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TO SUE IS HUMAN; TO SETTLE DIVINE: INTERCULTURAL COLLABORATIONS TO EXPAND THE USE OF MEDIATION IN COSTA RICA

*Don Peters**

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I. INTRODUCTION

Virtually all societies have developed non-adjudicative methods to resolve disputes.¹ Third party intervention to help resolve disputes consensually, typically called mediation or conciliation, occurs in all cultures throughout the world.² It now occurs in Costa Rica only voluntarily and primarily in family, community, labor, agricultural, and trade contexts.³

Connecting mediation or conciliation to court systems provides a comparatively new use of third party interventions not involving adjudication through arbitration or litigation. This typically occurs by referring matters for mediation services provided by state-funded

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1. Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned From Practice*, 5 HARV. NEGOT. L. REV. 339, 340 (2000).

2. See, e.g., DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS 191 (1992) (arguing that the experience of mediation is a universal one); JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 93 (1995) (contending that mediation has universal facets and performs several functions in all cultures); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 20 (2d. ed. 1996) (asserting “mediation has a long and varied history in almost all of the” world’s cultures).

3. Remarks of Ingrid Palacios Montero, Professor of Law, University of Costa Rica School of Law, San José, Costa Rica, June 25, 2004 (on file with author). Much of the conversation during the workshop was in Spanish, simultaneously interpreted into English. My notes of comments made during the workshop discussion thus often contain two occasions for error as paraphrases of English interpretations of original comments in Spanish.

programs,⁴ private centers,⁵ and private mediators. Florida, the first American state to authorize courts to order mediation broadly across their civil dockets, uses mediation extensively to resolve all or parts of contested small claims, county court, family, juvenile dependency, and circuit court matters.⁶

A workshop at the Fourth Annual Conference on Legal and Policy Issues in the Americas, held in San José, Costa Rica, on June 24-26, 2004, brought lawyers, law professors, and law students from Costa Rica and Florida together to discuss mutual interests in mediation. Costa Rican participants at this session shared concerns that voluntary mediation does not occur as frequently and in as many contexts as they believe it should in their country. They recommended that mediation's use in Costa Rica should be expanded.

This concern reflected experiences shared by many Florida workshop participants. Voluntary mediations do not occur as much as they would like in Florida or elsewhere in the United States.⁷ American mediation programs that depend upon voluntary participation typically attract relatively few participants even when offered at low or no cost.⁸ The

4. In Florida, for example, this is done for family mediations. Florida currently has court-connected programs in eighteen of its twenty judicial circuits. Most of the circuit courts use a two track system to handle referrals from judges. "Publicly funded staff or contract mediators are provided for families with income below a set level." Families with incomes above this level must use private mediators. DISPUTE RESOLUTION CENTER, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 80 (17th ed. 2004).

5. Florida has nine Citizen Dispute Resolution Centers that typically connect to the community through the support of state attorney's offices, the courts, local bar associations, and local County Commissioner Boards. These centers accept referrals from many sources including the courts. *Id.* at 70. In California, the San Diego Mediation Center is a private, nonprofit corporation that manages over 2500 cases a year and accepts clients referred by courts. Christopher Honeyman & Ellen A. Waldman, *San Diego Moveable Feast: Competition in Cooperation-Building*, 5 CARDOZO J. CONFLICT RESOL. 173, 175 n.8 (2004).

6. FLA. STAT. ANN. § 44.102 (2) (a)-(b) (West 2002) (providing that a court must, if requested by a party, and may refer "all or any part of a filed civil action to mediation."). Florida judges frequently interpret this to mean they shall routinely order most contested matters to mediation absent party requests. Partial data from 2003 indicates that in 2003 Florida courts referred 109,025 cases to mediation. *See* DISPUTE RESOLUTION CENTER, *supra* note 4, at 55, 89, 102. This underestimates the true number of cases mediated in Florida because it depends on local clerks gathering and transmitting accurate data. E-mail from Sharon Press (May 17, 2004) (on file with author).

7. Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 770 n.20 (1998).

8. *See* Rosselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 570 (1997). For example, placing brochures in the University of Florida's Student Legal Services office in

Community Dispute Resolution Program in Dade County, one of the pioneering mediation efforts in Florida, closed in 1995 in part because of a disappointingly low case load.⁹

Several factors make generating voluntary mediations difficult. Initiating mediation requires confronting rather than avoiding conflict and many prefer avoidance.¹⁰ People experiencing disputes and conflicts also often appear hesitant to seek a third party's assistance because they either do not know about mediation or fear that using this process will weaken their chances for outcomes that maximize gain.¹¹ One study done in a large American urban area concluded that many citizens chose to take disputes to court rather than to mediation because they desired public vindication of their rights.¹²

Costa Rican participants also expressed concerns about a general lack of awareness of mediation and needs to educate judges, lawyers, companies, and citizens about the value and availability of this process. These concerns reminded many Florida workshop participants of conditions in their state in the 1970s and mid-1980s before and just after it adopted mandatory, court-connected mediation.¹³ Relatively few

1997-1999 advertising the law school's mediation clinic and its desire to provide mediation services to disputing roommates produced no voluntary mediations.

9. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 906 n.11 (1997). Centers in large urban areas outside Florida, however, are maintaining case loads which include substantial numbers of voluntary mediations. The New York City Community Dispute Resolution Center Program has helped more than 75,000 participants since it started in 1982. Christopher Honeyman & Lela P. Love, *New York Moveable Feast: Boundaries to Practice*, 5 CARDOZO J. CONFLICT RESOL. 147, 151 n.14 (2004). The San Diego Mediation Center manages over 2500 cases a year. Honeyman & Waldman, *supra* note 5, at 175 n.8.

10. KARL A. SLAIKEU, *WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES* 4-9 (1996).

11. See MOORE, *supra* note 2, at 82. A voluntary mediation program launched at the University of Florida by the University's Student Services Office, using 12 graduate and law students whom the author helped instruct, did only 7 mediations in its first year on a campus of more than 40,000 students.

12. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping our Legal System*, 108 PENN ST. L. REV. 165, 172 (2003) (citing SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990)); Sally Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

13. The Florida legislature created the Study Commission on Dispute Resolution in 1984. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1043 (1993). This Commission published two reports, one recommending the establishment of a comprehensive mediation and arbitration program for trial courts and the other proposing legislation for this program. *Id.* at 1043-44. The comprehensive legislation was passed by the Florida legislature in 1987. *Id.* at 1045.

mediations occurred then in community dispute resolution programs that took voluntary referrals from courts¹⁴ and pilot family law projects.¹⁵ Lawyers typically either did not know about mediation or viewed it negatively, fearing potential loss of fees,¹⁶ and thus did not advise clients to use the process. Many sitting judges viewed mediation skeptically.¹⁷

Florida's experiences with mediation since 1987, when courts began ordering it broadly across their noncriminal dockets, confirms research showing that persons who participate in mediation are more likely to view the process positively.¹⁸ Citizens who participate in mediation clearly like it.¹⁹ A review of sixty-two studies evaluating the effectiveness of more than one hundred court mediation programs showed that more than seventy percent of litigants were satisfied with mediation and more than eighty percent thought the process was fair.²⁰ An analysis of nine studies which compared satisfaction and fairness perceptions between citizens who participated in mediation programs and those who did not found that six studies showed higher rates for those who mediated while three discerned no difference.²¹

Research confirms that lawyers who participate in mediation value it more than those who have not experienced it.²² In the past seventeen years Florida lawyers representing individual and company clients in non-criminal matters have experienced court-ordered mediation when disputes arise and litigation ensues. This exposure helped many of these lawyers forget that they were once skeptical about mediation because they now embrace it as a valuable tool for negotiating and problem-solving.²³ These

14. In 1975, Florida began its first court-connected mediation programs in community contexts and ten local citizen dispute programs were established by 1978. *Id.* at 1042.

15. Following a national trend to create alternative approaches to resolve divorce and child-related issues, in 1978 the first Florida court-connected family mediation program began operating in Broward County. *Id.*

16. Conference remarks of John Upchurch, June 25, 2004 (on file with author).

17. *Id.*

18. See Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (1996); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004).

19. See Jennifer Shack, *Efficiency: Mediation in Courts Can Bring Gains, But Under What Conditions?* ABA Dispute Resolution Section, 9 DISP. RESOL. MAG. 11 (2003).

20. *Id.*

21. *Id.* at 12.

22. See Bobbie McAdoo et al., *What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8 (2003); Reuben, *supra* note 18.

