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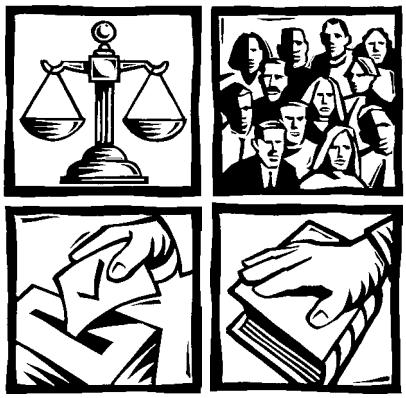
ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE



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ABOUT THIS PUBLICATION

This guide is intended to help practitioners make informed decisions with regard to incorporating alternative dispute resolution (ADR) in rule of law programs and other conflict management initiatives. While the primary focus is on the advantages and limitations of introducing ADR within rule of law programs, the guide also discusses how ADR can advance other development objectives. The views expressed are those of the authors and do not necessarily reflect U.S. government policies.

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ACKNOWLEDGMENTS

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ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE

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I. INTRODUCTION

During the past decade, USAID has supported programs throughout the world to facilitate the development of legal systems and promote civil society. They seek to stabilize developing societies and facilitate economic development by strengthening civil structures, improving access to justice, and reforming judicial systems.

USAID's work in promoting the rule of law in developing and transitional societies over the last decade has led to an interest in the use of alternative dispute resolution, or "ADR." Several reasons underlie this interest. ADR is touted as more efficient and effective than the courts in providing justice, especially in countries in which the judiciary has lost the trust and respect of the citizens. Moreover, ADR is seen as a means to increase access to justice for populations that cannot or will not use the court system, to address conflicts in culturally appropriate ways, and to maintain social peace.

With the spread of ADR programs in the developed and developing world, creative uses for and designs of ADR systems are proliferating. Successful programs are improving the lives of individuals and meeting broad societal goals. There is a critical mass of ADR experience, revealing important lessons as to whether, when, and how to implement ADR projects.

Drawing on this experience, this guide is intended to provide an introduction to the broad range of systems that operate under the rubric of ADR. It is designed to explore and clarify the potential uses and benefits of ADR and the conditions under which ADR programs can succeed. It is written to help project designers decide whether and when to implement ADR programs in the context of rule of law assistance or other development initiatives. The guide is also explicit about the limitations of ADR programs, especially where they may be ineffective or even counterproductive in serving some development goals.

With the caveat that data systematically evaluating ADR programs both in the United States and abroad is hard to find, we believe valid conclusions can be drawn from the evidence we have been able to collect and review, as well as from CMG's and our advisory team's experience designing and managing ADR programs around the world.[1] It is important to note that the primary focus of the guide (and therefore of the research) is on the uses of ADR related to the rule of law; other applications of ADR are discussed but not as thoroughly explored.

This guide reflects a broad review of English and Spanish language ADR literature pertaining to developing world experience. Relevant documents are summarized in the working bibliography, Appendix D. The guide also incorporates key observations in the course of field assessments in Bangladesh, Bolivia, South Africa, Sri Lanka, and Ukraine, which are more fully described in the case studies, at Appendix B. A more detailed description of our research methodology is contained in Appendix C. A taxonomy of ADR at Appendix A provides definitions of key terms and a framework for understanding the basic and hybrid ADR systems that have emerged. The matrix found in Appendix E highlights central issues relevant to dispute resolution and potential solutions.

[1] CMG's Advisory Group of ADR and conflict management experts includes Professors Frank Sander and David Smith of Harvard Law School; Robert Ricigliano, CMG Executive Director; Diana Chigas, CMG Regional Director; and Antonia Handler Chayes, CMG Senior Advisor. The Group was called upon to provide advice at key points in the project. Their role, as well as the composition and role of others on the CMG project team, are described in Appendix C.

II. KEY OBSERVATIONS

Highlighted below are a number of the key observations that are explored in greater depth in this guide.

- ADR programs cannot be a substitute for a formal judicial system. ADR programs are instruments for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in legal and social norms. However, ADR programs can complement and support judicial reforms.

- ADR programs can increase access to justice for social groups that are not adequately or fairly served by the judicial system—they can also reduce cost and time to resolve disputes and increase disputants' satisfaction with outcomes.

