Multi-Stakeholder Dispute Resolution: Building Social Capital Through Access to Justice at the Community Level

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Systems of multi-stakeholder dispute resolution are increasingly recognized as objectives of good governance by international organizations such as the United Nations Development Program (UNDP).[1] Such objectives arise out of insights based on the dynamics of social capital that community based initiatives cannot succeed where trust is absent and mechanisms for collective decision-making do not exist.[2] Yet localized decision-making can take many forms—whether distributional, competitive, or collaborative. This paper will examine, in particular, the impact of collaborative systems of decision-making on building social capital through access to justice in local communities. It will do this through examining participant feedback, meeting minutes, and post-consultation reports of a community multi-stakeholder dialogue process in Cajamarca, Peru. The creation of dispute resolution forums where community members can

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actively participate in the generation of shared objectives, collect and access information, and take action on issues of collective concern represents an important foundation for the development of social capital.[3]

I. INTRODUCTION

Multi-stakeholder decision-making is increasingly regarded as a key component of good governance processes and a means by which social capital may be developed within communities.[4] Such processes of localized decision-making correspond with prevailing conceptions of governance understood as a "system of values, policies[,] and institutions by which a society manages its economic, political[,] and social affairs through interactions within and among the state, civil society[,] and private sector. It is the way a society organizes itself to make and implement decisions— achieving mutual understanding, agreement[,] and action."[5] Such localized governance processes comprise the mechanisms and processes for citizens and groups to articulate their interests, mediate their differences, and exercise their legal rights and obligations.[6] Such processes have a positive effect on social capital, which will be explored in greater detail below.

A. The Concept of Social Capital

Social capital is a broad term that encompasses the "norms and networks facilitating collective actions for mutual benefit."[7] Depending on the particular area of application[8] and theoretical tradition,[9] the concept of social capital may be viewed through multiple lenses. In reviewing the extensive literature on social capital, observers have noted that "its definitions are diverse, numerous, and reveal[] various important aspects of the concept."[10] Whereas no conception of social capital seems to be generally accepted,

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3. Maktiia Wunsttin, *Community Mediation: Providing Justice and Promoting Transformation*, 19 CONFLICT RESOL. Q. 251, 253 (2001).

4. *See* UNDP, *supra* note 1, at 1-10.

5. UNDP, GOVERNANCE INDICATORS: A USER'S GUIDE 2 (quoting UNDP, *Strategy Note on Governance for Human Development* (2004)).

6. *See* UNDP, *supra* note 1, at 6-7.

7. Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 THEORY AND SOC'Y 151, 155 (1998).

8. Tristan Claridge, Social Capital and Natural Resource Management (2004) (unpublished thesis, University of Queensland), *available at* http://www.socialcapitalresearch.com/.

9. Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. OF SOC. 1 (1998).

10. Vladislav L. Valentinov, *Toward a Social Capital Theory of Cooperative Organization*, 37 J. OF COOPERATIVE STUD. 5, 11 (2004).

most definitions contain references to norms, values, relationships, connections, networks, and trust embodied in specific structural forms (e.g. cooperatives, networks, associations, groups, etc.). [11]   Below, various applications of the concept of social capital will be examined in greater detail.

1.   Social Capital as an Economic Idea

Social capital may be regarded as an economic idea—"a productive resource [similar to] financial, physical, or human capital."[12] Capital is a factor of production that is used to help in producing other goods or services.[13]   In recent years, capital has increasingly come to be used to include intangible items, such as skills or talents.[14] Just as a tractor (physical capital) or university education (human capital) can increase productivity (both individual and collective), social cohesion also enhances the productivity of individuals and groups. [15]

Social capital, as an economic idea, refers to the connectedness between individuals and groups.[16] Such connectedness "generates returns in the form of better access to information, better communication and coordination, [and the] reduction of opportunistic behavior."[17]

2.   Social Capital as a Socio-Political Idea

Apart from economic benefits, social capital can also bring about social cohesion in communities.[18] McDowell considers social capital as "one of a

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11.   *Id.* at 5.

12.   *Id.* at 12.

13.   Social capital can also produce negative effects, however. For example, if a social network is used for manipulative purposes such as fixing market prices, it will affect the economy negatively. Cohesive networks can also lead to mutual dependency and conservatism, resulting in resistance to necessary change and hampering growth.

14.   *See* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. OF DEMOCRACY 65 (1995).

15.   *Id.*

16.   *See* Valentinov, *supra* note 10, at 7-8.

17.   *Id.* at 8 (citing Partha Dasgupta, *Trust as a Commodity*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS (Diego Gambetta ed., 1988)).

18.   *See* Social Capital and Social Cohesion, http://www.courseweb.uottawa.ca/pop8910/Notes/Social_Capital.htm (part of unpublished MSC thesis).

number of related terms used to describe the extent to which members of a community view themselves as members of a coherent group, and to which they work toward the common good."[19] Putnam, speaking to education ministers of the Organisation for Economic Cooperation and Development (OECD) in 2004, reported robust correlations in various countries between vibrant social networks and important social outcomes like lower crime rates, improved child welfare, better public health, more effective government administration, reduced political corruption and tax evasion, and improved market performance.[20] In this sense, the value of social capital is not confined to economic benefits alone. It facilitates coordination and cooperation for mutual benefit and contributes to social cohesion and stability.[21]

In brief, social capital here refers to the social networks, connections, and norms shared by individuals and groups, or to the resources arising from them.

3. Social Capital and Social Cohesion

Related to the concepts of social cohesion and community, Brehm and Rahn define social capital as "the web of cooperative relationships between citizens that facilitates resolution of collective action problems." [22] Fukuyama observed that "social capital can be defined simply as the existence of informal values or norms shared among members of a group that permit cooperation among them."[23] Putnam also defines social capital as "features of social organisation [sic] such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit."[24] It includes, according to Thomas, "those voluntary means and processes developed within civil society which promote development for the collective whole."[25]

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19. *Id.*

20. *Id.*

21. *See generally* RAY FORREST & ADE KEARNE, JOINED-UP PLACES?: SOCIAL COHESION AND NEIGHBOURHOOD REGENERATION (1999).