23. Upchurch, *supra* note 16.

experiences also taught Florida lawyers that ADR²⁴ does not stand for Alarming Drop in Revenue.²⁵ Studies show that having experienced mediation, lawyers are also more likely to recommend voluntary use of the process to their clients.²⁶ Research also indicates that educating and providing judges with mediation experiences increases their willingness to suggest or recommend it which, in turn, expands voluntary use of the process.²⁷

24. The use of the word alternative connotes that these approaches are options to trial. See Hensler, *supra* note 12, at 165. Arbitration was one of the first judicial experiments with an alternative to trial that did not involve the courts. Pennsylvania trial courts in the 1950s required civil disputants whose claims involved modest but above small claims limit amounts to use an arbitration like process. *Id.* at 177. The word alternative does not accurately describe process differences because both arbitration and litigation are adjudicatory methods. Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1021 (2004). The form of arbitration most often connected to courts, however, generates non-binding outcomes. FLA. STAT. ANN. § 44.103 (West 2002); see Hensler, *supra* note 12, at 177.

25. Preparing clients thoroughly for mediation and then representing them during it are important components of contemporary practice. See David C. Webb, *Representing Clients in Mediation: Balancing Our Role as Advisor and Advocate*, 19 ME. B.J. 106, 106-07 (2004); Nancy Neel Yeend, *Avoiding Mediation Advocacy Pitfalls*, 29 S.F. ATT'Y 40 (2003). In most contexts except contingency agreements generated by attorneys representing plaintiffs in appropriate cases, Florida attorneys bill their clients by the hour for the spent doing these important tasks. See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 11-12 (1998). Research also suggests that without a statute or judicial rule to the contrary, mediation tends to occur later rather than earlier in cases meaning that most, if not all, of the pretrial civil discovery has occurred, and lawyers have earned fees for this work. See McAdoo et al., *supra* note 22, at 8. While resolving matters at mediation removes fees for litigating cases, this concern may not strongly influence many lawyers given that the number of trials actually held in American continues to decrease. A recent study of 22 states showed from 1976 through 1998 civil jury trials fluctuated between 23,000 and 25,000 per year but fell to 17,617 in 2002. Scott Atlas & Nancy Atlas, *Potential ADR Backlash: Where have all the trials gone?*, 10 DISP. RESOL. MAG. 14 (2004). Another study documents that the proportion of cases going to trial in federal courts has dropped during the 40 year period from 1962 to 2002 from 11.5% to 1.8%. Marc Galanter, *The Vanishing Trial: What The Numbers Tell Us, What They May Mean*, 10 DISP. RESOL. MAG. 3 (2004). Lawyers also have ethical duties to avoid conflicting interests that might arise between their desire to try matters to earn additional fees and client wishes to accept resolutions generated in mediation that satisfy their interests. See Robert F. Cochran, Jr., *ADR, The ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 196 (1999).

26. McAdoo et al., *supra* note 22, at 8.

27. Roselle L. Wissler, *Barriers to Attorney's Discussion and Use of ADR*, 8 DISP. RESOL. MAG. 27 (2003) (study of 462 Arizona lawyers who devoted at least half of their practice to civil litigation showed that how frequently judges suggested use of ADR had the largest impact on their use of voluntary mediation).

Given these shared experiences, exploring ways to collaborate developing approaches to expand the use of mediation in Costa Rica provides a logical next stage. This stage pursues the goal of the University of Florida's Rule of Law in the Americas Program to initiate ongoing dialogues "among legal professionals, law professors, government officials, and public servants to assist in resolving problems in the Americas."²⁸ Initial and tentative first steps in this direction occurred at the San José Conference. More steps are needed to translate knowledge and experiences gained in the past thirty years in Florida and elsewhere in the United States into sensitive collaborations that employ cultural and contextual resources in Costa Rica to expand the use of mediation there.²⁹

This Essay argues that next steps toward future collaborations should include enhancing existing services and creating new ways to deliver mediation services and building viable approaches for connecting mediation to courts on both a voluntary and mandatory basis. This Essay also identifies and analyzes intercultural challenges confronting efforts to design and implement these collaborations. Intercultural connotes interactions between persons from different cultures.³⁰ Although these interactions are also often called cross-cultural,³¹ the term intercultural better conveys the more elicitive,³² collaborative, and supportive approaches and attitudes that this work requires. San José workshop participants got a taste of intercultural challenge when they politely discussed, yet were unable to decide, whether this third party intervention process was mediation or conciliation and whether, and what, differences between these concepts exist.³³

28. Program Goal 6, Rule of Law in the America's Program funding proposal prepared by the Center for Governmental Responsibility at the Levin College of Law, and submitted by the University of Florida (n.d.) (copy on file with author).

29. JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* 95 (1997).

30. KENNETH CUSHNER & RICHARD W. BRISLIN, *INTERCULTURAL INTERACTIONS: A PRACTICAL GUIDE*, at 13 (2d ed. 1996).

31. *Id.*

32. Also called "emic" in anthropology, this approach seeks to begin intercultural collaborations with and build them on local insights, understandings, and experiences. Susan T. Wildau et al., *Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad*, 10 MED. Q. 303, 307 (1993); LEDERACH, *supra* note 2, at 55-62. Using what is commonly understood by and readily available to local participants, this approach aims to raise this knowledge to explicit levels and use it to construct appropriate conflict intervention and resolution levels for the problems they face. AUGSBURGER, *supra* note 2, at 35; KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* 61-62 (1998).

33. See *infra* notes 87-103 and accompanying text.

II. COLLABORATIVE POSSIBILITIES AND CHALLENGES

Thirteen centers or programs currently provide mediation services in Costa Rica.³⁴ Studies indicate that many of these programs handle cases efficiently and quickly.³⁵ For example, an interdisciplinary center targeting poorer families and using mediation methods under the government agency, *Patronato Nacional de la Infancia*, was found to have resolved 60% of its cases successfully.³⁶ This center attained high indices of user satisfaction. It also earned a good community reputation which evaluators attributed to listening to disputants during an elaborate filtering stage as well as the work of the mediators.³⁷

The Costa Rican Ministry of Labor provides an option to mediate with trained professionals and reports a high level of agreement after short sessions lasting two hours or less.³⁸ Similar services are provided by the Ministries of Trade and Agriculture.³⁹ The Costa Rican Chamber of Commerce runs a mediation center in San José.⁴⁰ The Arias Foundation established two pilot centers for community mediation in Costa Rica, one in a rural community and the other in an urban neighborhood.⁴¹

If requested, culturally sensitive collaborations with any of these existing mediation service delivery centers can occur. These collaborations can encompass efforts to instruct mediators,⁴² create credentialing

34. Montero, *supra* note 3.

35. ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 17 (Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development 1998) [hereinafter PRACTITIONERS GUIDE].

36. *Id.* app. D (summarizing EDUARDO GARRO, INFORME OPERATIVO I. INFORME OPERATIVO II (1995-95); DPK CONSULTING, EVALUACIÓN DEL CENTRO DE MEDIACIÓN PARA LA RESOLUCIÓN DE CONFLICTOS (1996)).

37. *Id.* app. D (summarizing GARRO, *supra* note 36).

38. Montero, *supra* note 3.

39. *Id.*

40. Workshop comments of Aaron Montero Sequira, June 25, 2004 (on file with author).

41. Community Mediation in Central America: Improving Access to Justice and Strengthening Social Peace, available at <http://www.arias.or.cr/fundarias/cpr/cpr2.htm> (last visited Mar. 31, 2005).

42. Research suggests that many Costa Ricans have already received instruction in mediation theories, practices, and skills. Professor Lederach describes conducting a year long program with a group in Costa Rica which involved twice-weekly meetings and four day workshops on conflict result for groups of church leaders. LEDERACH, *supra* note 2, at 37, 73. The Arias Foundation intends to instruct ninety Costa Ricans in mediation theory and provide an additional forty hours of individual training to twenty participants to qualify them to mediate in the two community dispute resolution centers. Community Mediation in Central America, *supra* note 41. Mediation instruction programs typically present dispute resolution theories, opportunities to observe, discuss, and practice common mediation tasks to improve skills, and a culminating opportunity for each

approaches,⁴³ ensure quality mediation services,⁴⁴ and develop standards of good practices⁴⁵ and ethics.⁴⁶ Although mediation in America remains largely a decentralized and relatively unorganized profession,⁴⁷ Florida has done more than virtually any other state to regulate and review mediation practice.⁴⁸ Florida workshop participants have played significant roles in

participant to conduct a simulated mediation role play. Press, *supra* note 13, at 1037. The most common mediation tasks requiring skillful performance are investigation, empathy, persuasion, and invention. See Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOT. J. 149, 155-59 (1988).

