all necessary stakeholders and is careful not to lose those who lack time and resources. Taking the time to recognize and address real difference is valued. Issues are thoroughly explored. Agenda setting is kept open so as not to oversimplify and miss important issues.¹⁸⁵ Social, economic and equity questions “may take time to emerge.”¹⁸⁶ Interestingly, contracts are faulted for emphasis on the simplest of outputs and failure to consider the more complex terms of collaborative efforts, such as expected outcomes.¹⁸⁷

A balance, or peace, between concerns can be navigated. It makes sense to consider mediation and ADR hybrids only when value-adding. Recommended is reserving the most

¹⁸⁰ Erbe, *supra* note 9.

¹⁸¹ Harter, *supra* note 42.

¹⁸² Harter, *supra* note 42 at 5 and 6, citing Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

¹⁸³ Hemmati, *supra* note 77 at 114.

¹⁸⁴ Hemmati, *supra* note 77 at 98.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

efficient process for disputes with equal bargaining power, where relationships, reputation and creativity are not priorities. More complex conflicts with multiple stakeholders or valuing of long-term relationships need more involved process. Advised for transnational corporations, for example, are dispute resolution mechanisms that proactively prevent crisis and anticipate challenges.¹⁸⁸

Can we design a model for assessing conflict intricacy and persuading those concerned of the value of more elaborate options as complexity grows?¹⁸⁹ If a conflict is relatively simple and straightforward, like sales of goods, and a simple process will suffice, there is no problem or confusion. When conflicts become more challenging, however, like those involving resistance or more than two parties, a model is needed to guide parties, introduce options and encourage greater investment and creativity.¹⁹⁰ The optimal guide will help parties link and delink issues so that relatively straightforward agreements can be reached quickly and easily, with more energy reserved for the most problematic.¹⁹¹ The beginnings of such a guide are found in a matrix developed by a transnational mining corporation and a global network of environmental NGOs.¹⁹² The matrix begins by rating the biodiversity importance of fifty seven different operational areas and institutional capacity; thus guiding attention to the areas of greatest need and importance.¹⁹³

¹⁸⁷ See, e.g., Michael P. Pappas, paper presentation, 2004. *A Flexible Framework for the Prevention and Resolution of Construction Disputes*, University of Massachusetts, Boston.

¹⁸⁸ Tri-Sector Partnership 'Markers,' *supra* note 81 at 5; see also Nancy Erbe, *Communications Theory and Restorative Justice: Approaches to Proactive Conflict Resolution*, BUS. RESEARCH YEARBOOK (forthcoming).

¹⁸⁹ Erbe, *supra* note 9.

¹⁹⁰ University of Cambridge, *supra* note 41 at 34-35.

¹⁹¹ *Id.*

¹⁹² *Id.*

VI. ADR Also Furthers Good Governance Through Enforceable Rule of Law.

De Tocqueville asserted that a “properly functioning democratic society fosters...context for constraining arbitrary and intrusive state power.”¹⁹⁴ When those with power abuse and ignore the rights of those they serve, they cannot be trusted to govern.¹⁹⁵ A government oppressing a group of citizens certainly cannot claim to be impartial.¹⁹⁶

While the importance of building durable cross-cultural relationships is explored in the preceding section, such relationships are also vulnerable to abuse. Interestingly, while mediation/arbitration is promoted for relationship building, it is simultaneously criticized as compromising the impartiality of the arbitrator since he has already heard “confidential” disclosures as mediator.¹⁹⁷ Likewise, “(w)hat causes lawyers most concern is a mediator privately caucusing with each side. A med/arb process may raise questions of bias, real or perceived, in the minds of the parties...Equally, as a result of private caucus sessions, the mediator may feel biased to one side or other on the basis of what he or she hears in confidence.”

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A. Impartial Rule of Law Guards Against Corrupt Relationships.

Increasing monitoring systems, legal enforcement and accountability can advance good governance. A rational cost/risk/benefit analysis of human behavior theorizes that increased costs

¹⁹³ *Id.*

¹⁹⁴ Moyer and Haynes, *supra* note 7.

