# ENVIRONMENTAL DISPUTE RESOLUTION IN BRAZIL: NEW PATHS AND LESSONS FROM THE U.S. LEGAL EXPERIENCE

*Daniel Castelo Branco Ramos**

ABSTRACT

*This Article analyzes the Brazilian legal framework of Environmental Dispute Resolution ("EDR"), taking into account its ability to ensure the effectiveness of environmental protection and comparing it with the United States' legal mechanisms of Alternative Dispute Resolution ("ADR"), largely adopted by the U.S. in the 1980s.*

*The aim of this Article, in detailing these points of comparison, is to facilitate discussion about improvements to the Brazilian environmental legal system through ADR. First, this Article makes an incursion into the most relevant collaborative innovations introduced in the American legal system as of the 1980s, with the aim of expanding ADR. Second, this Article focuses on traditional Brazilian adversarial and consensual approaches to Environmental Dispute Resolution, such as regulations, prosecution enforcement, and judicial review, focusing on issues regarding enforcement inefficiency, legal practitioners, and official statistics. Third, this Article aims to resolve whether the innovations introduced by the American legal system can be useful as a basis to improve the effectiveness of Brazilian environmental law and how to best implement potential changes given the particular legal requirements for adoption in Brazil.*

*This Article concludes by discussing the possibility of innovation by legal instruments and techniques through a collaborative approach that would strengthen the effectiveness of Brazilian environmental law. This Article argues that the enhancement of Brazilian legal instruments to improve environmental law enforcement must not be a mere copy of U.S. experiments—they are only an inspirational starting point. The introduction of new ways to approach environmental conflicts must come along with the improve-*

* The author is a Federal Judge at the Federal Court of the Sixth Region in Brazil. He received a SJD in Environmental Law at Pace Law School in New York.

*ment of agencies' infrastructure and legal power, as well as educational programs to work on formal and adversarial legal Brazilian culture in order to demonstrate the advantages of a pragmatic and collaborative approach to dispute resolution.*

## I. INTRODUCTION

### A. *Aim and Questions*

Brazil, like many nations over the past four decades, focused on formally creating and expanding the protection of fundamental environmental rights through the passage of Federal Laws no. 6938 in1981[1] and Law no. 7347 in 1985,[2] which, respectively, instituted the National Environmental Policy and the Public Civil Action Procedure (similar to a class action). In 1988, the so-called Green Constitution was enacted, giving constitutional status to many fundamental rights already granted by the preceding federal statutes.[3]

Considering the breadth and complexity of those environmental rights legally granted, the concern with the implementation of environmental policies and also with the effectiveness of those fundamental rights is still a challenging matter to juridical science. Through the lens of comparative law,[4] this Article evaluates and

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1 Lei 6938, de 31 de agosto de 1981, Diario Oficial da União [D.O.U] de 02.09.1981 (Braz.).

2 Lei 7.347, de 24 de julho de 1985, Diario Oficial da União [D.O.U] de 25.07.1985 (Braz.).

3 CONSTITUIÇÃO FEDERAL art. 225 (Braz.).

4 According to Edward J. Eberle:

> The essence of comparative law is the act of comparing the law of one country to that of another. Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law. But, of course, the comparison can be broader: more than two laws, more than law, more than written words. The key act in comparison is looking at one mass of legal data in relationship to another and then assessing how the two lumps of legal data are similar and how they are different. The essence of comparison is then aligning similarities and differences between data points and using this exercise as a measure to obtain understanding of the content and range of the data points. Here we need to focus quite carefully on the similarities and differences among the data points derived from the different legal systems. What is the substance of the data point? How does it diverge from the point to which it was compared? What is the nature of the divergences? What do the divergences and similarities reveal? On what data are the revelations based? It is not enough simply to compare words on the page. Lawsuits within a culture. Law both drives and is influenced by the culture of the home country. So we must look beneath the law as written formally in text. We need to excavate the underlying structure of law to understand better what the law really is and how it actually functions within a society.

compares the expansion of legal procedures on environmental dispute resolution in the United States and Brazil.

In the context of the effectiveness of justice systems in western countries in the 1970s, relating to the expansion of fundamental rights in the second half of the past century, the judiciary and public administration began to experiment with several approaches to alleviate caseload pressures and to give greater effectiveness to legal rights.[5] In this regard, the protagonist role of the ADR movement in the United States, which took shape in the early 1980s, produced remarkable ideas that influenced legal reforms, mainly in Western Europe and Latin America.[6]

The search for a consensual and collaborative approach to conflict resolution, as originated from the ADR movement, quickly spread to Environmental Dispute Resolution, which has used its techniques and procedures since the 1970s.[7] EDR has been adopted by several judicial and administrative courts around the world.[8]

The aim of this Article is to consider the space, implementation, and value of EDR and evaluate to what extent EDR contributes to making environmental law more effective. To put it succinctly, the aim is to determine the size and scope of the ADR/EDR space in Brazil and in the U.S. The problem this Article addresses is figuring out the contours of this space, considering a clear distinction between the two legal systems. The questions below are formulated to achieve this aim.

Thus, this Article engages in two specific research questions in evaluating ADR/EDR: the first one relates to comparative law, and the second relates to legal enforcement. The first question

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*See* Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOB. STUDS. L. REV. 451, 452 (2009).

5 The "access to justice" movement originated in the 1960s and the 1970s among Western European scholars. The movement expressed primordial concerns about the costs, delays, and general inaccessibility of adjudication and called for quicker, cheaper, and more readily available judgment with procedural informality as its hallmark. *See generally* Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978).

6 SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 65 (William Twining, 2d ed. 2005).

7 JEROME T. BARRETT & JOSEPH BARRETT, A HISTORY OF DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL AND SOCIAL MOVEMENT 160 (2004).

8 In a detailed study on the worldwide flowering of environmental courts and tribunals during the years of 2008 and 2009, the authors of the study, George and Catherine Pring, reported that there are 152 existing or proposed ECTs, resulting from onsite interviews and observations in twenty-four countries. *See* GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 4 (2009).

asks how the legal framework of ADR/EDR in Brazil has developed/evolved after assimilating the U.S. ADR/EDR procedures. The second question asks what the challenges are to achieving a cheaper, quicker, and more informal dispute resolution system.

> (1) What can be learned about ADR/EDR by comparing the U.S. and Brazilian legal frameworks and implementation rules, specifically considering the differences between the two legal systems?;
>
> (2) How and under what conditions can EDR be used to improve the implementation of environmental law in Brazil within the dispute resolution system?

Indeed, addressing such questions may not lead to definitive answers, but it certainly leads to new questions and a deeper understanding of how ADR/EDR interacts with different legal systems and how ADR/EDR performance can be improved. Due to the recent adoption of ADR/EDR by Brazilian law, there are many questions that scholars must address. Deepening this debate and identifying the parameters for the answer to such questions is the main goal of this Article.

### B. *Roadmap and Organizational Structure*

To answer the questions posed by this Article, one must know more about the framework and implementation of ADR/EDR. Again, this research considers, through a comparative law lens, what can be learned from the U.S. experience with ADR/EDR and under what conditions EDR may be effectively used to enhance the efficiency of environmental law.

The second part of this Article justifies and describes comparative law and other research methods used in this research. The next section of this study outlines an overview of the most relevant collaborative innovations to Environmental Dispute Resolution introduced in the U.S. legal system in the 1980s. The fourth part describes the legal structure of ADR/EDR in Brazil. Lastly, this Article compares the structure of U.S. and Brazilian legal systems, especially as they relate to ADR/EDR procedures.

The conclusion of the paper provides a reflection on the main challenges of the implementation of ADR/EDR in Brazil, given the cultural and legal differences between the two legal orders under analysis. Because the U.S. experience, which created and implemented ADR/EDR forty years before Brazil, is considerably

older than the Brazil experience, the present research chooses to limit itself to studying the impact of ADR/EDR in Brazil, its consequences, and the main legal issues.

Therefore, this study will not propose any improvement in the American legal system. It will, in effect, focus on understanding ADR/EDR, given the specificities of the Brazilian legal system, with the purpose of contributing to a better functionality of the EDR system in Brazil.

## II. Research Methodology

### A. *The Comparative Law Approach and Alternative/ Environmental Dispute Resolution*

This study analyzes the concepts of ADR/EDR in the U.S. and the recent assimilation of these legal ideas by the Brazilian system. For that purpose, comparative law plays a key role, allowing both the analysis of similarities and differences between legal systems and the study of the specifics of the cultural and legal context in both countries.

Traditionally, the scope of comparative law is connected to researching core topics of a given field of law "as they have evolved over time, such as the divide between civil and common law countries, the search for functional similarities between the laws of different countries, and the occurrence of legal transplants."[9] In this context, the cross-country comparison focuses on the traditional elements of law, such as questions on statutory law and case law, as well as the structure of the legal system and judicial institutions.[10]

In addition to the traditional approach to comparative law, research on questions related to legal history and culture[11] is necessary to fully understand the similarities and differences between the legal systems under analysis. In fact, considering that the legal transplantation of ADR/EDR from the U.S. to Brazil substantially

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[9] Mathias Siems, *The Power of Comparative Law: What Types of Units Can Comparative Law Compare?*, 67 Am. J. Compar. L. 861, 863 (2019).

[10] *Id.* at 866.

[11] "Culturalism, which compares legal systems as 'cultural wholes,' sheds light on the rich cultural fabric of legal institutions, allowing comparativists to develop richer causal explanations for legal change and warning lawmakers about the risks of hastily 'transplanting' legal institutions." *See* Anna di Robilant, *Big Questions Comparative Law*, 96 B. U. L. Rev. 1325, 1326 (2016).

increased the range of procedures to dispute resolution and challenged legal formalism typical in the civil law system, the present research details the legal history of ADR/EDR in both jurisdictions. This allows for an investigation into the reasons why it took nearly forty years for Brazil to adopt ADR/EDR and what, precisely, motivated the adoption of ADR/EDR both in Brazil and the U.S.

This Article inevitably touches on the matter of *Americanization* of the Brazilian jurisdiction since the importation of ADR/EDR can be seen as an effort to reproduce the American dispute resolution legal system. Actually, in a broader picture:

> Since the end of the Second World War, and particularly following the end of the Cold War, the American legal system arguably has become the most influential legal system in the world. American influences on the legal systems of other nations have ranged from general influences on jurisprudential approaches to law (e.g., legal realism and pragmatism, law and economics, rights discourse, etc.) to influences on specific legal areas (e.g., constitutional law, tax law, securities law, corporate law, patent law, international commercial arbitration, etc.); from legal education (e.g., a credits system for particular courses, or certain post-graduate studies leading to an LL.M. degree) and the structure of the legal profession (e.g., large law firms or the valorization of private practice) to the reform of the judiciary; from specific legal doctrines or legal tools (e.g., constitutional exclusionary rules, the doctrine of "actual malice" in the freedom of speech and of the press, class actions, etc.) to institutional arrangements such as the separation of powers and judicial review. These undeniable American influences on other legal systems have led a number of commentators, both in the United States and abroad, to announce that a substantial number of legal systems, both at the national and the international levels, may gradually come to resemble or mimic the American legal system and thus become "Americanized." Other commentators, while acknowledging the predominant influence of the American legal system, have stopped short of asserting that American influence is actually recreating American legal practice in non-American jurisdictions.[12]

ADR/EDR, in the same way as the legal institutes mentioned in the quote above, has influenced other jurisdictions worldwide.

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[12] Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 1–3 (2004).

However, the assimilation of ADR/EDR by the Brazilian legal system cannot be deemed as mere mimicry of the American system. Actually, the importation of legal institutes or concepts from one jurisdiction to another is not likely to reproduce a given model. Each jurisdiction tends to reshape the assimilated model, either due to decisions taken by legal reformers in each jurisdiction or because of structural differences between the U.S. legal system and the Brazilian civil law tradition.[13]

The metaphor of translation is very precise to demonstrate that "Legal practices and institutions may be transformed when translated between legal systems, either because of decisions by the reformers (translators) or structural differences between the original and receiving legal systems (languages)."[14] Indeed, the translated legal institution may produce a chain of changes in the receiving legal system,[15] leading to a unique legal concept.

Regarding ADR/EDR's legal transplantation to the Brazilian system, the present research uses comparative analysis to better understand how ADR/EDR has been transformed by legislators, institutions, and legal structures. Also, the comparative study identifies the most relevant legal barriers that the Brazilian system should overcome to enforce ADR/EDR procedures.

Moreover, through comparative analysis, this present research provides insights that can shed light on the enforcement of ADR/EDR in Brazil in order to enhance the performance of the dispute resolution system as a whole. Indeed, the comparative method identifies common answers to similar problems between the two jurisdictions, providing useful guidelines that can improve policy implementation of ADR/EDR.

### B. *Methodological Summary*

This Article undertakes a study of the comparison between U.S. law and Brazilian law through legal and deductive analysis, and it discusses the challenges of the implementation of ADR/EDR in the Brazilian legal system. To do so, this thesis employs the study of the most relevant collaborative innovations to EDR introduced under U.S. law in the 1980s and also undertakes a retrospective of the possible legal roots of ADR in the U.S.

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[13] *Id.* at 3.
[14] *Id.* at 63.
[15] *Id.*

Also, this research summarizes the possible historical origins of consensus based on procedures of dispute resolution in Brazilian law, making an incursion into major federal regulation laws on the subject. From a legal interpretation standpoint, this thesis recognizes that the U.S. and Brazil have different legal systems (common law versus civil law, respectively, with exceptions[16]), traditions, and sources of law.

The great challenge of this comparative analysis is to define how the interaction of a legal concept such as ADR/EDR, which has gained fertile ground in the American common law system, will be absorbed by a legal culture like the Brazilian civil law system, which sees the legal formalism of civil procedure as the main guarantee of legal certainty. In fact, both start from a common starting point: the crisis in the judicial system of conflict resolution led the U.S. courts in the mid-1970s to adopt ADR/EDR, which is the same reason that led the Brazilian judiciary in 2010 to regulate and encourage the use of alternative forms of conflict resolution.

Thus, society's demand for a quicker, cheaper, and more legitimate judiciary is likely to undermine the legal certainty that is ensured by the traditional civil law system. Achieving the best understanding of such an impact will, therefore, be the main task of the comparative analysis proposed by this research, as discussed below.