43. Florida was one of first American states to create a centralized, uniformly applicable, state center-administrated certification process. See Press, *supra* note 13, at 1029 n.5. Certification typically follows satisfying minimum qualifications including training, apprenticeships or mentorships, and educational background and professional experience requirements. *Id.* at 1036-38. Ensuring minimum qualifications seeks to protect consumers of mediation services and the integrity of the mediation process. *Id.* at 1036. Florida requires forty hours of instruction for family, dependency, and circuit court certification and twenty hours of instruction for county court. After completing this instruction, trainees must observe and conduct under supervision two mediations for family, dependency, and circuit and four mediations for county. Fla. R. Cert. & Ct.-Appt. Mediators R. 10.100. After finishing this mentorship trainees must submit evidence of their successful completion of these steps and good moral character to earn certification as a mediator by the Florida Supreme Court. *Id.*

44. Evaluating mediator performances by peer observation or performance-based testing approaches remains a concern within the mediation community. See Press, *supra* note 13, at 1038; Honeyman, *supra* note 42, at 155-59; Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOT. J. 23 (1990). A study conducted in Suffolk County Superior Court in Massachusetts, emphasizing core skills of investigative abilities, empathy, inventiveness, persuasion, and mediation management found that a performance-based evaluation approach provided a more reliable selection method. Brand Honoroff et al., *Putting Mediation Skills to the Test*, 6 NEGOT. J. 37, 46 (1990).

45. One scholar calls for an the creation of an "encyclopedia of best practices in problem-solving techniques" that embraces elements of conflict resolution techniques that are indigenous. James M. Cooper, *Latin America in the Twenty-First Century: Essay: Access to Justice I.1*, 30 CAL. W. INT'L L.J. 429, 437-38 (2000).

46. Florida was the first state to enact a comprehensive code of ethics for mediators. Fla. R. Cert. & Ct.-Apptd Mediators R. 10.200-10.690; see Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702 (1994). Florida revised its Standards of Professional Conduct in 2000, becoming the first American state to adopt revised ethics standards drawing its experiences and research into the ethical standards for mediation. See Committee Notes, Fla. R. Cert. & Ct.-Apptd Mediators R. 10.200.

47. Scott R. Peppet, *ADR Ethics*, 54 J. LEGAL EDUC. 72, 78 (2004).

48. See generally Press, *supra* note 13. States with a history of active mediation besides Florida include California and Texas. Creo, *supra* note 24, at 1063.

these endeavors and can collaborate meaningfully with existing Costa Rican mediation centers in these and other initiatives.⁴⁹

More immediate collaborative possibilities may lie in helping to create new mediation education and service mechanisms. For example, the Law Faculty at the University of Costa Rica is considering launching a Center for Conflict Resolution that will emphasize training for mediators and conciliators, generate interdisciplinary studies leading to graduate level degrees, and provide services for both low income matters and intellectual property disputes.⁵⁰ Collaborative roles in this endeavor could include training trainers,⁵¹ designing and developing curriculum and educational

49. I have had the great fortune to learn about intercultural transfer of dispute resolution ideas and behavioral suggestions by working in general mediation training workshops in Kampala, Uganda, and in Port-au-Prince, Gonaives, Mirebelais, and Jacmel, Haiti; in a commercial mediation training sponsored by the Polish Arbitration Association in Warsaw, Poland; and in workshops on family mediation and general dispute resolution theories sponsored by the Malaysian Bar Counsel and the University of Malaysia in Kuala Lumpur, Malaysia. I also served on the Supreme Court Committee responsible for revising the standards of professional conduct for Florida court-appointed mediators.

50. Montero, *supra* note 3.

51. I have participated in the trainer mediation workshops in Uganda. I have also hosted visiting dispute resolution teachers from Jordan and Malaysia who helped me co-teach the three week intensive seminar that begins my mediation clinic course. Peters, *supra* note 7, at 762-67. This instructional unit provides forty hours of instruction in twenty classes spread over three weeks. *Id.* It introduces concepts and theories of dispute resolution and presents and explains action theories for critical mediation tasks like questioning, listening, framing, checking mediation alternatives, and facilitating negotiation. *Id.* It also provides a valuable introduction to performance-based teaching and learning by providing numerous opportunities to practice mediation tasks in simulated problems and shorter, focused role plays. *Id.*

materials,⁵² and creating faculty and student exchanges in both dispute resolution and intellectual property.⁵³

Collaborative discussions began during the workshop in San José to explore creating a Central American Center for Dispute Resolution. Perhaps located at the University of Costa Rica and possibly supplanting the previously mentioned initiative, this Center will encourage effective prevention, management and resolution of commercial and other disputes in Central America.⁵⁴ The plan is to create a coalition of corporate, governmental, and educational entities to build and run this initiative. The Center developed and supported by this coalition will develop rules, protocols, training programs, and other methods for preventing and managing conflict; provide dispute resolution services; and advance the intellectual frontier of mediation through academic and educational programs.⁵⁵

As currently envisioned, the University of Florida through its Center for Governmental Responsibility and Institute for Dispute Resolution will

52. Mediation teaching materials frequently present information about effective action theories for accomplishing common mediation tasks and then provide opportunities to apply these theories by performing in simulated role plays. The concept of action theories is based on a premise that humans routinely design courses of behavior designed to change existing circumstances into preferred situations. CHRIS ARGYRIS & DONALD A. SCHON, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 205 (1974). Helping persons studying mediation identify what action theories they typically use and what assumptions and behaviors might work better by reflecting on what they actually did in simulated and real contexts provides opportunities for them to learn to behave purposefully and increase their skills. Don Peters, *Mapping, Modeling and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 878-80 (1996) [hereinafter Peters, *Mapping*]. Importing action theories from one cultural context to another needs to be done carefully and sensitively. Action theories based on one broad set of cultural influences may not sufficiently account for different probable behavioral tendencies and norms in other cultures which reinforce some actions and discourage others. See Don Peters, *It Felt Like He Was Inside My Skin: Intercultural Learning about Mediation in Haiti*, 2 RUTGERS CONFLICT RESOL. L.J. (2004) [hereinafter Peters, *Inside My Skin*]. Similarly, importing role plays can create situations where participants work on exercises that have no connection to their cultural, contextual, and conflicting experiences. *Id.* Using experiential learning exercises based on local situations and contexts ameliorates these problems and requires collaboration. See LEDERACH, *supra* note 2, at 37, 50 (describing interviewing several Central Americans about their family and community conflicts and problems before creating fifteen role plays developed from these real-life situations).

53. In addition to its Institute for Dispute Resolution and Center for Governmental Responsibility, the Levin College of Law offers a certificate in intellectual property. This is the only major Intellectual Property program in the Southeastern United States.

54. F. Peter Phillips & JoAnn Klein, Draft Proposal for Central American Center for Dispute Resolution, Sept. 1, 2004 (copy on file with author).

55. *Id.*

collaborate with the University of Costa Rica Faculty of Law, the CPR Institute for Dispute Resolution,⁵⁶ the Costa Rica-United States of America Foundation For Cooperation⁵⁷ [CRUSA], the Florida mediation group of Upchurch, Watson, White, and Max,⁵⁸ and participating corporations.⁵⁹ Specifically, Florida participants will collaborate with University of Costa Rica participants and the CPR Institute of Dispute Resolution to develop and conduct joint workshops and training programs, identify opportunities for law student internships in dispute resolution, conduct joint research and prepare publications resulting from these efforts, and generate scholars-in-residence opportunities.⁶⁰

While potentially valuable, these collaborative opportunities to build and operate new centers may not respond fully to needs of expanding the use of mediation in Costa Rica and increasing the exposure to, knowledge of, and support for this valuable dispute resolution process. One workshop participant, for example, wondered whether creating more mediation centers simply proliferated specialized, expensive options that most Costa Ricans could neither access nor afford.⁶¹ Workshop participants generally agreed that private mediation centers in Costa Rica are expensive,

56. The CPR Institute for Dispute Resolution was founded in 1979 by a group of General Counsel who sought to develop alternatives to commercial litigation and arbitration. The Institute is funded by the annual contributions of hundreds of Fortune 250 corporations and AmLaw 200 law firms and the provision of services and information. This institute has launched an International Project designed "to provide value to corporations engaged in cross-border transactions by helping businesses understand [and] use mediation and developing regionally appropriate conflict resolution resources." CPR Institute for Dispute Resolution, The CPR International Project, Project Summary, *available at* http://www.cpradr.org/pdfs/Intl_StrategySummary04.pdf (last visited Sept. 22, 2004). Its interest in developing a Central American Conflict Resolution Center coincides with efforts to encourage the continued growth of commercial mediation in Europe and to create a Sino-American Business Conciliation Center collaborating with the China Council for the Promotion of International Trade. *Id.*

57. This Foundation is a binational, private, nonprofit corporation designed to promote cooperation between these two countries. It emphasizes sustainable development supporting projects in capacity building, technological transfer and technical cooperation. Costa Rica, USA Foundation for Cooperation, Web Site, *at* <http://www.cr-usa.org/english/> (last visited Sept. 22, 2004).