¹⁹⁵ Business Partners for Development, *supra* note 47 at 6.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

deter. “Corrupt activities occur when marginal returns from crime exceed the marginal returns from legal occupation by more than the expected value of the penalty.”¹⁹⁹

The emerging economies of Eastern and central Europe show that quickly establishing rule of law can be instrumental to growth and development.²⁰⁰ ADR, like international commercial arbitration, provides confidence building infrastructure with emerging market economies. Foreign parties sometimes feel at a relative disadvantage in local courts: unfamiliar with domestic rules and procedures; fearful of local bias.²⁰¹ Local courts may be similarly ill-equipped to grapple with issues of foreign law.²⁰²

Trustworthy rule of law is necessary for all requisites of good governance. “Without a minimal level of human rights...local empowerment is an illusion.”²⁰³ Tolerating selective illegality erodes public confidence and discourages participation.²⁰⁴ To counter, some transnational corporations insist on contractual guarantees that contractors and governments will respect human rights.²⁰⁵

ADR is unquestionably growing in popularity around the world for its ability to fill critical gaps where rule of law is unreliable, corrupt or missing. ADR has the capacity to create trustworthy rule of law transcending domestic systems and combining legal traditions.²⁰⁶ Some

¹⁹⁸ *Id.*; see also BARRY C. BARTEL, MED-ARB AS A DISTINCT METHOD OF DISPUTE RESOLUTION: HISTORY, ANALYSIS, AND POTENTIAL 31(1990).

¹⁹⁹ Edgardo Buscaglia & Maria Dalokias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL’Y INT’L BUS. 95, 95 (1999), cited in Moyer & Haynes, *supra* note 7.

²⁰⁰ Fort and Schipani, *supra* note 24 at 58.

²⁰¹ Harpole, *supra* note 13 at 4.

²⁰² *Id.*

²⁰³ U.S. AGENCY FOR INT’L. DEV. NEW PARTNERSHIPS INITIATIVE RESOURCE GUIDE (1997).

²⁰⁴ Moyer & Haynes, *supra* note 7 at 638.

²⁰⁵ Business Partners for Development, *supra* note 47.

²⁰⁶ See Eric Luna, *A Place For Comparative Procedure*, 42 BRANDEIS L. J. 277 (2003/2004).

international multi-stakeholder process, for instance, establishes binding legal agreements.²⁰⁷ At its best,²⁰⁸ the rule created is truly impartial—created to oversee all groups and individuals, no matter how powerful, and applied equally (“blindly”), to ensure justice.

B. ADR Offers Popular Alternative to Untrustworthy Legal Systems.

Independent alternatives and leadership are particularly needed where courts are controlled and pressured politically by the executive branch.²⁰⁹ Lincoln’s role with slavery exemplifies the requisite response—true impartiality. If political fraternity had been priority, Lincoln may have allowed States to spread slavery without interference. If he had revered the judicial system as sacred, slavery would have prevailed.

In a study of sixteen countries and good governance, all but two (Argentina and Chile) report a much higher trust in community and indigenous dispute resolution than formal courts.²¹⁰ What is purportedly happening with ADR in the Philippines demonstrates the need and resultant enthusiasm. The Philippine courts urgently need vital reforms addressing backlog, corruption and systemic biases and inefficiencies.²¹¹ In 1999, during a two week National Settlement Period,

²⁰⁷The AARHUS Convention mentioned earlier is one example noted for linking environmental and human rights.

²⁰⁸Its worst justifies status quo injustice. In circumstances like South Africa’s apartheid, transitional justice requires transformative law. Gross, *supra* note 5 at 16. (“[T]he analytical tool of transitional (law) becomes both an interpretative tool that helps to elucidate the concept of justice during transitions, and a normative tool for evaluating change and the degree of commitment to correcting injustice”).

²⁰⁹Haynes, *supra* note 110. While judicial corruption is the natural focus for an examination of ADR and good governance, Transparency International’s Global Corruption Barometer found that political party corruption is the leading citizen concern, found in thirty three of the forty seven countries surveyed, (including the United States) and followed by concerns regarding corruption with police and medical services. In many industrialized countries, voting is declining, along with party affiliation, due to alienation from the decision making process. Judicial corruption is ranked third or fourth. Transparency International, *supra* note 2. In the U.S., corrupt medical services are the second leading priority. Corruption in the legal profession, however, represents a growing trend. Cochran Jr., *supra* note 76.

²¹⁰Court, Hyden and Mease, *supra* note 2.

