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Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management

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ARTICLE

**BEYOND INVESTOR-STATE DISPUTES:
INTERCULTURAL CAPACITY BUILDING TO
OPTIMIZE NEGOTIATION, MEDIATION, AND
CONFLICT MANAGEMENT**

MARIANA HERNANDEZ-CRESPO GONSTEAD*

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I. INTRODUCTION

Even though arbitration is a key process that ensures the enforcement of investor’s rights, it cannot remain the main process for addressing all types of investor-State disputes.¹ I cannot help but think of the many schools, hospitals, or roads that could have been built with the millions or billions that now have to be paid for arbitration awards had governments not violated their obligations under treaties.²

Having grown up in the Latin American region, I am well aware of the endless and imminent needs of the most vulnerable populations.³ I vividly remember the time someone said that Latin America was the “world cham-

1. U.N. Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration II* (Susan D. Franck & Anna Joubin-Bret, eds.), U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (2011), https://unctad.org/en/Docs/webdiaeia20108_en.pdf [hereinafter *Prevention and Alternatives II*].

2. See, e.g., Enrique Jaramillo, *2019 in Review: Latin America and Investment Arbitration*, KLUWER ARB. BLOG (Jan. 17, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/01/17/2019-in-review-latin-america-and-investment-arbitration>. See also *Investment Dispute Settlement Navigator*, INV. POL’Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/317/perenco-v-ecuador> (last visited Dec. 4, 2020).

3. See, e.g., RENOS VAKIS, JAMELE RIGOLINI & LEONARDO LUCCHETTI, *LEFT BEHIND: CHRONIC POVERTY IN LATIN AMERICA* (2015), https://www.worldbank.org/content/dam/Worldbank/document/LAC/chronic_poverty_overview.pdf.

pion” in the number of investor-State disputes.⁴ Since then, I have been trying to figure out what it would take for Latin America to become the “world champion” in investment retention and expansion. Clearly, political stability is indispensable as well as fertile ground for investment to flourish.⁵ As much as that is necessary, it is not sufficient to retain and expand foreign direct investment (FDI).⁶

My work has largely focused on developing channels for effective participation in the public square in Latin America.⁷ However, Professor Susan Franck⁸ made me realize that without FDI, even with the most advanced democracies, Latin American countries might still struggle financially.⁹ The

4. See Int’l Ctr. for Settlement of Inv. Disps. [ICSID], *The ICSID Caseload—Statistics (2020-2)*, at 12 (2020), <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>.

5. See Anabel Gonzalez, Christine Zhenwei Qiang & Peter Kusek, *Overview*, in GLOBAL INVESTMENT COMPETITIVENESS REPORT 1, 12 (2017–18), <http://pubdocs.worldbank.org/en/240611508856688243/GICR-00-Overview.pdf> (“According to the Global Investment Competitiveness (GIC) survey political stability and a business-friendly regulatory environment are most important in investors’ decision making.”).

6. See generally Mariana Hernandez Crespo G., *A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design (“SDSD”) to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551 (2017) (arguing that political stability is not enough to retain and expand investment and processes for public consultation need to be expanded to include other participatory processes that include the communities after the investor has started operations).

7. See generally Mariana Hernandez Crespo, *Building the Latin America We Want: Supplementing Representative Democracies with Consensus Building*, 10 CARDOZO J. CONFLICT RESOL. 425 (2008) (discussing how representative democracies could be supplemented with consensus building in the Latin American region to enhance political stability); Mariana Hernandez Crespo G., *From Noise to Music: The Potential of the Multi-door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335 (suggesting how *Houses of Justice* could be used for collaborative governance).

8. Professor Susan Franck realized that the world of investment was missing the critical body of knowledge that has been developed in the dispute resolution field over the past four decades in the United States. To address this, she brought together experts of both fields at the conference at Washington and Lee School of Law. The ideas generated were memorialized in a U.N. publication. It could be argued that this marked the beginning of dispute system design and conflict management in FDI. See generally, U.N. CONF. ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010), https://unctad.org/en/docs/diaeia200911_en.pdf [hereinafter ALTERNATIVES TO ARBITRATION]; *Prevention and Alternatives II*, *supra* note 1; U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II, a Sequel*, U.N. Doc. UNCTAD/DIAE/IA/2013/2 (2014), https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf. See generally 1 TRANSNAT’L DISP. MGMT. (2014), <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52>.

9. For example, Costa Rica is one of the most stable democracies in the world; however, without FDI, it would not likely have the economic prosperity that it enjoys. See INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *THE GLOBAL STATE OF DEMOCRACY 2019: ADDRESSING THE ILLS, REVIVING THE PROMISE* 118 (2019), <https://www.idea.int/sites/default/files/publications/the-global-state-of-democracy-2019.pdf> (noting that of the top five countries in the world with the highest levels of Representative Government, three (Chile, Costa Rica, and Uruguay) are in Latin America); Steve Colantuoni, *The Importance of Foreign Direct Investment in Costa Rica*,

question then became, what does Latin America need to do to retain and expand its foreign investments?

From Resolving Disputes to Preserving Relationships: Power, Rights, and Interests

To understand where we are today, we must look at how it all started. When foreign direct investors went around the globe and had problems with host governments, without systems in place to resolve disputes, the investors often resorted to gunshot diplomacy or diplomatic espousal.¹⁰ This extreme, power-based system to resolve disputes was not sustainable.¹¹ It gave birth to bilateral treaties that aimed to protect investors through a rights-based system, enforced through arbitration.¹² Since then, the world of FDI has been operating under the assumption that host countries may pose significant risks to foreign investors.¹³ Investors feel compelled to protect their investments from any “adverse consequences of social, economic, or political instability in the host country.”¹⁴

However, an investor’s drive for self-preservation could gradually decrease in order to grow a flourishing business relationship with the host country. This defense mechanism with its focus on self-preservation stems from self-interest, but relationships require incorporating the interests of all to increase synergies. As I have emphasized in my previous work,

Of central importance is expanding the notion of self-interest from that of “I” (the individual) to that of “we” (the collective). Investors might benefit long-term if they thought less in terms of strictly protecting investments (individual interests) and more in terms of promoting the best interest of the investor-State business relationship (joint gains). The expansion of this paradigm—from “I” to “we”—could open opportunities until now unimagined.¹⁵

In this way, individual potential is maximized, and risk is minimized, because when the parties experience a higher level of unity, they each become an integral part of the relationship. Therefore, they are less likely to work in opposition to the other.¹⁶

CENTRAL AM. GRP. (Mar. 4, 2020), <https://www.thecentralamericangroup.com/foreign-direct-investment-in-costa-rica>.

10. See, e.g., Mariana Hernandez Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction*, in *Prevention and Alternatives II*, supra note 1, at 56 (discussing the historical progression of dispute resolution and its impact on the investor-State business relationship).

11. *Id.* at 55.

12. *Id.* at 56.

13. *Id.* at 56–57.

14. *Id.* at 56.

15. *Id.* at 55.

16. Mariana Hernandez-Crespo Gonstead, *Remedy Without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process*, 88 *FORDHAM L. REV.* 2165, 2214–18 (2020).

From Protecting Rights to Generating Synergies: Conflict Management and Intercultural Capacities

This article aims to be a “paper of papers” in which I synthesize my work. Over the years I have developed, tested, and implemented frameworks and tools to strengthen the investor-State business relationship. This article explains why it is necessary to expand the goal from mainly securing investment and resolving and preventing disputes to developing a conflict management framework (conflict management mechanisms, or CMMs)¹⁷ and intercultural capacities¹⁸ to retain and expand foreign investment. It suggests that unless investors, host governments, and communities work as indispensable partners, they may be unable to reach higher levels of innovation and growth.

The time has come to unlock the potential of the investor-State business relationship. Engaging with each other in a dynamic and vibrant partnership requires (1) a shift in mindset, from playing defense to playing as a team, (2) expanding goals, and (3) developing new strategies.

In order to change mindsets, section II of this article suggests expanding the current goals of securing investment and preventing disputes, to broader goals that focus on strengthening the investor-State business relationship to promote investment retention and expansion. To this end, it first discusses the limits of a dispute-centered approach and the need to move to a relationship-centered approach. Next, this section explores the systems and processes required to address the escalation of differences, including disagreements, grievances, and disputes, and the need to engage such differences “outside the conflict zone.”

To develop new strategies, section III first argues that the investor-State business relationship—given its unique nature as a private-public, cross-border, and long-term relationship—presents significant levels of complexity. Among those challenges, culture is one of the most prominent. For this reason, this section explores the different types of investment and the distinct challenges that culture poses for each.

Section III then addresses these challenges by presenting a brief overview of a domestic framework for CMMs. The framework provides structure for coordination, implementation, opportunities for shared decision-making, and if needed, problem-solving when issues arise.

17. Roberto Echandi, *Complementing Investor-State Dispute Resolution: A Conceptual Framework for Investor-State Conflict Management*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 270, 270–305 (Roberto Echandi & Pierre Sauvé eds., 2013) (introducing the CMM framework); see also Roberto Echandi & Mariana Hernandez Crespo Gonstead, *Investor-State Conflict Management*, in ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW 334, 337–38 (Thomas Cottier & Krista Nadakavukaren Schefer eds., 2017).

18. Mariana Hernandez Crespo Gonstead, *A New Dance on the Global Stage: Introducing a Cultural Value-Based Toolbox to Optimize Problem-Solving, Innovation, and Growth*, 34 OHIO ST. J. ON DISP. RESOL. 675, 716–33 (2019) (explaining the importance of culture in investor-State relationships).

Next, this section examines the intercultural capacities that must be developed to optimize shared decision-making and problem-solving. To this end, it introduces three sets of tools to minimize risk and maximize potential within the investor-State business relationship. The first set of tools aims to enhance understanding, predictability, and engagement at the bargaining table in processes such as negotiation, mediation, and consensus building. The second set of tools aims to maximize efficiency and effectiveness in process selection when conflict erupts. The third set of tools aims to assess and improve the systems for conflict management and shared decision-making by examining what exists and designing what could be.

To visualize the relationship between the framework and the development of intercultural capacities, this section uses the analogy of first building a swimming pool and then training the participants to swim.¹⁹ Together, the framework and the development of intercultural capacities allow us to maximize the potential of the investor-State partnership.

In sum, section IV concludes that unless we adopt a new mindset, set broader goals to improve relationships, and develop new strategies to interact more effectively, we may be unable to unlock the potential of the investor-State business relationship. If we continue to focus mainly on securing investments and preventing and resolving disputes, the world may never see what can be accomplished when foreign investors, governments, and local communities come together as indispensable partners to promote innovation and growth.

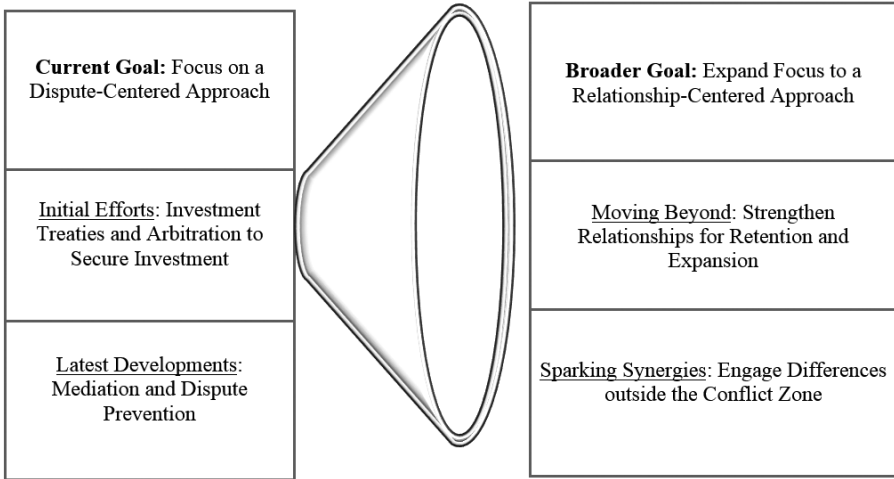
II. BROADENING THE GOAL: BEYOND PROTECTION OF RIGHTS TO RETAIN AND EXPAND INVESTMENT

To move forward, we cannot continue focusing on how to resolve or prevent investor-State disputes. There is simply too much at stake. We must examine where we have been and where we are today in order to move forward. This section first describes our current goals that focus on resolving and preventing investor-State disputes. It then suggests real progress can be made by broadening goals and focusing on strengthening the business relationship for investment retention and expansion.

19. See Gonstead, *supra* note 16, at 2175 (“[B]uilding channels in the public square is like building swimming pools; although the pool is there for citizens to use, they need to learn *how* to swim.”).

TABLE 1: BROADENING THE GOAL

Broadening the Goal: Beyond Protection of Rights to Retain & Expand Investment



A. The Current Goal: Focusing on Securing Investment and Preventing Investor-State Disputes

In the current global economy, companies routinely cross borders to access resources or markets or to expand their competitive advantage. In FDI, unlike in international trade, companies have to establish their operations in a host country. Navigating daily interactions in a foreign culture and legal system poses significant challenges, but there are powerful incentives for both the investor and the host country. For example, companies expect to obtain financial benefits while host countries expect to increase employment opportunities for their citizens, increase access to knowledge, and gain financially.