58. This mediation group includes a large and growing number of Florida Supreme Court certified attorney mediators. Members of Upchurch, Watson, White & Max have served on and chaired key dispute resolution committees appointed by the Florida Supreme Court and the four principals of the group have more than 35 years of combined mediation experience. Upchurch Watson White & Max Mediation Group Web Site, *at* <http://www.uww-adr.com/2002/aboutfirm.shtml> (last visited Nov. 8, 2004).

59. Phillips & Klein, *supra* note 54, at 1.

60. *Id.*

61. Workshop comments of Maria Esquivel, June 25, 2004.

specialized, and do not reach a broad spectrum of citizens or matters. The proposed Central American Center for Dispute Resolution will be expensive, specialized, and feature dispute resolution services that, initially, are not “aimed at resolving consumer or employment disputes.”⁶²

Workshop participants also discussed whether a more coordinated or systematized approach to developing mediation in Costa Rica should be pursued rather than the *ad hoc*, individual program-based approach that is now occurring. Many American states have followed a similar *ad hoc* developmental path. One commentator argues that some American states have reached a level where “dispute resolution organizations proliferate in an incomprehensible alphabetical mish-mash barely digestible by the marketplace.”⁶³

Aaron Montero Sequira, a practicing lawyer in San José who teaches intellectual property at the University of Costa Rica School of Law, recommended state subsidized mediation centers as a way to coordinate development.⁶⁴ Costa Rican neighbors have followed other options. Puerto Rico, for example, has successfully used the San Juan Dispute Resolution Center to assess cases, provide advice, make referrals, and mediate appropriate disputes as a way to reach poor and uneducated populations who may be intimidated by formal court processes.⁶⁵

Currently no Costa Rican statute or rule authorizes judges to order mediation.⁶⁶ No court-connected mediation occurs in Costa Rican courts except in instances when judges attempt to mediate matters themselves.⁶⁷ A Costa Rican practitioner described how judicial attempts to mediate cases he was handling made him uncomfortable because the person attempting to facilitate negotiation would ultimately decide the matter if settlement did not occur.⁶⁸ Undoubtedly related to the strong tradition in civil law systems which imposes obligations on judges to try to settle

62. Phillips & Klein, *supra* note 54, at 2.

63. Creo, *supra* note 24, at 1023.

64. Sequira, *supra* note 40.

65. PRACTITIONERS GUIDE, *supra* note 35, at 11.

66. Montero, *supra* note 3.

67. Sequira, *supra* note 40.

68. *Id.* Anecdotal reports in the United States report similar attorney discomfort when judges try to settle their cases by expressing skepticism about the value of trying the case before them and imply that obstacles will arise at trial. Hensler, *supra* note 12, at 175.

matters,⁶⁹ this approach does not constitute true mediation because it conflates and combines a conciliatory and adjudicatory role.⁷⁰

Connecting mandatory mediation to portions of the judiciary helped Florida coordinate and systematize an expanded use of mediation. It exposed judges, lawyers, and clients to this consensual dispute resolution process. It also provided free mediation services to low income citizens through the use of volunteer mediators in small claims matters and staff and contract mediators paid for by the state through filing fee increases in some family law matters. Mandatory referral to mediation by judges does not seem to affect adversely litigants' perceptions of procedural justice which include opportunities to voice concerns, have them heard, receive respectful treatment, and participate in a fair and balanced process.⁷¹ Mandating mediation also has seemed to increase voluntary use of the process. These significant experiences raise possibilities that Costa Rica might similarly benefit from developing mandatory mediation approaches connected to its judiciary.

Mandatory, court-connected mediation has been implemented successfully elsewhere in Latin America. Argentina, perceiving a severe docket backlog as a judicial emergency, passed a National Mediation and Conciliation Statute on October 4, 1995.⁷² This law mandated mediation before any lawsuit, except for family cases, could reach trial.⁷³ From April, 1996, to April, 1997, 75,010 cases were mediated and only 23.25%, or 17,526, did not settle and went back to the courts for disposition.⁷⁴ In this same period, 69.43% of 29,986 commercial cases mediated reached agreement.⁷⁵ This experience has also increased the use of voluntary mediations in Argentina.⁷⁶

69. See Nadja Alexander, *What's Law Got To Do With It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND L. REV. 335, 360-61 (2002). By comparison, no such requirement exists in America or other common law jurisdictions although judicial involvement in encouraging litigants to settle is quite common in this country. See *id.*; Hensler, *supra* note 12, at 175.

70. See Hensler, *supra* note 12, at 175; Kimberlee Kovach & Lela Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

71. McAdoo et al., *supra* note 22, at 8.

72. Cooper, *supra* note 45, at 433.

73. Michael Knox, *Continuing Evolution of the Costa Rican Judiciary*, 32 CAL. W. INT'L L.J. 133, 146 (2001).

74. Cooper, *supra* note 45, at 433.

75. *Id.*

76. *Id.* The City of Buenos Aires has accepted voluntary mediations since 1996 and Community Justice Centers using mediation have been established successfully in a number of neighborhoods in the city. *Id.*

The judicial docket backlog in Costa Rica has been described as “serious” generating continually increasing “delays for a definite and final resolution” making awards ultimately “obsolete, out of context, and generally useless.”⁷⁷ A conference participant estimated that it can take three to five years to resolve a commercial dispute in a Costa Rican court.⁷⁸

Costa Rican workshop participants expressed no eagerness to explore a broad approach to mandatory, court-connected mediation such as the approaches Argentina adopted in 1995 and Florida launched in 1987. A consensus emerged that such an approach would generate too much shock, confusion, and resistance to succeed. Whether narrower, limited initiatives might succeed was not discussed. These could include individual court- or judge-based projects and subject matter-focused pilot projects in areas such as small claims or in contested family issues involving children.

Narrower projects have been implemented successfully elsewhere in the region. In Bolivia, for example, a pilot project used one court as a model for the rest of the Country to follow.⁷⁹ Launched in Cochabamba District Court, this Conciliation Center accepted civil but not family law cases with all filings directed there first to determine eligibility for conciliation.⁸⁰ Appropriate cases were conciliated and, if not resolved, referred back to the court for further processing.⁸¹ Additionally, Chile has a law requiring a form of mandatory conciliation in consumer protection matters and is considering introducing a national system that would mandate the use of mediation for family matters.⁸² Although creating small claims courts, and using mediation before adjudication in them, has been recommended as a viable alternative to benefit both the poor and entrepreneurs,⁸³ apparently neither Costa Rica nor any of its neighbors have tried this approach.

77. Victor M.L. Garita, *Conceptual Basis for a New Arbitral Statute for Costa Rica: A New Approach in Latin America*, 65 TUL. L. REV. 1633, 1633-34 (1991).

78. Workshop Comments of Rafael Bellar, Dean, University of Costa Rica Faculty of Law, June 26, 2004.

79. Wanis-St. John, *supra* note 1, at 369.

80. *Id.*

81. *Id.* This form of mandatory mediation, if appropriate, first is a version of the multi-door courthouse concept proposed by Professor Frank Sander in 1976 when “he urged American lawyers and judges to re-imagine civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes parties bring to the justice system.” See Hensler, *supra* note 12, at 165 (citing Frank Sander, *Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 FED. RULES DECISIONS 79, 111 (1976)).

82. Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 178.

83. Steven E. Hendrix, *Current Trends in the Americas: USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean*, 9 SW. J.L. & TRADE AM. 277, 283 (2002-03).