## III. Overview of the Most Relevant Collaborative Innovations to Environmental Dispute Resolution Introduced in the American Legal System of the 1980s

### A. *ADR in the U.S.: Terminology*

The use of the label "ADR" is mostly connected to the "win-win" academic and judicial approach to dispute resolution, which was started in the late 1980s in the United States.[17] This school of thought aimed to reshape dispute resolution by switching the competitive and adversarial "win-lose" approaches of mediation and

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16 For instance, the Civil Procedure Code of 2015 created a system of precedents similar to common law "stare decisis." *See* Lei 13.105, de 16 de março de 2015, Diario Oficial da União [D.O.U] de 17.03.2015, http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm [https://perma.cc/AC3C-JGQ5].

17 Barrett & Barrett, *supra* note 7, at 209–10.

judicial fields to a "win-win" interest-based approach.[18] The goal of a "win-win" approach is to maximize gains for both sides of the conflict and to eliminate or minimize losses. The parties take a collaborative and interest-based approach to bargaining, which leads to maximum gains in favor of the interests of all participants in the dispute.[19]

This "win-win" approach, under the new ADR label, was meant to be an alternative to the adversarial way of conducting lawsuits and mediations. Indeed, in the 1970s, almost no one was using the term ADR. As shown by the 1977 Society of Professionals in Dispute Resolution ("SPIDR") Annual Conference and the Federal Mediation and Conciliation Service ("FMCS"), only the terms "non-labor disputes" and "new dispute areas" were used to refer to emerging disputes outside of the labor law field.[20] As this passage makes clear:

> When most labor-management dispute resolvers used the words negotiation, mediation, or arbitration, they were referring to the labor-management setting. From their perspective, the realms of conflict were international, handled by war or diplomacy; criminal and civil, handled by the courts; labor-management, handled by mediators and arbitrators; and these new areas, which they labeled non labor, handled by want-to-be mediators and arbitrators. All of this would begin to change in the 1980s as labor-management dispute resolvers increasingly took a back seat to the new areas.[21]

Therefore, as of the late 1970s, the "win-win" approach shaped and reinforced the term ADR as appropriate and connected to the idea of achieving all parties' best interests.[22] This represented a substantial change in what had previously been done in business and labor law dispute resolution settings.[23] Thus, the association between "win-win" ideas and the ADR label is a recent development, even though some scholars prefer the use of different terminologies—such as "dispute handling,"[24] "collaborative problem solving,"[25] or "appropriate dispute resolution."[26]

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18 *Id.*

19 *Id.* at 210 .

20 *Id.* at 189.

21 *Id.*

22 *Id.* at 256–57.

23 BARRETT & BARRETT, *supra* note 7, at 257.

24 CARRIE MENKEL-MEADOW, FOUNDATIONS OF DISPUTE RESOLUTION I xii (2012).

25 BARRETT & BARRETT, *supra* note 7, at 257.

Along with this conceptual relationship of the "win-win" approach, the term ADR is also connected with another idea that came about in the United States at the same time.[27] As traditional court proceedings were perceived to be too slow, costly, rigid, and unpredictable, alternative methods, including arbitration, emerged to provide a faster and more cost-efficient path to court proceedings.[28]

In the speech "Varieties of Dispute Processing," Frank E. A. Sander, a Harvard University Professor, described his vision of a courthouse in which not all cases would proceed through the doorway (literal and figurative) that leads to litigation. As an alternative, the multi-door courthouse proposes that cases proceed through a variety of other problem-solving alternatives to litigation, such as mediation, arbitration, conciliation, fact-finding, or ombuds services, depending on the nature of the case.[29] Sander's ideas influenced both judges and academia.[30] However, only in the early 1980s did the merits of the ADR movement formulate in substance, as will be described below. Although arbitration is an alternative to the judicial resolution of conflicts, in its essence, arbitration preserves the adversarial model. This is why the theories described in Section III(B) are not applicable, as they are more appropriate for non-binding consensual processes of conflict resolution, such as conciliation and mediation.

In this regard, it is necessary to clarify that arbitration is a binding ADR process in most cases, while conciliation and mediation are non-binding ADR processes. Arbitration falls under ADR as an alternative form of adjudication within the courts. However, arbitration is frequently a binding and adjudicative process closer to the adversarial model, to which the theories focused on problem-solving and collaborative approaches do not apply.

For this paper's purposes, this paper adopts the ADR label to broadly address all manners of dispute resolution, other than the adjudicatory forms implying an adversarial approach. In this way, ADR encompasses negotiation, conciliation, and mediation, as

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26 Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 931 (2004).

27 JEAN-CLAUDE GOLDSMITH ET AL., ADR IN BUS.: PRAC. AND ISSUES ACROSS COUNTRIES AND CULTURES 7 (2006).

28 *Id.*

29 MICHAEL L. MOFFITT & ROBERT C. BORDONE, THE HANDBOOK OF DISP. RESOL., ROOTS AND INSPIRATIONS: A BRIEF HISTORY OF THE FOUNDS. OF DISP. RESOL. 19 (2005).

30 *Id.*

well as all experiments claiming for more participatory and efficient processes for dispute resolution.

### B. *The Era of Win-Win*[31]

The shift from traditional collective bargaining with an adversarial bias to interest-based dispute resolution can be attributed to the academic work published in 1981 by Roger Fisher, a law professor, and William Ury, an anthropologist, both from Harvard University: Getting to Yes: Negotiating Agreement Without Giving In.[32] The book advocates a different approach to negotiation, focusing on parties' interests instead of their positions. Fisher and Ury propose the method of principled negotiation:

> There is a third way to negotiate, a way neither hard nor soft, but rather both hard and soft. The method of principled negotiation developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do. It suggests that you look for mutual gains wherever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The method of principled negotiation is hard on the merits, soft on the people. It employs no tricks and no posturing. Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness.[33]

From this pioneering work, the 1980s witnessed an academic movement of intellectual convergence around new approaches to negotiation.[34] This led parties to undertake integrative and collaborative processes—expanding the use of reasonable and objective standards along with underlying needs, wants, and desires to

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[31] The term "win-win" is being used for its popularity and its connection to the ADR movement, not for its conceptual precision. Some scholars prefer to not adopt this language, arguing that "in many disputes and most legal conflicts it will be impossible for both (or all) parties to actually "win" something. Consider the criminal defendant who may bargain for a "better" deal (less incarceration), but who will still be imprisoned." *See* Carrie J. Menkel-Meadow, *The Art and Science of Problem-Solving Negot.*, TRIAL MAG., June 1999, at 49.

[32] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOT. AGREEMENT WITHOUT GIVING IN (1st ed.1981).

[33] *Id.* at 6.

[34] *See* CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER, & LELA PORTER LOVE, NEGOT.: PROCESS FOR PROBLEM SOLVING XXVI (1st ed. 2006).

achieve better outcomes—while "giving the parties as much as they both need without unnecessary loss or harm to either."[35] Therefore, the "win-win" ADR movement can be generally defined as a pragmatic, principled, and utilitarian model of negotiation that aims to undermine adversarial approaches of competitive and distributional bargaining.[36]

The underpinning concepts of the movement were being shaped as the interest of academia increased throughout the decade, leading to important publications on the new approach to dispute resolution.[37] At this time, many law schools throughout the country, beginning at Harvard University, Cardozo Law School, and George Mason University, started to develop programs and centers of dispute resolution using professionals from broader backgrounds, such as sociologists, psychologists, anthropologists, and legal practitioners.[38]

Moreover, strong institutions were built to support the research and teaching of all phases of dispute resolution, such as the prestigious Program on Negotiation ("PON") recognized by Harvard University in 1983[39] and the Institute for Conflict Analysis and Resolution ("ICAR") founded at George Manson University.[40] Similarly, in 1987, the American Bar Association ("ABA") established the Standing Committee on Dispute Resolution with the explicit purpose to "study, experiment with, disseminate information concerning and identify appropriate integration of methods for the resolution of the disputes other than a traditional process."[41]

In the following decade, ADR experienced a great expansion in different settings. The court system started to reshape the traditional structure in order to expand alternative and supplementary procedures in civil and criminal litigation. This culminated with the creation of new sections in the courts, which specialized in small

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35 *Id.*

36 *Id.*

37 *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISP. RESOL. (1985); CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (1st ed. 1986); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987).

38 BARRETT & BARRETT, *supra* note 7, at 211.

39 Harvard's Program gathered outstanding scholars from different fields, such as Roger Fisher and Frank Sander (legal), Willian Ury (anthropology), and Lawrence Susskind (urban planning). *Id.* at 213.

40 *Id.* at 211.

41 *Id.* at 219.

claims mediation, family mediation, and dispute resolution.[42] Also, ADR ideas influenced the adoption of new consensus-based approaches to the rulemaking process[43] and its statutory enforcement by administrative agencies.[44]

At the federal level, the U.S. Congress passed important statutes to promote ADR in the 1990s. The Administrative Dispute Resolution Act of 1996 ("ADRA"), which gave federal agencies additional authority to use ADR in most administrative disputes, also directed federal agencies to place ADR requirements in all of their standard contracts for goods and services.[45] The Negotiated Rulemaking Act of 1990 ("NRA") directed regulatory agencies to use negotiation and facilitate consensus-building to develop administrative rules.[46] Finally, the Civil Justice Reform Act of 1990 ("CJRA")[47] required all federal district courts to develop plans that implemented ADR procedures, to combat the costs of delays in civil litigation. In order to achieve these goals, the district courts were authorized to develop an expense and delay plan, which likely entails the possibility of referring cases to mediation, mini-trials, summary jury trials, and neutral evaluation programs.[48]

With respect to the federal administrative branch, the Administrative Conference of the United States ("ACUS")—a federal agency that existed from 1968 to 1995 "to study the efficiency, adequacy, and fairness of administrative agencies and make recommendations for improvements"—issued many reports supportive of ADR in administrative agencies[49] and influenced the enactment of the ADRA and the NRA by the U.S. Congress. Also, ACUS promoted federal ADR by creating and maintaining a roster of mediators and arbitrators to support federal agencies.[50]

The same acceptance of ADR can be seen in states that utilize ADR in their courts, governments, and communities.[51] In order to achieve uniformity in approaching ADR, states have adopted the acts issued by the National Conference of Commissioners on Uni-

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42 At this time in 1985, the pioneering experiment that the Washington, D.C., Superior Court launched was remarkable. *See id.* at 234–35.

43 Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (1990).

44 *See* Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27282-04 (May 23, 1995).

45 5 U.S.C. § 571 (1996).

46 5 U.S.C. § 561 (1990).

47 28 U.S.C. § 471 (1990).

48 *Id.*

49 BARRETT & BARRETT, *supra* note 7, at 235.

50 *Id.* at 247.

51 BETTE J. ROTH ET AL., 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:15 (2021).

form State Laws ("NCCUSL") regarding mediation and arbitration procedures.[52]

As a result of ADR consolidation in the U.S. legal system, labor-management relations were reshaped to incorporate ADR approaches, thus leading to a change of the traditional collective bargaining paradigm into a cooperative model.[53]

As the twenty-first century began, the ADR field continued to improve on dispute resolution techniques, such as online dispute resolution ("ODR"), which has been applied mostly to arbitrations of international business law disputes.[54] Indeed, the use of ODR is now widespread across the world,[55] as it can be used to overcome temporal and geographical barriers between disputants.[56] However, because ODR operates outside of national boundaries, one of the most challenging issues is to appropriately regulate these disputes, all while ensuring that these regulations do not impede the growth of ODR.[57]

Therefore, the use of ADR has been disseminated for public and private institutions, triggering the enactment of laws and regulations. There is no doubt that ADR became a relevant field of the legal system, which makes the study of the founding ideas imperative for understanding its merit.

### C. *Disputing Procedures*

One of the most important legacies of ADR is the development and distinction of dispute procedures. Since Lon Fuller launched the basis for the legal pluralism doctrine, there has been an academic consensus on the assertion that different kinds of disputes require different types "of processes and that the processes themselves might be limited in their appropriateness for certain

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52 *Id.*

53 *See* BARRETT & BARRETT, *supra* note 7, at 250.

54 *Id.* at 261.

55 *See* Robert J. Ambrogi, *Virtual Justice: Resolving Disputes Online*, 62 BENCH & B. MINN. 13, 13 (2005); *Homepage*, NAT'L CTR. TECH. DISP. RESOL., https://odr.info [https://perma.cc/59RP-3JTU] (last visited Feb. 22, 2022) (One of the most notable sources of ODR is the website, www.odr.info, managed by the University of Massachusetts, which supports development in the field and provides information for companies and organizations.).

56 BARRETT & BARRETT, *supra* note 7, at 261.

57 Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 193 (1998).

human activities."[58] Therefore, one of the fundamental premises of ADR is that for each dispute, there is a procedure that best fits into its underlying reality. Based on that idea, it was necessary to develop and deepen different alternatives to adjudication through problem-solving and/or cooperative bargaining approaches.

One of the most relevant criteria that clearly distinguishes dispute resolution procedures is the need to use "third parties" to control both the process and the solution.[59] When a third party is not needed, and the parties themselves can control both process and outcome, a negotiation takes place. On the other hand, when the disputants need a third party to interfere, either to impose a solution or to assist the disputants in arriving at their own solutions, there will be room for adjudication and mediation, respectively.[60]

These three primary processes—negotiation, mediation, and adjudication—can be combined in a variety of hybrid dispute resolution processes.[61] For instance, "an adjudication-like presentation of proofs and arguments is combined with negotiation in the mini-trial; arbitration is combined with court adjudication in a procedure known as rent-a-judge or private judging, and mediation is combined with the arbitration in med-arb."[62]

In the following sections, this Article will list the main characteristics of the most common disputing procedures. While the purpose of this research is to provide an overview of the most remarkable dispute resolution alternatives, this Article will not exhaust the theoretical biases regarding each procedure.

### i. Negotiation

Negotiation is commonly seen as the first step to dispute resolution.[63] A negotiation takes place when parties exchange information, reach an understanding of conflicting issues and achieve an outcome without assistance or guidance from a third party.[64] Ne-

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

59 The "problem-solving" approach to negotiation has, at times, been called "principled," "integrative," "interests-based," "win-win," and "cooperative". *See* STEPHEN B. GOLDBERG ET AL., DISP. RESOL.: NEGOTIATION, MEDIATION AND OTHER PROCESSES 3 (5th ed. 2007).

60 *Id.*

61 *Id.*

62 *Id.*

63 Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 8–9 (1996).