It is in this context that the investor-State business relationship is of critical importance. Unlike in international trade, which is transactional in nature, allowing parties to easily change their course of business, in FDI, de-coupling usually results in significant sunk cost for the investor, and potential harm for the host economy.²⁰ In addition, severing the relationship poses a significant loss of business opportunity and could affect the reputations of both parties.²¹

1. Initial Efforts: Investment Treaties and Arbitration

Given the complexity of investor-State business partnerships, conflict can quickly escalate into disputes at the international level. Historically, investor-State disputes were resolved through gunshot diplomacy and diplo-

20. See Crespo, *supra* note 10, at 55.

21. See *id.*

matic espousal until the introduction of bilateral investment treaties.²² These treaties were instrumental in securing investment by providing guarantees to foreign investors and a direct recourse through arbitration.

Treaties and arbitration expanded the framework for resolution from a power-based system to a rules-based system, and alleviated concerns regarding the security of the investment. However, the arbitration process as the main mechanism for the enforcement of rights is insufficient to retain investment and preserve the relationship. Moreover, despite its increased use, the arbitration process requires significant costs,²³ and its relief is limited to legal remedies.²⁴ For these reasons, leading experts, such as Susan D. Franck, have suggested that instead of defaulting to investment treaty arbitration for disputes arising under investment treaties, parties should consider a variety of processes.²⁵

While arbitration has been the predominant process selected to resolve investor-State disputes, other methods, such as conciliation, have been used for the past several decades.²⁶ Furthermore, there is also evidence that parties to arbitration tend to settle after the process has begun. A study by Roberto Echandi and Priyanka Kher provides evidence that parties are actively seeking alternatives to arbitration that better meet their needs and allow parties to control the outcome.²⁷

2. Latest Developments: Mediation and Dispute Prevention

Recently, mediation has become more prominent among the options available for resolving disputes in foreign investment at the international and domestic level.²⁸ The next generation of treaties have included media-

22. See, e.g., *id.*

23. See, e.g., SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* (2019).

24. Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 *FORDHAM INT'L L.J.* 138, 138–43, 146–47, 154–56 (2007) (arguing that arbitration is insufficient to address the complex and unique nature of investor-State disputes).

25. FRANCK, *supra* note 23, at 309–16 (2019) (suggesting a matrix of dispute resolution options including two dimensions, informal/formal and adjudicative/non-adjudicative mechanisms); see also Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 *MINN. L. REV.* 161, 177–78, 181–84 (2007); Susan D. Franck, *Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements*, in *APPEALS MECHANISMS IN INTERNATIONAL INVESTMENT DISPUTES* 143, 143–92 (Karl P. Sauvant ed., 2008).

26. Jack J. Coe Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—a Preliminary Sketch*, 12 *U.C. DAVIS J. INT'L L. & POL'Y* 7, 15–18 (2005) (discussing strengths and weaknesses of the processes).

27. Roberto Echandi & Priyanka Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 *ICSID REV.* 41, 63–65 (2014).

28. See, e.g., JACQUELINE NOLAN-HALEY, ELLEN E. DEASON & MARIANA HERNANDEZ-CREPO GONSTEAD, *GLOBAL ISSUES IN MEDIATION* 225–64 (2019) (providing an overview of the development of mediation's use in the context of FDI).

tion, and this inclusion has signaled mediation's legitimacy.²⁹ Other significant developments have also contributed to the consideration of mediation as a viable option,³⁰ such as UNCITRAL's Convention on the Enforcement of Mediation Settlements, and ICSID's proposed Mediation Rules. Both have contributed to the "legal infrastructure to support non-adjudicative methods."³¹

The International Bar Association (IBA) Investor-State Mediation Rules were one of the most significant developments in international dispute resolution.³² These rules provide a regulatory framework and introduced opportunities to adapt the mediation process to reflect the parties' preferences and increase their level of satisfaction with the process.³³ The rules offer guidelines for those unfamiliar with mediation, and a high level of flexibility, enhancing the level of self-determination of the parties.³⁴ For example, Article 1 establishes that the parties can "exclude or vary any of these rules at any time," and Article 9 guidelines allow the parties to use mediation management conferences as opportunities to address any procedural issues.³⁵

Process choice includes different mediation models,³⁶ such as facilitative, evaluative, and transformative mediation, among others. Parties can also select co-mediators who share their cultural ties in order to enhance understanding across cultures to increase the level of engagement and gen-

29. See, e.g., Frauke Nitschke, *The ICSID Conciliation Rules in Practice*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* (Catharine Titi & Katia Fach Gómez eds.) (forthcoming) (discussing the importance of the specific reference to mediation in treaties such as: EU-Canada Comprehensive Economic and Trade Agreement (CETA), Central American Free Trade Agreement (CAFTA), and Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa (COMESA)).

30. See generally Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PENN. J. INT'L L. 1 (2010).

31. FRANCK, *supra* note 23, at 11.

32. Int'l Bar Ass'n [IBA], *IBA Rules for Investor-State Mediation*, at 2–9 (adopted Oct. 4, 2012), [https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf) [hereinafter *IBA Rules*].

33. Barton Legum, Anna Joubin-Bret & Inna Manassyan, *Rules for Investor-State Mediation: Draft Prepared by the International Bar Association State Mediation Subcommittee*, in *PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY* 265, 265 (Roberto Echandi & Pierre Sauvé eds., 2013); see also Susan D. Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID REV. 1, 66–89 (2014); Anna Joubin-Bret & Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, 29 ICSID REV. 1, 17–24 (2014).

34. See Anna Joubin-Bret, *International Dispatch: Investor-State Disputes*, 20 DISP. RESOL. MAG., Fall 2013, at 37, 39–40 (discussing prominent features of the rules).

35. *IBA Rules*, *supra* note 32, at 2, 6.

36. See Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 PA. ST. J.L. & INT'L AFFS. 86, 95–96 (2012) (arguing that the goals of the parties need to drive the mediation model adopted).

erate mutually satisfying options.³⁷ These procedural choices can contribute to the quality of the process and sustainability of the agreement.

In addition to mediation, there have been significant efforts oriented to not only effectively resolving disputes between foreign investors and host countries but also preventing disputes from arising. For example, among the dispute prevention policies and best practices approaches, a United Nations Council on Trade and Development (UNCTAD) publication lists the following: “Information sharing[;] Targeting sensitive sectors[;] Reinforcing institutional and amicable procedures—administrative review[;] Implementation of ISDS commitments: access to information, inter-institutional arrangements and authority to settle[;] Securing authority to negotiate and settle—budgetary authority[;] Assessing the claim: making all relevant documents available to the lead agency at short notice[;] Institutional response: ombuds and mediation services[;] State-State cooperation in dispute prevention[;] The ability to settle during an arbitration procedure.”³⁸

These approaches emphasize that “States would be better off anticipating possible sources of investor-State disputes in advance and taking necessary action much earlier. In doing so, the difficulties and costs, including political costs, involved by resorting to international arbitration or ADR could be avoided entirely.”³⁹ Yet, UNCTAD recognizes that using good practices “does not imply that a State will be totally immune to any disputes from occurring, but rather that it has taken concrete and positive steps towards preventing conflict from arising and crystallizing into fully formed disputes under a treaty.”⁴⁰

B. The Broader Goal: Strengthening the Investor-State Business Relationship for Investment Retention and Expansion

Having effective methods for dispute resolution, as well as dispute prevention, is foundational to ensure fairness in a relationship. However, to strengthen the relationship, rules and processes are not enough. Instead, strengthening a relationship requires a deep understanding of who the parties are. This section first explores the limits of a dispute-centered approach and the need for a relationship-centered approach to integrate differences. Next, it discusses the importance of engaging investor-State differences outside the conflict zone in order to understand disagreements, grievances, and disputes.

37. Gonstead, *supra* note 18, at 749–50 (emphasizing the critical role co-mediators can play as cultural translators). See generally Rebecca Golbert, *An Anthropologist’s Approach to Mediation*, 11 CARDOZO J. CONFLICT RESOL. 81, 86–88 (2009) (emphasizing the role of culture on how we approach conflict, the role of the mediator, and the different expectations regarding neutrality).

38. ALTERNATIVES TO ARBITRATION, *supra* note 8, at 65–97.

39. *Id.* at 65.

40. *Id.* at 65–66.

1. *Limits of a Dispute-Centered Approach: The Need for a Relationship-Centered Approach to Integrate Differences*

Even when disputes are resolved or prevented through rights, investors may still leave. Treaties and arbitration as a recourse are necessary but not sufficient to prevent divestment and propel investment retention and expansion.⁴¹ Because of the relational nature of FDI, framing issues in terms of rights and adjudicating them through arbitration harms or ends the business relationship.⁴²

Jeswald Salacuse has stressed that

underlying the dispute is an intended long-term investment relationship: A complex connection, often amounting to a state of interdependence, between the investor and the host country. In cases of privatization of public services, such as water, gas, or telecommunications, the investor and the host country are linked in a more or less permanent relationship that is very difficult to unravel, far more difficult than that arising out of a simple contract of sale of a commodity in international commerce.⁴³

A focus on dispute resolution or prevention reinforces the mindset of protecting individual interests in order to secure investments. This defense mechanism can affect the development of a vibrant business relationship. Instead, parties could gradually lower their guards to start the process of integrating the interests of all, thereby sparking synergies. When parties move from an individual to a collective mindset, from “I” to “we,” it maximizes potential and minimizes risk because the parties increase the level of unity.⁴⁴ They begin perceiving themselves as an integral part of the whole and are then less likely to act in opposition to the other.

To move forward, we need to move from a defensive posture that focuses on dispute resolution and prevention and expand to a proactive, relationship-centered approach that maximizes joint gains. Adopting a relationship-centered approach can shift the paradigm from the mindset of protection to cooperation, from a focus on individual positions to a focus on collective interests, from mainly enforcing a “Bill of Economic Rights” to maximizing joint gains, and from securing investment to strengthening the investor-State business relationship⁴⁵ to reach higher levels of investment retention and expansion.

41. Roberto Echandi, *The Blind Side of International Investment Law and Policy: The Need for Investor-State Conflict Management Mechanisms Fostering Investment Retention and Expansion*, COLUM. CTR. ON SUSTAINABLE INV. (Nov. 2, 2020), <http://ccsi.columbia.edu/files/2018/10/No-290-Echandi-FINAL.pdf>.

42. Crespo, *supra* note 10, at 55.

43. Salacuse, *supra* note 24, at 138–43, 146–47, 154–56.

44. Crespo, *supra* note 10, at 56.

45. *Id.* at 57.

2. *Engaging Investor-State Differences Outside the Conflict Zone: Understanding Disagreements, Grievances, and Disputes*

A focus on strengthening investor-State business relationships requires engaging investor-State differences outside the conflict zone. To do so, we must understand how differences can escalate through disagreements, grievances, and disputes. Each of these stages require a specific system and process to effectively address differences.

A relationship-centered approach is at the core of the World Bank's work in assisting host countries to retain and expand investment.⁴⁶ The goal of that work focuses on conflict management that goes beyond avoiding arbitration and instead aims to prevent divestment.⁴⁷ A dispute-centered approach is insufficient⁴⁸ because ultimately, we want to address differences outside the conflict zone.

When foreign investors establish operations in a host country, they likely are entering into a long-term business relationship. In any relationship, the question is not if there will be disagreements, but when. Long-term relationships⁴⁹ require planning for addressing differences, which can escalate from informal disagreements to more formal grievances and disputes. The following table, previously published,⁵⁰ shows how each level of differences corresponds to a particular stage and particular processes, focuses, and foundations.

46. Echandi, *supra* note 41.

47. Roberto Echandi, *Proof of Concept: Pilots Fostering Greater Retention and Expansion of FDI (FDI) by Enabling Governments to Early Address Investor-State Grievances* (forthcoming) (on file with author).

48. Roberto Echandi, *Investor-State Conflict Management: A Preliminary Sketch*, 1 TRANS-NAT'L DISP. MGMT. (2014), <https://www.transnational-dispute-management.com/article.asp?key=2083>.

49. JOHN ASHCROFT, ROY CHILDS, ALISON MYERS & MICHAEL SCHLUTER, *THE RELATIONAL LENS: UNDERSTANDING, MANAGING AND MEASURING STAKEHOLDER RELATIONSHIPS* 4–6 (2016) (stressing that a relationship is more than practical results and is instead an integral part of the parties' unique reality).

50. Gonstead, *supra* note 18, at 745.

TABLE 2. THE ESCALATION OF DIFFERENCES

THE ESCALATION OF DIFFERENCES			
	Disagreement	Grievance	Dispute
Stages	Early Stage– Informal	Advanced Stage– Formal	Conflict– Escalation
Appropriate System	Shared Decisions System Design	Appropriate Grievance Management	Investor-State Dispute Settlement
Process	Information Sharing, Consultation, Negotiation	Facilitative, Hybrids, Adjudicative	Facilitative, Hybrids, Adjudicative
Focus	Relationship- focused	Relationship/ Issue-focused	Issue-focused
Foundation	Interest/Value Based	Interest/Value & Rights Based	Interest/Value & Rights Based
Mariana H.C. Gonstead, Part of the Cultural Value-Based Toolbox			

For a relationship-centered approach, the disagreement stage is particularly relevant. This stage is early and informal and allows the parties to determine the appropriate level of participation (information sharing, consultation, or negotiation) in the decision-making process. To facilitate this discernment, I have conceptualized an analytical framework, which I have termed Shared Decisions System Design (SDSD).⁵¹

The focus at the disagreement stage is on understanding the other as part of the whole. At this stage the foundation requires learning about the parties: what they want (positions), why they want it (interests),⁵² and why it is important to them (values).⁵³ By increasing understanding and engaging differences at an early stage (outside the conflict zone), parties are better able to capitalize on their differences.⁵⁴

Grievances are a more advanced stage where the disagreement is formalized but has not yet escalated into a legal dispute. The system for resolution at the grievance level is called appropriate grievance management or conflict management.⁵⁵ The processes range from facilitative to hybrid to

51. Crespo G., *supra* note 6, at 556, 574–75, 580–81, 584, 618–19.

52. *See generally* ROGER FISHER, WILLIAM L. URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011).