An even less bold step explores educating judges to encourage, but not mandate, that lawyers mediate matters with existing or new centers. Florida began its judicial involvement in this way with judicial encouragement to mediate matters with citizen justice centers.⁸⁴ Many private and non-profit centers in the United States depend on this type of judicially encouraged, but still voluntary, mediation.⁸⁵ An Arizona study showed that the frequency with which judges suggested using mediation had the strongest impact on whether lawyers actually employed it.⁸⁶

III. INTERCULTURAL CHALLENGES

Whatever collaborative efforts that arise from the Conference and continued discussions and dialogues will generate intercultural challenges and rewards. This process began at the Conference as we discussed whether we should talk about mediation or conciliation, or both. Addressing whether mediation and conciliation are different words for the same process, or significantly different processes, illustrates the potential for confusion about procedures and the complexity of intercultural issues.⁸⁷

Confusion reigns in scholarship addressing this issue.⁸⁸ Some scholars argue that these are different processes because international trade law and the World Trade Organization distinguish between mediation and conciliation by defining them differently. The World Trade Organization defines mediation as involving an impartial third party who helps parties settle the dispute.⁸⁹ It then defines conciliation as involving an impartial third party who undertakes an independent investigation and suggests a resolution.⁹⁰ Practitioners from other countries than the United States often

84. See DISPUTE RESOLUTION CENTER, *supra* note 4, at 70.

85. See Honeyman & Love, *supra* note 9, at 151 n.14; Honeyman & Waldman, *supra* note 5, at 174 n.4.

86. Wissler, *supra* note 27, at 27.

87. The apparent inability of American lawyers to differentiate between an alternative adjudicatory process like arbitration, where the neutral decides, and a consensual process like mediation or conciliation where the neutral helps others but does not decide and seemingly knows no limits. I received a call in April 2004, from a local lawyer wanting to know how she could arrange "binding mediation." See Alison Gerencser, *Alternative Dispute Resolution Has Morphed Into Mediation, Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 846-47 (1998).

88. See Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 105 n.89 (1995).

89. Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 366 (2004).

90. *Id.*

use this different degree of involvement to discern separate processes.⁹¹ According to this distinction, mediation generates a primarily facilitative role for a third party neutral while conciliation creates a very evaluative role for interveners that approaches non-binding arbitration.⁹²

Other scholars define these terms in directly opposite ways, reversing the degree of involvement assigned to each.⁹³ They contend that mediators are primarily evaluative and conciliators primarily facilitative, claiming that mediators not only conciliate but make their own recommendations so that mediation is conciliation plus evaluation.⁹⁴ One workshop participant echoed this view suggesting that conciliation is a facilitative process where the intervener does not get involved in evaluating or recommending specific agreement directions.⁹⁵

Still others analyze other aspects of transborder commercial dispute resolution and contend that although conciliation is how mediation is commonly known internationally, the terms are essentially synonymous.⁹⁶ For example, the United Commission on International Trade Law for International Commercial Conciliation [UNCITRAL] says as much when, in Article 1(3), it defines:

For the purposes of this law, “conciliation” means a process, whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute. . . . The conciliator does not

91. Rau & Sherman, *supra* note 88, at 105 n.89; M. SCOTT DONAHEY, INTERNATIONAL MEDIATION AND CONCILIATION, IN THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 33:1 (Bette J. Roth et al. eds., 1993); see D. ALAN REDFERN & J. MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 26 (2d ed. 1991).

92. Framed this way, the distinction mirrors the controversy in American mediation regarding whether mediators should use only facilitative behaviors or whether they may use actions that evaluate strengths and weaknesses in claims and assertions. See generally James J. Alfini, *Moderator, Evaluative Versus Facilitative Mediation: A Discussion*, 34 FLA. ST. U. L. REV. 919 (1997). This controversy reflects competing visions of mediation. Compare Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) with James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals*, 38 S. TEX. L. REV. 769 (1997).

93. Rau & Sherman, *supra* note 88, at 105 n.89.

94. See, e.g., Lord Wilberforce, *Resolving International Commercial Disputes: The Alternatives*, in UNCITRAL ARBITRATION MODEL IN CANADA 7, 7 (Robert K. Paterson & Bonita J. Thompson eds., 1987); Lord Donaldson, *Alternative Dispute Resolution*, 58 ARBITRATION 102, 103 (1992); Rau & Sherman, *supra* note 88, at 105 n.89.

95. Workshop comments of Christian Diaz, June 25, 2004 (on file with author).

96. Sekolec & Getty, *supra* note 82, at 175.

have the authority to impose upon the parties a solution to the dispute.⁹⁷

Many scholars treat the terms interchangeably in other contexts, writing about mediation or conciliation in ways that assert no meaningful differences result from the label used.⁹⁸ They maintain that both describe a process where a third party without authority to decide issues, claims, and defenses intervenes to help parties negotiate. They contend that any perceived differences are “negligible,”⁹⁹ and that efforts to distinguish mediation and conciliation are “pointless”¹⁰⁰ and represent largely academic “attempts to dichotomize a continuum.”¹⁰¹

I am persuaded that existing efforts to distinguish conciliation and mediation depict primarily style or emphasis differences ranging from very facilitative to highly evaluative behaviors that may occur when third parties intervene in disputes, not to decide, but to help the participants resolve them.¹⁰² Thus, I see no meaningful differences between mediation and conciliation and conclude that they are different names for the same process.¹⁰³ One empirical survey suggests that Costa Rican practitioners may view mediation and conciliation as separate processes.¹⁰⁴ Thus,

97. *Id.* at 185.

98. See, e.g., Rau & Sherman, *supra* note 88, at 105 n.89 (arguing conciliation seems to be a more familiar term in international commercial contexts although “there can hardly be any substantive significance in the use of one term rather than the other”); Sekolec & Getty, *supra* note 82, at 175 (contending that mediation or “conciliation” fundamentally differs from trial and arbitration because it requires parties to resolve their differences consensually with the help of a third party rather than using a third party to decide their dispute); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT’L ARB. 83, 83 n.1 (1997) (drawing no distinction between mediation and conciliation because mediation covers all kinds of techniques).

99. Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, DISP. RESOL. J., July/Sept. 1995, at 34 ; Peter, *supra* note 98, at 84 n.1.

100. Rau & Sherman, *supra* note 88, at 105 n.89.

101. *Id.*

102. *Id.*

103. This conclusion mirrors where I come out on the facilitative-evaluative debate that rages in contemporary American mediation practice. I agree that all mediators necessarily engage in internal evaluations to the extent that they must make judgments about process and people when mediating. See L. Randolph Lowery, *To Evaluate or Not — That is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48 (2000). The current rhetorical tug of war treating facilitating and evaluating as separate models of mediating obscures the fact that most mediators, including myself, routinely make choices that fall within both categories. Peters, *supra* note 7, at 835-36.

104. Jurgen Nanne Koberg, *Costa Rican Commercial Arbitration Rules and the U.S. Federal Arbitration Act*, 3 ILSA J. INT’L & COMP. L. 31, 33 n.8 (1996). An April 1995, CID-GALLUP survey indicated that 38% of the lawyers surveyed accepted conciliation as an alternative dispute

Florida participants cannot safely assume that Costa Ricans agree that conciliation and mediation describe essentially the same process. Because practitioners, judges, and scholars from civil law traditions frequently call this process conciliation rather than mediation, Florida collaborators should always explore what, if any, different meanings Costa Rican participants attach to these words.¹⁰⁵

Similarly, Florida collaborators should not assume that their task is to bring theory, practice ideas, problem solutions, and vocabulary from their cultural influences and traditions to Costa Rica for use there with no adaptation other than linguistic translation. This approach assumes that our exported material is neutral technology containing a high degree of universality and that it is not embedded with cultural assumptions and influences.¹⁰⁶ Yet increasing evidence suggests that American models of conflict resolution are often founded on assumptions that do not fit the cultural influences and behaviors of persons to whom they are presented.¹⁰⁷ Assuming that American methods can be exported without change also implies that these materials constitute the right way to think and act, and that Costa Ricans should conform their perceptions and behaviors to them.¹⁰⁸

Latin Americans do not appreciate the implied messages this approach communicates. One of the Chamber of Commerce-based commercial mediation centers developed in Bolivia expressed concern that “‘the Harvard model’ of dispute resolution [was] not directly adaptable to Bolivian commercial” dispute resolution.¹⁰⁹ Professor Lederach learned this through experience. Near the beginning of his first workshop in Guatemala, he provided an overview of American mediation and then demonstrated it by inviting participants to play the spouses in a role play he had written based on a local situation. When he asked for comments after the hour long demonstration, the first speaker addressed his role playing colleagues and said “[y]ou two looked like *gringos*!”¹¹⁰

resolution method and 31% accepted mediation. *Id.* No definitions of these allegedly different processes were provided.

105. See Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 J. LEGAL EDUC. 60, 67 (2004) (arguing legal systems have their “own distinctive attributes, embodied in both its procedural and substantive rules as well as the ways in which those rules are interpreted and enforced” which “may be critical in shaping the dispute resolution process”).