64 ROBERTS & PALMER, *supra* note 7, at 113.

gotiation involves communication leading to joint decision-making[65] in which the following conditions must be present:

> The first involves finding some medium of communication that will allow messages to pass backwards and forwards between the parties; this may, but need not, involve finding a mutually acceptable forum. Second, the parties must formulate and successfully communicate to each other their goals, what they want to achieve in exchange. Third, in light of those mutually understood goals, the parties must identify and evaluate the options available to them. It will sometimes be that the greater understanding resulting from an exchange of information will reveal a convergence or compatibility of goals, resulting in an agreed outcome without shifts of position. Otherwise, if an agreed outcome is pursued, this will be an accommodation reached through further exchanges in which the respective bargaining endowments are brought to bear.[66]

These conditions are more likely to be found in the context of principled negotiation and interest-based bargaining as they imply a collaborative approach to the conflict by the negotiators. In order to reach a joint decision, a negotiation needs a process to oversee the communication and exchange of information. Usually, the negotiation process encompasses the following successive phases: (1) identifying the issues and forming an agenda (the parties come together to see whether disagreement exists; if so, an agenda then has to be formed in which negotiable issues are identified); (2) exploring the limits (the parties explore their antagonism in order to find boundaries in which negotiations may go forward); (3) narrowing the differences (parties understand the dimensions of the dispute between them, and as they do so, the central issues emerge as well as potential options); (4) preliminary bargaining (parties set a viable bargaining, differences, and possibly possible solutions); (5) final bargaining (in this second bargaining round, parties make linked, reciprocal concessions that enable all to recognize an acceptable outcome); (6) confirmation by the stakeholders of the procedural steps of the agreement; and (7) definition of the means to enforce the outcome.[67]

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65 *Id.* According to Roberts and Palmer, negotiation corresponds to the "ideal speech situation" from Habermas' theoretical construct.

66 *Id.* at 113.

67 *See* P.H. Gulliver, Disputes And Negotiations: A Cross-Cultural Perspective 127–30 (Academic Press, 1979). Roberts and Palmer based their proposal of a negotiation process on this text.

When the process does not culminate in a joint decision, there will usually be room for another alternative to dispute resolution before parties start a litigation process or even an arbitration process.[68] At this point, a neutral third party will be necessary to assist parties in reaching a mutually acceptable outcome through the mediation process.[69]

### ii. Mediation

In the last two decades, mediation gained substantial attention from ADR scholars, and its use and relevance have been remarkably accepted as a very broad way to facilitate negotiation.[70] The revival and re-institutionalization of mediation is an important component of ADR initiatives within the court system in order to help parties resolve their dispute with a mediator and reach an agreed-upon outcome.[71]

Indeed, the mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.[72] Yet the mediator's role of guiding the parties toward a solution is actually a complex process.

In that regard, there are two abstract models that define the main types of mediators. The first, which is closer to an adviser or consultant, has the following intervening functions: (1) establishes communication between the parties; (2) ensures that issues are identified and communicated; (3) makes sure that options are identified and evaluated; (4) encourages any necessary positional change; and (5) helps with the formulation of any ensuing agreement.[73] Under the second model, the intervener is more active and: (1) establishes communication with each of the parties; (2) obtains information about the nature of the dispute; (3) evaluates this information to reach a diagnosis; (4) issues prescriptions on the basis of expert knowledge; and (5) attempts to persuade the parties to accept the solution.[74]

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68 Williams, *supra* note 63, at 9.

69 *Id.* at 10.

70 ROBERTS & PALMER, *supra* note 7, at 178.

71 *Id.*

72 GOLDBERG ET AL., *supra* note 59, at 107.

73 ROBERTS & PALMER, *supra* note 7, at 157.

74 *Id.* at 158.

Historically, mediation began with "facilitative mediation," which is included in the negotiation first model.[7576] In facilitative mediation, the mediator is restricted to assisting parties in finding a solution rather than offering his or her opinion on the outcome.[77] Another kind of mediation fits closer in the second model and is called "evaluative mediation." Under "evaluative mediation," mediators provide their objective perspective of the case only when requested to or after being given permission by all parties.[78]

There is also a movement arguing for "transformative mediation," which enables parties to engender growth and not just resolve a specific dispute.[79] According to this movement, through an enhancement of parties' communication and negotiation, future disputes would be better resolved.[80]

Regardless of the mediation model chosen by the parties, the mediator will have the role of facilitating the parties' advancement throughout the different phases of the mediation process, as described above.[81] In the transformative mediation model, the mediator provides help with communications, enables the parties to engage in the process of information exchange, and learns what lies at the heart of decision-making through negotiation.[82]

### iii. Arbitration

Along with negotiation, arbitration is the most widely recognized ADR process in the U.S.[83] Arbitration is a private dispute resolution procedure designed by the parties through a contract to

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75 ANDREA DONEFF & ABRAHAM P. ORDOVER, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTEDISP. RESOL. 63 (National Institute for Trial Advocacy, 3rd ed. 2014).

76 In the settings of "facilitative" mediation, the term "conciliation" commonly appears connected to the informal process in which a third person facilitates communication between parties during negotiation, while mediation is reserved for a more formal process of meeting first with both parties and then with each of the parties separately. The term mediation, however, because it has a broader and more comprehensive meaning, is more frequently adopted. *See, e.g.*, Frank E. A. Sander, Varieties of Dispute Processing, Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976) *in* 70 F.R.D. 79, 111 at n.14.

77 DONEFF & ORDOVER, *supra* note 75, at 63.

78 *Id.*

79 Robert A. Baruch Bush & Joseph P. Folger, *Changing People, Not Just Situations: A Transformative View of Conflict and Mediation*, *in* MEDIATION: THEORY, POLICY AND PRACTICE 73 (Carrie Menkel-Meadow ed., 2001).

80 *Id.*at 87.

81 ROBERTS & PALMER, *supra* note 7, at 173.

82 *Id.*

83 DONEFF & ORDOVER, *supra* note 75, at 15.

allow a neutral third party, or arbitrator, to issue a binding decision; this is unlike what happens in a mediation process.[84]

Under the Federal Arbitration Act ("FAA"),[85] the decision rendered by an arbitrator will be subject to judicial enforcement when parties fail to comply with an arbitrator's award.[86] The procedure followed in arbitration is usually less formal than that followed at a trial because the rules of evidence are not strictly applied and because pretrial discovery is often the only solution mandated by the arbitrator.[87] As a result, arbitration is usually less expensive and results in faster resolutions than traditional adjudication.[88] However, in the U.S. today, arbitration is now used as a risk management tool by persons or entities with superior bargaining power against those with weaker bargaining power.[89]

### D. *ADR in the Court System*

Chief Justice Warren E. Burger urged for innovation of the civil system in the 1976 Pound Conference.[90] He argued for the development of other mechanisms and procedures to meet society's needs[91] and to help manage delays and high costs in resolving disputes.[9293]

In the 1970s, and especially in the 1980s, the federal judicial system functioned as a laboratory for ADR experiments.[94] In

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84 GOLDBERG ET AL., *supra* note 59, at 213.

85 9 U.S.C. § 2.

86 Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–21 (1985).

87 GOLDBERG ET AL., *supra* note 59, at 213.

88 *Id.* at 214.

89 *See generally* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

90 Chief Justice Warren E. Burger, Agenda for 2000 A.D.: A Need for Systematic Anticipation, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976) *in* Fed. R. Civ. P. 16(b)(7) (1976) (amended 1983).

91 *Id.* at 2.

92 *Id.* at 9.

93 *See also* Chief Justice Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274 (1982).

94 In 1978, three district courts presumptively established mandatory arbitration programs, requiring parties in cases that met certain criteria to participate in arbitration unless they could show why it would be inappropriate. In the Northern District of Ohio, Judge Lambros pioneered the summary jury trial. The District Court for the Western District of Washington established mediation programs in 1979. In 1982, the Northern District of California established an early neutral evaluation program under the leadership of Judge Peckman. *See* Susan K. Gauvey, *ADR's Integration in the Federal Court System*, 34 MD. BAR J. 36, 38 (2001).

1983, the use of ADR in the court system gained statutory support though the amendment of Rule 16(b)(7) of the Federal Rules of Civil Procedure, which subsequently authorized judges and litigants at the pretrial conference to "consider and take action with respect to the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[95]

The Civil Justice Reform Act of 1990 ("CJRA")[96] required all federal district courts to develop plans that implemented ADR procedures to combat the costs of delays in civil litigation. In order to achieve these goals, the district courts were authorized to refer cases to mediation, mini-trials, summary jury trials, and neutral evaluation programs.[97]

Only beginning in 1998 was ADR substantially regulated, as the U. S. Congress passed the Federal Alternative Dispute Resolution Act to include in ADR: "any process or procedure other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration."[98] The Act also authorized every United States District Court to use ADR in all civil actions, including adversarial procedures in bankruptcy courts.[99]

After gaining legal support, ADR was institutionalized in a comprehensive justice center called the multi-door courthouse ("MDC"). The concept of the MDC is that parties can choose the most appropriate process for their conflicts, accessing one of the doors for "arbitration," "mediation," "mini-trial," "summary jury trial," or "case evaluation."[100] The list of ADR types authorized by the Act apparently works as a guideline,[101] and the neutral panel will be comprised of, "among others, magistrate judges who have been trained to serve as neutrals in [ADR] processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in [ADR] processes."[102]

In the federal courts, the most common approach of judges for selecting cases appropriate for ADR works on a case-by-case basis,

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95 FED. R. CIV. P. 16.

96 28 U.S.C.A. § 471 (West 1990).

97 *Id.*

98 28 U.S.C. § 651 (1998).

99 *Id.*

100 GOLDBERG ET AL., *supra* note 59, at 396.

101 ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 40 (2002).

102 28 U.S.C. § 653(b) (1998).

according to local rules.[103] A common practice in mediation is to define which case types are eligible for mediation, and each district court can define exemptions for specific cases or case categories.[104] In some states, as required by statutes, certain types of cases must go to a designated ADR process, such as in California,[105] where contested custody cases must go to mediation; and in Hawaii,[106] where all money claim tort actions below $150,000, with specified exceptions, must go to court-annexed arbitration.

Generally, many district courts' local rules give individual judges the authority to make decisions on whether referrals are to be mandatory or voluntary. According to the statutory provision, "any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration."[107] Therefore, it is possible for judges to make referrals without a party's consent, but they should do so while pursuing the guidelines set in the statutes.

### i. Goals and Accomplishments

As mentioned *supra*, the ADR movement focused on a substantial transformation of dispute resolution by expanding the methods used to satisfy parties' needs and interests.[108] Besides this unique approach to conflict resolution, another core concern of the movement, expressed by leading jurists and lawyers at the 1976 Pound Conference, was the increased expense and delay for parties in a crowded justice system.[109]

Professor Frank Sander explained at the Conference that his vision of a court was not simply a courthouse but rather a dispute resolution center where the claimant, with the help of a screening clerk, would be directed to the process (or sequence of processes) most appropriate for a given type of case. A task force created from the Conference recommended the creation of the "multi-door courthouses" model and encouraged the use of mediation and arbitration.[110]

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103 NIEMIC ET AL., *supra* note 101, at 20.

104 28 U.S.C. § 652(b) (1998).

105 Cal. Fam. Code § 3170(a) (1993).

106 Haw. Arb. Rules, Rules 6, 8(a).

107 28 U.S.C. § 652(a) (1998).

108 GOLDBERG ET AL., *supra* note 59, at 7.

109 *Id.*

110 *Id.*

Since the 1980s, the priorities of ADR to encompass the goals of reduction of court caseloads and expenses have succeeded, leading to the curtailment of parties' expenses and time.[111] Along with these goals, ADR was meant to encourage resolutions more suited to parties' interests and needs and to enhance voluntary compliance with resolutions and public satisfaction with the justice system.[112]

Indeed, the U.S. legal system witnessed a resounding expansion of the use of ADR, supported by statutory provisions, regulations, and increased funding of institutions that were focused on the overall improvement of ADR processes and on the adoption of ADR by the courts. With respect to the goal of the reduction of court caseloads, from the mid-1980s until 2002, a study reported a remarkable sixty percent decline in the absolute number of trials in federal courts, whether it was civil, criminal, or bankruptcy cases, regardless of population and economic growth.[113] The same phenomenon has occurred in state courts, where a comparable decline in criminal and civil trials has been observed.[114]

The plausible causes of this decline are related to a change in ideology and practice among litigants, lawyers, and judges and a diversion of trials to ADR forums.[115] However, the decline in trials is based on many factors, and it is not confined only to sectors or localities where ADR has flourished.[116] Another important factor in explicating the vanishing trial is the economic argument, based on the realization that going to trial has become more costly, technical, complex, and risky, consequently discouraging some parties, especially those that deal with small cases.[117]

Regarding dispute processing efficiencies, more recent descriptive data[118] shows that in the realms of federal government litigation, "the earlier ADR is used in a case, the more quickly the

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111 *Id.*

112 *Id.*

113 In that regard, the civil trial rate in the federal courts steadily dropped from 11.5 percent in 1962 to 1.8 percent in 2002. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459–60 (2004).

114 *Id.*

115 *Id.*

116 *Id.* at 517.

117 *Id.*

118 Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes,* 24 OHIO ST. J. ON DISP. RESOL. 225, 259 (2009).

case reaches resolution."[119] Indeed, "65% of cases [were] settled when ADR was used, [while] only 29% of cases were settled when it was not."[120] Therefore, "this difference provides some support for claims that ADR is a better process than litigation for producing settlements among disputing parties."[121] "In addition, significantly more cases were settled when ADR was voluntary than when it was mandatory (71% vs. 50%)."[122]

Even though the decline in trials might be attributed to factors other than the diffusion of ADR in the 1980s, such as the increasing costs of litigation, the fact is that ADR might have contributed to the accomplishment of the goal envisioned by its founders, namely the reduction of court caseloads and the numerical enhancement of consensual outcomes to conflicts. The multi-door courthouses are a definitive legal achievement, although the gain of such transformation in the judicial system is not yet fully known.[123]

The following section demonstrates how ADR largely influenced environmental litigation from the 1970s onward, leading to the setting of a very specific dispute resolution system, both in the U.S. and worldwide.

### E. *Environmental Dispute Resolution*

The 1970s were a decisive decade for environmental protection in the United States. In 1970, President Nixon created the Environmental Protection Agency ("EPA"), and the complexity of environmental regulation increased with the passage of several environmental statutes.[124] As a result of the recognition of such rights relating to the environment, many disputes arose involving multiple parties and complex rules. This helped create an entirely specialized field of ADR.[125]

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119 *Id.* ("This result replicates independent studies in a number of state courts suggesting that, with an appropriate opt-out for good cause, early referral to ADR may facilitate settlement.").