22. John Brehm & Wendy Rahn, *Individual-Level Evidence for the Causes and Consequences of Social Capital*, 41 AM. J. OF POL. SCI. 999 (1997).

23. Francis Fukuyama, *Social Capital and Civil Society* (IMF Institute, Working Paper, 2000).

24. *See* Putnam, *supra* note 14, at 1.

25. Tristan Claridge, Social Capital and Natural Resource Management (2004) (unpublished thesis, University of Queensland), *available at* http://www.socialcapitalresearch.com/.

Social cohesion refers to the level of connectedness and solidarity among groups in society.[26] In socially cohesive societies, strong social bonds are evinced by high levels of trust and norms of reciprocity (features of social capital); therefore, efficient institutions of conflict resolution and ample organizations that bridge social divisions should be present.

In this sense, social capital can be seen as a subset of social cohesion.[27] A cohesive society is one that has abundant social capital, while social capital includes those features which act as resources for individuals and facilitate collective action.[28]

4.   Social Capital and Trust

The concept of social capital is also directly linked with the presence of trust within a given community. Historians such as Francis Fukuyama have defined social capital as "the crucible of trust."[29] He explains that trust is "critical to the health of an economy, rests on cultural roots,"[30] and is "a key by-product of the cooperative social norms that constitute social capital."[31] When trust is present, communities comply with shared norms, avoid taking advantage of each other, and readily form groups to achieve common purposes. The energy that is consumed by second guessing is replaced by a commitment to take action on social problems. Without trust, the transaction costs at every level of human interaction, from everyday interaction between neighbors to business associates, are high.[32]

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26. *See* Social Capital and Social Cohesion, http://www.courseweb.uottawa.ca/pop8910/Notes/Social_Capital.htm

27. *See* Penelope Hawe & Alan Shiell, *Social Capital and Health Promotion: A Review,* 51 SOC. SCI. & MED. 871, 871-85 (2000) (defining social capital as an overarching concept that incorporates the relational, material, and political dimensions of social cohesion, information exchange, networks of support, and informal social control).

28. One can see that most authors in their literature stress the positive aspects of social capital, such as trust and mutual reliance leading to development, harmony, and stability. Few take the negative aspects of social capital, e.g., exclusionism, inward looking, and resistance to change, into account.

29. FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 33 (1995).

30. *Id.*

31. FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTRUCTION OF SOCIAL ORDER 49 (2000).

32. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 135 (2000).

From one perspective, Putnam suggests that the development of social capital, such as trust, requires long periods of development.[33] Other research shows that "the design of institutions delivering local public goods can influence levels of social capital [relatively early on]."[34]

This paper submits that development strategies in environments characterized by high levels of distrust might consider integrating consultative decision-making processes, preferably initiated at the outset of a development program, to catalyze the long-term development and the maintenance of trust within a community and strengthen local administrative institutions. To the extent that individuals are trained to resolve conflict on their own and are given access to forums that facilitate such resolution, societal capacity for self-reliance, self-determination, and the ability to find appropriate solutions to collective problems is greatly strengthened.

This paper will proceed as follows. Following an examination of the concept of social capital, section two will explore the impact of collaborative and competitive negotiation on building social capital and achieving social justice within communities. Finally, the last section will examine a case study of how social capital can be built through access to justice programs at the community level.

II. DECISION-MAKING TO UNLOCK INDIVIDUAL AND GROUP CAPACITY AND ENHANCE SOCIAL CAPITAL

Insights based on the dynamics of social capital indicate that community-based initiatives cannot succeed where trust is absent and mechanisms for collective decision-making do not exist. Yet governance decision-making can take many forms—whether distributional, competitive, or collaborative. This section will examine the impact of collaborative systems of decision-making on building social capital in communities.

In general, this section finds that the creation of consultative community-based programs serves to build trust and social capital. The creation of dispute resolution centers where neighbors can become familiar with each other and build bridges of understanding that cross cultural, political, and economic barriers represent an important foundation for the development of social capital.[35] Effective exercise of the capacity for collective decision-making and collective action contributes to the

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33. *Id.*

34. Anirudh Krishna, *Creating and Harnessing Social Capital, in* SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 72 (Ismail Serageldin & Partha Dasgupta eds., 2000).

35. Maktiia Wunsttin, *supra* note 3, at 253.

development of "institutions that are devoid of corruption and . . . that engender public trust."[36]

A.   Negotiated Decision-Making at the Community Level

A key component of a community decision-making forum is the process of coming to decisions about issues facing a community. As defined by Korobkin, negotiated decision-making "is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone."[37] Such processes may be carried out within the context of a collaborative or competitive framework with differing effects on the building of social capital. In what follows, two primary types of group decision-making will be examined: competitive negotiation and collaborative negotiation.

Competitive negotiation is sometimes called "positional," "distributive," or "distributional bargaining," whereas the collaborative approach is sometimes referred to as "integrative" bargaining or "problem-solving negotiation."[38] Lax and Sebenius view these two bargaining processes as being distinguished by "value claimers" and "value creators."[39] While competitive negotiators focus on claiming value, collaborative negotiators focus on creating value.[40] Competitive negotiation is likely to have a negative impact on social capital as it undermines trust and the tendency to cooperate within a community.[41] Collaborative negotiation, on the other hand, tends to have a positive impact on building social capital.[42] The process of collaborative negotiation often facilitates social cohesion and cooperation through information sharing and exploring solutions.[43]

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36.   INSTITUTE FOR STUDIES IN GLOBAL PROSPERITY, SCIENCE, RELIGION AND DEVELOPMENT: SOME   INITIAL   CONSIDERATIONS   10   (2008), http://www.globalprosperity.org/documents/ISGP_Science_Religion_and_Development_Some_Initial_Considerations.pdf.