106. LEDERACH, *supra* note 2, at 51.

107. Wanis-St. John, *supra* note 1, at 354.

108. LEDERACH, *supra* note 2, at 38.

109. Wanis-St. John, *supra* note 1, at 354.

110. LEDERACH, *supra* note 2, at 37-38. Professor Lederach derived two conclusions from this experience.

Rather than seeking to export their ideas unchanged, Florida participants should gather information from their Costa Rican counterparts about local insights, understandings, and experiences that relate to their collaborations. Collaborations built on or linked to this bedrock of local knowledge and practice have much greater chances of contributing significant value and generating intercultural learning for all participants. When presenting workshops and designing educational materials, Florida participants should use ideas and concepts commonly understood by and readily available to local participants to maximize chances that they provide relevant and practical information. Outsiders helping develop dispute resolution systems have been better received in Bolivia when they speak Spanish and use teaching materials containing terms and contexts easily related to by trainees.¹¹¹

Florida participants should avoid attempts to transfer concepts encased in jargon,¹¹² a goal that requires acknowledging the challenges of transferring accurate meanings from one language to another. Many words in one language have no direct corollary in other languages that capture the same meaning accurately.¹¹³ For example, the words *mediate* and *compromise* have no positive corollaries in Farsi because the closest Farsi words connote notions of meddling for mediating and disadvantaging for compromising.¹¹⁴ When U.N. Secretary General Waldheim's statement that he came to Tehran to mediate a compromise regarding the release of American hostages was interpreted as manifesting his intent to meddle to disadvantage Iranians, his car was stoned by an angry crowd.¹¹⁵ In the Czech Republic, the word *collaborate*, which carries a positive meaning in

First, embedded implicitly in the mediation process I presented were fundamental assumptions about conflict and how to handle it that were appropriate and applicable in one cultural setting but not necessarily shared by another. . . Second, and perhaps more important . . . was the unintended residue of imperialism. Difficult to admit, and even more difficult to recognize, the outcome was clear for those who had eyes to see. The cultural assumptions of my context were moved to theirs with the underlying premise that mine were the right way to go and that they should learn them.

Id. at 38.

111. Wanis-St. John, *supra* note 1, at 354.

112. LEDERACH, *supra* note 2, at 81.

113. See MICHELLE LEBARON, BRIDGING CULTURAL CONFLICTS 47 (2003). The words *yes* and *no* have no equivalents in the Gaelic language. *Id.*

114. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 33 (2d ed. 1991).

115. *Id.* at 33-34.

dispute resolution contexts and appears in this essay's title, is associated negatively with giving information to law enforcement authorities.¹¹⁶

Some words may have many possible corollaries in another language which challenges accurate meaning transfer. Professor Lederach identified eighty Spanish words that connote or relate closely to conflict.¹¹⁷ Other words present interpretive challenges transferring them to languages where no corollaries exist.¹¹⁸ Labels given to theories and concepts generated by scholars often challenge accurate meaning transfer. Professor Lederach noted that the important American concept of assessing negotiation progress against one's best alternative to a negotiated agreement, captured in the English acronym BATNA,¹¹⁹ translates unhelpfully into Spanish as *Mejor Alternativa a un Acuerdo Negociado*, or MAAN.¹²⁰

Floridians participating in any of the potential collaborations outlined earlier will receive wonderful opportunities to learn the subtle ways cultural assumptions influence their ideas regarding mediation theories, tasks, and actions.¹²¹ Most of us deal primarily with persons who share our assumptions, perceptions, and traditions and experience little reason to identify, evaluate, and discuss them.¹²² Experiencing other cultures in depth helps one acquire knowledge of one's cultural influences.¹²³ This learning begins with perceiving ourselves as culturally influenced.¹²⁴

116. MICHAEL ELLIOTT & KENDRA BRICHLE, TRANSFER OF ADR TO CENTRAL AND EASTERN EUROPE: OPPORTUNITIES AND BARRIERS FACING MEDIATION PRACTITIONERS 20 (2001) (unpublished manuscript, on file with author).

117. LEDERACH, *supra* note 2, at 75.

118. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 87 (2001).

119. FISHER ET AL., *supra* note 114, at 91-102.

120. LEDERACH, *supra* note 2, at 80. Professor Lederach argues that for many grassroots level persons with whom he worked in Central America this phrase was difficult to understand cognitively and hard to use practically. He concluded that the phrase "simply rang of sophistication, complexity, and professional technique, something 'foreign.'" *Id.* at 80-81.

121. See generally Peters, *Inside My Skin*, *supra* note 52 (describing how designing and presenting seventeen short mediation workshops in Haiti helped author identify numerous ways that cultural assumptions influenced his thoughts and actions).

122. CUSHNER & BRISLIN, *supra* note 30, at 7.

123. BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE 87 (2000).

124. Bryant, *supra* note 118, at 49. Professor Bryant argues: "Knowing ourselves as cultural beings is key to being able to identify when we are using biases or stereotypes, when we are misinterpreting or filing in, and why we are judging people as different." *Id.* at 49 n.56. She also contends that we must accept that our cultural influences might "create roadblocks to understanding others," and that as long as we are committed to growth and change, "accepting the blinders that shape our understanding of others, we can feel less frustrated by setbacks and not judge ourselves too harshly. . . ." *Id.*

Scholars posit that culture is a dynamic, evolving, interrelated set of processes comprising shared mental perceptions that help group members determine how to behave.¹²⁵ These shared perceptions, containing categories and implicit rules used to interpret communications, behaviors, and events, provide ways for group members to give meaning to their actions and assess the behaviors of others.¹²⁶ These shared perceptions also provide frameworks for sending, receiving, and understanding verbal and non-verbal communications,¹²⁷ mold attitudes and values,¹²⁸ and supply formulas for conducting relationships.¹²⁹ Not surprisingly, the shared perceptions that comprise culture influence definitions of conflict¹³⁰ and habit-related attitudes, behavioral norms, and actions regarding how conflicts are expressed, managed, and resolved.¹³¹

Learning about relevant cultures before attempting intercultural dispute resolution collaborations helps outsiders avoid missing important cues, misinterpreting data, misreading meanings, and confusing issues.¹³² Any

125. RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD* 12 (rev. ed. 1997); Par R. Kimmel, *Culture and Conflict* 455, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE*, 453, 455 (Morton Deutsch & Peter T. Coleman eds., 2000). I agree with Cohen in rejecting beliefs that culture is: (1) homogenous because it contains internal paradoxes and contradictions and does not provide clear, unambiguous behavioral guides; (2) something that exists independently of human actors; (3) distributed uniformly among group members; (4) singular because everyone belongs to multiple cultures; (5) merely custom; and (6) timeless in the sense that it never changes. COHEN, *supra*, at 14-16.

126. See Kimmel, *supra* note 125, at 455; LEBARON, *supra* note 113, at 10.

127. Kimmel, *supra* note 125, at 455. Professor LeBaron argues that cultures provide “systems of shared understandings and symbols that connect people to each other, providing them with unwritten messages about how to express themselves and how to make meaning of their lives.” LEBARON, *supra* note 113, at 10.

128. See Bryant, *supra* note 118, at 50.

129. See KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* 36-37 (1998); COHEN, *supra* note 125, at 12; LEBARON, *supra* note 113, at 10.

130. AUGSBURGER, *supra* note 2, at 19. For example, unwelcome words or deeds in one culture may be met with “immediate violence, in another with covert attack . . . while a third moves toward compromise or reconciliation.” *Id.* One culture may define a conflict something that in another constitutes merely a difference of opinion. *Id.* at 23. “Crossing one’s legs or showing the sole of one’s foot” may constitute a serious insult in one culture but might be “a matter of comfort in another.” *Id.*

131. *Id.* at 22; Bryant, *supra* note 118, at 40.