120 *Id.* at 258.

121 *Id.*

122 *Id.*

123 Galanter, *supra* note 113, at 530–31.

124 *See e.g.*, Clean Air Act of 1970 (CAA), 42 U.S.C. § 7401 (1970); Clean Water Act of 1972 (CWA), 33 U.S.C. § 1251 (1972); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 (1976).

125 BARRETT & BARRETT, *supra* note 7, at 160.

It is believed that the first mediated environmental case reported in the United States took place in 1973, and it centered on "a proposed flood control dam on the Snoqualmie River in Washington State."[126] After a large flood, the United States Corps of Engineers came up with "a plan for a large control dam that was heavily endorsed by residents, developers, and farmers in the area."[127] However, "environmentalists and citizen groups [defended] that the opening of the flood plain would produce urban sprawl, interrupt a free-flowing river," and could be costly.[128]

Thus, Washington's governor asked mediators Gerald Cormick and Jane McCarthy to lead a mediation process. The group took four months to reach an agreement based on the various parties' interests,[129] and it resulted in a smaller dam being built at a different site along the river to control flooding. "This result would prevent flooding, would not interrupt the free-flowing river and would oversee development at the site, [taking into consideration] everyone's concerns over the river and the dam."[130]

In the following years, many groups of environmental mediators were operating in the United States. "Resolve, a nonprofit organization founded in 1978 . . . create[d] a remarkable record of success in these extremely complex disputes, using consensus building among interested groups while" promoting information disclosure on the scientific issues related to the dispute.[131]

Environmental disputes became a large and fertile field for consensus-based approaches to "conflicts over water and fishing rights, timber cutting and mining practices, wetlands and forest protection, energy use and clean air," as well as global warming issues.[132] The use of ADR in environmental conflicts was largely spread to all branches of the federal government in the 1980s and 1990s, leading to the rise of EDR.

In 1990, the U.S. Congress enacted the Administrative Dispute Resolution Act ("ADRA") in order "to authorize and encourage [f]ederal agencies to use mediation, conciliation,

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126 *Id.*

127 Matthew Patrick Clagett, *Environmental ADR and Negotiated Rule and Policy Making: Criticisms of the Institute for Environmental Conflict Resolution and the Environmental Protection Agency*, 15 TUL. ENV'T. L. J. 409, 411 (2002).

128 *Id.*

129 BARRETT & BARRETT, *supra* note 7, at 161.

130 Clagett, *supra* note 127, at 412.

131 BARRETT & BARRETT, *supra* note 7, at 162.

132 *Id.*

arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes."[133] The ADRA "requires federal agencies to consider ADR in rulemaking, litigation, enforcement actions, licensing and permitting, and formal and informal adjudications," thus leading to the creation of specialized courts and tribunals on environmental matters, as detailed in the next section.[134]

## F. *Environmental Courts*

The creation of Environmental Courts and Tribunals ("ECTs") is now a worldwide phenomenon. The 1992 UN Conference on Environment and Development in Rio de Janeiro emphasized the notion of "sustainable development," for which enforcement requires an administrative and legislative system structured for environmental protection, as the Agenda 21 plan resulting from this Conference states.[135]

In fact, "[a]ccess to justice to vindicate environmental legal rights" has been relegated to the status of the customary norm for a long time until Principle 10 of the Rio Declaration on Environment and Development expressly affirmed the citizens' right of effective access to judicial and administrative proceedings.[136] This major recognition of access rights has motivated domestic legislation in many countries to create judicial and administrative bodies for the implementation of environmental standards.[137]

In a detailed study on the worldwide increase of environmental courts and tribunals during the years 2008 and 2009, authors George and Catherine Pring reported that there are 152 existing or

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133 Administrative Dispute Resolution Act, 5 U.S.C. § 581 (1990).

134 Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 ARB. J. 24, 24 (1993).

135 Nicholas A. Robinson, *Ensuring Access to Justice Through Environmental Courts*, 29 PACE ENV'T L. REV. 363, 375 (2012).

136 *Id.* at 365–66.

137 Principle 10 of the Rio Declaration provides:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*See* U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration].

proposed ECTs; their study was based on onsite interviews and observations in twenty-four countries:[138] "Countries on every continent and as diverse as Australia, Bangladesh, Belgium, Brazil, China, Japan, Kenya, Thailand, Trinidad and Tobago, and the United States have created ECTs at national, state/provincial, and/or local levels."[139]

Specifically, in the United States, Vermont was found to be the first state to create a judicial environmental court at the state level.[140] Additionally, Massachusetts has a land court, and New York has a state administrative environmental tribunal within its Department of Environmental Conservation.[141] At the federal level in the United States, there are specialized tribunals in the EPA and the Department of the Interior ("DOI").[142]

Regarding the types of ECTs, there are judicial courts, administrative tribunals, and other dispute-resolution forums.[143] Three types of environmental courts were identified in the study: free-standing courts, green chambers within a general court, and designated green judges on a general court.[144] The administrative/environmental tribunals were identified in the study as independent tribunals (completely separate from another agency or ministry), quasi-independent tribunals (under another agency's supervision but not the agency whose decisions they review), and "captive" tribunals (within the control of the agency whose decisions they review).[145] Other ECT types can include special commissions, ADR programs, ombudsman, and human rights bodies.[146]

Within the United States, after the creation of the Vermont Environmental Court, other environmental courts emerged within the judiciary branch, such as the Hawaii Environmental Court and the Colorado Water Court.[147] A classic example of a "quasi-independent" administrative tribunal is the New York City Environmental Control Board ("ECB"), which, in 2008, was removed from

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138 PRING & PRING, *supra* note 8, at xiii.

139 *Id.* at 11.

140 *Id.* at 22.

141 Robinson, *supra* note 135, at 381.

142 *Id.* at 381–82.

143 PRING & PRING, *supra* note 8, at 21.

144 *Id.*

145 *Id.*

146 *Id.*

147 *See Environmental Court*, HAW. STATE JUDICIARY, http:/www.courts.state.hi.us/special_projects/environmental_court [https://perma.cc/LVB6-5NHY] (last visited Apr. 13, 2021); *see also Water Courts*, COLO. JUD. BRANCH, http:/www.courts.state.co.us/Courts/Water/Index.cfm [https://perma.cc/R7G5-RRZZ] (last visited AprilApr. 13, 2021).

within the environmental agency whose decisions it reviews. It was then placed within New York City's Office of Administrative Trials and Hearings ("OATH").[148]

Concerning jurisdiction, as in the United States, a number of legal systems refer to administrative complaints in the field of environmental law as civil issues and make no distinction in the same forum in their court systems.[149] Some courts have a "hybrid" combination of civil, administrative, and criminal jurisdictions, such as a number of local government ECTs in the United States.[150] In conclusion, ECTs have various procedural forms according to the tradition and needs of different legal systems.

i. Environmental Courts and ADR

The use of ADR in the court system had been widely adopted by the end of 1970, as described in Section III(D) above, which includes the Environmental Courts and Tribunals. According to George and Catherine Pring's research, the use of ADR in ECTs is broader than that in the courts of general jurisdiction.[151]. They also explained that over 50% of the ECTs surveyed in twenty-four countries use ADR.[152]

There are two ways in which international ECTs provide ADR:

Some provide a "court-annexed" process (conducted and controlled by the ECTs' staff, judges, or decision-makers), while others use a "court-referred" process (conducted by external paid or volunteer mediators, a government ombudsman, or an external group that is brought in to help balance power between communities and government or corporate interests).[153]

The U.S. court system follows the same avenue, using both processes: either a "court-annexed" process (e.g., the U.S. Office of Administrative Law Judges ("OALJ"))[154] or a "court-referred" process (e.g., the Vermont Environmental Court).[155]

The suitability of ADR to solve environmental conflicts in the ECTs system seems to be widely tested. In order to resolve com-

148 PRING & PRING, *supra* note 8, at 25.
149 *Id.* at 26.
150 *Id.*
151 *Id.* at 78.
152 *Id.* at 112.
153 *Id.* at 62.
154 PRING & PRING, *supra* note 8, at 63.
155 *Id.* at 61.

plex environmental cases and achieve sustainable development, it is necessary to adopt a multi-faceted approach that goes beyond traditional legalistic decision-making and may include the use of mediation and other forms of ADR, participation of a broad group of stakeholders in collaborative decision-making, development of non-traditional remedies, and/or creative sentencing.[156] Both judges and external mediators should view themselves as "problem solvers" and look beyond the narrow application of the rule of law and the simplistic right-or-wrong determination.[157] These players must create new options that will maximize both short- and long-term outcomes for the parties and for the environment.[158]

Certainly, the use of ADR tools for resolving environmental conflicts can significantly enhance access to justice by permitting wider public participation, lowering standing barriers, reducing time and costs, supporting problem-solving by the parties, and reducing caseloads.[159] As a result, the stakeholder will likely feel that better outcomes are achieved using ADR and that creative solutions can be developed beyond those that are possible through traditional remedies.[160]

### G. *Criticisms of EDR and ADR*

Environmental ADR or EDR has been subject to criticism, mostly surrounding its efficiency in ensuring that noble values of the environmental law, such as related human rights, are not overlooked by a given agreement.[161] According to that critique, mediation as consensus-building may not be able to solve disputes over fundamental values, thus causing some permanent and unacceptable environmental harm.[162] Specifically, the confidentiality of environmental ADR can enhance the risk of disregard for these values.

The privacy afforded by ADR may allow parties to make concessions they might not agree to in a more public setting. It may also conceal environmental disputes and negotiated agreements from the public, which has health and safety interests at stake. The

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156 *Id.* at 16.
157 PRING & PRING, *supra* note 8, at 63.
158 *Id.*
159 *Id.* at 61.
160 *Id.*
161 Clagett, *supra* note 127, at 422.
162 PRING & PRING, *supra* note 8, at 62.

EPA's policy mentions that it will balance confidentiality in ADR proceedings with "open government," but it remains to be seen how the EPA will implement those competing objectives.[163]

Another recurring criticism of ADR is focused on the assertion that negotiation tends to favor the party with more resources.[164] Considering that there is a relative balance of power in only a minority of environmental conflicts, mediation is not suitable for resolving most of these disputes.[165]

Relatedly, some scholars argue that mandatory programs set by the U.S. Congress and administration, like Court-Annexed Arbitration Programs ("CAA"), do not ensure access to justice in all scenarios. They claim that parties who are more socially and economically disadvantaged, as well as those who are more risk-averse, are subjected to an additional layer of cost for the procedure—such as with programs with a post-arbitration fee and cost-shifting provisions—and it also forces litigants to take more risks.[166] In fact, the "experimentation with federal court-annexed arbitration is unwarranted since the programs will produce neither private nor social benefits."[167]

The fact that the ADR and multi-door courthouse concepts substantially rely on a sophisticated early assessment of the dispute and have the ability to offer a range of appropriate options to the parties[168] shows that the quality of the early assessment would, in theory, prevent parties from engaging in a proceeding that might be harmful to one or both of them.

Therefore, some supporters of environmental ADR feel that it is unlikely that environmental ADR proceedings will take place without an appropriate early assessment made by properly trained individuals with "[e]xpertise in dispute resolution techniques and understanding of complex environmental laws."[169] This raises another critique, based on the clear difficulty of EDRs to provide well-trained neutral third parties who can ensure that the disputants would undergo an adequate ADR proceeding, which includes

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163 Clagett, *supra* note 127, at 422.

164 *Id.* at 422–23.

165 *Id.*

166 Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 UNIV. PA. L. REV. 2169, 2253 (1993).

167 *Id.*

168 PRING & PRING, *supra* note 8, at 70–71.

169 Clagett, *supra* note 127, at 423.

choosing the proceeding that best achieves the balance between litigants.[170]

In short, despite the fact that such criticisms are relevant, it is not possible to say that the majority of them would also apply to adjudication. For instance, it cannot be denied that there is also a possibility that one party may dominate the other and cause an imbalance in an adjudicatory proceeding. Likewise, there is a strong possibility that a judicial decision may leave aside essential environmental values, which cannot discredit adjudication.

In addition to the fact that ADR has greatly reduced the caseload for American courts since the 1980s, as mentioned in Section III(E)(i), the enhancement of options for conflict resolution, by itself, is a significant advantage for the adoption of ADR in environmental conflicts. This article, *infra*, will discuss the Brazilian ADR system, and these criticisms will again be analyzed, but under the light of comparative law.

## IV. ADR IN BRAZIL

### A. *Introduction*

Unlike common law systems, the judicial system in civilian law is traditionally more bureaucratic, hierarchical, formal, and centered on the civil procedural codes, with judges playing a more active role in litigation.[171] As a consequence, until recently, the civil law judicial apparatus in different countries has left little room for alternative forms of dispute resolution.[172]

In civil law in developing countries, the change in this tradition of court-sponsored adjudication, which has always adopted a dominant model of dispute resolution, to ADR can be mostly noted only in the last two decades.[173] In Brazil, the expansion of conflict resolution towards the U.S. ADR movement model only took shape in 2010 with the enactment of Ordinance 125 by the National Council of Justice ("CNJ"),[174] an administrative regulation that set the standards for ADR within the Brazilian judicial system even

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170 *Id.*

171 ROBERTS & PALMER, *supra* note 7, at 6.

172 *Id.*

173 *Id.* at 243.

174 Resolução No. 125/2010, de 1 de dezembro de 2010, Diário Judiciário Eletrônico [D.J.e] (Braz. 2011).

before the Brazilian Congress enacted legislation on the matter. For purposes of clarification, the CNJ is an administrative council independent of the judiciary and Congress, with constitutional powers to oversee the judiciary in fulfilling its legal duties and efficiency.

Therefore, the adoption of ADR in Brazil is quite recent, which explains the fact that dozens of academic texts accessed by this research only address basic concepts of ADR and do not provide further details and statistical data on the issues arising from the practice of the proposed changes. In the following section, the history of the consensual ways of dispute resolution within the Brazilian legal system will be discussed in order to contextualize recent changes that have been incorporated into ADR in Brazil.