37.   RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 1 (2002).

38.   *Id.* at 34.

39.   DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 1 (2006).

40.   *See* KOROBKIN, *supra* note 37, at 111-29.

41.   *See id.* at 17-21.

42.   *See id.*

43.   *See id.* at 20-21.

1. Competitive Decision-Making Processes

Competitive negotiation is a form of contest in which there generally is a "winner" and a "loser."[44] According to the competitive framework, the negotiator needs to be tough, powerful, and skillful in maximizing his or her principal's self-interest.[45] Competitive negotiation is also called distributive bargaining because it is "'distributive' of the limited resources considered to be available for distribution."[46] As Raiffa puts it, in distributive bargaining, "one single issue . . . is under contention and the parties have almost strictly opposing interests on that issue."[47] Thus, the more you get, the less the other party has left.[48] In other words, the interest pie is seen as fixed.[49] As a result, hard bargaining tactics are often employed to maximize individual profits irrespective of the overall effect on others, or even at the other's expense.[50] These strategies give rise to a hostile and confrontational approach and response, focusing on manipulation and threats rather than trying to understand the issues sufficiently to find a mutually acceptable solution.[51] Deception and bluffs may also be employed by competitive negotiators.[52]

Competitive negotiation is likely to have a negative impact on social capital. Because the negotiator views the interest pie as fixed he believes that the outcome will be a win or lose situation.[53] This means that joint gains cannot be identified, and innovative solutions will not be created. Moreover, as analyzed by Murray, Rau, and Sherman, communications in competitive negotiation are often distorted, and tension, mistrust, anger, and frustration may result.[54] Brinkmanship inherent in the competitive approach often results in deadlock and a breakdown of negotiations, with consequent delays, stress, and additional costs.[55] Such outcomes have a negative impact on social capital because they increase distrust between individuals within a

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44. *Id.* at 18.

45. HARRY J. BROWN & ARTHUR L. MARRIOTT, ADR PRINCIPLES AND PRACTICE 94 (1999).

46. *Id.*

47. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33 (1982).

48. *Id.*

49. LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 8 (2009).

50. John S. Murray, *Understanding Competing Theories of Negotiation*, *in* THE NEGOTIATION SOURCEBOOK 5, 5-10 (Ira G. Asherman & Sandra Vance Asherman eds., 2d ed. 2001).

51. *Id.*

52. *Id.* at 6-7.

53. *Id.* at 7.

54. *See* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 115-124 (1996).

55. *Id.* at 121-22.

community. Lewicki, Saunders, and Minton note that misrepresentation or lying is more common in distributive bargaining than in integrative bargaining.[56] This causes hostility and hampers social cohesion, which in turn has a negative impact on social capital.

2.   Collaborative Decision-Making

In collaborative problem-solving decision-making,[57] the paradigm shifts from battling over the division of the pie to the means of expanding it by uncovering and reconciling underlying interest.[58]   In collaborative negotiation, negotiators avoid being positional but rather concentrate on parties' respective needs and interests. Looking beyond stated aspirations and trying to assess underlying needs or preferences is a recurring theme of problem-solving negotiation.[59]

Collaborative decision-making contributes to the building of social capital in various ways. In collaborative negotiations, rather than focusing on the form in which an aspiration is expressed, parties examine one another's underlying needs, particularly where differences exist. By recognizing the differences in underlying needs and priorities, it is possible to create value since the existence of differences allows more scope for constructing a settlement which accommodates those differences.[60] It also provides many opportunities for arriving at creative solutions. Through collaborative negotiation, differences between individuals and groups do not lead to conflict or trigger hostility that restrains cooperation and weakens social cohesion. In contrast, differences are taken as opportunities to create value and solutions. Cooperation between groups is encouraged because mutual benefits are generated through collaborative negotiation. This helps build social capital.

The process of collaborative negotiation, which often includes a space for dialogue and resolution, is also conducive to building social capital. In the dialogue stage, active listening is encouraged.   Through focused

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56.   R.J. LEWICKI ET AL., NEGOTIATION 75-99 (1999).

57.   ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 73 (1983).

58.   James K. Sebenius, *Six Habits of Merely Effective Negotiators*, HARV. BUS. REV., April 2001, at 91-92.

59.   Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

60.   *See* Portes, *supra* note 9, at 1.

listening, the needs and feelings of each party are identified. This helps individuals to "[w]alk in the [o]ther's [s]hoes," which, described by Wilson, is one of the "collaborative process skills that [is] the key to building social capital."[61] It is suggested that walking in the other's shoes is conducive to both building and bridging social capital.[62]

Another important element in the process of collaborative negotiation is informing. The purpose of informing is to make one's own positions, needs, and feelings known to the other party. During the process, information unknown to the other party will be shared.[63] As Wilson notes, communicative actions increase parties' access to information and dialogue, build consensus, foster understanding, and encourage interdependent projects between companies and institutions[64] in turn promote social cohesion and contribute to the building of social capital between groups.[65]

In collaborative negotiation, parties work together to identify joint solutions on which they mutually agree. It is rare for a party in negotiation to be satisfied if he is the only one who pays or contributes to the joint solution.[66] In other words, parties in negotiation contribute toward a common goal, creating a positive impact on social capital.

B. *Collaborative Decision-Making and Social Justice*

Collaborative negotiation, while providing numerous benefits to individuals and societies, must not be indifferent to the possibility of masking procedural or distributional inequalities.[67]

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61. Patricia Wilson, *Building Social Capital: A Learning Agenda for the Twenty-First Century*, 34 URBAN STUD. 745, 750-51 (1997). In her research, she quoted an experience of the Grameen Bank, a bank "known for its successful micro-enterprise group lending to the landless poor of Bangladesh." The bank "developed an intense six-month training program[]" that requires its head office professionals to live in a village and work at the local bank branch. It is reported that by walking in the other's shoes, those who completed the training had a higher level of commitment to its company and its partner, contributing to the building of social capital. *Id.* at 751-52.