132. AUGSBURGER, *supra* note 2, at 25. When Soviet Premier Nikita Khrushchev gestured with clasped hands held over his head during a visit to the United States in the 1950s, he communicated a signal of friendship in Russia’s common culture. For many Americans including this author who was then a young boy, this gesture communicated a malevolent threat to acquire a forceful victory over the United States. See Kimmel, *supra* note 125, at 458-59.

of these errors makes design and action choices likely to fail.¹³³ Intercultural understanding informs outside collaborators about action tendencies and accepted practices to help them plan, adjust, and evaluate what they say and do.¹³⁴ Learning probable cultural influences will not generate accurate predictions about how individuals will behave.¹³⁵ All groups contain substantial behavioral variation within them.¹³⁶ Assuming that cultural influences determine behavior ignores human complexity¹³⁷ and stereotypes by denying individuals their freedom to choose their actions purposefully.¹³⁸

Published research on Costa Rican experiences with and attitudes toward mediation, which focuses on community and family contexts, suggests several culturally influenced differences from general mediation practice in Florida. Professor Lederach asserts that key concepts for Costa Ricans¹³⁹ seeking to resolve everyday disputes and conflicts are: *confianza* and *cuello*.¹⁴⁰ *Confianza* connotes trust and confidence, encompassing persons who have known a disputant for a long time and can be counted on.¹⁴¹ One of the San José Workshop participants emphasized the

133. See, e.g., ELLIOTT & BRICHLE, *supra* note 116, at 17 (contending foreign professions need, at a minimum, a cursory understanding of host country's culture); Jan Jung-Min Sunoo, *Some Guidelines for Mediators of Intercultural Disputes*, 6 NEGOT. J. 383, 387 (1990) (asserting that responsible mediators and dispute resolution practitioners should make "every effort to learn about the cultural and social expectations" of the people they will deal with); Wildau et al., *supra* note 32, at 307 (arguing that consultants should be familiar with problems host society is addressing and aware of effective approaches and procedures that are available inside those cultures).

134. See FISHER ET AL., *supra* note 114, at 166. Professor LeBaron warns that while these understandings usefully illustrate "broad differences and patterns," they can equally mislead. LEBARON, *supra* note 113, at 35-36.

135. See, e.g., AUGSBURGER, *supra* note 2, at 18; AVRUCH, *supra* note 129, at 105; LEBARON, *supra* note 113, at 18.

136. See, e.g., AUGSBURGER, *supra* note 2, at 18; AVRUCH, *supra* note 129, at 19-20; FISHER ET AL., *supra* note 114, at 167.

137. See, e.g., AVRUCH, *supra* note 129, at 12; MICHAEL D. LANG & ALISON TAYLOR, *THE MAKING OF MEDIATOR* 29-30 (2000); MAYER, *supra* note 123, at 72-74.

138. See FISHER ET AL., *supra* note 114, at 167; Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 273-74 (1996). A belief that humans design the behaviors, use in conflicting, negotiating, and mediating, even if they are not aware of their design choices and the reasoning that underlie them, which supplies a crucial component of the clinical teaching method which I have used for more than thirty-three years. Peters, *Mapping*, *supra* note 52, at 879-80.

139. Professor Lederach did his research primarily in Costa Rica and secondarily in Guatemala. See generally LEDERACH, *supra* note 2.

140. JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* 96 (1997).

141. *Id.*

importance of *confianza* in his experiences with mediation and conciliation.¹⁴² Literally meaning “neck” and one of many vernacular metaphors in Spanish for connections, *cuello* connotes the strategic use of one’s network.¹⁴³ Professor Lederach contends that Costa Ricans are likely to seek solutions from network resources or *cuello*, looking to persons they trust who know them and enjoy the *confianza* of other persons in the dispute.¹⁴⁴

Unlike my tradition of believing mediation should be done by outsiders not directly connected to disputants to pursue objectivity and impartiality objectives,¹⁴⁵ a strong Costa Rican cultural influence runs toward drawing interveners from networks of people who know disputants well.¹⁴⁶ These influences emphasize an intervener’s connectedness to disputants and the trust that this engenders as an important way to hold participants together while helping them resolve problems.¹⁴⁷ These interveners emerge from within a setting and their knowledge and their relationships with the disputants are seen not as obstacles but as resources.¹⁴⁸ They are connected to disputants on a long-term basis rather than quickly entering and then exiting a relationship with the participants.¹⁴⁹ Challenging the American emphasis on mediation theory, technique, and skill, the value of Costa Rican interveners lies more in the relationship in which they are involved rather than in any specific tasks they perform.¹⁵⁰ Professor Lederach describes the Costa Rican approach as “insider-partial” as opposed to the American and Floridian preference for “outsider-neutral” intervention.¹⁵¹

Other research aimed at improving mediation services for Latinos in an American family court-attached program handling contested custody and visitation matters suggests additional insights regarding potential culturally

142. Diaz, *supra* note 95.

143. LEDERACH, *supra* note 140, at 96.

144. *Id.*

145. The Florida Standards of Professional Conduct for mediators require them to disclose “any relationship between the mediator and mediation participants or the subject matter of the dispute [which] compromises or appears to compromise the mediator’s impartiality.” Fla. R. Cert. & Ct.-Appt. Mediators R. 10.340 (b). This rule reflects a western cultural preference for formal, abstract, and impersonal process. See AUGSBURGER, *supra* note 2, at 192.

146. LEDERACH, *supra* note 2, at 78.

147. See M. Abu-Nimmer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 AM. J. ECON. & SOC. 35, 43 (1996); M. Abu-Nimmer, *Conflict Resolution in an Islamic Context*, 21 PEACE & CHANGE, 22, 30-31 (1996); AVRUCH, *supra* note 129, at 84.

148. LEDERACH, *supra* note 140, at 96.

149. *Id.*

150. *Id.*

151. *Id.*

influenced differences that may influence Costa Rican citizens.¹⁵² This research confirmed the Costa Rican findings that for Latinos the status of mediators as persons respected in the community may be more important than training or certification.¹⁵³ The research also suggests that unlike Anglo-American mediation which typically meets only with parents, Latino parties often prefer a more holistic approach involving gathering perspectives from grandparents and other extended family members.¹⁵⁴ While Anglo-American mediation proceeds from an individualistic orientation and assumes that searching for underlying interests is paramount because participants want to maximize their personal needs,¹⁵⁵ Latino litigants often express collective¹⁵⁶ as well as individualistic perspectives.¹⁵⁷ They may seek to promote the welfare of their extended family as much as or more than their own personal interests.¹⁵⁸

Research suggests that Latino litigants may also want mediators to be more directive than advocates of facilitative mediation would support. In response to a research question “[w]hen you came to mediation, what did you expect that the mediator would do for you,” the most common response for Spanish-speaking respondents were “[t]ell us what to do” and “[g]ive us advice.”¹⁵⁹ The most common response from English-speaking respondents was “[h]elp us solve the problem.”¹⁶⁰ The research data also showed that Spanish-speaking respondents looked to the mediator for most of the solutions with 80% indicating that mediators provided most of the final solutions while only 35% of the English-speaking participants gave that response.¹⁶¹ These approaches seem consistent with Florida’s Standards of Professional Conduct for mediators which permits mediators,

152. See Steven Weller et al., *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185 (2001).

153. *Id.* at 195.

154. *Id.* at 196.

155. Emphasizing individual or collective values is one of two fundamental cultural differences that probably influence conflict resolution perceptions, values, attitudes, and behaviors more than the other factors scholars have articulated. Peters, *Inside My Skin*, *supra* note 52, at 21. An individualistic orientation views individuals as primary and expects that conflicts should be owned and resolved by privately asserting and negotiating rights and pursuing remedies. AUGSBURGER, *supra* note 2, at 8.

156. A collective orientation views communities as primary and, because conflicts threaten communal concerns, individuals should collaborate and seek informal resolutions that preserve social harmony. AUGSBURGER, *supra* note 2, at 8.

157. Weller et al., *supra* note 152, at 196.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 197.

consistent with standards of impartiality and party self-determination to provide information they are qualified by training or experience to give.¹⁶² Florida mediators are also permitted to share personal or professional opinions as long as they are not intended to coerce the parties, decide disputes, or direct resolution of issues.¹⁶³

Potential collaborations exploring the creation of court-connected mandatory mediation approaches must sensitively handle cultural differences stemming from Costa Rica's different legal traditions. Costa Rican courts operate under the civil law tradition.¹⁶⁴ Rooted intellectually in earlier Roman law, this legal tradition was formally adopted in civil codes across continental Europe, including the various Codes promulgated by Napoleon, and influenced the development of law in Costa Rica and other former Spanish colonies.¹⁶⁵ Scholars claim that these codes are often abstract, difficult to apply realistically, and fail to reflect the social realities of a majority of citizens in these countries.¹⁶⁶

Civil law jurisdictions have demonstrated a greater reluctance to adopt court-connected mediation than have common law countries.¹⁶⁷ Some argue that civil law cultural traditions contribute to this reluctance.¹⁶⁸ While mandatory mediation annexed to courts began in the United States in the 1980s and soon spread to common law countries like Australia,¹⁶⁹ it is only now beginning to appear in civil law jurisdictions in Europe.¹⁷⁰ Argentina and Chile were ahead of this curve.¹⁷¹

Knowing the theories that scholars have advanced to explain how civil cultural traditions inhibit and restrain the acceptance and development of court-connected mediation may help collaborators create viable proposals. Some discern a general judicial reluctance in Costa Rica to remove resolution from courts to other forums as mandating mediation requires,¹⁷²

162. Fla. R. Cert. & Ct.-Appt, Mediators R. 10.370(a).

163. *Id.*

164. Bruce M. Wilson & Roger Handberg, *From Judicial Passivity to Judicial Activism: Explaining the Change with Costa Rica's Supreme Court*, 5 NAFTA L. & BUS. REV. AM. 522, 523 (1999).