53. *See* Gonstead, *supra* note 18, at 716–23.

54. Gonstead, *supra* note 16, at 2213–21 (arguing that differences can be used to spark ongoing synergies).

55. Echandi, *supra* note 41.

adjudicative. Even though there is already a conflict centered around a particular issue instead of a decision to be made, the focus is still relational. At this stage the foundation is still made up of interests and values, but rights may also be considered.⁵⁶

When differences have escalated to the dispute stage, the appropriate system for resolution is investor-State dispute settlement.⁵⁷ The three processes are facilitative, hybrids, and adjudicative. Generally, the focus is no longer on the relationship but rather on resolving the issue at hand. While the foundation remains interests, values, and rights,⁵⁸ rights tend to prevail given the legal nature of the dispute.

As discussed in this section, to strengthen the investor-State business relationship, parties must move beyond securing investment and preventing investor-State disputes. To broaden the goal, parties could adopt a relationship-centered approach that engages parties' differences at the disagreement and grievance level—before they become legal disputes. To this end, the next section introduces strategies at the domestic level to facilitate this shift.

III. INNOVATIVE STRATEGIES: CULTURAL CHALLENGES, A DOMESTIC FRAMEWORK FOR CONFLICT MANAGEMENT, AND INTERCULTURAL CAPACITY BUILDING

Focusing on the business relationship, this section first examines the challenges that culture poses to different types of investment. Second, this section presents a domestic framework for conflict management mechanisms (CMMs). Third, this section introduces the intercultural skills to optimize shared decision-making and problem-solving. The relationship between CMMs and intercultural capacities is fundamental. To understand their connection, one can visualize the CMMs framework as a swimming pool and the intercultural capacities as the ability to swim.

The CMMs framework (swimming pool) provides the structure for coordination, implementation, and opportunities to have more effective and efficient interactions between the investor and the host country. Operating within the CMMs framework requires the development of intercultural capacities (the ability to swim). These capacities allow parties to effectively interact when conflict erupts, when bargaining at the table, and when assessing and improving systems for conflict management and shared deci-

56. The grievance mechanisms are considered part of the problem-solving stage in CMMs. See Echandi & Gonstead, *supra* note 17, at 337–38.

57. See Roberto Echandi, *Investor-State Dispute Prevention: A Conceptual Framework* (NCCR Trade, Working Paper No. 2011/46), <https://www.wti.org/research/publications/245/investor-state-dispute-prevention-a-conceptual-framework> (emphasizing the importance of distinguishing between conflict and disputes).

58. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 3–19 (1st ed. 1988) (discussing three alternatives to deal with conflict: powers, rights, and interests).

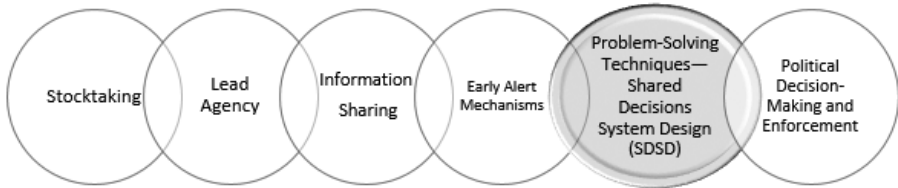
sion-making. These intercultural capacities can enhance engagement, understanding, and predictability, thereby increasing effectiveness and efficiency in investor-State business interactions.

TABLE 3. INNOVATIVE STRATEGIES: CULTURAL CHALLENGES, A DOMESTIC FRAMEWORK FOR CONFLICT MANAGEMENT (CMMs), AND INTERCULTURAL CAPACITY BUILDING

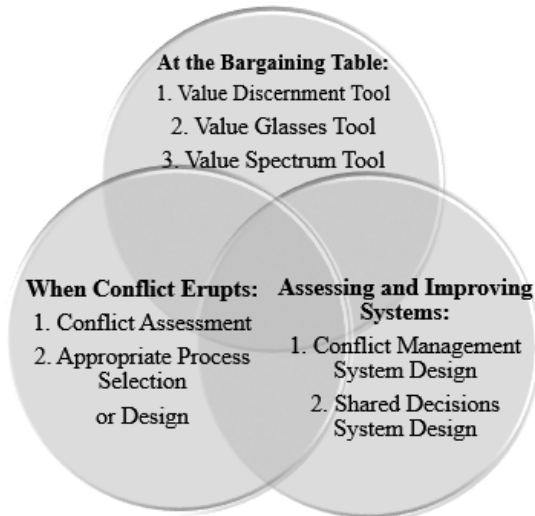
A. The Impact of Culture on Different Types of Investment

- Natural Resource-Seeking: The Challenges of Engaging with Communities
- Market-Seeking: Underestimating Cultural Values of Target Markets
- Efficiency-Seeking: Reconciling Global Standards and Domestic Culture
- Strategic Asset-Seeking: The Challenges of Integrating Corporate Cultures

B. A Framework: Conflict Management Mechanisms (CMMs) (Swimming Pool)



C. Intercultural Capacity Building: Optimizing Problem-Solving in the Investor-State Relationship (Ability to Swim)



A. Challenges for the Investor-State Relationship: The Impact of Culture on Different Types of Investment

Culture plays a critical role in the ever-important investor-State business relationship. Investor-State business relationships are unique given the

private-public, cross-border, and long-term nature.⁵⁹ It is in this context that culture can become a barrier to the relationship or provide the necessary leverage in fostering the business partnership.

For the purpose of this article, culture is defined as “the tacit social order of an organization: It shapes attitudes and behaviors in wide-ranging and durable ways. Cultural norms define what is encouraged, discouraged, accepted, or rejected within a group.”⁶⁰ Incorporating cultural differences enables partners to work together in a more efficient and effective way.⁶¹

Furthermore, culture is a critical factor that allows leaders to maximize gains while minimizing risks.⁶² A *Harvard Business Review* article emphasizes that the failure to understand the impact of culture can derail the best-laid plans.⁶³ By developing the capacity to integrate cultural differences, host countries may improve their investment climates,⁶⁴ and foreign companies may improve their reputations as attractive investors.

When we discuss FDI, it is critical to distinguish the four types of investment: (1) natural resource-seeking, (2) domestic market-seeking, (3) efficiency-seeking, and (4) strategic asset-seeking.⁶⁵ Each of these poses distinct opportunities but also presents challenges,⁶⁶ especially in the cultural realm, because of the complexities of navigating cultural differences.

1. *Natural Resource-Seeking Investment: The Challenges of Engaging with Communities*

As its name suggests, natural resource-seeking investment is the practice of searching out natural resources such as oil or minerals that either cannot be found in the investor’s home country or can be found somewhere

59. See generally Salacuse, *supra* note 24.

60. Boris Groysberg, Jeremiah Lee, Jesse Price & J. Yo-Jud Cheng, *The Leader’s Guide to Corporate Culture*, HARV. BUS. REV., Jan.–Feb. 2018, at 44, 46.

61. FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE 7–8 (2d. ed. 1998) (discussing the different levels of culture: national, corporate, and professional).

62. Groysberg et al., *supra* note 60, at 46.

63. *Id.*

64. See World Bank Grp. [WBG], *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications*, at 5 (2018), <https://openknowledge.worldbank.org/bitstream/handle/10986/28493/9781464811753.pdf>.

65. See generally John Dunning, *Toward an Eclectic Theory of International Production: Some Empirical Tests*, 11 J. INT’L BUS. STUDIES 9 (1980). See also JOHN DUNNING & SARIANNA M. LUNDAN, *MULTINATIONAL ENTERPRISE AND THE GLOBAL ECONOMY* 63–73 (2d ed. 2008); Echandi, *supra* note 47 (applying Dunning’s framework to investment retention).

66. For challenges associated with each type of FDI, see Roberto Echandi, *Connecting the Dots Between International Trade and Investment Regulation, Investment Climate Reform and Development: The World Bank’s Investment Reform Map*, in CURRENT ISSUES IN ASIA PACIFIC FDI 31, 31–53 (Austl. APEC Study Centre ed., 2015). See also World Bank Group, *Investment Policy and Promotion Diagnostics & Tools*, at 42 (2017), <http://documents.worldbank.org/curated/en/666341500008847215/pdf/117475-PUBLIC-WP-13-7-2017-12-8-30-SPIRATool-KitGuide.pdf> [hereinafter *Policy and Promotion*].

else at a lower cost or more accessibly.⁶⁷ Dating back to colonialism, there have been significant political and economic challenges with regard to natural resources.⁶⁸ For this reason, this type of investment is one of the most politically charged. Investors may also face challenges including distributing gains at the subnational and national levels and concerns related to environmental impact, labor rights, and possible civil conflicts.⁶⁹

Despite these challenges, both investors and States continue to seek business relationships because of the potential benefits of their collaboration. Natural resource-seeking investment is the type with the most incentives⁷⁰ for the host State and the investor to work together with the local community because this type of investment is limited to where the resources are located.

In natural resource-seeking investment, the cultural challenge manifests most prominently when investors interact with the local community. While including the community complicates the investor-State relationship, it also presents enormous potential⁷¹ for collaboration and participation among stakeholders.⁷² To this end, foreign investors must effectively interact with the culture of the local community. If they do not, operations could be paralyzed because of power dynamics exasperated by cultural differences.⁷³

More often than not, investors find themselves in rural areas with very little government presence.⁷⁴ This is a significant issue that cannot be overlooked. However, even if there is government presence, the cultural differences between investors and communities should be properly addressed throughout the life of the investment.⁷⁵

Acknowledging the culture of the community and incorporating the community's interests and values can lead to higher levels of engagement that can in turn lead to unprecedented synergies.⁷⁶ By understanding the culture in which it is operating, the investor can work with the local com-

67. Echandi, *supra* note 66, at 43; *see also Policy and Promotion, supra* note 66, at 9.

68. Echandi, *supra* note 66, at 43.

69. *Id.*

70. Crespo G., *supra* note 6, at 553.

71. *Id.*

72. JEANNE M. BRETT, *NEGOTIATING GLOBALLY 177–202* (2001) (articulating the complexity when governments are at the bargaining table).

73. Crespo G., *supra* note 6, at 576–79.

74. *See generally id.* (arguing that collaborative governance can help fill the void when there is a weak government presence in rural areas).

75. *See* Gonstead, *supra* note 18, at 735–37.

76. *See* Mariana Hernandez Crespo, *From Problem to Potential, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR* 225, 225 (Krista Nadakavukaren Schefer ed., 2013).

munity to problem-solve and reveal long-term solutions that maximize the wellbeing of all.⁷⁷

2. *Market-Seeking Investment: Underestimating Cultural Values of Target Markets*

In market-seeking investment, investors aim to increase financial gains by accessing new markets.⁷⁸ The members of a host country benefit from the access to new goods and services and higher-paying jobs. The domestic economy benefits from added competition with the addition of “international business practices, standards, know-how and technology” that the investors bring.⁷⁹

Because the goal of market-seeking investment is not to generate exports,⁸⁰ it creates competition with the domestic market. The domestic business sector is the interest group most affected and therefore may create the most resistance to this type of investment.⁸¹ Despite this challenge, investors have a high level of motivation and a need to understand the culture of the host country in order to effectively penetrate the market and compete for market share.

The cultural challenge in market-seeking investment is significantly greater than in natural resource-seeking investment. In market-seeking investment, the investor is not interacting with a particular community but instead might be selling its products to a broader and more diverse target population. To provide the appropriate goods and services, the investor seeks to understand the culture of the populace including their language, traditions, and behaviors. Without true understanding, the investor may risk significant financial losses and may even destroy any potential for a relationship with its target consumers.⁸²

An example that illustrates the level of sophistication required and the cost of underestimating culture is the failure by Dolce & Gabbana to launch its “Dolce loves China” campaign.⁸³ The company produced videos that Chinese consumers found shocking.⁸⁴ It erred by producing a humorous

77. See generally *id.* (arguing that local communities could be an asset rather than a liability in the FDI context).

78. DUNNING & LUNDAN, *supra* note 65, at 69–71.

79. Echandi, *supra* note 66, at 47.

80. *Policy and Promotion*, *supra* note 66, at 9.

81. *Id.* at 12.