62. *Id.*

63. Through transactional collaborative negotiation, ideas and norms are shared between the parties, "facilitat[ing] coordination and cooperation for mutual benefit." Putnam, *supra* note 14, at 67. This, as Putnam defines it, is the very nature of social capital. *See id.*

64. Wilson, *supra* note 61, at 753. Research done by Alex Sharland, focusing on negotiation and business relationships, shows that one of the major requirements for a viable long-term business relationship is for companies to negotiate a win-win solution when finalizing contracts. Alex Sharland, *The Negotiation Process as a Predictor of Relationship Outcomes in Relationship Outcomes in International Buyer-Supplier Arrangements*, 30 INDUS. MKTG. MGMT. 551, 552 (2001).

65. Wilson, *supra* note 61, at 753.

66. *See* RAIFFA, *supra* note 47, at 33.

67. *See* Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 470-71 (2002).

[Vol. 11: 181, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

One means by which collaborative negotiation can address such challenges is through the selection of collective operational rules and principles, pooling common facts, training in decision-making skills, and careful and close evaluation of processes.[68] The ability to pursue legal rights and protections is an additional mechanism by which structural inequalities may be addressed.[69] On the one hand, the goals of social justice are not fully realized without a foundation of social cohesion and trust. On the other hand, trust is maintained through the realization of objectives of social justice, as will be examined further below.

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68. *See* Shahla Ali, *Measuring Success in Devolved Collaboration*, 26 J. LAND USE & ENVTL. L. (forthcoming 2010).

69. *See* UNDP, *supra* note 1, at 59.

191

C. *Community Decision-Making and Social Capital*

> The task of building capacity for community decision-making in environments
> characterized by weak relational capital requires an initial demonstration of how
> coordinated behavior can benefit both individuals and the community as a whole[;] . . . an
> agreement on the structures and norms that support the required behavior[;] . . . and most
> important, an institutionalization of these structures and norms in such a way that the
> desired form of behavior becomes institutionalized or customary.[70]

Classification Scheme of Social Capital[71]

Relational Capital			
		Strong	Weak
Institutional Capital	Strong	High Social Capital Task: Extend scope of activities	Strong organization Task: Legislation, institutionalization
	Weak	Traditional/Associative Task: Introduce rules, procedures, and skills	Anomic, atomistic Task: Assist in development of structure and norms

As noted above, research in collaborative group decision-making demonstrate the positive gains to be made by cooperative action.[72] The Institute for Studies in Global Prosperity observes that "the realization of justice is dependent upon universal participation and action among all members and agencies of society."[73] It adds that once such a culture begins to evolve, "practical issues such as training in the administration and

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70. Shahla M. Ali & William E. Davis, *Building Social Capital through Consultative Decision Making: A Proposal for an Integrated Approach to Local Justice Sector Reform Programs* 3 (paper presented at 17th Annual International Association for Conflict Management Conference, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600104.

71. Krishna, *supra* note 34, at 79.

72. This research is also supported by findings in cooperation theory, law and economics, and interactive game theory, which all demonstrate the practical gains to be made by cooperative action.

73. INSTITUTE FOR STUDIES IN GLOBAL PROSPERITY, *supra* note 36, at 6.

enforcement of justice, equitable distribution of community resources, and the upliftment [sic] of persons and groups historically excluded from the benefits and opportunities offered by society can be effectively addressed."[74]

Joint analysis of the conditions that directly impact the life of a community can serve as the first focal point for developing an intervention strategy designed to build trust. Convening community members to seek consensus through the broadest possible participation contributes to the creation of a setting where the parties to a conflict can learn to bring their issues in a non-confrontational environment. With regard to the nature of that participation, it must be "substantive and creative; it must allow the people themselves access to knowledge and encourage them to apply it."[75] The Institute for Studies in Global Prosperity has identified a number of capabilities needed for effective participation, including:

- the capacities to take initiative in a creative and disciplined manner;
- to think systematically in understanding problems and searching for solutions;
- to use methods of decision-making that are non-adversarial and inclusive;
- to contribute to the effective design and management of community projects; and
- to manifest rectitude in private and public administration.[76]

This kind of intervention requires an important time commitment from all participants. Changing old habits of debate, conflict, and violence; and establishing new principles of initiative, rectitude, and collaboration requires patience and long-term commitment. When viewed in this manner, the project design phase becomes a part of project implementation.[77]

D. Conclusion

Because it is intangible, social capital is inherently difficult to measure. Yet, from the discussion above, it is clear that collective decision-making

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74. *Id.*
75. *Id.*
76. *Id.*
77. Ali & Davis, *supra* note 70, at 3.

plays an important role in the construction of social capital. While competitive negotiation has a negative impact on the building of social capital, collaborative group negotiation has a positive impact on forging constructive bonds at the community level.

III. MULTI-STAKEHOLDER DISPUTE RESOLUTION IN CAJAMARCA, PERU

"Among the variety of avenues for the resolution of conflicts is the development of access to justice at the community level" through the use of multi-stakeholder dispute resolution processes.[78] "Such dispute resolution forums have both short term and long term benefits. In the short term, such forums allow for the creative resolution of present concerns and the development of decision making and management capacity. In the long term, opportunities for the development of group cohesion and social trust ("relational capital") developed by this process serves to" build a foundation for achieving collective aims and preventing future conflict.[79] The realization of such social justice objectives, in turn, reinforces social cohesion and fosters the trust necessary to resolve ongoing issues.

The following case outlines insights gained from a multi-stakeholder dispute resolution process in Cajamarca, Peru. This process was implemented under the auspices of the International Finance Corporation following a mercury spill by a national mining corporation. Following a discussion of the background of the case, this section will outline the development of the community multi-stakeholder dialogue forum named by the participants, the "Mesa de Dialogo," and finally examine and evaluate its process in relation to the creation of social capital.