### B. *Legal History*

Since the colonial period in Brazil, as is illustrated in the Manoelina and Filipinas Ordinances of 1514 and 1603, respectively, the Portuguese legal tradition adopted reconciliation as a primary consensual form of dispute resolution before the adversarial judicial procedure began.[175] The first Brazilian Constitution of 1824 followed this tradition since Article 161, paragraph 1, states that "without it being stated that the means of reconciliation has been attempted, no process shall begin."[176]

Reconciliation continued to be used in court cases until 1939 when the Civil Procedure Code abolished any form of consensual approach to dispute resolution. Only with the enactment of the 1943 Labor Law Act (*Consolidação das Leis do Trabalho ("CLT")*) was conciliation[177] restored at the preliminary hearing of a labor lawsuit procedure.[178] In this scenario, consensual outcomes were restricted to labor law disputes.

Thirty years later, the adoption of the 1973 Civil Procedure Code again allowed the use of conciliation in the adjudication dispute procedure in a broader context.[179] In 1984, the Small Claims

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175 Cristiane Rodrigues Iwakura, *Conciliar é legal?*, Revista Seleções Jurídicas Adv. 1, 12 (2010).

176 *Id.*

177 Brazilian legislation commonly uses the word "conciliation," meaning the first attempt to a consensual dispute resolution, which is close to the expression "facilitative mediation," used by the ADR theory described above.

178 Iwakura, *supra* note 175, at 12–13.

179 *Id.*

Court Act ("Lei 7244") adopted the consensual approach to dispute resolution as a guiding principle of the procedure.[180]

The major change came with the 1988 Constitution. It strengthened consensual forms of dispute resolution by creating, in Section 98(I), the federal Small Claims Courts—and in Sections 111(I), 112, and 113, the conciliation and trial boards. Following that, several statutes were passed by the Brazilian Congress in the same term. For example, Act 8952 of 1995, which introduced in the Civil Procedure Code the prior mandatory conciliation hearing; Act 9099 of 1995, which reshaped the procedures in small claims courts; and Act 9037/96, which introduced arbitration in the Brazilian legal system.[181]

Despite such statutory provisions for the adoption of consensual dispute resolution, up to this point—except at the small claims courts, where conciliation became widely used—the ordinary civil procedure considered conciliation as an attempt by the judge at the beginning of the procedure, to encourage the parties to reach an agreement and prevent a lawsuit from proceeding. This scenario only began to change with the enactment of the 45th Constitutional Amendment in 2004, which detailed the standards of a reasonable length for a procedure and the means to ensure speedy decision-making.

As noted earlier, the greatest milestone of the adoption of ADR in Brazil was the Ordinance 125 of CNJ. This not only encompassed the regulation of the mediation procedures adopted by the Brazilian legal system, but it also settled a national policy for the implementation of ADR concepts and techniques towards the selection of the most appropriate procedures to ensure effectiveness in the judiciary system.[182] In fact, Ordinance 125 has made it clear that the organization of conciliation, mediation, and other consensual conflict resolution services should serve as the principles and basis for the establishment of ADR centers, in which judicial bodies are specialized.[183] This is the Brazilian version of the multi-door courthouse concept that was launched by the U.S. judicial system in the 1970s. The model, built by the aforementioned Ordinance, provides for the creation of ADR forums where concil-

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180 *Id.*

181 *Id.*

182 João Luiz Lessa Neto, *O Novo CPC Adotou O Modelo Multiportas!!! E Agora?!*, 244 Revista Processo 427, 427 (2015) [https://perma.cc/CE5P-ZK2W].

183 Resolução no. 125/2010, de 1 de dezembro de 2010, Diário Judiciário Eletrônico [D.J.e] (Braz.) (2011).

iation and mediation services are offered. These services are mainly driven by mediators and conciliators who are trained by the judiciary system, and they perform legal duties similar to those for which civil servants are responsible.[184] In fact, Ordinance 125 is strongly oriented to developing educational programs on ADR and is intended to standardize training for mediators from all over the country, which allows wide dissemination of ADR paradigms in the Brazilian legal system. It is very important for law practitioners to absorb ADR's ideas over the coming decades in relation to the ingrained formalistic civil law tradition.

In 2015, the Brazilian Congress passed the new Civil Procedure Code ("CPC"), which made the adoption of ADR by the Brazilian legal system an official procedure. Pursuant to the First Chapter of the Single Title, Book I, of the General Part, devoted to the fundamental rules of Civil Procedure, state and legal practitioners shall promote consensual dispute resolution. Indeed, the 2015 CPC highlights in the third paragraph of Section 3 that "mediation and other methods of consensual settlement of disputes shall be encouraged by judges, lawyers, public defenders and prosecutors, including pending judicial proceedings."[185]

The CPC regulates conciliation (facilitative mediation) and mediation in Articles 165 through 175. Paragraphs 2 and 3 of Article 165 specifically differentiate conciliation and mediation. The conciliator will act preferentially in cases where there is no prior relationship between the parties and may suggest solutions to the dispute. The mediator will preferentially act in cases where there is a prior relationship between the parties, helping interested parties to understand the issues and interests in conflict so that they can, by reestablishing communication, identify consensual solutions that generate mutual benefits.[186] Likewise, in Ordinance 125, the new Code furnished the creation of alternative conflict resolution judicial forums, as well as the stimulation of private conciliation chambers (Article 175).[187] In court proceedings, the judge still has a duty to try to reconcile the parties at any time, even if mediation has already been used in the proceedings (Article 3, Paragraph 2).[188]

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184 *Id.*

185 Lei No. 13.105, de 16 de março de 2015, Diário Oficial da União [D.O.U] (Braz. 2015).

186 *Id.*

187 *Id.*

188 *Id.*

According to the Report on the 100 Largest Litigants, which was prepared by the National Council of Justice,[189] the federal public sector is the largest individual litigant in all of the Brazilian judiciary. As an attempt to enhance dispute resolution in this scenario, Act 13140 was enacted in 2015 to regulate mediation. It also promotes mediation within public administration. The Act is clearly more specific in regard to the definition of mediation when compared to the new Civil Procedure Code. It states that "mediation is considered the technical activity performed by an impartial third-party without decision-making power, which, when chosen or accepted by the parties, helps and encourages them to identify or develop consensual solutions to the controversy." (First Section, single paragraph).[190] According to the Act, the mediator can either be chosen by the courts or by the parties.[191]

In both private and judicial mediation, the final agreement will be considered as an extrajudicial executive title (that it can be privately enforced), and if ratified by a judge, it may be enforced throughout a court's proceedings. (Article 20, single paragraph).[192] The Act values mediations coordinated by the courts and mediations carried out outside the courts, which leads to the conclusion that it is not simply a reproduction of the U.S. multi-door courthouse concept.

Perhaps the greatest benefit of Act 13140 is that it broadened the possibilities of consensual dispute resolution within the Brazilian public administration itself, which has traditionally been resistant to making any agreements. This caused a significant delay in litigation, as mentioned above. In order to lighten caseloads, the Act created administrative mediation chambers and regulated the mediation procedure to be conducted by administrative agencies. (Article 32, caput).[193]

The law, however, sets boundaries to the agreements, making their outcomes subject to authorization by the highest Administration authority when the agreements potentially benefit a large

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189 Sylvia Marlene de Castro Figueiredo, *Breves Notas Sobre A Prestação Jurisdicional Efetiva E Os Caminhos Apontados Pelo Novo CPC: A Ampliaçao do Acesso à Justica em Face dos Métodos Autocompositivos de Solução de Conflitos*, 96 REVISTA DA AJUFE DE DIREITO FED. 549 (2017) (Braz.).

190 Lei No. 13.140, de 26 de junho de 2015, Diario Oficial da União [D.O.U] de 29.06.2015 (Braz.).

191 *Id.*

192 *Id.*

193 *Id.*

number of citizens (Article 35).[194] With respect to agreements on specific matters of fact, the Mediation Act makes no specifications regarding the authorization granted by the highest Administration authority. That leads to the conclusion that they can be freely agreed upon, subject to other legal rules governing public administration.

These are the main statutes that outline the system of ADR in Brazil. The statutes do not specifically mention Environmental Dispute Resolution, which will be analyzed in the next section.

## C. *Brazilian EDR*

### i. History

The history of EDR in Brazil shows the lack of a specific approach to legislation on the subject. This absence was maintained with the enactment of Ordinance 125 of the new CPC 2015, as well as the Mediation Act. Due to the complexity of environmental conflicts, a specific structure for environmental mediation forums is undoubtedly necessary. Environmental law—taking into consideration the constitutional configuration of environmental protection in Brazil, as well as the international law on the subject, rather than just covering mechanisms of liability—concerns itself with the regulation of the conduct to be taken before the occurrence of any damage, or even of a mere possibility of damage.[195] It is then understood that environmental law is closely tied to the prevention of risky situations, such as the possibility of environmental pollution from mining activities, thus holding prevention and precaution[196]

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194 *Id.*

195 In the sense of protection against environmental risk, the Brazilian Federal Constitution establishes that "[i]n order to ensure the effectiveness of this right, it is incumbent upon the Government to . . . control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, ¶ 1, § V (Braz.). The precautionary principle hosted by the Rio de Janeiro Declaration on the environment goes in the same direction: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), (Aug. 12, 1992).

196 According to the doctrine, prevention deals with risks and impacts already known by science, and precaution deals with risks and impacts not known. That is to say, prevention deals with the certainty of the risk and, precaution goes beyond dealing with the uncertainty of the risk. Or else, prevention is related to the concrete danger and precaution to the abstract one,

as its core tenets and accounting for sophisticated decision-making from several scientific knowledge areas.

Hence, environmental law is characterized by a multidisciplinary approach, not dismissing any elements that connect different schools of thought. As in a puzzle, environmental law uses varied pieces of knowledge to address complex issues raised in a postmodern society by the environmental paradigm.[197] The need to control and regulate situations prior to their occurrence requires that the environmental law occupy the primordial role of serving as an instrument of measurement and valuation of environmental risks, as well as of minimizing uncertainties related to the decision-making process, be it in legislative, administrative, or judicial spheres.

Even when taken as a mere possibility, environmental damage embodies considerable issues, such as a lack of scientific consensus on the probability of damage or conflict between the economic and social interests at stake. On the other hand, environmental damage is, by its very nature, either irreversible or extremely difficult to recover and/or identify, both in the temporal and spatial spheres.[198] Therefore, the EDR decision-making process should be structured to account for all of the complexities of environmental law, which implies the specific training of mediators. Until the effective legal adoption of ADR in Brazil, conflict resolution took place primarily through the action of the institutions admitted by law to prosecute environmental lawsuits.

In fact, ADR has added mechanisms for dispute resolution alongside existing institutional means. In the next section, the functions of the mechanisms for dispute resolution in Brazil will be detailed to better understand the whole EDR landscape.

### ii. EDR Institutions

#### 1. Ministério Público

The *Ministério Público* ("MP"), which translates to "Public Ministry," is usually described to English speakers as equivalent to the Office of the Attorney General. However, its powers and po-

according to EDIS MILARÉ, DIREITO DO AMBIENTE: DOUTRINA, JURISPRUDÊNCIA 766 (5th ed. 2007) (Braz.).

197 RÔMULO SILVEIRA DA ROCHA SAMPAIO, DIREITO AMBIENTAL DOUTRINA E CASOS PRÁTICOS 281 (2012).

198 RÔMULO SILVEIRA DA ROCHA SAMPAIO, TÓPICOS DE *Direito A*MBIENTAL: 30 *A*NOS DE *Política N*ACIONAL DO *Meio A*MBIENTE 447 (2011) (Braz.).

tential are, in fact, much greater than that of its nearest U.S. equivalent.[199] In addition to possessing the legal power to hold criminal prosecution trials, the MP has broad constitutional duties to protect the environment, among other things, which makes it the protagonist of environmental dispute resolution. Indeed, the MP is currently responsible for filing 90% of environmental litigations, as the capabilities of Non-Profit Organizations in Brazil are very limited.[200] However, the expansion of MP assignments beyond criminal prosecution is relatively recent and stems from a remarkable transformation in the Brazilian State that started in the mid-1980s.

The MP has been historically responsible for exercising the state's monopoly on accusing and prosecuting criminals, and also having the power to intervene–and in some cases—initiate civil litigation that involves the interests of the general public.[201] This, however, did not detract from the predominance of attributions relating to criminal persecution.

One can notice, from the 1980s onwards, a significant increase in civil litigation involving public interests such as consumer defense, children's rights, disability rights, and worker health and safety, as well as environmental protection. This is reflective of the "judicialization of politics" in Latin America, meaning an augmented presence of judicial processes and court rulings in political and social life and the increasing resolution of political, social, or state-society conflicts in the courts.[202] This significant enlargement of powers was made possible by the enactment of Federal Laws ns. 6.938/1981[203] and 7347/1985,[204] which, respectively, instituted the National Environmental Policy and the Public Civil Action Procedure.

The National Environmental Policy Act (Law no. 6.938/1981) created substantive and procedural mechanisms, remedies, and types of relief to facilitate effective protection against environmen-

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199 Colin Crawford, *Defending Public Prosecutors and Defining Brazil's Environmental "Public Interest": A Review of Lesley McAllister's Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, 40 GEO. WASH. INT'L L. REV. 619, 620 (2009).

200 Luis Roberto Proença, *Improving Brazilian Environmental Law Enforcement*, 41 U.C Davis Environs: ENV'T. L. & POL'Y J. 157, 181 (2018).

201 Crawford, *supra* note 199, at 620.

202 *Id.* at 621–22.

203 Lei No. 6938, de 31 de agosto de 1981, Diario Oficial da União [D.O.U] de 02.09.1981 (Braz.).

204 Lei No. 7347, de 24 de julho de 1985, Diario Oficial da União [D.O.U] de 25.07.1985 (Braz.).

tal damage (Article 14, first paragraph).[205] According to the Act, only the MP is entitled to sue companies and individuals that cause damage to the environment. This was the first time that the Brazilian legal system introduced a procedural mechanism to ensure the enforcement of environmental law by the redefinition of the MP's powers.