82. See Gonstead, *supra* note 18, at 737–40.

83. See *id.* at 681–83.

84. Adam Jourdan & Pei Li, *Dolce & Gabbana Cancels Shanghai Show After “Chopsticks” Ad Causes Uproar*, REUTERS (Nov. 1, 2018, 4:28 AM), <https://www.reuters.com/article/us-dolce-gabbana-china/dolce-gabbana-cancels-shanghai-show-after-chopsticks-ad-causes-uproar-idUSKCN1NQ162>.

campaign that overlooked the deeply held value of Chinese patriotism.⁸⁵ This failure by the investor to understand the culture of its target market resulted in significant damage to its bottom line.⁸⁶

Market-seeking investment requires a deep understanding of the risk involved with navigating a new culture. Without the correct cultural interpretation, the investor may fail to adapt its products or services to meet the expectations of the target market, or may adapt them but in an ineffective way.⁸⁷ To develop a cultural strategy that reflects the values of the target market, an investor must gather information and filter it through the investor's lenses and also through the lenses of the domestic partner.⁸⁸ By doing this, both perspectives can be taken into account, enhancing understanding and preventing errors that may significantly affect the business relationship.⁸⁹ Furthermore, failure to understand how much culture influences behavior and decision-making may also lead to ineffective interactions between the investor and government officials, since the government shares the culture of the market.

3. *Efficiency-Seeking Investment: Reconciling Global Standards and Domestic Culture*

In efficiency-seeking investment, investors are motivated to leave the familiarity of their own countries in search of places where they can operate with lower costs and higher quality.⁹⁰ This type of investment is driven by the “global value chain,”⁹¹ in which products are produced and assembled wherever is most efficient.⁹² Host countries compete for this type of investment because it generates jobs and provides access to technology and know-how.⁹³ Since products are exported, this type of investment does not compete with the domestic market but helps the host country's economy.⁹⁴ For this reason, it is the most sought-after type of investment.⁹⁵

85. *Dolce & Gabbana Fiasco Shows Importance, Risks of China Market*, NBC NEWS (Nov. 27, 2018), <https://www.nbcnews.com/news/asian-america/dolce-gabbana-fiasco-shows-importance-risks-china-market-n940706>.

86. *Can Dolce & Gabbana Recover From Its Mistakes in China?*, WHARTON SCH. UNIV. PA. (Dec. 11, 2018), <http://knowledge.wharton.upenn.edu/article/dolce-gabbana-mistakes-in-china>.

87. Gonstead, *supra* note 18, at 681–83.

88. *See id.* at 723–28, 749–50.

89. *Id.*

90. Cecile Fruman, *Why Does Efficiency-Seeking FDI Matter?*, WORLD BANK GROUP (Feb. 5, 2016), <https://blogs.worldbank.org/psd/why-does-efficiency-seeking-fdi-matter#:~:text=efficiency%2Dseeking%20FDI%20is%20not,with%20greater%20productivity%20and%20value> (referencing the framework created by John Dunning); DUNNING & LUNDAN, *supra* note 65, at 72.

91. Enrique Martínez-Galán & Maria Paula Fontoura, *Global Value Chains and Inward FDI in the 2000s*, 24 WORLD ECON. 175, 175 (2018).

92. *Global Value Chains (GVCs)*, OECD, <https://www.oecd.org/sti/ind/global-value-chains.htm> (last visited Mar. 24, 2019).

93. *See Policy and Promotion*, *supra* note 66, at 10.

94. *See id.*

95. *See id.*

The impact of cultural challenges can be significant in this type of investment because of the high level of competition among host countries and even among states within a host country.⁹⁶ Unlike in natural resource-seeking investment, where investors are limited by the places where the resources are located, or in market-seeking investment, where again the investor is looking for a specific location, in efficiency-seeking investment investors are looking for the locations that offer the best conditions for the production of their goods or services. In this regard, the capacity to understand culture could be a competitive advantage or a significant challenge for both investors and host governments. It could also be the point of differentiation between two countries that are otherwise similarly situated.

For both investors and host countries, it is essential to have a strategy for addressing cultural differences that could make or break the deal. In the case of the investor, the selection of the country is a clear indicator that the investor believes that is where it can gain a competitive edge. For this reason, the investor has a strong incentive to understand and possibly adapt to local cultural behavior that is not consistent with the investor's previous practices.⁹⁷

However, the investor must meet global standards in its operations, and culture can impede this goal because of deeply rooted traditions that may affect the behaviors and expectations of the labor force. For example, strictly observed extended holidays may affect production. Ideally, investors should make a cultural assessment before establishing operations, so that they can discern whether adaptation is possible and beneficial, or whether the cultural barriers are impossible to overcome.⁹⁸

After establishing operations, investors should have ongoing processes in place to integrate the culture of the labor force. By acknowledging and respecting cultural practices, the investor may gain not only a more engaged labor force but also a better understanding of the host country's culture.⁹⁹ This better understanding can guide future interactions with representatives of the government. By enhancing cultural knowledge, investors can better predict behavior, which in turn can help investors reduce risk.¹⁰⁰

Similarly, host countries should consider a strategy for engaging cultural differences with the foreign investors they are trying to attract. For example, a host country could identify potential sources of culture-based incompatibilities and discern whether it is possible to adapt in order to de-

96. *See id.*

97. *See* Gonstead, *supra* note 18, at 738–40.

98. *See id.*

99. *See id.*

100. *See* JAMES HESKETT, *THE CULTURE CYCLE* 18 (2012) (arguing that cultural understanding may decrease risk through clearer expectations, increased trust, better communication, and decreased uncertainty).

velop a strong business relationship.¹⁰¹ Cultural norms and their impact on behavior should not be underestimated. If the organizational culture of the investor does not align with the culture of the domestic labor force, workers may disengage and do the bare minimum.¹⁰² Therefore, governments should pay attention to their own national culture as well as the culture of the foreign investors they are trying to attract. Otherwise, these types of cultural incompatibilities could lead to divestment.

4. *Strategic Asset-Seeking Investment: The Challenges of Integrating Corporate Cultures*

In strategic asset-seeking investment, investors seek a competitive advantage by acquiring intangible assets through mergers and acquisitions. These intangible assets include brands, networks for distribution, and labor forces.¹⁰³ Acquiring strategic assets facilitates competition by lowering transaction costs, increasing market share, decreasing risk, and allowing for more strategic flexibility.¹⁰⁴ Usually, this type of investment involves a rigorous screening process and a heavily regulatory regime¹⁰⁵ because it may pose a threat to the host country's economic security.¹⁰⁶

The impact of culture in strategic asset-seeking investment is palpable not only in the relations between the host government and investor but also within the acquired or merged firm. The relevance of culture within an organization is fundamental. Within the firm,

[c]ulture consists of what people . . . think they should do, how they believe they should perform, and what they think will be rewarded. . . . The importance of an organizational culture cannot be underestimated. Many organizations have failed to perform effectively over time because of dysfunctional cultures.¹⁰⁷

In any merger or acquisition, the culture of the firm poses a significant challenge,¹⁰⁸ and when investors engage in cross-border transactions, the culture of the host can add a layer of difficulty.¹⁰⁹ The same firm operating

101. See Gonstead, *supra* note 18, at 729–33, 750–51.

102. See, e.g., Groysberg et al., *supra* note 60, at 46.

103. DUNNING & LUNDAN, *supra* note 65, at 72–74.

104. Echandi, *supra* note 66, at 47.

105. *Id.*

106. *Id.* at 51.

107. EDWARD E. LAWLER III, TREAT PEOPLE RIGHT! HOW ORGANIZATIONS AND INDIVIDUALS CAN PROPEL EACH OTHER INTO A VIRTUOUS SPIRAL OF SUCCESS 55 (2008).

108. Michele Gelfand, Sarah Gordon, Chengguang Li, Virginia Choi & Piotr Prokopowicz, *One Reason Mergers Fail: The Two Cultures Aren't Compatible*, HARV. BUS. REV. (Oct. 2, 2018), <https://hbr.org/2018/10/one-reason-mergers-fail-the-two-cultures-arent-compatible> (arguing that disregarding cultural compatibility when companies merge can have a significant negative impact).

109. Matthew Bird, *Merging Two Global Company Cultures*, HARV. BUS. REV. (Dec. 2, 2020), <https://hbr.org/2015/08/merging-two-global-company-cultures>.

in different countries may keep its distinctive corporate culture¹¹⁰ but might have to adapt to some of the values of the host country. If these cultural challenges are not taken into account as part of the decision-making process to acquire strategic assets, and as an integral part of the implementation of policy, they can severely affect the integration process required to maximize effectiveness and efficiency.¹¹¹

In sum, each type of investment poses distinct challenges to the investor-State business relationship. As discussed, in particular, the role that culture plays cannot be underestimated given its significance in stakeholder interactions.

B. *A Framework: Conflict Management Mechanisms (CMMs)*

To address these challenges at the national level, stakeholders should first consider conflict management mechanisms (CMMs).¹¹² CMMs are the current framework that host countries use not only to prevent conflict from escalating into legal disputes at the international level but also to effectively solve issues that may arise between foreign investors and host countries in order to promote and retain investment.¹¹³

In the past, there was no infrastructure for investors and States to interact effectively before conflict escalated and became a legal dispute.¹¹⁴ In other words, it is as if there were no swimming pools in which they could swim. As I emphasized in one of my prior works,

[T]he central issue in developing a sustainable relationship between investors and host States is the marked gap between the IIA rights and offered IIA remedies—namely the arbitration process. Focusing on after-the-fact monetary solutions as a catch-all, without considering more constructive processes, inhibits the growth of the relationship.¹¹⁵

To illustrate the dynamic of the investor-State business relationship, I have used the analogy of a landlord and tenant relationship:

Just as a renter is subject to the rules of the house and vulnerable to the decisions of the landlord, so too the foreign investor has to operate within the framework of the host country's political, social, and economic landscape. Under the current structure of IIAs,

110. HALLAM MOVIUS & LAWRENCE SUSSKIND, *BUILT TO WIN* 144 (2009) (arguing that values—when aligned with incentives—are essential to affect the behavior of the workforce, and suggesting that mere discussion about values and explicit written statements are insufficient to this end).

111. TAYLOR COX JR., *CREATING THE MULTICULTURAL ORGANIZATION* 103 (2001) (discussing how change has to be done at a systemic level with an understanding of the firm as an interdependent social system).

112. Echandi, *supra* note 17 and accompanying text.

113. *Id.*

114. *Id.*

115. Crespo, *supra* note 10, at 55–58.

if the renter (foreign investor) was not satisfied with the landlord's (host country's) implementation of some aspects of the agreement, no matter what kind of dispute, the main recourse available is to sue the landlord (arbitration), likely resulting in the severance of the relationship.¹¹⁶

I have suggested that when these tensions arise,

[r]ather than resolving tensions with extreme options, IIA disputes might consider other options. Foreign investors have a significant relationship with the host country, made up of joint human resources, environmental concerns, and an interlocking of the foreign entity into the larger economic network of the country. That relationship is generally worth preserving. By the time conflict arises there is a substantial interconnection between the two entities, even if through a myriad of representatives.¹¹⁷

Thus, to improve the investment climate of a host country, investor-State dispute settlement at the international level is insufficient. Investor-State dispute settlement allows for the resolution of legal disputes, but CMMs focus on the enhancement of the ongoing relationship between the key stakeholders on the ground, namely foreign investors, government officials from the host country, and local communities.¹¹⁸ CMMs increase the capacity of the government to manage conflict domestically before it escalates into a legal dispute addressed through an international arbitration process.¹¹⁹

Because governments are composed of agencies and other federal, state, and local authorities, their organizational structure poses a challenge to coordinating governmental response to foreign investors. In some cases, conflict can occur because of the lack of coordination and information sharing among these various authorities.¹²⁰ To address this challenge, host countries have started to utilize CMMs such as the "Systemic Investment Response Mechanisms" (SIRM), conceptualized by Roberto Echandi and implemented by the World Bank Group.¹²¹ SIRMs are the protocol frameworks that facilitate effective and efficient interactions between government officials and foreign investors. SIRMs were defined in the G-20 Compact with Africa as an

early warning and tracking mechanism to identify and resolve complaints and issues that arise from government conduct . . . , ultimately preventing legal disputes and facilitating harmonious relations between investors and governments. . . . [SIRM] enables countries to collect data and helps identify patterns in govern-

116. *Id.* at 58.

117. *Id.*

118. *See* Echandi & Gonstead, *supra* note 17, at 337–38.

119. *Id.*

120. *See id.* (describing the need for CMMs before conflict escalates to legal disputes).

121. Echandi, *supra* note 17, at 270–305.

ment-generated grievances affecting investments. . . . SIRM quantifies investment retained or expanded as a consequence of addressing grievances, as well as investment lost as a consequence of not addressing them.¹²²

The six basic protocols for the establishment and operation of SIRMs are (1) stocktaking, (2) lead agency, (3) information sharing, (4) early alert mechanisms, (5) problem-solving techniques—Shared Decisions System Design (SDSD), and (6) political decision-making and enforcement.¹²³ As part of the problem-solving mechanisms of SIRMs, and when issues are systemic, systems can be designed to allow the participation of multiple stakeholders affected by the same issues through SDSD. SDSD offers an analytical framework to integrate the interests of investors, States, and communities when the decision affects them directly. This framework for decision-making includes addressing differences pre-conflict, and also through rulemaking, policy implementation, and conflict management with a focus on the relationship between the stakeholders.¹²⁴

The emphasis is placed on the relationship to avoid divestment instead of on preventing disputes. For these reasons, CMMs constitute an important framework for problem-solving. In particular, SDSD integrates facilitative processes, which provide opportunities to strengthen the investor-State business relationship by aiming to satisfy the interests of all.¹²⁵

C. *Intercultural Capacity Building: Optimizing Problem-Solving within the Investor-State Business Relationship*

The previous section introduced the infrastructure for problem-solving as a foundation to facilitate effective and efficient interactions between representatives of the host country and foreign investor, and in some cases the communities. However, to maximize its potential, stakeholders must develop intercultural skills.¹²⁶ As has been emphasized,

Perhaps the biggest threat to the positive relationship required for any successful negotiation comes with cross-cultural bargaining—when the potential for misunderstanding and confusion rises sharply. As businesses from around the world increasingly inter-

122. WBG, Afr. Dev. Bank & IMF, *The G-20 Compact with Africa*, Report to the G-20 Finance Ministers and Central Bank Governors Meeting, at 23 (2017), <https://www.compactwithafrica.org/content/dam/Compact%20with%20Africa/2017-03-30-g20-compact-with-africa-report.pdf>.