A. Background

In June 2000, a contractor at the Minera Yanacocha Gold Mine in Cajamarca, Peru, spilled 151 kilograms of elemental mercury along a forty-one kilometer stretch of road between a local mine site and the town of Choropampa.[80] The mercury spill sparked a massive public outcry regarding the activities of the mine in the region.[81] Since the mining activities began, the area (populated primarily by agricultural and dairy farmers who farm

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78. *Id.* at 4.

79. *Id.*

80. Compliance Advisor Ombudsman, *Peru / Yanacocha-02/Cajamarca* (2009), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=111.

81. SUSAN T. WILDAU, REPORT OF THE COMPLIANCE/ADVISOR OMBUDSMAN EXPERT MISSION TO CAJAMARCA: SITUATION ASSESSMENT AND PROPOSAL FOR A DIALOGUE PROCESS 2 (2001), *available at* http://www.mediate.org/wp-content/uploads/international_peru.pdf.

[Vol. 11: 181, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

small plots of land on the hillsides of the Andes) had been affected by an influx of people from outside the region, filling streets with very large trucks and creating a risk to local pedestrians.[82] As a result of the population growth, each year the hillside plots are reported to grow smaller, making the farming less economically sustainable.[83]

Following the mining spill in Choropampa, a number of local farmers were exposed to the mercury and suffered adverse health effects.[84] Immediately following the spill, local authorities intervened to attempt to manage the situation. The Ministry of Health sent a minister to the region who subsequently promised aid to those affected by the spill. However, no attention was forthcoming.[85] Community members submitted a complaint to the Compliance Advisory Office (CAO) of the International Finance Corporation, a minority shareholder in the mine, through the Federation of Rondas Campesinas.[86]

As a general matter, the mining industry in Peru has become an arena of intense conflict.[87] "The mining industry has transformed the regional economy, . . . taxed the local housing market and social service agencies," and sparked "an unwelcome growth in nightclubs and brothels to entertain the newcomers."[88] At the same time, the mining industry has stimulated employment and the development of social services through job creation and tax revenue.[89] Increasingly, there is recognition of the need to develop new

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82. William E. Davis, Minutes of Cajamarca Mediation Process, Sept. 2001 (on file with the author).

83. Compliance Advisor Ombudsman, *Peru / Yanacocha-01/Cajamarca* (2009), http://www.cao-ombudsman.org/cases/case_detail.aspx?id=110 ("Despite mine projections conceiving of a [ten] year operational life span, tremendous exploratory success witnessed the significant continuation of operations. The company is a consortium of three shareholders— Newmont Mining Corporation, Compania de Minas Buenaventura S.A., and IFC. A group of individuals affected by the spill also filed suit against Newmont Mining in U.S. and Peruvian courts and deliberation continues in both jurisdictions.").

84. *Id.*

85. MANUEL RODRIGUEZ ET AL., REPORT OF THE INDEPENDENT EVALUATION OF THE MESA DE DIALOGO Y CONSENSO CASO-CAJAMARCA 9, 22, 26 (2005), *available at* http://www.cao-ombudsman.org/cases/document-links/documents/MESA_Evaluation_Report_Final_English.pdf [hereinafter RODRIGUEZ].

86. *Id.* at 5-7.

87. *Id.* at 5.

88. *Id.* at 6.

89. *Id.* at 5-6 ("According to the [Yanacocha mining] company's sustainability report for 2003, 7,443 workers were employed by the mine . . . [and] [o]ver 44% of the permanent employees came from Cajamarca."). The mine contributed $140 million in taxes. *Id.*

195

social and political consensus regarding the role and management of the mining industry within affected local communities.[90]

In mid-2001, community mine conflicts intensified and local communities expressed concerns, such as the lack of consultation with affected individuals and failure to distribute mining benefits in an equitable fashion.[91] In response to the widespread local demand for a comprehensive approach to addressing the conflict, the CAO supported the creation of a multi-stakeholder dialogue roundtable in September 2001.[92]

In July 2001, the CAO sent a team to investigate the feasibility of utilizing a facilitative or mediation-based approach to address the concerns raised in the complaint.[93] After visiting the region, the team became aware of the complex lines of hostility and resentment in the area.[94] The team found that this resentment, hostility, and lack of trust within the community impeded collective decision-making.[95] It agreed that its task was to create favorable conditions for a process to be initiated that would enable the participants to begin to work together over the long term.[96]

> For four and a half years, the Mesa de Dialogo y Consenso (Mesa) sought to create an open forum for dialogue to help prevent and resolve conflict between the communities and Yanacocha. With the participation of over [fifty] public and private institutions, the Mesa facilitated conflict meditation training, undertook capacity building workshops for community members and mine staff, oversaw an independent participatory water impact study and subsequently led a participatory water monitoring program.[97]

These efforts aimed to promote dialogue and transparency.[98]

B. Development of Multi-Stakeholder Dialogue

The development of the Mesa and its identification of collective objectives took place through a sequence of three phases of training and

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90. *Id.* at 5.

91. *Id.* at 5-6.

92. *Id.* at 1.

93. WILDAU, *supra* note 81, at 5. The team consisted of Mr. Bill Davis of DPK Consulting, Mrs. Susan Wildau of CDR, and a representative of the CAO's office.

94. SUSAN T. WILDAU ET AL., POWER, RIGHTS AND INTERESTS—LESSONS FROM THE MESA DE DIALOGO Y CONSENSO CAO-CAJAMARCA, PERU 15 (2009), *available at* http://www.mariachappuis.com/wp-content/uploads/2009/03/documento.pdf [hereinafter POWER, RIGHTS AND INTERESTS].

95. *Id.*

96. Ali &Davis, *supra* note 70, at 5-6.

97. Compliance Advisor Ombudsman, *supra* note 80.

98. *Id.*

development.[99] These three phases included an exploratory phase, a period of development, and a "consolidation" phase[100] that will be described below.