Four years after the enactment of the National Environmental Policy Act, the Brazilian Congress passed the Public Civil Action Act (Law no. 7347/1985) to improve environmental protection mechanisms, among other public interests. It also expanded the list of legal entities that have standing to sue those who violate environmental law, allowing public civil action to be commenced by a prosecutor, the federal government, a state or municipal government, the public defense, a public company, a foundation, or an environmental NGO duly organized and existing for at least one year prior to the action (Article 5).[206]

Considering the lack of infrastructure and the power to coerce compliance of federal and state agencies, from the 1980s onwards, public prosecutors became significant actors in the enforcement of environmental laws and regulations.[207] Such enforcement was then made possible by the ability of the MP to directly seek injunctions from the courts, requiring a person who breaches environmental law to make cash payment compensation or requiring the person to do—or to refrain from doing—something (Article 3).[208]

The 1988 Brazilian Federal Constitution introduced an extensive and detailed article on environmental protection, including, for instance, the constitutional requirement for environmental impact statements, commitments to biodiversity protection, and pollution controls.[209] In another article,[210] the 1988 Constitution

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205 Lei No. 6938, de 31 de agosto de 1981, Diario Oficial da União [D.O.U] de 02.09.1981 (Braz.).

206 Lei No. 7347, de 24 de julho de 1985, Diario Oficial da União [D.O.U] de 25.07.1985 (Braz.).

207 Crawford, *supra* note 199, at 623.

208 Lei No. 7347, de 24 de julho de 1985, Diario Oficial da União [D.O.U] de 25.07.1985 (Braz.).

209 CONSTITUIÇÁO FEDERAL art. 225 (Braz.).

210 CONSTITUIÇÁO FEDERAL art. 129 (Braz.) ("The following are institutional functions of the Public Prosecution: (I) to initiate, exclusively, public criminal prosecution, under the terms of the law; (II) to ensure the rights guaranteed in this Constitution are effectively respected by the public authorities and by the services of public relevance, taking the action required to guarantee such rights; (III) to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests; (IV) to institute action of unconstitutionality or representation for purposes of intervention by the Union or by the states,

restructured and rebuilt the MP, supported by the changes that took place in the 1980s but going beyond and setting the stage for a newly empowered "public prosecution"—one that would go well beyond its traditional role of criminal prosecution, defending public interests through civil litigation as an equally important part of its work.[211] The constitutional promulgation of civil litigation in the MP led to the essential notion of diffuse and collective interests.[212] Indeed, the term diffuse interest is preferred to the public interest, as that term is used in the United States, because traditionally, "public interest" has been used in Brazil to refer to interests of the state or government. "Diffuse interests," in contrast, are those of society as a whole, defined in Brazilian law as interests that are transindividual, indivisible by nature, and held by an indeterminate number of people linked by a factual situation.[213] Therefore, following this reasoning, forest conservation is a "diffuse interest." On the other hand, the protection of certain indigenous people's lands is a collective interest which is transindividual, indivisible interests held by a determinable number of people of a particular group, class, or category who are united through a basic legal relationship.[214]

The Brazilian Supreme Court (*Supremo Tribunal Federal*) confirmed that the notion of environmental law encompasses the protection of diffuse interests because the environment is a public asset to be protected for all collectivities.[215]

The MP has been authorized to act on behalf of a diffuse interest since the 1981 National Environmental Policy Act. The 1988 Constitution ratified that authority, increasing the MP's power to protect consumer interests and cultural patrimony. As a result, the MP started to play a primary role in defense of societal interests,

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in the cases established in this Constitution; (V) to defend judicially the rights and interests of native indigenous populations; (VI) to issue notifications in administrative procedures within its competence, requesting information and documents to support them, under the terms of the related supplementary law; (VII) to exercise external control over police activities under the terms of the supplementary law mentioned in the previous article; (VIII) to request investigatory procedures and the institution of police investigation, indicating the legal grounds of its procedural acts; (IX) to exercise other functions, which may be conferred upon it, provided that they are compatible with its purpose, with judicial representation and judicial consultation for public entities being forbidden.").

211 Crawford, *supra* note 199, at 625–26.

212 *Id.*

213 *Id.*

214 *Id.* at 626.

215 S.T.F, Ação Direta de Inconstitucionalidade no. 3.540, Relator: Ministro Celso Mello, https://www.stf.jus.br/ [https://perma.cc/K4AF-22R8] (last visited on Feb. 22, 2022).

conquering a high level of independence at both the institutional and individual levels.[216]

Regarding environmental protection, the MP has been the main protagonist of dispute resolution over the last three decades, whether as a plaintiff in the filing of environmental actions or as a conductor of the first form of consensual settlement of conflicts involving diffuse interests, which is the Terms of Conduct Adjustment (Termo de Ajustamento de Conduta). This last form will be further detailed in the following section.

### 2. Terms of Conduct Adjustment

According to the Public Civil Action Act (Law no. 7347/1985), Section 5, Paragraph 6,[217] any public agency or legal entity that holds standing to bring a public civil action to court, which includes the MP, can make an agreement called a Conduct Adjustment Agreement (C*ompromisso de Ajustamento de Conduta*). This is a type of "friendly agreement for the environmental malefactor to adjust their action to the law; however, the MP cannot compromise the defense of a healthy environment, essential to the quality of life, by consenting to situations or practices prejudicial to the primary public interest and/or the environment."[218]

The MP usually runs the elaboration of the document called a "Term of Adjustment of Conduct" (*Termo de Ajustamento de Conduta*) and negotiates with representatives of the environmental malefactor and federal/state environmental agency.[219] In practice, this process always relies on the participation of the MP due to its constitutional function of preserving diffuse interests. Much criticism has been drawn on what can be transacted when it comes to environmental interests. As a matter of fact, the MP cannot give his assent to an agreement that endangers environmental interests, which by their very nature are considered inalienable.

In addition to environmental interests, the Public Civil Action Act (Law no. 7347/1985)[220] allows transactions over several other interests that are also considered inalienable, such as, for example, those connected to consumer rights and cultural patrimony. There-

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216 *Id.*

217 Lei 7.347, de 24 de julho de 1985, Diario Oficial da União [D.O.U] de 25.07.1985 (Braz.).

218 Crawford, *supra* note 199, at 630.

219 Luiz Fernando Henry Sant'Anna, *General Overview of Brazilian Environmental Law*, 15 INT'L L. PRACTICUM 22, 28 (2002).

220 Besides the Public Civil Action Act, other subsequent statutes and regulations authorize the "Term of Adjustment of Conduct" on environmental conflicts, such as the Federal Law 9.605/1998 and the Ordinances no. 6.514/2008 and 99.274/1990.

fore, the fact that the diffuse interest is unavailable doesn't mean it is a prohibition of the negotiation on conflicts involving such interests.

Indeed, Brazilian statutes do not provide explicit boundaries for transactions on conflicts when dealing with public interests. Federal Law no. 9.469/1997[221] deals specifically with the transaction within the Federal Administration, considering essential topics such as those people who are entitled to propose the agreement; the possibility of creating specialized chambers to analyze and formulate proposals; and the provision of the specific regulation that will stipulate monetary amounts that the Union Advocate General, Ministers of State, and other authorities will be required to authorize. However, there is no reference to what the object of the transaction might be.

The Mediation Act of 2015[222] provides that "[m]ediation will take place on disputes regarding available rights or unavailable rights that allow transaction" (Section 3)[223], also clarifying that "the consensus of the parties involving unavailable but enforceable rights shall be ratified in court, require[ing] the hearing of the Public Prosecution Service." (Section 3, Paragraph 2).[224] Despite authorizing the conclusion of agreements on unavailable rights, the Mediation Act is silent on the limits regarding the parties' disposition on such interests. Therefore, both the Mediation Act and Federal Law 9469/97 regulate the matter in a general way. Because of that, there is a great deal of uncertainty concerning how to diffuse interest boundaries can be managed. As a result, federal agencies remain strongly opposed to negotiating in such cases.[225]

In fact, the traditional unwillingness of the Brazilian Public Administration to negotiate cannot be justified by the lack of definition of the legal statutes governing the matter. Although inaccurate, the statutes are firm in authorizing and stimulating consensual dispute resolution. They also establish a mechanism for the prosecution to monitor conflicts on a case-by-case basis, with unavailable interests at stake.

Despite their correlation, unavailability and un-tradability are not to be confused. The former concerns the impossibility of nego-

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221 Lei 9.469, de 10 de julho de 1997, Diario Oficial da União [D.O.U] de 11.07.1997 (Braz.).

222 Lei 13.140, de 26 de junho de 2015, Diario Oficial da União [D.O.U] de 29.06.2015 (Braz.).

223 *Id.*

224 *Id.*

225 Fernanda Bragança, *O Princípio do Dispositivo e sua Repercussão no uso da Mediação pela Administração Pública Brasileira e Portuguesa*, 73 REVISTA CEJ 20, 27 (2017).

tiating over the substance of public interest, as the concessions would denature the subject of legal protection. Un-tradability has to do with the total impossibility of negotiation.

Restriction to negotiation is an exceptional hypothesis and has been explicitly provided for by the legislature. This is the case, for example, of the prohibition found in Act 8.429/1992, regarding settlements on administrative misconduct lawsuits.[226]

The "Term of Adjustment of Conduct" was, in fact, the first legal institute to allow the negotiation of diffuse environmental interests in the Brazilian legal system. However, part of the doctrine criticizes the fact that there is no equality among negotiating parties. Indeed, the MP has a legal role in demanding that the violating part of environmental law adjusts to what the MP understands to be the best option for the satisfaction of diffuse environmental interest, as the polarization of interests typical of the adversarial model always occurs.[227]

Therefore, the mediation process—in which the negotiation on diffuse environmental interests is legally allowed—seems to be appropriate for EDR, as far as it enlarges the possibilities of consensus by ensuring parties' parity and a constructive approach to the conflict when compared to the "Term of Adjustment of Conduct."[228] The figure of the impartial mediator is therefore essential to aggregate a broader approach to conflict resolution and gain parties' legitimacy to the solution.

### iii. EDR, Agencies, and Courts

Even though, since 2015, administrative agencies have had at their disposal a powerful instrument to promote the consensual settlement of conflicts—traditionally, the Mediation Act[229]—environmental conflicts end up in the judiciary, which provides either a consensual or adversarial solution. As a general rule, Brazilian environmental agencies tend to be among the least powerful agencies in the government. "They have difficulty in defending policies and administrative actions that run contrary to the priorities of political leaders and other governmental agencies."[230] In this sense, the absence of mediation by the public administration, either for the pre-

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226 *Id.*

227 Juliana Cabral Lima, *Mediação Como Meio de Solução Alternativa de Controvérsia dos Conflitos Ambientais*, 52 Revista de Doutrina e Jurisprudência 183, 202 (2017).

228 *Id.*

229 Lei 13.140, *supra* note 222.

230 Crawford, *supra* note 199, at 624.

vention of conflicts—for instance, in the case of environmental permits—or in the resolution of previously posed conflicts, entails a prevalent judicialization of decision-making processes in environmental matters. Unfortunately, mediation has not yet been incorporated by the Brazilian public administration, specifically to prevent potential conflicts, as in the case of the environmental permitting process.[231]

Due to the overload of environmental litigation, which started in the mid-2000s, the Brazilian judiciary has been organized to assign jurisdictional units with exclusive environmental competence. The judiciary has chosen judges with intensive training in the field, sheltering the attribution of judging the crimes typified in Law no. 9.605/98, as well as public civil actions concerning diffuse environmental interests.[232] However, there is little qualitative statistical data to clarify the number of lawsuits that have been resolved by consensus or adjudication in these specialized courts.[233]

Despite their complexity, environmental public civil actions are fewer in comparison to other legal fields because they represent diffuse interests by their nature, thus considerably diminishing the number of individual actions. They do not even appear as a specific legal field among the most frequent actions in the Brazilian courts.[234]

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231 Ana Cláudia La Plata de Mello Franco, *Mediação de Conflitos Oriundos do Licenciamento Ambiental: Novos Paradigmas Ante o Advento do Novo Código de Processo Civil (Lei 13.105/2015) e da Lei de Mediação (Lei 13.140/2015),* Revista de Arbitragem e Mediação 48, 269 (2016).

232 Vladimir de Passos Freitas, *O Poder Judiciário e o Direito Ambiental no Brasil*, 65 Revista Justitia 95, 104–05 (2008).

233 Data from the Federal Justice Council obtained via email on July 26, 2019, indicate the existence of eleven Environmental and Agrarian Courts in the Brazilian Federal Justice. In the Amazon rainforest region, the First Federal District Court (*Tribunal Regional Federal da 1a Região*) provides six specialized courts in Environmental Law.

*Justiça em Nümeros,* Conselho Nacional de Justiça 1, 137 (2018), https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf [https://perma.cc/97Z2-5WL8] (last visited Feb. 22, 2022). Regardless of specific legal fields, the conciliation index, which is found by taking the percentage of judgments and decisions resolved by ratification in relation to the total number of judgments and final decisions issued, has been growing slowly since 2015. In 2017, there were 12.1% ratifications of agreement, a value that has grown in the last two years—11.1% in 2015 and 11.9% in 2016.

234 *Id.* at 183.

### D. *EDR in the Mariana Dam Case*

In order to demonstrate the complexity of the challenging Brazilian environmental conflicts, this Article analyzes one of the largest environmental accidents in the world, the case of the Fundão dam rupture near Mariana, Minas Gerais State, Brazil. Ironically, what motivated the present research was precisely the need to deepen the ADR mechanisms due to the existence of many public civil actions aimed at preventing the breaking of iron ore tailings dams at the Federal District Court of the State of Minas Gerais.

Back in 2010, many agreements were signed at the Minas Gerais Federal Court in order to establish the commitment of mining companies to comply with regulations that set various requirements for the safety of iron ore tailings containment dams under the Federal Law 12334/2010 provisions.[235] Unfortunately, the effectiveness of such agreements has not been proven, as there have been two major dam disruptions in Minas Gerais—the Fundão dam in Mariana (2015) and Brumadinho (2019)—and there are several other dams at risk of disruption in Brazil.[236]

#### i. Dam Burst

On November 5, 2015, despite the dispatch of the emergency team, the tailings dam containment structure of the Fundão dam broke, causing mud and tailings to leak. The mud quickly reached the Gualaxo do Norte River, which flows into the Carmo River following its normal course. This, in turn, carried the tailings to the Doce River—one of the most important rivers of the states of Minas Gerais and Espírito Santo, as it is a source of income and livelihood for hundreds of thousands of people.

Tons of mud released by the collapsed dam created a path of destruction. After traveling 650 kilometers, it reached the Atlantic Ocean sixteen days later at the mouth of the Doce River. The path of destruction caused by the "muddy sea" left nineteen people dead and countless socio-environmental and socioeconomic damages. Experts at the time said that any recovery of the river basin

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235 Lei 12.334, de 20 de setembro de 2010, Diario Oficial da União [D.O.U] de 21.09.2010 (Braz.).