123. See Echandi & Gonstead, *supra* note 17, at 337–38.

124. *Id.*

125. *Id.*

126. See, e.g., Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Trans-border Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251, 1275–80, 1288–90 (2008) (arguing that intercultural skills are essential in cross-border interactions).

act with one another, the ability to engage skillful collaborative negotiation is more important than ever.¹²⁷

This section discusses the need to develop intercultural capacities to enhance mutual understanding of the values that drive the decision-making process¹²⁸ and ensure both predictability and higher levels of satisfaction. As stated previously, the infrastructure for problem-solving (CMMs) is analogous to a swimming pool, and these capacities are analogous to the ability to swim. To maximize the benefits of intercultural problem-solving, stakeholders must have both.

1. At the Bargaining Table: Tools to Enhance Understanding, Predictability, and Engagement in Negotiation, Mediation, and Consensus Building

Culture may not be as significant in adjudicative processes such as arbitration because of its emphasis on securing investment through legal rights. However, in interest-based, facilitative processes such as negotiation, mediation, and consensus building, culture can be a catalyst for strengthening the relationship, which may lead to higher levels of innovation and growth.¹²⁹ Failure to properly engage culture can also place significant barriers at the bargaining table.¹³⁰

By identifying the driving values of parties,¹³¹ we are better able to predict behavior, enhance understanding, and mutually discern the optimal level of integration. To accomplish this, I have developed “The Cultural Value Toolbox,” which contains three essential value-based tools: (1) Value Discernment, (2) Value Glasses, and (3) Value Spectrum.¹³² By using these tools, parties are able to integrate their cultural differences, which may lead to maximization of joint gains and higher levels of satisfaction. Used in conjunction, these value-based tools utilize culture as a transversal factor in interest-based, facilitative processes.

i. Value Discernment Tool: Enhancing Predictability

The level of commitment among the parties is one of the distinct characteristics of the business relationship in FDI. Generally, investors have

127. WINNING NEGOTIATIONS THAT PRESERVE RELATIONSHIPS 143 (HARV. BUS. SCH. PRESS 2004).

128. TROMPENAARS & HAMPDEN-TURNER, *supra* note 61, at 193 (explaining cultural problems are often unidentified or perceived as stubbornness).

129. See Gonstead, *supra* note 18, at 704–16.

130. See, e.g., MICHELLE LEBARON & VENASHRI PILLAY, CONFLICT ACROSS CULTURES 92 (2006) (“Cultural differences make conflict harder to resolve because they expand the potential for misunderstandings and misperceptions.”).

131. See generally Kevin Avruch, *Toward an Expanded “Canon” of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic*, 89 MARQ. L. REV. 567 (2006).

132. Gonstead, *supra* note 18, at 713.

spent significant resources to establish operations in the host country. Similarly, the host country will have expended resources to attract foreign investors. Both expect to benefit from a long-term relationship.¹³³ This high level of commitment is matched by the level of complexity in cross-border relationships. As I have emphasized,

[S]ome of the most complex interactions across cultures take place in the context of Foreign Direct Investment (FDI). The foreign investors' corporate culture, to some degree, is immersed in the culture of the host country. The foreign investors have to not only interact with clients and personnel, but also with the government and the local community.¹³⁴

It is in this context that the Value Discernment Tool could play a critical role not only as an integral part of the negotiation, mediation, and consensus-building process, but also in process design.¹³⁵ Identifying the distinct cultural values of host countries, investors, and communities makes it possible to adapt processes¹³⁶ and roles to reflect the stakeholders' goals¹³⁷ and values.

In the field of negotiation, moving from position-based bargaining (what the parties want) to interest-based bargaining (why they want it) represented a quantum leap. By exploring the underlying reasons for the demands at the bargaining table, the proposal of the best-selling book *Getting to Yes* allows the parties to create options that do not require compromise.¹³⁸ Compromise requires at least one of the parties to not be fully satisfied.¹³⁹

The alternative to compromise, as promoted in *Getting to Yes*, is the possibility of creating value together. Once parties identify the interests underlying their positions, they can generate options that aim to satisfy both of their interests.¹⁴⁰ In this way, they are able to maximize "joint gains"¹⁴¹ and create sustainable agreements that are "nearly self-enforcing."¹⁴² This is because the parties are better off with the agreement than without it. Therefore, it is generally in their best interest to comply with it.¹⁴³

133. See Salacuse, *supra* note 24, at 138–43, 146–47, 154–56.

134. Gonstead, *supra* note 18, at 746.

135. Golbert, *supra* note 37, at 97 (concluding that to be "truly responsive to context and to culture [an approach] must do more than explain and translate important cultural differences").

136. The flexibility of the IBA rules provide an extraordinary opportunity for mediation process design. Joubin-Bret & Legum, *supra* note 33, at 17–24. For further discussion on the mediation rules, see Legum et al., *supra* note 33, at 265. See also Franck, *supra* note 33, at 66–89.

137. Welsh & Schneider, *supra* note 36, at 95–96.

138. See generally FISHER ET AL., *supra* note 52.

139. *Id.* at 3–15 (arguing that positional bargaining leads to less than satisfactory agreements).

140. *Id.* at 42–81.

141. *Id.* at 72.

142. LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* 133–54 (1st ed. 2006).

143. *Id.*

Interest-based processes are foundational to the field of appropriate dispute resolution. However, to maximize the processes' potential, the parties must connect their interests with their corresponding values to discover one of the driving forces in their decision-making process.¹⁴⁴

Until now, values have most commonly been considered when they clashed.¹⁴⁵ The goal has been to address values in a separate process that focuses on understanding. Even though acknowledging the parties' values is a step in the right direction, consideration of values cannot be limited to times when they clash. Instead, values should be considered in every negotiation process. Making the identification of values an integral part of interest-based processes is indispensable to enhancing understanding at the bargaining table, especially when the parties do not share a culture.¹⁴⁶

Stopping at the interest level assumes that every negotiation is simply a transaction, rather than a critical interaction that shapes and is shaped by the ongoing relationship between the parties. As parties from different cultures increasingly interact with each other,

staying at the interest level[] can at best lead to subpar agreements[] and at worst alienate a significant number of cultures around the world, for whom the relational aspect of the negotiation is an integral component.¹⁴⁷

For these reasons, I have argued that interest-based processes are insufficient when the situation demands "some understanding of the parties' distinct personal and cultural/collective values, and how those values affect their relationship."¹⁴⁸ To this end, I developed the Value Discernment Tool as a straightforward process¹⁴⁹ in which we are adding one question to the interest-based process: "why is that (interest) important to you?" As I have previously stated,

144. See Gonstead, *supra* note 18, at 709–10, 718–23.

145. LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES 152–97 (1996); see, e.g., *Four Conflict Negotiation Strategies for Resolving Value-Based Disputes*, HARV. L. SCH.: PROGRAM ON NEGOT. (Mar. 21, 2019), <https://www.pon.harvard.edu/daily/dispute-resolution/four-negotiation-strategies-for-resolving-values-based-disputes/>; *Values-Based Mediation Simulations*, HARV. L. SCH.: PROGRAM ON NEGOT., <https://www.pon.harvard.edu/shop/values-based-mediation-simulations> (last visited Apr. 12, 2020); see also JOHN FORESTER, DEALING WITH DIFFERENCES 59–91 (2009) (explaining value-based disputes and how to handle them in participatory processes); Lawrence Susskind, *How to Negotiate When Values Are at Stake*, CONSENSUS BUILDING INST. (Oct. 2010), <https://www.cbi.org/article/2010/how-to-negotiate-when-values-are-at-stake> (suggesting that if there is a conflict of values, it should be addressed in a separate process from the interest-based conflict). See generally Gonstead, *supra* note 18.

146. Gonstead, *supra* note 18, at 718–23.

147. *Id.* at 720.

148. *Id.*

149. Peter F. Drucker, *The Discipline of Innovation*, HARV. BUS. REV. (Aug. 2002), <https://hbr.org/2002/08/the-discipline-of-innovation> ("To be effective, an innovation has to be simple, and it has to be focused. It should do only one thing; otherwise it confuses people. . . . Effective innovations start small.").

Learning why parties care about a particular interest opens the door to understanding what truly matters to them. Values are the driving force behind the parties' articulated positions and interests that guide the decisionmaking [sic] process. These values are the core of who we are and the cultures to which we belong. Therefore, this additional inquiry is often worth the effort, as it can enhance understanding of the parties' motivations.¹⁵⁰

Identifying individual values¹⁵¹ allows us to gain deeper knowledge of the parties, which in turn translates into better strategies for efficient and effective interactions. This value identification is particularly relevant in the field of FDI, where an ongoing relationship is of the essence.¹⁵²

Using the value-based tool in interest-based negotiations could be perceived as an unnecessary step because parties can move beyond compromise without knowing the values of their business partners. While this is true, an interest-based resolution primarily addresses the issue at hand, missing an extraordinary opportunity to gain the knowledge of the parties' motivations necessary to predict future behavior and reach an optimal agreement.¹⁵³

Some may argue that revealing values could increase the parties' vulnerability.¹⁵⁴ Yet, without revealing and learning who the parties are at the value level, it may not be possible to fully understand the identity of those with whom we are trying to build a business relationship. As it has been stated, "[V]ulnerability does not come after trust—it precedes it"¹⁵⁵ and "[a]t some level, we intuitively know that vulnerability tends to spark cooperation and trust."¹⁵⁶ Furthermore, by strengthening the relationship through value discernment, each party sees itself as an integral part of the whole—trusting the other to act in its best interest—thereby decreasing competition while increasing collaboration.¹⁵⁷ If we connect at the value level, we will be better equipped to build the bond required for effective interactions.

150. Gonstead, *supra* note 18, at 718.

151. There are many ways to categorize values. See, e.g., Patrick M. Lencioni, *Make Your Values Mean Something*, HARV. BUS. REV. (Jul. 2002), <https://hbr.org/2002/07/make-your-values-mean-something> (categorizing values as (1) Core values as deeply-held values that guide actions; (2) Permission-to-Play values, which reflect the minimum standard of behavior; (3) Aspirational values, which reflect ideals not yet realized; and (4) Accidental values, which are spontaneous and reflect current group interests).

152. See Gonstead, *supra* note 18, at 719 ("[T]he Cultural Value Discernment (CVD) provides relevant information, by revealing the value motivating the other's decisionmaking [sic] process.").

153. See generally Gonstead, *supra* note 18, at 720.

154. Jayne Seminare Docherty, *Symposium: Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 719 (2004).

155. DANIEL COYLE, CULTURE CODE 107 (2018).

156. *Id.* at 103.

157. See generally Gonstead, *supra* note 10, at 56. See also Keld Jensen, *Why Negotiators Still Aren't Getting to Yes*, FORBES (Feb. 5, 2013), <https://www.forbes.com/sites/keldjensen/2013/02/05/why-negotiators-still-arent-getting-to-yes/#7bc377392640> ("Low trust makes collaboration impossible!").

ii. *Value Glasses Tool: Increasing Understanding*

In FDI, when parties are at the bargaining table, because of the distinct cultures of their home countries, and the private-public nature of the relationship, significant tensions can arise with regard to process and substance. This happens because culture affects the way a person filters and interprets data.¹⁵⁸ Also, if cultural differences are not accounted for regarding expectations about process and the role of a neutral mediator or facilitator, the parties may miss opportunities to enhance understanding, increase satisfaction, and create a more sustainable agreement.

I have previously argued that culture needs to be treated as a transversal factor in every stage of the interest-based process:

Culture has generally been treated as one factor to consider during the problem-solving process, rather than an intrinsic and fundamental component. However, it is necessary to develop a framework that treats culture as a transversal aspect that affects every single stage of the process, rather than treating it as an isolated element. Culture not only has implications at the external level (non-verbal signals, words, behaviors), but it also deeply impacts our cognitive processes (perceptions, expectations, interpretations).¹⁵⁹

These implications affect the way we communicate and interact, significantly increasing the level of difficulty for understanding one another, because of how culture affects what we perceive, expect, and interpret¹⁶⁰ at the bargaining table.¹⁶¹ To address the challenges that culture poses in interest-based, facilitative processes, I developed the Value Glasses Tool, which “provide[s] guidelines for assessing how personal and cultural values affect . . . information gathering, generation of options, selection of options, and . . . drafting of agreements.”¹⁶²

We all have a unique set of glasses that are formed of a variety of lenses. Each lens reflects the values that we have adopted from the cultural groups of which we are a part.¹⁶³ Our unique glasses are ever-present, de-

158. Gonstead, *supra* note 18, at 713.

159. *Id.* at 724.