²¹¹Abaya, *supra* note 179.

the Department of Justice referred eighteen hundred cases to mediation. Most reported satisfaction with both the process and the mediator whether or not their case settled.²¹²

The above success sparked a societal trend. The Supreme Court started mediation in the Court of Appeals and the Department of Trade in its consumer protection bureau. The Departments of Environment and Natural Resources and Agrarian Reform “are encouraging greater private sector participation in...community wide conflicts over land and resources.”²¹³ The Board of Investments and Intellectual Property Rights office hope to gain a competitive edge over other Asian investment destinations through the use of mediation.²¹⁴

C. True Impartiality Is Pivotal To Good Governance.

“(The) stability of all democratic institutions rests upon a justice system founded on principles of equal access, impartiality and independence.”²¹⁵ “A fair and just result” is named primary in evaluating international private commercial arbitration in particular.²¹⁶ In one survey, eighty one percent ranked fairness nearly twice as significant as cost, the monetary award, finality and speed of decision, and arbitrator expertise.²¹⁷

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ UNDP, *supra* note 8.

²¹⁶ Naimark, Richard W. and Keer, Stephanie E., *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People* INT’L. BUS. L. 203 (2002).

²¹⁷ *Id.* Procedural justice research in the United States similarly correlates decision maker neutrality with perceived fairness. Carolyn Copps Hartley and Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL’Y. 133, 141 (2004). Interestingly, in a study of sixty major U.S. corporations, forty nine percent expressed lack of confidence in their arbitrators’ qualifications. Lipsky and Seeber, *supra* note 178.

Yet some developing countries are challenging international commercial arbitral awards as unfair.²¹⁸ In the Philippines, for instance, suspicion of partiality and less party satisfaction is expressed when evaluating arbitration. Requested is increased transparency through strengthening appeal mechanisms²¹⁹ and participation by those from developing countries who distrust the system.²²⁰ Arbitration seminars can be held in Indonesia as well as London. “If arbitration has nothing to hide, then let them not hide it.”²²¹

An American “proclivity that raises eyebrows abroad” is the practice of interviewing potential arbitrators.²²² Not surprising, particularly troublesome are attorneys who attempt to solicit arbitrator candidate opinions on the merits of their cases.²²³ This is noteworthy because ex parte communications are also present in the corrupt systems that ADR seeks to circumvent. A related concern is the autocratic mediator-arbitrator pushing parties into making “premature and unnecessary concessions that interfere with the attainment of high joint benefit.”²²⁴

Fortunately, international standards strongly back the impartiality of commercial arbitrators.²²⁵ Combined with enforcement certainty²²⁶ provided by various arbitration treaties, particularly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), international commercial arbitration is growing in use.²²⁷

²¹⁸ Michael D. Goldhaber, *Arbitral Terrorism*, FocusEuro at <http://www.americanlawyer.com/focuseurope/aterror.html> (11/18/2003).

²¹⁹ Other ADR process, like negotiated rule-making, already has judicial recourse in the event of illegality. Harter, *supra* note 42 at 10.

²²⁰ Goldhaber, *supra* note 218 at 2.

²²¹ *Id.*

²²² Coe, *supra* note 16.

²²³ *Id.*

²²⁴ Bartel, *supra* note 198 at 26.

²²⁵ Coe, *supra* note 16 at 110-111.

²²⁶ In one survey, treaty created enforceability ranked as the number one reason behind international commercial arbitration’s growth in popularity. Local court decisions are often not enforceable. Harpole, *supra* note 13 at 5.

²²⁷ Arbitration/mediation is one hybrid process promoted as impartial. Haig Oghigian, *Mediation/Arbitration Hybrid* J. INT’L. ARB. (forthcoming).

True impartiality is key to whether alternative dispute resolution advances rather than erodes good governance.²²⁸ Attempting to measure through documented increase in decision-makers' honesty and concern for the public is one avenue, or conversely, decrease in political patronage, rent seeking, and special interest influence. One proposal to increase public confidence and decrease the potential for political manipulation with ADR is appointment of multiple member panels including members chosen by each of the communities concerned—like the current model for international commercial arbitration.²²⁹ Multilateral and NGO groups abiding by principles of impartiality and neutrality, such as those of the International Committee of the Red Cross, may be the most independent and trustworthy if their participation in a particular ADR process is feasible.

Building trust between stakeholders, particularly those from different countries, is essential.²³⁰ An independent and impartial facilitator is seen as superior to one of the stakeholders or a related group attempting to lead. NGOs that fully depend on facilitation income are not seen independent.²³¹

²²⁸ See, e.g., Alma Abdul-Hadi Jadallah, *The Arab-Israeli Conflict: Challenges for American Third-Party Intervenors*, ACRESOL. 36 (2003).