236 According to a February 2020 Federal Mining Agency survey, there are 47 existing mining dams in Brazil with a high risk of burst. *See* ANM, *Relatorio Anual de Seguranca De Barragens De Mineracao*, https://www.gov.br/anm/pt-br/assuntos/barragens/relatorios-anuais-de-seguranca-da-barragens-de-mineracao-1/relatorio-anual-gsbm-2019-v-final. (last visited July. 31st, 2022).

would take at least 500 years, and others said the Doce River and its ecosystem would never again be what it once was.[237]

Among the damage caused by the dam burst, upon which all parties have reached a consensus,[238] are:

- Death and disappearance of nineteen people;
- Loss is proven by the owner of movable goods or real state property;
- Loss of productive capacity or the viability of using immovable property, or part thereof;
- Proven loss of fishing areas and fishing and extractive resources, making extractive or productive activities unfeasible;
- Loss of sources of income, work, or self-subsistence that workers depend on economically due to the rupture of the bond with affected areas;
- Proven losses to local productive activities, with an impracticable establishment or economic activities;
- Unfeasible access to, or management of, natural resources and fisheries, including public domain land and collective use, affecting the income and livelihoods of populations;
- Damage to physical or mental health;
- Destruction or interference with the community; and
- The reproduction conditions of the sociocultural and cosmological processes of riverside, estuarine, traditional, and indigenous peoples.

### ii. Court Procedures

As a result of the dam burst, many interests were affected, leading to polycentric conflicts and dozens of lawsuits. The Superior Court of Justice (*Superior Tribunal de Justiça*) then decided to centralize all lawsuits under the jurisdiction of the Federal District Court of Minas Gerais State, except for individual claims for damages.[239]

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237 *See* VLADIMIR PASSOS DE FREITAS, JUSTIÇA FEDERAL 50 ANOS: SUES CASOS E SUAS CAUSAS CONTADOS POR SEUS JUÍZES 296 (1st ed. 2017) (Braz.) for a description given by the judge conducting the damage compensation lawsuits.

238 Luiz Inácio Lucena Adams et al., *Termo de Transação e de Adjustamento de Conduta* (Mar. 2, 2016), https://www.fundacaorenova.org/wp-content/uploads/2016/07/ttac-final-assinado-para-encaminhamento-e-uso-geral.pdf [https://perma.cc/5QY3-HCQF].

239 "At the Conflito De Competência N° 144.922–MG, the Superior Tribunal de Justiça ruled that "the Federal Court is, therefore, competent to hear and judge demands related to the envi-

There are currently approximately thirty-five public civil actions in progress in the Federal Court of Minas Gerais involving the nominated "Samarco Case," whose volumes and attachments exceed 200, constituting more than 50,000 pages, including petitions, reports, expertise, and documents.[240] The lawsuits 69758-61.2015.4.01.3400 and 23863-07.2016.4.01.3800 concentrate on the main claims involving the dam failure, corresponding to the amounts of $4 billion and $39 billion, respectively.[241] In international environmental courts, there is no data on such a high claim amount.[242]

Challenged by the difficulty of delimiting the consequences of the dam rupture, several federal and state agencies, the Federal Prosecutor's Office, the Prosecutor's Office of the states, the representative of the affected population, the Federal Union, and the mining companies—which are all the potential stakeholders—came to a Preliminary Term of Transaction and Adjustment of Conduct ("TTAC") after several negotiating sessions. In the TTAC, the parties established objective conditions and parameters for hiring a body of experts to prepare the socio-environmental and socioeconomic diagnosis of the hazard to environmental interests, public health, and the economy, as well as the harm to affected communities.[243] This preliminary agreement was endorsed by the judge designated to preside over the adjudication procedure at its initial stage, which is the attempt to reconcile the parties.[244]

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ronmental impacts that have occurred and those that will still occur on the Rio Doce ecosystem, its mouth and on the coastal area. . . . In fact, the 12th Federal Court of the Judicial Section of Minas Gerais has better conditions to settle the controversies posed here, resulting from the environmental accident of Mariana, because besides being the Capital of one of the states most affected by the tragedy, the state already has under analysis other processes, aiming at not only the strict sense of environmental repair, but also the distribution of water to the population of the affected municipalities, among other measures, which will provide it, given a macroscopic view of the damage caused by the environmental disaster of the Fundão dam burst and the set of legal charges already directed at Samarco, to take more effective measures that do not risk being neutralized by other court decisions from different judgments, in addition to contemplating the largest number of those affected." S.TJ., Conflicto de Competência No. 144.922, Relator: Ministra Diva Malerbi, 22.06.2016. at 12, 13, 21, 22.

240 FREITAS, *supra* note 238, at 6.

241 *Id*.

242 To illustrate, the final amount of compensation agreed upon between the United States government and British Petroleum ("BP"), in the case of the 87-day Gulf of Mexico oil spill in 2010, was $20.8 billion (the equivalent of 70 billion reais), less than half of which the Federal Public Prosecutor postulated in the case of the Mariana tragedy. *See* FREITAS, *supra* note 238, at 6.

243 *Id.*

244 *Id.*

The agreement approved furnished legal and institutional conditions for complete socio-environmental and socioeconomic diagnoses to be produced by specialized and independent institutes with notorious technical training. The technical report must set the necessary support for the effective repair of damage caused by a dam's burst. According to the presiding judge,[245] the identification and quantification of the damage based on a group of independent experts have helped reduce the climate of distrust between the parties, making room for dialogue and the joint construction of a solution on the merits.

The idea of this preliminary agreement was the construction of a system (structured demand) based on three pillars (socio-environmental, socioeconomic, and monitoring axes of ongoing programs), all connected and managed by an advanced governance system.[246] Alongside these so-called "main actions," there are approximately sixty other public civil actions under the Minas Gerais State Federal Court Jurisdiction, each dealing with the Mariana dam burst.[247]

As per the terms of the decision approving the agreement,[248] the ultimate goal is, in fact, to reach a definitive agreement (on the merits), contemplating the full reparation of the damage and its multiple consequences and benefiting all parties. It is, therefore, a two-step consensus procedure: the first, which is currently underway, concerns the assessment of the damage caused and the establishment of programs to repair the damage to socioeconomic and socio-environmental interests; the second step is, after the time required to meet the first step, closure of the conflict with the actual compensation for the damage.

### iii. Remarks from the Case

The agreement on the Mariana dam burst was reached after the filing of the main public civil action that aimed to repair the damage caused by the burst of the Fundão dam in Mariana. Several high-level federal and state government officials—such as the Federal Attorney General and Minas Gerais and Espírito Santo state governors, as well as various state and federal agencies, federal and state prosecutors, a public defender—and the three min-

245 *Id.*

246 *Id.*

247 FREITAS, *supra* note 238, at 6.

248 J.F., Juízo Federal da 12ª Vara Civel/Agrária de Minas Gerais, Ação Civil Pública No. 69758-61.2015.4.01.3400, Relator: Mário de Paula Júnior, 05.11.2015, at 11.

ing companies responsible for the harmful event took part in the agreement.[249]

In fact, the agreement establishes a set of rules for long-term monitoring of damage repair and compensation programs, as there are no explicit deadlines for completing such programs.[250] In order to centralize the administration, monitoring, and governance of these programs, the agreement created a non-profit organization.

The programs are mostly remedial, and only those expressly indicated as such are deemed compensatory. The socio-economic and socio-environmental compensation measures are intended to respond to the impacts on which the recovery, mitigation, and remediation arising from the event are not feasible or possible, resulting in improvements in the socio-environmental and socioeconomic conditions of the affected areas.[251] Such compensatory programs can include, for instance, the recovery of water springs in different areas of the affected states.

Indeed, the agreement does not resolve those conflicts caused by the dam disruption but formulates rules for the long-term repair of damage and establishes mechanisms for monitoring the effectiveness of remedial programs. Many individual situations derive from this agreement and are resolved on a case-by-case basis by the judge responsible for conducting the court proceedings.

It is not, therefore, a procedure that is in accordance with the typical format of the U.S.-style ADR, which was adopted by the Brazilian legal system in 2010. There is no use of mediators specifically trained in the environmental field, nor is the procedure conducted in the conflict resolution centers recommended by the National Council of Justice and the Civil Procedure Code of 2015.

Neither were the principles and techniques of ADR explicitly adopted, even though it was legally possible because the New Procedure Code of 2015, as procedural law, can be applied immediately to pending procedures. Apparently, the agreement in question took the form of the legal context of the Term of Conduct Adjustment, in which the MP rules the procedure, whereby environmental wrongdoers will have little room to negotiate effectively. However, the Mariana dam breach conflict is not to be approached as a regular conflict as it encompasses a unique proce-

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249 Preliminary Term of Transaction and Adjustment of Conduct (TTAC) on the Mariana Dam burst case, *Commitment to Repair,* SAMARCO, https://www.samarco.com/reparacao/ [https://perma.cc/52E2-Z635] (last visited on Jan. 25, 2022).

250 *Id.*

251 *Id.*

dural nature. According to recent scholarly research, Mariana's dam breach is addressed as a conflict in which various damages with different consequences and degrees occur to different social groups.[252] In such cases, various groups will be affected by collective damage related to assorting degrees and modes. For this reason, an affected community is composed of multiple groups from different social segments with different perspectives on the conflict—even antagonistic ones.[253]

Indeed, in the Mariana case, several groups were injured by the disaster, such as residents of the thirty-five affected cities, fishermen who depended on the Doce River basin, indigenous people and Quilombolas in the region, and Mariana dam workers. The restoration of the environmental and social damage from the disaster will affect each of these groups differently.[254] In addition, the Mariana disaster created a polycentric collective conflict in which there are not simply plaintiffs or defendants at the two poles of the dispute. In fact, these disputes tend to have various interests under discussion that may, for example, be pointing in the same direction but in different ways. They may also be opposed to more than one claim and may, to the parties' satisfaction, make it impossible to fulfill another claim.[255] As a result, there are several positions of distinct subgroups that do not fit into a simplified model with a dichotomous plaintiff-defendant configuration.

For this reason, the prerogative of the MP to defend diffuse environmental interests should be viewed with reservations in such a case. In a conflict of this magnitude, there are conflicting interests that will not be adequately protected by a single representative.

One fact that can be considered, for instance, is the high level of pollution of the Doce River Basin, which has greatly damaged the environmental balance of the region and has consequently impacted all those who depended on it, such as fishermen and riverside communities.[256] On the other hand, the mining company Samarco is responsible for about 90% of Mariana's economy. A process that puts too much burden on Samarco, thus impeding the continuity of its activities, would harm workers whose source of

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252 Catharina Peçanha, Guilherme Lamego, Isaac Argolo, Jairo Sento-Sé & Thais Rossi, *O desastre de Mariana e a tipologia dos conflitos: bases para uma adequada regulação dos processos coletivos*, 278 Revista de Processo 264, 281 (2018).

253 *Id.*

254 *Id.* at 281–82.

255 *Id.* at 290.

256 *Id.* at 289.

income is directly linked to the mining company. This group is also part of the community affected by the damage, and it deserves guardianship.

As a result, these two interests are antagonistic and should not be represented by the same legal professional or institution. Thus, multi-representativeness is the most appropriate technique for the tutelage of the various groups involved and should be adopted in all polycentric disputes.[257]

In the specific case of the Mariana dam rupture, a first agreement was attempted without the participation of representatives of the affected communities, the Federal Public Ministry, or the States of Minas Gerais and Espírito Santo. A second agreement was made, which is the prevailing agreement approved by the judiciary—including the State and Federal MP offices and both the State and Federal Public Defender Offices (Defensoria Pública)—in order to represent the diffuse, collective, and individual interests of the communities affected by the dam burst.[258]

Those institutions are state-sponsored and are meant to represent the environmental diffuse, social, and individual interests of impoverished people affected by accidents. This last interest is more connected with the constitutional assignments of the Public Defender Office (Defensoria Pública), as it is entitled to represent the citizens that cannot afford a lawyer to represent them in the conflict. Also, the Federal MP should represent the interest of the affected indigenous population (Krenac People).

In this context, an agreement was signed to ensure the multi-representativeness of the affected communities through the participation of the MP and the Public Defender Office (Defensoria Pública). Due to the high number of people affected, this was a possible viable solution to reach a settlement, although it is also the most controversial point that arises from it. Many people represented by the MP and Defensoria Pública filed individual lawsuits with the court that approved the agreement.[259]

On the one hand, without these institutions, no agreement would be reached. Conversely, the attempt to simplify the settlement of the dispute is thwarted by the high number of complaints from individuals of the affected communities before the competent court. Perhaps this is the only best possible solution to this type of

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257 *Id.* at 290.

258 J.F., Juzio Federal da 12ª Vara Civel/Agrária de Minas Gerais, Ação Civil Pública n. 69758-61.2015.4.01.3400, Relator: Mário de Paula Júnior, 19.12.2019.

259 Interview with J. Mário Junior, Julyin Belo Horizonte, Brazil (July 10, 2019).

polycentric conflict with multiple and contradictory interests, which does not mean that the adjudicatory route and the caseload at the court will be eliminated.

Possibly, the path taken in the Mariana agreement was strongly influenced by the lack of a properly structured EDR center for resolving environmental conflicts within the judiciary or even before the administrative courts. In this regard, an EDR center equipped with trained mediators and available experts prepared to resolve scientific issues related to the conflict could have better attended to the particularities of a dispute as complex as that of Mariana's case, and it would have given a more satisfactory outcome to the involved parties.

## V. Comparative Law Observations

### A. *Common Law and Civil Law Traditions*

The civil law tradition that prevails in Brazil has always promoted adjudication as the form of dispute resolution that most ensures legal certainty to procedures. Like other jurisdictions within the civil law tradition, Brazil has built its civil procedure theory in the last century upon a formalistic approach, in which the civil process is a technical, rational institution centered on the figure of the judge. In a triangular relationship, the judge conducts and directs the procedure in order to guarantee equality between the parties and respect for the procedural rules pre-established by law.[260]

This purely formal theoretical elaboration of the civil process underwent a transformation at the time of the promulgation of the 1988 Federal Constitution, which enshrined an instrumental view of the process, placing procedural formalism at the service of constitutional values.[261] In this context, the judge is still the central figure in the process, and the process must be conducted in order to enable the materialization of constitutional values.[262]

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260 Daniel Francisco Mitidiero, *Bases Para Construção de um Processo Civil Cooperativo: o Direito Processual Civil no Marco Teórico do Formalismo Valorativo*, Universidade Federal do Rio Grande do Sul, Faculdade de Direito, Programa de Pós-Graduação em Direito 9, 21–22 (2007).