1.   Phase One: Exploratory Phase

At the outset of the development of the Mesa, the CAO sent a team to meet with a wide variety of stakeholders.[101] During this first phase, which took place between July and September 2001, the team met with community members to identify issues facing the community and to determine the willingness of individuals and groups to engage in a process of dialogue and discussion aimed at identifying options for resolution.[102] After determining that there was a desire and an opportunity to engage in a process of dialogue, the team then met again with stakeholders to convene three meetings to (1) facilitate discussion about the scope of issues identified, (2) explore the principles and alternative approaches for building consensus and resolving disputes, and (3) examine options for moving forward.[103]

At the first meeting, the team of collaborators reviewed the findings regarding the situation in Cajamarca and asked the participants to identify their primary concerns.[104] Approximately fifty individuals from a cross section of the community participated.[105] Representatives of the mine were also present to listen to the complaints.[106] This emotionally charged session reflected the extensive pent-up anger that the participants felt toward the mine.[107] Some remained silent, and key nongovernmental organizations did not attend the session due to a boycott.

The members of the Mesa identified "Work Plan Goals" that included the following: train members in dialogue skills and natural resource management; promote actions to improve the environmental conservation of water, air, soil, and human health quality with participation of the mine; promote social and economic development through strengthening small enterprises; achieve the integration of new public-private and civil society

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99.   RODRIGUEZ, *supra* note 85, at 28.
100.   *Id.* at 8-11.
101.   *Id.* at 8.
102.   *Id.*
103.   *Id.*
104.   *See* POWERS, RIGHTS AND INTERESTS, *supra* note 94, at 16.
105.   *Id.*
106.   Ali & Davis, *supra* note 70, at 5.
107.   *Id.* at 5.

organizations to strengthen the representation of the Mesa to complete its mission; work on conflicts within a framework of good faith, respect, cooperation and tolerance, and seek solutions through consensus to satisfy the interests and needs of all parties; promoting and publicizing conflict resolution mechanisms through training, dialogue, and active participation of the member institutions of the Mesa with the purpose of promoting good relations; supporting and promoting actions that improve and preserve the environment and that respect individual and group differences; contribute to and promote participation in diverse public and private institutions through representatives with decision-making capacity to promote sustainable development in Cajamarca; promote institutional strengthening of the administration of the Mesa; improve the quality of the environment in the valleys adjacent to the mine; provide optimal quality and quantity of air and water for diverse local users; and provide a technical reference for social environmental conflicts in Cajamarca.[108]

In the second public workshop, the parties discussed possible consensus-building models (such as Mesa de Dialogo) and their feasibility, advantages, and disadvantages.[109] This enabled the team and participants to determine which model would be most effective in the local environment.[110]

"With a view to balancing the negotiating position of all participants, facilitation efforts focused on cultivating capabilities of group decision making."[111] The Mesa selected fifty "representatives to attend a consultative skills training session[]." [112] "The training activities provided an environment in which the participants from all groups, including the mine, could engage" one another.[113]

> Individuals from the rural areas recounted that this was the first time in their lives that they were able to participate as equals with people from the city . . . . The highly interactive style of training assisted all the participants to engage on subjects relevant to their lives.[114]

This form of engagement served to assist participants as they gradually adopted broader goals based on interests.[115]

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108. RODRIGUEZ, *supra* note 85, at 12.
109. *Id.* at 13.
110. WILDAU, *supra* note 81, at 5.
111. Ali & Davis, *supra* note 70, at 5.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

[Vol. 11: 181, 2011]

The dialogue skills training focused on the development of skills such as: "fact finding, selection of relevant principles for decision making, listing of all possible solutions, [and] selection of appropriate solutions and collective implementation."[116] "Individuals were trained to facilitate group processes and re-convene on-going meetings." [117] Significantly, such training processes "also underscore[ed] the importance of structured learning in generating and sustaining an integrated set of social and economic activities."[118]

The training sequence, which included a segment for training future trainers,[119] aimed to ensure that community-based decision-making capacity could be sustained in the long run. Eventually training for trainers was offered.[120] The participants selected members to attend the training sessions to ensure that there was wide representation. [121] Special attention was focused on encouraging the participation of women in the process.[122]

Finally, in the third workshop, three working groups were formed focusing on water, development, and other community natural resource issues, and participants chose which group to be involved in based on their area of interest.[123] Each working group was responsible for coming up with a proposed plan of action (rather than a solution to the problem itself).[124] Each group had to formulate its own goals as well as decide which specific issues it wanted to focus on.[125] The groups also had to come up with a design for their collaborative process, considering questions such as how to make decisions, how to establish a pool of credible information, how to coordinate with other working groups, and how to ensure discussions are balanced, credible, and representative. [126] Finally, each group had to consider the relevant time frame required and how to proceed.[127] After each working group had finished discussions, it presented its model to all the

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116. *Id.* at 4.
117. *Id.*
118. *Id.*
119. *Id.* at 5.
120. *Id.*
121. *Id.*
122. *Id.* at 6.
123. WILDAU, *supra* note 81, at 15.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

199

participants who could then ask questions, make comments, and assess the feasibility of moving forward.[128] The participants also came up with a mechanism to ensure coordination among all working groups.

The three trainings included in this first stage of the development of the Mesa de Dialogo were oriented to the creation of a consultative environment, the creation of shared identity, and the initiation of a group process through which "relational capital" could be built. Through joint identification of issues of common concern and participation in joint dialogue training, the group began to form a group identity and find agreement around common issues of shared concern.[129]

2.   Phase Two: Development Period

During the second phase of development, which occurred between October 2001 and March 2002, the Mesa established a coordinating committee, continued training programs, and launched its technical work.[130] Additional capacity building workshops were held on dispute resolution and methods for creating consensus in public meetings.[131] Terms of reference were established for the water study, including the concept of using "Veedores" (community monitors) to verify the activities and methods of the hydrology team. [132]   Ostrom's references to the shared knowledge, understandings, norms, rules, and expectations that groups of individuals bring to a recurrent activity are consistent with the aims and operational mode of the Mesa community dispute resolution forum at this stage.[133]

3.   Phase Three: Consolidation of the Mesa

During this third phase of consolidating the activities of the Mesa, which occurred between March 2002 and January 2003, the meetings included regular progress reports on the water study.[134] At this time a full-time coordinator was hired.[135]

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128. *Id.* at 15-16.