160. Bee Chen Goh, Habib Chamoun-Nicolas, Ellen E. Deason, Jay Folberg & Sukhsimranjit Singh, *As We See It*, in *EDUCATING NEGOTIATORS FOR A CONNECTED WORLD* 103, 103–24 (2012) (arguing that familiarity affects our assumptions and expectations).

161. *See generally* Mariana Hernandez-Crespo, *Workshop 1: Global Opportunities and Conflicts: The Need for Cross-Cultural Mediation*, in *MEDIATION: A ONE TRICK PONY? USING MEDIATION IN THE WIDER CONTEXT* 48, 48–59 (Chartered Institute of Arbitrators ed., 2013).

162. Gonstead, *supra* note 18, at 726.

163. *See, e.g.*, Michael W. Morris & Michelle J. Gelfand, *Expanding the Cognitive Perspective of Negotiation*, in *THE HANDBOOK OF NEGOTIATION AND CULTURE* 45, 45–70 (Michelle J. Gelfand & Jeanne M. Brett eds., 2004) (“We gain a deeper understanding of familiar biases when we trace them back not only to knowledge structures, but to the socialization practices and institutions that the knowledge structures reflect.”).

velop over time, and are constantly changing.¹⁶⁴ If we fail to acknowledge our own glasses as well as the other sides' and the experts' glasses,¹⁶⁵ we may miss or misinterpret information that may be fundamental to resolving the issue at hand, to strengthening the relationship, or to both.

Interest-based processes, in particular mediation, should be ideal forums¹⁶⁶ for parties to better understand their cultural differences.¹⁶⁷ However, the presence of experts at the table, such as mediators,¹⁶⁸ adds a level of complexity with the addition of a new culture.¹⁶⁹ Unlike in adjudicative processes where the third-party neutral is the decision maker, in interest-based processes the third-party expert (mediator or facilitator in consensus building) mainly guides the process and assists the parties in reaching a sustainable agreement. To this end, understanding the culture of the parties and third-party experts can play a significant role.¹⁷⁰

Culture has been described as the "silent language."¹⁷¹ The mediator can act as a translator of this silent language to facilitate understanding. Furthermore, having two mediators rather than one can help bridge the cultural gap between the parties.¹⁷² Co-mediation¹⁷³ is particularly helpful

164. Michelle LeBaron, *Transforming Cultural Conflict in an Age of Complexity*, in Berghof Handbook for Conflict Transformation 1, 2–8 (2001).

165. See, e.g., Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U.J.L. & POL'Y 71 (2010) (discussing implicit bias in mediation).

166. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, in FOUNDATIONS OF DISPUTE RESOLUTION (VOL. 1) 258–59 (Carrie Menkel-Meadow ed., 2012) (discussing the potential of the mediation process). "[In mediation] we may learn about new kinds of communication, human interaction, and problem solving that may challenge, transform, and supplement—as well as supplant—other ways of conflict resolution and political change." *Id.* at 359.

167. Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185, 186 (2001) ("One method of dispute resolution that should be able to provide a culturally sensitive forum is mediation.").

168. John Barkai, *What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 81–86 (2008) (discussing that the culture of the mediators has a significant impact on them) ("Just as Popeye's words imply that Popeye cannot change who he is, mediators with low-context communication styles may not be able to adjust their communication styles to work well with high-context communicating parties.").

169. See generally Fred D. Butler, *The Question of Race, Gender & Culture in Mediator Selection*, 55 DISP. RESOL. J. 36 (2001) (noting that cultural competency cannot be assumed from shared race or gender, and suggesting co-mediation).

170. Joe Epstein & Robyn McDonald, *The Influence of Cultural Diversity in Mediating Complex Multi-Party and Catastrophic Loss Conflict*, MEDIATE.COM (Aug. 2011), <https://www.mediate.com/articles/EpsteinJ1.cfm> ("In complex multi-party cases, co-mediation with mediators who blend their own mix of cultural experiences and styles might be what the situation requires to create the opportunities for resolution.").

171. JESWALD SALACUSE, THE GLOBAL NEGOTIATOR 90 (2003); Jeswald W. Salacuse, *Ten Ways That Culture Affects Negotiating Style: Some Survey Results*, 14 NEGOT. J. 221, 222 (1998).

172. Harold Abramson, *Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 S. TEX. L. REV. 921, 925 (2008).

173. The IBA Rules for Investor-State Mediation specifically refer to the designation of co-mediators, in Article 4, regarding the designation of a mediator, and in Article 6, regarding desig-

when the parties do not share cultural knowledge. A marked gap in cultural knowledge can hinder the parties' interactions and severely affect understanding. To alleviate these issues, co-mediators who share cultural ties with the parties can help recognize and address the challenge that culture presents at each stage of mediation,¹⁷⁴ as well as reconcile the parties' values with the process.¹⁷⁵

iii. *Value Spectrum Tool: Discerning Level of Integration*

Stakeholders may benefit from determining the level of integration that is most advantageous for an effective and efficient partnership.¹⁷⁶ This is particularly relevant in FDI because of the multiple cultures involved and their respective values. These cultures include not only those of the local community and host country but also the corporate culture of the investor.¹⁷⁷ I have previously argued that

[i]n order to facilitate . . . discernment [of the appropriate level of integration], the Cultural Value Integration Spectrum (CVIS) is conducted through three steps. First, the identification of stakeholders' values through the Cultural Value Discernment (CVD); second, an assessment of the stakeholders' value compatibility and the level of integration of their cultural values on a spectrum that goes from co-existence [sharing resources], to collaboration [sharing a goal], to complementarity [sharing core values]; third, based on the information gained in the first two steps, appropriate processes and systems can be designed for dispute resolution.¹⁷⁸

nation, resignation, and replacement of co-mediators. Joubin-Bret & Legum, *supra* note 33, at 1, 17–24.

174. Bianca Keys, *Co-mediation: Positives, Pitfalls and Lessons Learned*, 11 ADR BULLETIN 1, 1–5 (2009) (stating that mediators have a unique opportunity to model teamwork and show how unity can be reached).

175. Joe Epstein & Susan Epstein, *Co-Mediation*, 35 THE COLO. LAWYER 21, 23 (June 2006) (“In some instances, such as international business transaction disputes, a cross-cultural co-mediation team might be the best method to evoke the trust and understanding needed to enable a peaceful resolution of the conflict.”).

176. Douglas M. Lambert & A. Michael Knemeyer, *We're in This Together*, HARV. BUS. REV. 5–6 (Dec. 2004), <https://hbr.org/2004/12/were-in-this-together> (explaining the Partnership Model for facilitators to evaluate company compatibility to determine the appropriate compatibility level, from arms-length relationship to limited coordination partnership to integration partnership to partnership where the companies view each other as an extension of their operations); Rosabeth Moss Kanter, *Collaborative Advantage*, HARV. BUS. REV. (Jul.–Aug. 1994), <https://hbr.org/1994/07/collaborative-advantage-the-art-of-alliances> (explaining the Collaborative Advantage spectrum, which assesses how strong and deep a relationship is on a spectrum ranging from mutual service to joint-venture to value-chain partnership). Both models highlight the significance of culture and values when determining the level of integration in a business relationship.

177. I have previously argued that processes such as World Café dialogues enhance understanding among participants. For a discussion of the potential of these processes, see, for example, Jacqueline N. Font-Guzmán, *Moving 'Beyond Neutrality' and Cross-cultural Training: Using World Café Dialogue to Address End-of-life Care Inequalities*, 21 PEACE & CONFLICT STUD. 49, 49 (2014).

178. Gonstead, *supra* note 18, at 750.

This value spectrum tool could assist in determining the appropriate level of cultural integration,¹⁷⁹ which could enhance the selection or design of the process at the bargaining table.¹⁸⁰ As I have written,

[T]he different approaches of mediation, such as facilitative, evaluative, transformative, and narrative, can be utilized to assist foreign investors, host States, and communities in the designing of processes for decisionmaking [sic] and dispute resolution that take in to account the appropriate level of cultural integration determined by the Cultural Value Integration Spectrum (CVIS). Reflecting stakeholders' values in the processes can make interactions between foreign investors and host States more efficient and effective.¹⁸¹

The CVIS is a tool to help parties make informed decisions at the bargaining table and as part of their ongoing relationship. Failure to recognize a clash in values not only could result in lost opportunities for a stronger relationship but also could weaken or break the business partnership.

2. *When Conflict Erupts: Tools for Efficient and Effective Process Selection*

I have written extensively about the need to overcome conflict illiteracy.¹⁸² In this section, I discuss the need to understand the sources of conflict and the variables (including culture). Without understanding the sources of conflict, we will be less effective selecting or designing the appropriate process and identifying experts for when conflict erupts.

i. Conflict Assessment: Diagnosing to Maximize Effectiveness

The time has come to shift the focus from preventing conflict escalation to understanding its source. Currently, when conflict escalates, parties tend to end up in arbitration or litigation.¹⁸³ However, depending on the

179. Raymond Cohen, *An Advocates' View*, in *CULTURE AND NEGOTIATION* 22, 37 (Guy Olivier Faure & Jeffrey Z. Rubin eds., 1993) ("Disharmonies in negotiation, then, derive from profound philosophical and methodological incompatibilities, not just from superficial, stylistic differences or monetary misunderstanding.").

180. Brian Gunia, Jeanne Brett & Amit Nandkeolyar, *In Global Negotiations, It's All About Trust*, *HARV. BUS. REV.* (Dec. 2012), <https://hbr.org/2012/12/in-global-negotiations-its-all-about-trust> (discussing three levels of trust: "1) when trust is likely, 2) when trust seems possible, 3) when trust is not possible").

181. Gonstead, *supra* note 18, at 750.

182. *See generally* Gonstead, *supra* note 16.

183. *See, e.g.*, JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 1 (4th ed. 2013) ("The chief purpose of this book is to disabuse you of the 'one size fits all' litigation mentality and to help you understand and appreciate that more creative problem-solving is available through alternative dispute resolution (ADR) processes.").

type of conflict, its context, and the culture(s) in which it is occurring, other processes could be better suited to satisfying the interests of the parties.¹⁸⁴

As I have explained in my previous work, conflict can be compared to illness.¹⁸⁵ When we go to doctors, they do not prescribe brain surgery for a mere headache. Instead, doctors assess symptoms to determine an accurate diagnosis before determining the appropriate treatment.¹⁸⁶ Similarly, conflict should not be sent straight to litigation.¹⁸⁷ In the legal field, we need to become doctors of conflict and analyze the conflict at hand before selecting or designing the appropriate process.¹⁸⁸ To this end, I have suggested a “Comprehensive Framework for Conflict Resolution” that places culture at the center of conflict assessment as well as at the center of selecting the resolution process. As I have previously stated,

If you are ill, merely determining you have an illness is insufficient. Instead, it is necessary to have a comprehensive framework that would help make an accurate diagnosis. As part of this framework, the first factor on the checklist is the type of illness you have and its source. The second factor is who you are, your goals, specific needs, and priorities. The third factor is awareness of your mindset because your culture, namely the social norms of the group in which you operate, and your perception of the problem may also affect the treatment selection.¹⁸⁹

Once we understand (1) the source of conflict;¹⁹⁰ (2) the parties at the table, third parties affected, and the broader system in which they interact;¹⁹¹ and (3) their mindsets¹⁹² and how those mindsets have affected their relations,

184. See MARY PARKER FOLLETT, *PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s* 22 (Pauline Graham ed., 1995) (arguing that we need to expand how we deal with conflict).

185. Gonstead, *supra* note 16, at 2194–95.

186. STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE* 243 (2013) (“Although it’s risky and hard, seek first to understand, or diagnose before you prescribe, is a correct principle manifest in many areas of life. It’s the mark of all true professionals. It’s critical for the optometrist, it’s critical for the physician. You wouldn’t have any confidence in a doctor’s prescription unless you had confidence in the diagnosis.”).

187. See John R. Allison, *Five Ways to Keep Disputes out of Court*, HARV. BUS. REV. (Jan.–Feb. 1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court> (explaining the cost and damage that litigation poses for business organizations).

188. See Gonstead, *supra* note 16, at 2195 (explaining that the source of a conflict must be determined to properly assess and select a process); LAURIE S. COLTRI, *ALTERNATIVE DISPUTE RESOLUTION: A CONFLICT DIAGNOSIS APPROACH* 103–24 (2d ed. 2020) (distinguishing the sources of conflict).