261 *Id.* at 23.

262 *Id.* at 24.

Such values instrumentalized by civil proceedings are, in sum: the rule of law, judicial review, and due process of law.[263] Passed shortly after the end of the dictatorial political regime that ruled the country from 1964, the 1988 Federal Constitution expressly regulated civil procedure to explicitly ensure fundamental procedural rights.[264]

When comparing the traditions of civil law and common law in relation to civil procedural law, we can see that both view the judge as the central figure of the process. However, a difference is evident: in common law, the law primarily derives from and is legitimized by judicial precedents, which, in turn, derive substantially from the procedural practice of the due process of law; in civil law, the law finds its clearest expression in a formal act emanating from the legislative branch—which legitimizes and limits the power of judges.[265] There are, therefore, two different modes of reasoning: one that finds the law from the judicial practice of the due process of law and another that takes the law formalized in the act of legislative power and applies it to a concrete case.

In both traditions, it is possible to identify an inverse movement in the formation of procedural law: in the civil law system, in principle, the rules come directly from the law, abstractly elaborated by the legislative power; in the common law system, the rules of procedural law are extracted from judicial practice. Therefore, both are characterized by the adoption of procedural models. The process of forming these models differs and brings the common law system closer to the primary focus in legal practice.

All of these cultural and political elements led the Brazilian legal system to aim for minimum procedural guarantees of the adjudicatory procedure. The adoption of more flexible and informal means only became part of the Brazilian legal reality much later, in 2015, with the enactment of the New Civil Procedure Code.[266]

Even though Brazil, in 2010, previously attempted to adopt ADR through the Ordinance 125 of the CNJ, due to Brazil's civil law context, Congress' approval of a statute meant actual incorpo-

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263 *Id.* at 37.

264 Constituição Federal art. 5 (Braz.).

265 Mitidiero, *supra* note 261, at 34.

266 On the basic norms of the Civil Procedure, Article 3, provides that, "[Section] 1[.] Arbitration is allowed, in accordance with statutory law. [Section] 2[.] The State must, whenever possible, encourage the parties to reach a consensual settlement of the dispute. [Section] 3[.] Judges, lawyers, public defenders and prosecutors must encourage the use of conciliation, mediation and other methods of consensual dispute resolution, even during the course of proceedings." *See* Lei No. 13.105, de 16 de março de 2015, Diario Oficial da União [D.O.U.] de 17.03.2015 (Braz.).

ration by the legal system and paved the way for its acceptance by the legal community. It cannot be denied that the main reason for the adoption of ADR in Brazil was the need for case relief in the courts and the longtime disbelief in the efficiency of the judiciary branch.

Considering the 40-year gap between the United States' adoption of ADR and Brazil's adoption of ADR, the theoretical elaboration of ADR in Brazil is still a work in progress. It is currently hard to say what the Brazilian version of ADR will be. So far, there is a great effort from the judiciary to implement programs to spread not only ADR procedures but also the idea of collaborative, consensus-based dispute resolution processes.[267]

In short, the idea is to promote the dissemination of the ideal of collaborative negotiation proposed by the ADR movement among legal professionals. Law schools are gradually incorporating courses that provide training for students regarding consensual dispute resolution skills,[268] given that legal teaching is so far only based on traditional civil law adjudication proceedings strongly attached to the adversarial model.

It should be noted that the implementation of ADR was initiated by the impulse of the judiciary. This branch, at first, centralized consensual dispute resolution through judicial centers created by Article 165 of the 2015 Civil Procedural Code.[269] With the seal of credibility of the judiciary, it seems that ADR is more likely to flourish in Brazil, even though the law already authorizes and encourages the consensual resolution of disputes in private settings.[270]

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267 *See Movement for Conciliation*, Conselho National de Justiça, https://www.cnj.jus.br/programas-e-acoes/conciliacao-e-mediacao/movimento-pela-conciliacao/ [https://perma.cc/4XL4-3AEU] (last visited Jan. 25, 2021).

268 *See Métodos de Resolução de Conflitos e Desenhos de Solução de Disputas (2017)*, USP, https://edisciplinas.usp.br/course/view.php?id=43078 [https://perma.cc/YS57-4BCG] (last visited Jan. 25, 2021).

269 "Art. 165. The courts are to establish judicial centers for consensual dispute resolution, responsible for holding conciliation and mediation sessions and hearings and for the development of programs aimed at assisting, guiding and encouraging the resolution of disputes by the parties themselves. § 1 The constitution and organization of the centers shall be defined by the respective court, in compliance with the rules of the CNJ (National Council of Justice)." *See* Lei No. 13.105, de 16 de março de 2015, Diario Oficial da União [D.O.U.] de 17.03.2015 (Braz.).

270 "Art. 175. The provisions of this Section do not exclude other forms of extrajudicial conciliation and mediation linked to institutional bodies or performed by independent professionals, and which may be regulated by specific laws. Sole paragraph. The provisions of this Section are applicable, when appropriate, to private conciliation and mediation chambers." *Id.*

It is, therefore, necessary to assimilate ADR into Brazilian culture in both public and private settings. The peculiarities of this assimilation, even given the natural creativity of Brazilian culture, will only be seen in the near future. So far, it is certain that without the assimilation of ADR ideas among legal professionals, such as the concept of a collaborative approach to negotiation, the CNJ reform will be ineffective.

### B. *ADR Results*

Differences in ADR results in Brazil and in the United States can be reflected in the numbers quite clearly. The settlement rate is not really known, but in civil cases, it was probably close to 66.7% in the United States between 2001 and 2002.[271] However, in Brazil, after a considerable improvement in 2019, the settlement rate was only 12.5%.[272] The Brazilian settlement rate had slightly declined over the three-year period from 2017 to 2019.[273]

In Brazil, the improvement of infrastructure for ADR is recent. The implementation of mediation centers by state courts has grown more than 100% since 2014, from 362 mediation centers in 2014 to 1,088 in 2018.[274] Together with CNJ's mediator training programs and policies to encourage consensual dispute resolution, settlement rates are expected to increase over the coming years, although it is not possible to predict how explosive this growth will be and how the legal community will assimilate the concepts and legal culture of ADR.

### C. *EDR*

Regarding EDR, Brazil and the U.S. have bold differences in where conflict resolution occurs. As seen in Section III(E)(i), Vermont was the first U.S. state—and Hawaii the second—reported to have a statewide judicial environmental court, and conflicts are

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271 Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009).

272 The settlement rate comes from a comparison of the total number of decisions that put an end to lawsuits. *See Justica em Numeros 2020*, CONSELHO NATIONAL DE JUSTIÇA 1, 6 (2020), https://www.cnj.jus.br/wp-content/uploads/2020/08/WEB-V3-Justi%C3%A7a-em-N%C3%BAmeros-2020-atualizado-em-25-08-2020.pdf [https://perma.cc/4G62-GESS].

273 *Id.* at 171.

274 *Id.*

mostly resolved by administrative tribunals. Brazil, on the other hand, has not yet fully considered the possibility of referring EDR to administrative tribunals, although it is permitted by the Mediation Act of 2015.

In Brazil, environmental conflicts are predominantly solved within the court system by general jurisdiction judges or specialized environmental courts. Consensual dispute resolution can take place within the pre-trial *adjustment of conduct* proceeding led by the MP and submitted for judicial approval. Also, once an environmental lawsuit is filed, the judge can refer the conflict to ADR/EDR procedures, like mediation, before proceeding with litigation steps. Whichever procedure is chosen, participation and approval by the MP are mandatory, as it holds the function of watching over diffuse environmental interests.

Therefore, the Brazilian EDR system differs substantially from the U.S. system, as it establishes mandatory and centralizing participation of the MP in all procedures that potentially deal with environmental interests. Even when government agencies that hypothetically represent public interests are negotiating over an environmental matter, no agreement can be enforced without the MP's approval.

As it turns out, the 1988 Federal Constitution reshaped the MP as a powerful totem of diffuse environmental interests, but it did not stimulate direct popular participation in environmental conflicts. Even the participation of NGOs is not remarkable, as we can conclude from the Mariana case analysis.

In fact, the Mariana case well exemplified the traditional configuration of the resolution of environmental conflicts in Brazil, still strongly influenced by the tradition established by the legal advent of "Term of Conduct Adjustment" (*Termo de Ajustamento de Conduta*).[275] This legal context seems to be based on the adversarial paradigm according to which the MP defends diffuse environmental interests in the face of their violators, representing the interests of various groups involved in environmental conflicts. Indeed, the MP has the legal position to demand that the violating part of environmental law adjusts to what the MP understands to be the best option for the satisfaction of diffuse environmental interests. This prerogative to define the diffuse interests and also the power to sue potential violators tends to lead to the polarization of interests typical of the adversarial model.[276]

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[275] *See* Sant'Anna, *supra* note 219, at 28.

[276] Lima, *supra* note 227, at 202.

As in the Mariana case, the resolution of environmental conflicts, solely based on the representation of affected parties' interests only by bodies designated by law to do so (e.g., the MP), can leave a legacy of many dissatisfied citizens, overloading the judiciary with litigation. However, one cannot deny the importance of the representative system of interests by parties designated by law was created to enable the protection of these interests, taking into account the complexity of social life.

Even with NGOs, there is a representation of the interests of members by the entity itself in a given conflict of interest. However, NGOs represent the interests of specific social groups, such as fishermen or workers in the mining sector, and the equal participation of such groups at a negotiating table is likely to provide legitimacy to the eventual agreement. In addition to NGOs, it is necessary to improve the system to allow the direct participation of some groups in the negotiation of environmental conflicts, such as indigenous peoples and remaining Quilombola groups. There is no doubt that such an extension would give greater legitimacy to environmental agreements, which potentially would reduce the number of disputes to be solved in court through adjudication procedures.

The question that remains is how to make an EDR system feasible, taking into account all of the legal peculiarities of Brazilian law in order to guarantee a quick resolution to environmental conflicts that are as legitimate as possible. On this path, the great challenge is to reconcile the leading role of the MP in the representation of diffuse environmental interests in Brazil with the right of direct participation by groups of vulnerable people who are not satisfactorily represented by the public bodies designated by law for this purpose.

Certainly, the proper structuring of EDR centers by the judiciary branch itself and/or within administrative agencies, in which the techniques and principles of ADR are put into practice by professionals specifically prepared to handle environmental conflicts, is the way in which a new concept of environmental dispute resolution can be translated into the Brazilian legal system. It is, therefore, necessary to go beyond the legal framework of ADR in Brazil in order to build a unique EDR system for the country.

In fact, the assimilation of the ADR/EDR legal concept can enhance the Brazilian dispute resolution system, as far as EDR expands the possibilities for consensus by ensuring parity for the parties and a constructive approach to the conflict when compared to

the "Term of Adjustment of Conduct" tradition.[277] The combination of protagonists of EDR can aggregate a broader approach to conflict resolution and gain parties' legitimacy to the solution. These protagonists are the MP, ensuring the observance of diffuse interests, and the mediator, ensuring an impartial negotiation among various groups involved in a given polycentric environmental conflict, whether represented by public bodies; NGOs; or direct participation.

Additionally, taking a U.S. system that relies on administrative agencies to lead EDR initiatives as a template, Brazil must still work on structuring the environmental agencies so that they are fully capable of carrying out EDR processes and, thus, be new options for the judicial EDR system. As a result, both public participation and the right to information disclosure on environmental conflicts can be effective beyond the enforcement of the environmental law itself.

## VI. CONCLUSION

Coming to the end of this research, it is clear that, in Brazil, the adoption of ADR, which started with Ordinance 125 enacted by the CNJ and the subsequent promulgation of the 2015 Civil Procedure Code by the Brazilian Congress, is mostly motivated by the need to alleviate caseload in the courts and to improve the judiciary's public image. As already shown, since 2015, there has been a slight increase in the number of settlements in court proceedings; however, the improvement in the effectiveness and speed of dispute settlement has not yet become noticeable in the legal community.

Brazil still needs to pave its own path toward the practice of collaborative dispute resolution, which cannot be done without a change in the cultural mindset and legal education. Without that, the introduction of ADR can end up ineffective.

In relation to EDR, despite the introduction of new ways to conduct dispute resolution in recent years, such as mediation, the MP still centralizes the proceedings regarding environmental matters, leaving little room for other social actors, such as NGOs and affected communities, to directly participate in the steps of deci-

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[277] *Id.*

sion-making processes. This was a recurring criticism of the EDR procedure arising from the Mariana dam burst.

At this point, the great gain for Brazilian democracy by the expansion of the functions of the MP, carried out by the 1988 Federal Constitution, is not to be denied. However, the outstanding performance of the MP service cannot overshadow the importance of popular direct participation at negotiating tables and the exercise of the right of information disclosure.

The "Term of Conduct Adjustment" is the first legal institution to allow the negotiation of diffuse environmental interests in the Brazilian legal system. However, part of the doctrine criticizes the fact that there is no equality among negotiating parties, as the MP has the legal authority to demand that the violating part of environmental law adjusts to what the MP understands to be the best option for the satisfaction of diffuse environmental interests.

Therefore, the mediation process, in which the negotiation on diffuse environmental interests is legally allowed, seems to be appropriate to EDR, as far as it enlarges the possibilities of consensus by ensuring the parties' parity and a constructive approach to the conflict when compared to the "Term of Conduct Adjustment." The figure of the impartial mediator is, therefore, essential to add a broader approach to conflict resolution and to advance the parties' legitimacy in the solution.

Due to the broad protections created by the environmental law in Brazil and strongly inspired by the precautionary principle, the exercise of regulatory power by agencies becomes a complex task that has little effect in practice, mainly relating to public participation and information disclosure. For this reason, environmental regulations are often reviewed by the courts that, due to the lack of technical apparatus to deal with the complexity of environmental lawsuits, take too long to come to a final decision, thus weakening the enforcement of environmental law.

It has to be pointed out that the enhancement of Brazilian legal instruments to improve environmental law enforcement must not be a mere copy of U.S. experiments. The U.S. experiments are only an inspirational starting point. The introduction of new ways to approach environmental conflicts must come along with the improvement of agencies' infrastructure and legal power. Also, educational programs can work on formal and adversarial legal Brazilian culture in order to demonstrate the advantages of a pragmatic and collaborative approach to dispute resolution.