²²⁹ Haynes, *supra* note 110 at 282.

²³⁰ *Id.*

²³¹ Hemmati, *supra* note 79 at 118-119.

VI. Impartial Panels and Ombuds Are Commended Globally for Independence, Oversight and Accountability.

Monitoring the results and impact of dispute resolution guards against token efforts.²³²

Accountability simply means that individuals and institutions are answerable for their actions and the consequences that follow from them...Accountability may take many forms, from merely 'taking into account', so that those affected by decisions are consulted or considered, to independent inspection, external monitoring, public reporting, judicial review and elections.²³³

Robust accountability requires all stakeholders embracing the tensions of co-existence.²³⁴ This truth is often lost in common "finger pointing." Government and business need independent watchdogs to oversee and stimulate their best, while all stakeholders, including civil society, benefit from a stable and reliable legal structure accountable to many rather than one special interest group. Ideally, the stronger the nation-state and intergovernmental body, the more it allows, even seeks, strong voice and questioning within. Civil society likewise is learning the value of working with government. As one example, the International Landmine Campaign in Africa obtained leverage through engaging rather than confronting the state.

²³² *Id.*

²³³ Their and Chopra, *supra* note 123 at 8.

²³⁴ Naidoo and Heinrich, *supra* note 23.

Civil society stakeholders are generally more independent than government and business stakeholders. Their presence should enhance accountability. Some NGOs, however, are the problem. They discourage popular participation, waste resources and unknowingly support corruption.²³⁵ They, too, must be held accountable.

One stated purpose of the dispute resolution surveyed in this article is to produce “information from an independent source.”²³⁶ Impact studies, monitoring by impartial panels, and public access are practical examples, along with the office of ombuds.

An ombuds like process was established in South Africa as part of negotiating the Peace Accords. The Goldstone Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation,²³⁷ composed of a judge, senior advocate and three other legally qualified persons “(i)nvestigated the nature and causes of violence, identifying those responsible and recommending action to the state president.”²³⁸

Likewise, the Civil and Political Rights Covenant (and its accompanying Protocol) and the Convention on Racial Discrimination created Ombuds committees, with representatives from eighteen ratifying countries, to oversee worldwide human rights.²³⁹ Ex officio experts “investigate (on petition) and criticize what the governors do that the governed do not like.”²⁴⁰ Criticized governments are mandated to respond with remedies.

²³⁵ Their and Chopra, *supra* note 123 at 8.

²³⁶ *Id.*

²³⁷ Collin Marks, *supra* note 75 at 18.

²³⁸ *Id.* Violence and intimidation reportedly declined in response.

²³⁹ Frank C. Newman, *Ombudsmen and Human Rights: The New U.N. Treaty Proposals*, 34 U. CH. L. R. 951 (1964).

²⁴⁰ *Id.*

In 1995 the IFC and MIG created an ombuds division, Office of the Compliance Advisor/Ombuds (hereinafter “CAO”), in response to harsh criticism of the World Bank by a Chilean NGO.²⁴¹ The CAO office now investigates such complaints. In one case CAO arranged an independent study of water quality, with monitoring of transparency and impartiality by a diverse collectively chosen group of local community representatives.²⁴²

The most publicized example of CAO work occurred in Peru last year in response to local and NGO complaints of pollution by a local investment (mine). CAO’s intervention elaborates options available to ombuds. CAO organized a series of trainings for sixty-three participants, including politicians and government staff involved with mining, community delegates selected for this particular process, mine employees, academics, members of the local chamber of commerce, and staff from various NGOs. Almost one hundred and fifty hours were provided in dispute resolution, training for trainers, effective communication, mediation, consensus building, and case study analysis of sociocultural and economic context.²⁴³

Impartiality, inevitably tested with tough political pressure, must be strictly maintained.²⁴⁴ It is imperative that all stakeholders be prepared to support and monitor the ombuds’ independent role.²⁴⁵ While government often proclaims independent oversight, in actuality, NGOs more often serve as true watchdogs. Environmental Rights Action, for example, publicly alleged CAO’s failure to consult with a truly inclusive group of opinion leaders in examining Shell and IFC implementation of the Niger Delta Contractor Revolving Credit Facility. Despite this reality, CAO reviewers still found “the risk of perceptions from within the

²⁴¹ The complaint involved a hydroelectric dam. While civil society criticism can be uncomfortable, the World Bank acknowledges that it has moderated its activities in response. Nadoo, *supra* note 23 at 1.