189. Gonstead, *supra* note 16, at 2194–95.

190. See, e.g., COLTRI, *supra* note 188, at 103–24 (identifying the sources of conflict).

191. See generally Carrie Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 909–10 (2000).

192. MARK GERZON, *LEADING THROUGH CONFLICT: HOW SUCCESSFUL LEADERS TRANSFORM DIFFERENCES INTO OPPORTUNITIES* 17–47 (2006) (discussing how we assume three distinct mindsets in our interactions with others).

then we are ready to select or design a process to address the parties’ specific needs.

ii. Process Selection or Design: Tailoring to Optimize Resolution

When selecting or designing the appropriate process for resolution of a specific issue, I have suggested a framework which builds upon the knowledge of the dispute resolution field and incorporates culture. This “Comprehensive Framework for Conflict Resolution . . . [includes] a selection checklist with three factors: (1) the levels of party self-determination and control over process and outcome, (2) the satisfaction of parties’ objectives, and (3) the cultural implications of uniformity or unity.”¹⁹³

TABLE 4: THE LEVELS OF PARTY SELF-DETERMINATION AND CONTROL OVER PROCESS AND OUTCOME¹⁹⁴

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

193. Gonstead, *supra* note 16, at 2199.

194. *Id.*

iii. *Level of Self-Determination and Control for Process and Outcome*

With regard to the level of each party's self-determination¹⁹⁵ and control over the process, it is important to note that processes directly affect how much decision-making power the parties are keeping or delegating. On one end of the spectrum,¹⁹⁶ in adjudicative processes,¹⁹⁷ such as the court system¹⁹⁸ or arbitration,¹⁹⁹ the parties delegate decision-making power to a third party such as the judge or arbiter. In the court system, parties delegate complete control over process and outcome to the judiciary. In arbitration, the parties retain control over a number of factors, such as selecting the decision maker, substantive law, and process.²⁰⁰

On the other end of the spectrum, in facilitative processes such as negotiation, mediation, consensus building, and others,²⁰¹ the parties are the protagonists since they are the decision makers.²⁰² In negotiation, the parties have control over process and outcome, while in mediation and other

195. Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 277 (2005) (“[U]nderstanding of self-determination is rooted in the philosophical principle of personal autonomy and is expressed through the legal doctrine of informed consent. The simple version of the normative story states that those who are affected by a dispute should voluntarily consent to the outcome of that dispute. In short, ‘party’ self-determination in mediation gives ownership of the conflict to the disputants.”).

196. See generally Frank E.A. Sander, Professor of Law, Harvard Univ., Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (Apr. 7–9, 1976), in 70 F.R.D. 111, 111–18, 120, 124–32 (1976) (introducing the spectrum at the Pound Conference); LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2020).

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

198. Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 29–30 (2000) (explaining the power of the judiciary).

199. See, e.g., STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION & OTHER PROCESSES 601–21 (5th ed. 2007); see also FRANK E.A. SANDER ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION & OTHER PROCESSES 303–12 (6th ed. 2012).

200. See FRANK E.A. SANDER ET AL., *supra* note 199.

201. See, e.g., Font-Guzmán, *supra* note 177, at 50–51 (arguing for other processes, such as the World Café dialogues).

202. See generally Carrie Menkel-Meadow, *Introduction to MEDIATION: THEORY, POLICY AND PRACTICE*, at xiii (Carrie Menkel-Meadow ed., 2001) (explaining the distinct role of the mediation process, given its consensual, voluntary, participatory, and facilitative nature; arguing its advantage to enhance understanding and reach a mutually satisfying agreement); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54–55 (1996) (“Mediation is thought to enhance parties’ self-determinative capabilities because it permits them to structure and consent to the outcome of the bargaining process.”). See also Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135–36 (2004) (“Citizens—not judges or attorneys or other professionals—would communicate and negotiate directly with each other, identify the issues to be discussed, determine the substantive norms that were legitimate and relevant (including the pursuit of

expert-led processes,²⁰³ they give up some control. That being said, the parties are still in control of the final outcome.

In addition, parties can select or design hybrid processes²⁰⁴ that combine some of the essential elements²⁰⁵ of other processes that are better suited to their particular needs.²⁰⁶ Paying attention to the level of party self-determination is the first essential step when making informed decisions about process selection or design.

iv. *The Satisfaction of Parties' Objectives*

The next step when selecting or designing the process is to ensure that it satisfies the goals or objectives of the parties. Frank Sander and Stephen Goldberg place these goals in eight categories: “Minimize Costs,” “Speed,” “Privacy,” “Maintain/Improve Relationship,” “Vindication,” “Neutral Opinion,” “Precedent,” and “Maximizing/Minimizing Recovery.”²⁰⁷ However, there may be additional goals or objectives that affect the assessment of the process’s suitability.²⁰⁸ It is also possible that none of the processes or hybrids that already exist can satisfy the parties’ objectives. When this is the case, experts lead the parties in the design of a new process that aims to satisfy their needs.²⁰⁹

harmony and reconciliation if they wished), create the options for settlement, and control the final decision regarding whether or not to settle and on what terms.”).

203. See, e.g., CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 386 (2d ed. 2011) (explaining that the parties are in charge of the outcome in negotiation, whereas in mediation the parties are guided by a mediator).

204. See generally Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ON ARB. & MEDIATION 219, 221–24 (2013) (explaining the arb-med hybrid); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT’L ARB. 1, 3–5 (1999) (alerting to the problems associated with utilizing the same expert as a mediator and arbiter).

205. See generally Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 29 (2000).

206. See, e.g., NOLAN-HALEY ET AL., *supra* note 28, at 181 (explaining some of the problems of utilizing mediation or arbitration as distinct processes, and suggesting that because of the issues, elements of each are combined).

207. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 50–52, 66 (1994).

208. See, e.g., Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 123–24 (2000) (discussing the need to consider the impact that the process selection can have on the mental health of the client).

209. NOLAN-HALEY ET AL., *supra* note 28, at 12–15 (discussing the need for process design as a way to align values with the mediation process in the context of our global landscape).

v. *The Cultural Implications of Uniformity or Unity*

Process selection affects culture²¹⁰ while also being shaped by it.²¹¹ Depending on the system used to resolve conflict—power-based, rights-based, or interest-based,²¹² the cultural consequences will vary.²¹³

In power-based systems,²¹⁴ the winners generally impose their cultural values on the others.²¹⁵ The power-based system resolves conflict through force by using the logic of coercion and a mindset of domination. It ultimately aims to achieve uniformity through assimilation. In the FDI context, this is how conflicts were resolved before bilateral treaties.²¹⁶

The rise of bilateral treaties gave birth to a system of rights. In rights-based systems,²¹⁷ the winner is allowed to impose the values already reflected in the agreed-upon rights. The rights-based system introduced the mindset of competition and the logic of persuasion. Similar to a power-based system, it achieves uniformity through assimilation, but here uniformity is achieved based on the agreed-upon rights.²¹⁸ Even though the introduction and continued use of a rights-based system in FDI allows for the resolution of legal disputes, it remains insufficient to prevent divestment because it does not provide the conflict management mechanisms to strengthen the business relationship.²¹⁹

Instead, for stakeholders to retain and expand investment, interest-based systems²²⁰ that include processes such as negotiation, mediation, and consensus-building²²¹ are critical for strengthening the investor-State business relationship. Generally, in an interest-based system, there is no winner and no loser. Instead, if the parties have a conflict, they can either reach

210. Lebaron, *supra* note 164, at 6–7, 9–10, 14 (presenting the multidimensional nature of culture: a lens, a medium, and a relationship).

211. Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 295–301 (synthesizing the theories of Edward T. Hall and Geert Hofstede and suggesting the impact of cultural values on processes); see also DILYARA NIGMATULLINA, *COMBINING MEDIATION AND ARBITRATION IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION* 21–22 (1st ed. 2018) (explaining the need for parties to specify their needs when considering med-arb).

212. URY ET AL., *supra* note 58 and accompanying text.

213. FOLLETT, *supra* note 184, at 67–69, 75, 77, 79, 82, 84–86 (suggesting that we can address conflict through domination, compromise, or integration).

214. URY ET AL., *supra* note 58, at 7–8.

215. For example, when there is a strike, the labor force imposes their values on company management.

216. See Crespo, *supra* note 10, at 56–57.

217. URY ET AL., *supra* note 58, at 7.

218. Lon. L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–09, 325–27 (1971) (“[T]he judge orders the parties to conform themselves to the rules.” *Id.* at 308.).

219. Echandi & Gonstead, *supra* note 17, at 337–38.

220. URY ET AL., *supra* note 58, at 5–7.

221. BERNARD MAYER, *STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES* 119 (2009) (suggesting that it is necessary to broaden how we address conflict to also include the possibility of “staying with it”).

agreements that are mutually satisfying and more sustainable²²² or search for alternatives outside the bargaining table.²²³

This mindset of collaboration to resolve conflict requires a logic of participation that goes beyond persuasion.²²⁴ Each party contributes something that is indispensable to the other. This is the concept of “power-with,”²²⁵ where the “other” is considered an indispensable ally, instead of “power-over,” where the “other” is a competitor at best and an enemy at worst.²²⁶ Therefore, this interdependence²²⁷ requires a process that promotes integration rather than assimilation.²²⁸ It is important to note that when the dispute is the product of a clash of values, interest-based processes may not be the best ones because the ultimate goal is to reach an agreement. Generally, reaching an agreement is not the main objective with issues regarding deeply held values.²²⁹

222. SUSSKIND & CRUIKSHANK, *supra* note 142, at 133–54.

223. FISHER ET AL., *supra* note 52, at 3–15, 42–81, 99–108.

224. *See, e.g.*, Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68–71 (describing the significant influence of dominant narratives in the mediation process).

225. *See* BERNARD MAYER, *THE DYNAMICS OF CONFLICT: A GUIDE TO ENGAGEMENT AND INTERVENTION* 65, 66–67 (2012) (“When we try to persuade others to change their behavior or approach to a conflict, we are exercising power.”); Domènec Melé & Josep M. Rosanas, *Power, Freedom and Authority in Management: Mary Parker Follett’s ‘Power-With,’* 3 PHIL. MGMT. 35, 38 (2003). *See generally* MARY PARKER FOLLETT, *Power, in DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT* 72 (Henry C. Metcalf & L. Urwick eds., 2014) (explaining power over and power with).

226. *See generally* GERZON, *supra* note 192 (distinguishing between leadership styles and suggesting that we perceive others as either an enemy, a competitor, or an indispensable partner); MAYER, *supra* note 225, at 111–92. For discussions on power-with, see Melé & Rosanas, *supra* note 225.

227. COVEY, *supra* note 186, at 48–49 (explaining his “maturity continuum,” which begins with dependence and moves toward independence and interdependence).

228. *See, e.g.*, Laila Lalami, *What Does It Take to ‘Assimilate’ in America?*, N.Y. TIMES MAG. (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/magazine/what-does-it-take-to-assimilate-in-america.html> (“For some, assimilation is based on pragmatic considerations, like achieving some fluency in the dominant language, some educational or economic success, some familiarity with the country’s history and culture. For others, it runs deeper and involves relinquishing all ties, even linguistic ones, to the old country. For yet others, the whole idea of assimilation is wrongheaded, and integration—a dynamic process that retains the connotation of individuality—is seen as the better model. Think salad bowl, rather than melting pot: Each ingredient keeps its flavor, even as it mixes with others.”).

229. Susskind, *supra* note 145 and accompanying text.

Processes that promote integration²³⁰ lead to unity,²³¹ not uniformity.²³² Through unity, the integration of both parties' contributions can lead to higher levels of innovation and growth. This is particularly relevant to the types of investment where there is less incentive to conform²³³ to the culture of the host country because of high levels of competition, such as efficiency-seeking investment.

Therefore, when selecting or designing processes for the conflict at hand, it is indispensable to keep in mind the cultural implications.²³⁴ The process may lead to uniformity through assimilation or unity through integration. If the goal is to ensure adhesion to treaty rights, then adjudicative processes or hybrids that promote uniformity and include characteristics that follow the logic of persuasion would be preferable. If the goal is to problem-solve conflict and unlock the potential of the relationship, then facilitative processes or hybrids that promote unity and include characteristics that follow the logic of participation would be preferable.

3. *Assessing and Improving Systems: Tools to Examine What Exists and Design What Could Be in Conflict Management and Shared Decision-Making*

At a systemic level, intercultural capacity requires frameworks for assessment and improvement of the current systems in place. Without frameworks for analysis, processes cannot function as an integral part of the whole. This section describes two analytical frameworks: (1) the analytical framework used in the field of Dispute System Design (DSD), which is used for conflict resolution,²³⁵ and (2) Shared Decisions System Design

230. TROMPENAARS & HAMPDEN-TURNER, *supra* note 61, at 205 ("Once we are aware of our mental models and cultural predispositions, and can respect and understand that those of another culture are legitimately different, then it becomes possible to reconcile differences.").

231. COVEY, *supra* note 186, at 318 (discussing that achieving unity is the "highest and best" experience and disunity is a "bitter and lonely" experience); *see also* FOLLETT, *supra* note 225, at 71-94 (explaining integrative unity in business). "Business cannot serve its maximum degree of usefulness to the community, cannot perform the service which it has, tacitly, *bound itself* to perform, unless it seeks an enlarged understanding of the practical methods of unifying business organization." *Id.* at 71; LEBARON & PILLAY, *supra* note 130, at 3 ("[W]e remember that unity is not uniformity or sameness, but harmony in the midst of diversity. Since diversity involves differences and some of those differences bring us into conflict, our shared goal is not the elimination of conflict, but finding ways to live well with it.").

232. Fuller, *supra* note 218, at 308 ("[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.").

233. *See, e.g.*, Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 880 (explaining that assimilation leads people to "shed their culture of origin" and "replace[] their . . . ethnic identities [with] a [new] identity").

234. Carrie Menkel-Meadow, *Exporting and Importing ADR: "I've Looked at Life from Both Sides Now,"* 12 DISP. RESOL. MAG., Spring 2006, at 5, 5-7 (distinguishing between shaping culture and competency).