129. The formation of group identification as opposed to constituency identification further enabled participants to build on a foundation of trust and thus enhance the prospects of achieving a viable solution.

130. RODRIGUEZ, *supra* note 85, at 8-9.

131. *Id.* at 9.

132. *Id.*

133. Elinor Ostrom, *Social Capital: A Fad or a Fundamental Concept?, in* SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 172, 175 (2000).

134. RODRIGUEZ, *supra* note 85, at 9.

135. *Id.*

200

The members of the Mesa engaged in the following activities to work toward its goals: Mesa training workshops; annual planning sessions; referral of complaints (i.e., contractor payments); water study and oversight of data collection through community monitors (Veedores); and an aquatic life study.[136] In an effort to localize the Mesa and establish it as a fully Cajamarcan entity, the CAO concluded its active oversight in March 2006.[137]

4.   Results: Impact of Mesa Activities on the Development of Access to Justice and Social Capital Development

During its four-year existence, the Mesa de Dialogo y Consenso CAO-Cajamarca worked to "address and resolve conflicts between Minera Yanacocha and the community of Cajamarca with the participation of public and private institutions in a transparent, open, independent[,] and participatory manner."[138]

Determining whether the Mesa was successful in addressing its aims of fostering access to justice and contributing to the building of social capital requires an assessment of its achievements in relation to its stated aims, which included: (1) achieving broad representation of the community; (2) facilitating a participatory, open, transparent, and independent governance process; and (3) establishing an effective mechanism to prevent and resolve conflicts between the community of Cajamarca and Minera Yanacocha.[139]

C. Results

1.   Representation of the Community

The aim of the Mesa to be fully representative of the community corresponds with insights into good governance practice that aims for management of resource decisions through interactions within and among the state, civil society, and private sector.[140]

At the outset, members of the Mesa recognized that "the lack of trust and social fragmentation existing in Cajamarca could not be overcome

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136.   *Id.*

137.   Compliance Advisor Ombudsman, *supra* note 83.

138.   RODRIGUEZ, *supra* note 85, at 11.

139.   *Id.* at 11-12.

140.   *Id.* at 11.

without a broadly representative and participatory body."[141] As a result, the "policies and actions of the Mesa have deliberately sought to embrace a broad spectrum of the community as possible."[142] In reviewing participant feedback, one participant noted that "at the moment there is good representa[tion]: men and women are representing their towns and institutions."[143] While a significant effort was made to ensure that all major "governmental actors, and rural and urban civic organizations and interest groups would participate," nevertheless, observers noted that "there are still some significant actors absent from its meetings."[144] The Mesa's fifty-two plus organizations represented a broad spectrum of the community,[145] yet at the same time, the Mesa lacked the participation of regional and local government and civil society NGOs.[146]

2. Participatory, Open, Transparent, and Independent Governance Process

Among the recognized values associated with good governance and decision-making at the grassroots level are participatory, open, transparent, and independent governance processes. Such decision-making processes have an impact on fostering the establishment of trust in communities so that collective challenges can be effectively addressed.

In working to foster participation, the Mesa organized a series of training sessions in group decision-making.[147] The ongoing development of skills has enabled participants to gain skills in group decision-making and to seek practical solutions.[148] According to one participant, "the training is a

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141. *Id.* at 18.

142. *Id.*

143. *Id.*

144. *See id.*

145. *Id.* Represented entities included, among others, the following: representatives of the Rondas Campesinas:

> [R]epresentatives of [those] valleys affected by the operation of the mine, a representative of the Mayor of Cajamarca, mayors of small villages, representatives of the Chamber of Commerce, the Water Company (SEDECAJ), representatives of the two principal Universities in Cajamarca, nongovernmental organizations, the Ministry of Mines and Gems, The Ministry of Health, representatives of the Catholic Church, and representatives of the Minera Yanacocha.

Ali & Davis, *supra* note 70, at 5.

146. RODRIGUEZ, *supra* note 85, at 16.

147. Ali & Davis, *supra* note 70, at 5.

148. *Id.* at 5-6.

[Vol. 11: 181, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

process where we need the willingness to learn and also practice the skills. I am discovering a whole new facet of concepts and strategies that are important for me, especially the need to be well informed in elements of communication and to solve problems . . . ."[149] "Another participant noted that through the training they learned to 'not see the conflict as unsolvable,'[150] while another participant noted that she learned to dialogue and not to judge."[151]

From the outset, the Mesa meetings were made open to the public and press.[152] The Mesa technical work has also been directly monitored by the public, and the Mesa has actively sought to disseminate and explain the results of its technical studies to affected members of the public. [153] Observers noted that in order for the Mesa to improve its level of openness and independence and address concerns that the Mesa is not independent, "a set of rules regarding conflict of interest and public disclosure of a member's interests in the Mine" would be useful.[154] According to one evaluation, "in the current context of Cajamarca . . . no institution, person, or initiative is immune from the pervasive atmosphere of suspicion and distrust affecting the relations between Minera Yanacocha and the community."[155]

Finally, the ability to independently investigate the socioeconomic conditions of a community and search for common solutions requires an effective process of joint fact-finding and investigation. Achieving this objective requires that "mechanisms be established and avenues be opened for community members to participate meaningfully in the conceptualization, design, implementation[,] and evaluation of the policies and programs that affect them."[156] Research has found that "[r]esolving a complex public policy dispute requires that interested parties share understanding of the technical dimensions of the problem they face . . . [and that] the very best scientific information must be collected and used."[157]

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149. *Id.* at 5.