165. *Id.*

166. Knox, *supra* note 73, at 141; John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L.J. 50, 52 (1996).

167. Alexander, *supra* note 69, at 337.

168. *Id.*

169. Court-connected alternative dispute resolution including mediation exists in every court and tribunal in Australia. *Id.* at 336.

170. *Id.*

171. See *supra* text accompanying notes 72-76, 82.

172. See Garita, *supra* note 77, at 1644. One indication of apparent judicial disinterest was that four Justices of the Costa Rican Supreme Court were invited to our Workshop held at the Supreme

noting that arbitration developed slowly in Costa Rica and elsewhere in Latin America.¹⁷³ Some of this reluctance may stem from a civil law tradition where judges take more activist positions regarding litigation assigned to them, deciding what witnesses to examine, blurring sharp divisions between pretrial stages and hearings, and relying extensively on written rather than oral submissions.¹⁷⁴ The contrasting traditions of common law judges, which leaves the carriage of matters to the parties, discourages active judicial participation in the development and presentation of evidence, and generates a clear pretrial process that builds toward an ultimate trial may create less role tensions when diverting resolutions to mediation.¹⁷⁵

The civil law tradition requiring judges to attempt to settle matters before entering final judgment often creates views that court-connected mediation programs are not needed since mediation already occurs.¹⁷⁶ Costa Rican workshop participants who experienced these judicial efforts¹⁷⁷ confirmed the general view that judicial efforts to encourage settlement cannot emulate mediation.¹⁷⁸ A judge's possession of ultimate decision-making authority chills the willingness of participants to share information that could be later used against them to support adverse decisions. This risk strips mediation of its ability to generate confidential information that can lead toward creative, interest-based resolutions.¹⁷⁹ Moreover, civil judges are often constrained to find a legal solution for disputants which means that judicially-facilitated settlements will typically stay within the contours of relevant legal norms.¹⁸⁰ By contrast, mediation as practiced in common law jurisdictions often generates opportunities to

Court's beautiful facility in downtown San José. None attended or gave any explanation for their non-attendance.

173. *Id.* at 1643. Professor Garita, Professor of Commercial Law at the University of Costa Rica and member of the Special Committee of the Costa Rican Bar Association for drafting arbitration legislation, concluded that "the legal treatment of arbitration in Costa Rica, as in Latin America, is deficient, old-fashioned, and missing the general trends of modern arbitration." *Id.* Describing statutes that have been largely replaced, since the article was published, Professor Garita wrote that their typical characteristics included "excessive judicial control, little autonomy of the parties, lack of clear concepts about subject matter arbitrability, and an overabundance of conceptual and abstract pitfalls. *Id.*

174. Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 913, 917 (2001).

175. *See id.*

176. Alexander, *supra* note 69, at 360.

177. *See supra* text accompanying notes 68, 70.

178. Alexander, *supra* note 69, at 360.

179. *Id.*

180. *Id.*

create individualized resolutions that far exceed the constraints imposed by legal remedies and norms.¹⁸¹ Parties can agree to apologize and do other affirmative acts that common law courts rarely have the power to order.¹⁸²

Practicing in a civil system may also influence the views of lawyers in ways that encourage resistance to supporting and participating in court-connected mediation. Lawyers practicing in a civil tradition may display, from a common law perspective, a formalistic orientation to dispute resolution and preferences for written approaches to resolving legal problems.¹⁸³ A Costa Rican workshop participant reflected this perspective commenting that mandatory, court-connected mediation would not work because their dispute resolution system is based on written documents and that people do not like oral processes.¹⁸⁴

Mediation is undeniably an oral process. As practiced generally in Florida and throughout America and other common law jurisdictions, mediation primarily uses oral communication that includes confrontation, self-disclosure, assertiveness, flexibility, adaptability, and collaboration.¹⁸⁵ Although premediation summaries often usefully educate mediators and other participants,¹⁸⁶ written documents typically play a lesser role thereafter until final agreements are negotiated and drafted.

It was not clear whether Costa Rican opposition to the oral nature of mediation reflected concerns of the legal profession or the populace.

181. Court-connected mediation participants may develop creative proposals and resolutions that differ from remedies that courts have the power to provide in the underlying lawsuit. *See* Cochran, *supra* note 25, at 194; Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429 (1986).

182. Mediation, unlike adjudication which seldom makes apology or other affirmative acts part of available remedial relief, allows these acts as long as the parties agree and they are not illegal. KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 37 (2003); *see* Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

183. *See* Alexander, *supra* note 69, at 356. A study of Venezuelan business lawyers in 2001 showed they preferred using courts and social networks to resolve commercial disputes notwithstanding a general assumption that legal professionals desired ADR because they were tired of a malfunctioning judicial system. MANUEL GOMEZ, *DISPUTE RESOLUTION IN VENEZUELA*, NEWSLETTER OF THE GOULD CENTER FOR CONFLICT RESOLUTION PROGRAMS 5 (Spring 2004).

184. Montero, *supra* note 3.

185. *See* AUGSBURGER, *supra* note 2, at 32-33 (describing this as the approach of western cultures).

186. DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 145-46 (1996). Providing mediators with written summaries of legal issues and procedural histories, along with copies of basic documents such as contracts and accident reports, lets interveners fill in gaps in their knowledge and saves the parties time during the mediation. *Id.* Professor Golann recommends that mediators should generally receive written submissions as shared rather than confidential submissions and gather private data through confidential conversations. *Id.*

Professor Lederach discerned no unwillingness to engage in oral discourse from the Central Americans with whom he worked.¹⁸⁷ Although he learned that his demonstration of an American mediation model featuring direct, fast-paced talk emphasizing cognitive skills of issue development and analysis helped inadvertently turn two Guatemalans into *gringos*,¹⁸⁸ a participant-generated role play in Nicaragua produced an oral process that emphasized network, trust, and holistic connection and played out very differently. Suggesting a conflict involving a jealous, unemployed husband and a wife with a job who had been thrown out of the house for “flirting, the participants role-played a process featuring an indirect entry by an intervening couple as the wives first went to market together and, after developing trust and connection, the wives concluded that maybe the husbands could talk.¹⁸⁹ After talking to the aggrieved wife, the intervening husband found an opportunity to talk to the jealous husband and then the two disputants were invited to the intervener’s house for a pig roast.¹⁹⁰ Although indirect and circuitous from a western perspective, this intervention involved oral discourse and no reliance on written documents.

The Costa Rican judiciary has started to make its criminal process more transparent by revising their criminal procedure to include oral proceedings.¹⁹¹ By doing this Costa Rica has joined many civil law nations in introducing more traditionally common law approaches of “orality, directness, and party activism.”¹⁹² Concern about moving dispute resolution from written documents may preserve familiar and comfortable procedures for the legal profession rather than reflect what people want.

IV. CONCLUSION

Floridians embarking on collaborations designed to expand the use of mediation in Costa Rica are likely to learn more than they teach.¹⁹³ They have opportunities to blend best practices of different legal cultures and dispute-resolving experiences. Rather than engaging in debates about whose system works better, collaborators can forge entirely new

187. See LEDERACH, *supra* note 2, at 104-07.

188. *Id.* at 105; see *supra* text accompanying note 110.

189. LEDERACH, *supra* note 2, at 105.

190. *Id.*

191. KNOX, *supra* note 73, at 148; see Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 197 (1995).

192. Epstein, *supra* note 174, at 917.

193. See Peters, *Inside My Skin*, *supra* note 52, at 6; Janeen Kerper, *Trial Advocacy Lessons From Latin America*, 74 TEMP. L. REV. 91, 94 (2001).

approaches incorporating cultural traditions of American common law, Latin and European civil law, and indigenous and aboriginal dispute resolution.¹⁹⁴ They can pursue leapfrog technologies that may shape truly global justice systems.¹⁹⁵

194. See Kerper, *supra* note 193, at 94.

195. See *id.*; Cooper, *supra* note 45, at 437.