²⁴² CAO, DRAFT REPORT OF THE CAO EXPERT MISSION TO CAJAMARCA (2002).

²⁴³ CAO, REPORT ON THE TRAINING ACTIVITIES OF THE MESA DE DIALOGO Y CONSENSO CAO/CAJAMARCA (2001- 2002).

²⁴⁴ *Id.*

institutions that (the ombuds) too consistently adopts the NGO perspective, and from civil society that it represents the institutions of which it is a part.”²⁴⁶ Thus ombuds accountability necessitates further guarding through independent and critical media, a representative decision making body that is separate from police and military forces, and education of the individuals being protected so they are aware of their rights.²⁴⁷ External evaluation of ombuds oversight, like that described here, may also be necessary.

CAO reviewers concluded that the ombuds was beneficially impacting its institutions “by influencing the agenda and terms of internal debate on challenging issues central to successful development.”²⁴⁸ They also found that “senior management and some middle management, and most environmental and social development specialists, seem to particularly value...early warning.”²⁴⁹

NGOs valued opportunities for review and comment provided by ombuds but perceived that the IFC and MIGA

are not yet comfortable operating in a climate that demands accountability, openness and trust....the natural tendency is to have conversations in private....Change and learning with respect to uncomfortable or painful issues are seldom sought out and embraced by any large institution... (N)ot all potential or active clients... understand the business value of

²⁴⁵ University of Cambridge, *supra* note 41 at 32.

²⁴⁶ Dysart, Murphy and Chayes, *supra* note 83.

²⁴⁷ Roberta Jamieson, presentation, 2000. *Shaping The Future: Taking the Initiative In A Turbulent Environment*, 2nd Ombudsman Leadership Forum Conference.

²⁴⁸ See, e.g., Their and Chopra, *supra* note 123 at 18.

²⁴⁹ Dysart, Murphy and Chaves, *supra* note 83.

properly managing environmental and social risks and
aggressively growing environmental and social
opportunities.²⁵⁰

Outside evaluation recommended that the CAO “carefully evaluate the willingness and ability to engage in productive problem solving of the senior management of any company.”²⁵¹ Party unresponsiveness should be a reason for dismissing a case.

When establishing their ombuds, IFC and MIGA emphasized that accountability is more than financial return. For a development bank, environmental and social performance matter as much as financial rate of return.²⁵² Outside review, however, reported that “ there were typically no explicit social development goals for IFC projects.”²⁵³ Such tangible commitment is necessary to monitor accountability.²⁵⁴ Reviewers identified a committed external sponsor as the essential variable in meeting desired environmental and social outcomes.

Conclusion

While scholars scrutinize legal systems around the world, domestic and international, a quiet revolution grows. Practitioners from many fields, law as well as development, public administration, and business, along with citizens and NGOs, are crafting alternative forums.

²⁵⁰ Dysart, Murphy and Chaves, *supra* note 83 at 5.

²⁵¹ *Id.*

²⁵² A REVIEW OF IFC’S SAFEGUARD POLICIES---CORE BUSINESS: ACHIEVING CONSISTENT AND EXCELLENT ENVIRONMENTAL AND SOCIAL OUTCOMES (2003).

²⁵³ Dysart, Murphy and Chaves, *supra* note 83 at 6.

²⁵⁴ Erbe, *supra* note 9.

They seek access, inclusion, reliability and fair consideration of their needs---in short, good governance.

In many countries, parties to conflict face legal ineptitude and barred access. Private deals occur behind closed doors. Alternative dispute resolution provides a ready option where accountability, impartiality, rule of law and transparency can be contracted.

ADR's democracy likewise creates outcomes truly responsive to diverse needs at all levels of society. At its best, ADR transforms, empowering broader democracy, building durable relationships, and enriching ability to work effectively.

Of course, questions as well as promises are raised by ADR's global surge in growth. ADR has the capacity to circumvent rule of law and create more corruption as well as promote good governance. What safeguards are necessary to enhance ADR's contribution to the best of governance around the world? The premise behind this article is that ADR and its relationship to good governance deserve scholarly attention and guidance.

Nelson Mandela recently shared his new vision: a world order based on partnership and mutual respect, in which the benefits of collective human endeavor accrue to all and the imbalances of the past and their legacy are redressed. ADR plays an important part that demands scrutiny.