235. *See generally* URY ET AL., *supra* note 58; CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996); NANCY H. ROGERS, ROBERT C.

(SDSD), the analytical framework previously mentioned as part of conflict management mechanisms (CMMs) that is used to analyze current systems of decision-making. Having a framework that recognizes culture as a transversal factor to assess how conflicts and decisions are currently resolved and made, and how they could be better resolved and made, can have a significant impact in optimizing problem-solving within the investor-State business relationship.

i. Dispute System Design (DSD): An Analytical Framework for Intercultural Conflict Resolution Systems

Experts in the dispute resolution field have defined DSD as “the applied art and science of designing the means to prevent, manage, learn from, and resolve streams of dispute or conflict.”²³⁶ They have also suggested that the analytical framework examines six elements: (1) the goals of the system; (2) its stakeholders; (3) the context and culture; (4) processes and structures; (5) resources; and (6) how to determine success, accountability, and learning.²³⁷

The spectrum of processes for conflict resolution examined in the previous section are considered the building blocks for designing systems for conflict resolution.²³⁸ The main difference with the previous section is that DSD focuses on, as the definition states, streams of conflicts instead of just a single conflict.²³⁹ In this regard, the framework for system design explores how conflicts are resolved between different stakeholders, and what can be done to better meet the goals of the system.²⁴⁰

As I have previously stressed,

DSD can be a powerful tool for analysis, reform, and reconceptualization of old systems. It provides the lenses to challenge the current systems and the roles stakeholders and experts are playing. Furthermore, its participatory framework allows the old systems to be transformed through inclusive procedures.²⁴¹

For stakeholders to maximize the potential of the DSD analytical framework, it is important to emphasize its participatory nature when assessing

BORDONE, FRANK E.A. SANDER & CRAIG A. MCEWEN, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013); AMSLER ET AL., *supra* note 196.

236. AMSLER ET AL., *supra* note 196, at 7–21.

237. *Id.* at 22–38.

238. *Id.* at 39–60.

239. *See id.* at 7–21.

240. *See* ROGERS ET AL., *supra* note 235, at 1–10, 16–41; Mariana Hernandez Crespo G., *Introduction to the Symposium: Leveraging on Disruption: The Potential of Dispute System Design for Justice, Accountability, and Impact in Our Global Economy*, 13 U. ST. THOMAS L.J. 159 (2017).

241. Crespo G., *supra* note 240, at 167.

and designing systems for conflict resolution.²⁴² Without the participation of stakeholders, a system is unlikely to have the same effectiveness that comes from having ownership of the final outcome.²⁴³ When systems for conflict resolution are optimized, they may prevent conflict escalation, lessen disruption, and ultimately enhance the interactions of the different stakeholders. Conflict is inevitable, but it also creates opportunities, and because of that, it is critical to have systems in place that mitigate risks and attempt to optimize resolution.²⁴⁴

As in process selection or design, culture plays a critical role in the DSD framework because values are at the core of culture, and the process selection or design reflects a specific set of values. When designing a system, the impact of culture is more prevalent because its impact is not limited to the resolution of a single conflict, rather culture affects an entire system that will be implemented and used to resolve conflicts until the system is reassessed.²⁴⁵

Therefore, it is indispensable to make informed decisions as to the cultural implications of the processes that will be integral components of the conflict resolution system design.²⁴⁶ Failure to do so may result in missed opportunities for higher levels of cultural integration, and higher risk of dissatisfaction and disengagement since the process may not align with stakeholders' values. This is relevant to the FDI investor-State relationship because instead of using conflict to strengthen the relationship, the conflict resolution system could resolve the conflict but erode the relationship.

ii. *Shared Decisions System Design (SDSD): An Analytical Framework for Intercultural Shared Decision-Making Systems*

In any long-term relationship,²⁴⁷ and especially in an investor-State business relationship, the appropriate level of decision-making not only can have a significant impact on the effectiveness and efficiency in accomplish-

242. See CONSTANTINO & MERCHANT, *supra* note 235, at 49–67 (discussing the critical importance of stakeholders' engagement).

243. See URY ET AL., *supra* note 58, at 65–83; see also AMSLER ET AL., *supra* note 196, at 29–30; CONSTANTINO & MERCHANT, *supra* note 235, at 49–66; ROGERS ET AL., *supra* note 235, at 145–77.

244. CONSTANTINO & MERCHANT, *supra* note 235, at xiii (“Conflict is like water: too much causes damage to people and property, too little creates a dry, barren landscape devoid of life and color.”).

245. See Gonstead, *supra* note 16, at 2226 (“Unlike ADR, which generally focuses on a single dispute, similar to a static picture, DSD and SDSD, given their systemic nature, can assist in managing conflict and making decisions on an ongoing basis, similar to a motion picture. This is critically important when the parties share any kind of ongoing relationship.”).

246. GERZON, *supra* note 192, at 61–79 (arguing the importance of integral vision).

247. I first introduced this analytical framework in my keynote address at the 2016 Seoul International Conference on Public Conflict, where I discussed the potential not only for FDI but also for densely populated cities such as Seoul.

ing goals²⁴⁸ but also can strengthen the relationship²⁴⁹—potentially leading to investment retention and expansion.²⁵⁰ To this end, SDS²⁵¹ provides a value-based analytical framework for leaders or partners to examine the optimal level of engagement with regard to who makes decisions, what decisions are made, and how they are made.²⁵² It is not enough to have a shared vision. The path to achieve it requires a significant number of decisions—such as deciding how the decisions are to be made, who gets to participate, and in what capacity—which can be influential factors in failure or success.²⁵³

The ultimate goal of this analytical framework is to help stakeholders make informed decisions about decision-making itself. The framework is made up of six elements: (1) participants: who should participate; (2) degree of participation: information, consultation, shared decision-making; (3) procedural options: persuasive or participatory processes; (4) organizational area and level: in what area of the business and at what level; (5) goals and procedures: what procedures should be used to execute the organizational goals; and (6) timing: when to make the organizational decisions.²⁵⁴

This is a value-based analytical framework because the prerequisite to making each of these determinations is an assessment of the parties' values.²⁵⁵ Values, as stated previously, are at the core of culture and also at the core of our individual identities. They drive decision-making and act as a compass to provide a sense of direction that we use to prioritize among possible options.²⁵⁶ Therefore, when parties come from different cultures, understanding their underlying values is of critical importance to synchronize shared decision-making.

Through value-based assessments, we can determine who cares about the issue at hand. Those who care need to be involved in the decision-

248. COVEY, *supra* note 186, at 262 (arguing that engaging differences can produce synergies).

249. See Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 344 (emphasizing that we should “develop more sophisticated theories about relationships”). See generally FROM CONFLICT RESOLUTION TO SOCIAL JUSTICE: THE WORK AND LEGACY OF WALLACE WARFIELD (Alicia Pfund ed., 2013); Wallace Warfield, *Public Policy Conflict Resolution: The Nexus Between Culture and Process*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 176, 176–93 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993). I conceptualized SDS building on the work of Wallace Warfield, who emphasized the need to pay attention to culture, relationships, and decision-making.

250. See generally Crespo G., *supra* note 6.

251. See Ehandi & Gonstead, *supra* note 17, at 337–38. See generally Gonstead, *supra* note 16.

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

253. Gonstead, *supra* note 16, at 2227–33.

254. *Id.*

255. Gonstead, *supra* note 18, at 716–23.

256. *Id.*

making process to some degree.²⁵⁷ The degree of participation has to be aligned with the degree of significance of the matter for those involved.²⁵⁸ If a matter is less significant to a party, that party might only need to be informed or consulted.²⁵⁹ In consultation and information sharing there is a solo decision-maker. The primary difference between consultation and information sharing is that in consultation, others have a voice, while in information sharing, they are simply being informed.²⁶⁰ In contrast, if the matter is of high significance, it would be critical to consider sharing decision-making power. In this case, being informed or consulted might not be enough to truly maximize the level of engagement required for effective interactions.²⁶¹

It is also necessary to consider whether the decision-making process will be based on persuasion or participation.²⁶² Persuasion-based processes such as voting, in which there must be a winner, lead to the exclusion of the options proposed by those who lost.²⁶³ Participation-based processes such as interest-based negotiation, mediation, and consensus building lead to inclusion as they integrate interests and values into mutually satisfying agreements.²⁶⁴

Finally, when a decision could affect more than those directly involved (systemic decision-making), it is important to take into account the specific area and level of an organization,²⁶⁵ as well as goals, procedures, and timing.²⁶⁶ Even though some degree of inclusion of those who care about a decision could be perceived as less efficient and effective than solo decision-making, failure to include those for whom the matter is highly significant can produce high levels of dissatisfaction, disengagement, and

257. See SUSSKIND & CRUIKSHANK, *supra* note 142, at 41–60. See generally David Laws, *Representation of Stakeholding Interests*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 241, 241–85 (Lawrence E. Susskind et al. eds., 1st ed. 1999) (discussing the importance of who is at the table).

258. See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 87–89 (2006) (explaining the degree of participation with three levels that affect the core concern of autonomy: inform, consult then decide, and negotiate joint agreements).

259. *Id.*

260. *Id.* at 72–95.

261. *Id.* at 87–89.

262. See Lawrence Susskind, *An Alternative to “Robert’s Rules of Order” for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 3, 3–13, 20–35, 55–56 (Lawrence E. Susskind et al. eds., 1st ed. 1999) (explaining that in collective decision-making, the procedures adopted could be based on persuasion, such as *Robert’s Rules of Order*, or they could be based on participation, such as consensus building).

263. *Id.* at 3–17 (arguing that with *Robert’s Rules of Order*, “majority rules”).

264. See generally *id.* at 133–53 (discussing “nearly self-enforcing agreements”).

265. See generally Ron Carucci, *How Systems Support (or Undermine) Good Decision-Making*, HARV. BUS. REV. (Feb. 4, 2020), <https://hbr.org/2020/02/how-systems-support-or-undermine-good-decision-making> (discussing that despite robust scholarship regarding decision-making, there is still discrepancy regarding organizational level decision-making).

266. See generally Gonstead, *supra* note 16, at 2233–34.

disruption.²⁶⁷ Therefore, to minimize risk and maximize potential, stakeholders must have a culturally informed analytical framework that is grounded in values when crafting a system for decision-making.

IV. PUTTING IT ALL TOGETHER: CONNECTING THE GOAL AND THE STRATEGY TO MINIMIZE RISK & MAXIMIZE POTENTIAL IN INVESTOR-STATE BUSINESS RELATIONSHIPS

This article argued that if we broaden the goals, from securing investment to strengthening the investor-State business relationship, then we can maximize the potential for investment retention and expansion. If we aim to move forward, we must develop new strategies that help foreign investors and host countries interact more effectively with each other at the domestic level. In this way, it will be possible to capitalize on differences and address conflicts before they escalate into legal disputes.

Conflicts can be resolved through the assertion of power, rights, or interests. Historically, we have experienced the damaging effect of relying mainly on the exercise of power. Currently, we have systems in place to enforce rights when there is an abuse of power or noncompliance with treaty terms. It is time to further explore how conflict can be resolved in a way that incorporates the parties' values and aims to satisfy the interests of the parties at the table and those affected by the agreement at the domestic level.

As has been well established in the dispute resolution field, conflict is inevitable. The question is not whether there will be conflict but when, and how it will be resolved. Therefore, to strengthen the investor-State relationship, minimize risk, and maximize potential, stakeholders must have systems in place to manage conflict before it escalates and becomes a legal dispute.

To effectively use differences and address conflict at the domestic level, this article suggests innovative strategies to identify cultural challenges. Cultural challenges vary depending on the type of investment. For example, natural resource-seeking investment may require cultural understanding of the local community, and market-seeking investment generally requires a broader understanding of the domestic target market. Efficiency-seeking investment generally requires an alignment of global standards and the domestic culture, and strategic asset-seeking investment generally requires the integration of corporate and domestic cultures. Therefore, it is imperative to consider and understand the impact of culture on the specific type of investment.

267. See generally Susskind, *supra* note 262, at 3–13, 20–35, 55–56 (discussing the benefits of shared decision-making through consensus building, rather than persuasion-based processes such as *Robert's Rules of Order*).

To address these cultural challenges, this article argued that it is necessary to have a framework for conflict management, and the intercultural capacities necessary to optimize the interactions between foreign investors and host countries, thereby enhancing engagement, understanding, and predictability. These capacities include tools to enhance interactions at the bargaining table in processes such as negotiation, mediation, and consensus building. They also include tools to select or design processes for when conflict erupts. Finally, they include tools to assess and improve systems for conflict management and shared decision-making.

When we are operating in a partnership, sharing a vision is not enough to navigate the daily interactions of the stakeholders. To enter into a business relationship without systems for conflict management and shared decision-making not only is a huge risk but also leaves a lot of potential value at the table.

The framework for conflict management and shared decision-making, as well as the intercultural capacities required to maximize the potential of the relationship, can be developed over time both at home and at work. It is unlikely that stakeholder representatives will be able to handle the most complex types of negotiations and conflict with those with whom they have very little in common unless they have trained the *participatory muscle* on a daily basis with those with whom they share daily life.²⁶⁸ Unless investors and States start seeing each other as indispensable partners, the world may never reach the new levels of innovation and growth that can be achieved by working together, unlocking the full potential of their business relationship.

268. Gonstead, *supra* note 16, at 2214.