150. *Id.* at 6.

151. *Id.*

152. RODRIGUEZ, *supra* note 85, at 21.

153. Compliance Advisor Ombudsman, *supra* note 83.

154. RODRIGUEZ, *supra* note 85, at 22.

155. *Id.* at 20.

156. Baha'i International Community, *Valuing Spirituality in Development*, Feb. 18-19, 1998, *available at* http://info.bahai.org/article-1-8-1-5.html.

157. Scott T. McCreary et al., *Refining and Testing Joint Fact-Finding for Environmental Dispute Resolution: Ten Years of Success*, 18 MEDIATION Q. 329, 329 (2001).

In pursuing the aim of collecting reliable, independent, technical information regarding the impact of the mine's activity on the community, the Mesa oversaw a technical study on water quality and quantity carried out by Stratus Consulting.[158] The Water Study reflects a strategy for dispute resolution that focuses on providing an open and transparent process for developing and disseminating technical information about issues in dispute. This view rests on the accepted proposition that an effective dispute resolution process requires that all parties share credible, independent, scientifically-sound information regarding the issues to be addressed.[159]

3.   Facilitate Mechanisms to Prevent and Resolve Conflicts

At the outset of its development, community members voiced the desire that the Mesa become an effective organization capable of addressing community concerns.[160] In examining its impact, observers noted that the Mesa provided a safe place to address critical and challenging issues regarding the operation of the mine and oversee the collection of important information necessary for the community to reach joint consensus and action.[161] At the same time, its efficacy was hindered by ongoing questions as to the existence and operation of the mine.[162]

With regard to its efficacy, the Mesa met regularly for three years, developed annual work plans, and oversaw the implementation of fact-finding, assessment, and community development activities derived from those plans.[163] In addition, participation in the Mesa was constant and regular.[164] "[T]he Assembly . . . met over [twenty] times since its inception, and membership participation has seldom dropped below [sixty] . . . ."[165] Several observers noted that the Mesa "[has] become a valuable forum for the mayors of smaller rural villages and other rural organizations to air issues and inform themselves about the activities of the Mine and the work being done under the auspices of the Mesa."[166]

The Mesa evolved into a "mixture of a forum for civil society dialogue and a mechanism for providing objective technical information on issues

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158.   *See* RODRIGUEZ, *supra* note 85, at 29.
159.   *Id.*
160.   *Id.* at 2.
161.   *Id.* at 21.
162.   *Id.* at 6.
163.   *Id.* at 17.
164.   *Id.* at 2.
165.   *Id.* at 20.
166.   *Id.* at 17.

surrounding the relationship between Yanacocha and Cajamarca."[167] Over a period of four years, the Mesa participants have identified work plans and activities designed to: (1) establish "an open and transparent process for developing accurate, objective[,] and authoritative factual information about the issues in dispute which can be made available to all parties," and "to provide an environmental oversight role[] based on technical information gleaned from independent monitoring;"[168] (2) provide education on effective methods for resolving disputes; and (3) "establish an administrative system for conflict resolution between [the] community and [the] mine that people recognize as credible, independent, and accessible."[169]

From a wider perspective, "the Mesa has become a broad forum for Civil Society Dialogue, an instrument for Technical Dispute Resolution, and in the minds of some of its members, a fledgling mechanism for Targeted-Issue [D]ispute resolution."[170] The study of water quality in the region[171] established an objective, scientific basis for understanding the scope of the problems facing the community.[172] On this basis, "the dialogue group was able to achieve a number of significant environmental, social, and economic achievements."[173]

> These included: . . . the development of an environmental management plan, a new mechanism to transport dangerous materials, an emergency response manual, increased employment of rural residents in the work of the mine, a plan for the promotion of health in the region and the delivery of health services, the initiation of a public works project in the three affected towns; and the development of potable water, sewage drainage, health centers[,] and schools.[174]

At the same time, addressing concerns regarding the existence of the mine, some observers have recommended that early intervention, community consultation, and input regarding the existence, scope, and duration of mining activities would go far to prevent future conflict.[175] In reaching the Mesa's objective of establishing a formal dispute resolution

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167. *Id.* at 28.

168. *Id.* at 23.

169. *Id.*

170. *Id.* at 16.

171. *Id.*

172. *Id.* at 28.

173. Ali & Davis, *supra* note 70, at 6.

174. *Id.*

175. *See* Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009).

system, observers noted that several steps would need to be taken to enhance its capacity to effectively resolve community disputes.[176] These steps would include the drafting of (1) a set of documents describing the objectives, methodology, and staffing of the dispute resolution body; (2) a set of policies and procedures to receive and handle complaints; and (3) the identification of a team of mediators or conflict resolution specialists as resource people.[177]

IV. CONCLUSION

In virtually every development activity, the primary focus must be the early engagement and participation of community members in formulating consensus, trust, and social cohesion surrounding the nature and scope of activities within a community. Recent experience has found that development-project design directly benefits from early development of mechanisms to manage and resolve conflicts as they arise, and from training participants and community members in the practical skills of collective decision making. Through this approach, the ability to prevent conflictive situations is enhanced, and local partnership, trust, and social cohesion are strengthened.

The development of new capacities to manage and resolve conflict is a key element in the strategy to build social capital. The informal sector offers many opportunities to develop unique and distinctive approaches to decision making; individuals acquire new skills and new relationships as they develop these dispute resolution capacities.

Development designs that incorporate forums for multi-stakeholder dispute resolution can defy the conclusion that the creation of social capital is an unapproachable ideal, requiring the passage of centuries. Rather, given the opportunity to build decision-making capacity, individuals are enabled to effectively exercise their will for change, strengthen social cohesion, expand access to justice, and thereby contribute to the progress and development of their communities.

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176. *See* RODRIGUEZ, *supra* note 85, at 28-35.
177. *Id.* at 30-34.