- When courts are systematically biased against women, ADR may be able to improve women's access to justice, especially when discrimination against women inherent in local norms or traditional dispute resolution mechanisms can be overcome in the new ADR mechanism.

- ADR programs can support not only rule of law objectives, but also other development objectives, such as economic development, development of a civil society, and support for disadvantaged groups, by facilitating the resolution of disputes that are impeding progress toward these objectives.

- Before developing an ADR program, it is critical to determine whether ADR is appropriate for meeting development objectives, or whether establishment of rights, strengthening of the rule of law, and/or creating a more even balance of power among potential users should precede the use of ADR.

- If ADR is appropriate in principle, program designers must assess background conditions to ensure that ADR will be feasible in practice. These include political support, institutional and cultural fit, human and financial resources, and power parity among potential users.

- If ADR appears feasible, program designers should ensure that the ADR program meets key preparation criteria— needs assessment and identification of goals, participatory design process, adequate legal foundation, and effective local partner.

- In addition to meeting preparation criteria, program designers should also ensure that the ADR program meets implementation criteria— effective selection, training and supervision of ADR providers, financial support, outreach, effective case selection and management, and program evaluation procedures.

III. WHAT IS ADR?

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or minitrials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems.

Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation, and conciliation programs are non-binding, and depend on the willingness of the parties to reach a voluntary agreement. Arbitration programs may be either binding or non-binding. Binding arbitration produces a third party decision that the disputants must follow even if they disagree with the result, much like a judicial decision. Non-binding arbitration produces a third party decision that the parties may reject.

It is also important to distinguish between mandatory processes and voluntary processes. Some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate prior to court action. ADR processes may also be required as part of a prior contractual agreement between parties. In voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

These forms of ADR, and a variety of hybrids, are described in more detail in Appendix A: Taxonomy of ADR Models from the Developed and Developing World. The guide uses the general term, ADR, when referring to conditions or programs that may affect or include various types of ADR, but will refer to particular types of ADR—negotiation, conciliation, mediation, or arbitration—whenever possible.

A. A Brief History of ADR [2]

Dispute resolution outside of courts is not new; societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.

The ADR movement in the United States was launched in the 1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an over-crowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress, and state governments. For example, in response to the 1990 Civil Justice

[2] This history is drawn from a number of sources, including: Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes (2d ed., Little Brown and Co., New York: 1992), pp. 3-12; and Elizabeth Plapinger and Donna Stienstra, ADR and Settlements in the Federal District Courts: A Sourcebook for Judges and Lawyers (Federal Judicial Center and CPR Institute for Dispute Resolution: 1996), pp. 3-13.

Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems, and increased interest in ADR by disputants has made the United States the richest source of experience in court-connected ADR.

While the court-connected ADR movement flourished in the U.S. legal community, other ADR advocates saw the use of ADR methods outside the court system as a means to generate solutions to complex problems that would better meet the needs of disputants and their communities, reduce reliance on the legal system, strengthen local civic institutions, preserve disputants' relationships, and teach alternatives to violence or litigation for dispute settlement. In 1976, the San Francisco Community Boards program was established to further such goals. This experiment has spawned a variety of community-based ADR projects, such as school-based peer mediation programs and neighborhood justice centers.

In the 1980s, demand for ADR in the commercial sector began to grow as part of an effort to find more efficient and effective alternatives to litigation. Since this time, the use of private arbitration, mediation and other forms of ADR in the business setting has risen dramatically, accompanied by an explosion in the number of private firms offering ADR services.

The move from experimentation to institutionalization in the ADR field has also affected U.S. administrative rule-making and federal litigation practice. Laws now in place authorize and encourage agencies to use negotiation and other forms of ADR in rule-making, public consultation, and administrative dispute resolution.

Internationally, the ADR movement has also taken off in both developed and developing countries. ADR models may be straight-forward imports of processes found in the United States or hybrid experiments mixing ADR models with elements of traditional dispute resolution. ADR processes are being implemented to meet a wide range of social, legal, commercial, and political goals. In the developing world, a number of countries are engaging in the ADR experiment, including Argentina, Bangladesh, Bolivia, Colombia, Ecuador, the Philippines, South Africa, Sri Lanka, Ukraine, and Uruguay. The experience of many of these countries provides important lessons drawn upon in this guide.

B. The Characteristics of ADR Approaches

Although the characteristics of negotiated settlement, conciliation, mediation, arbitration, and other forms of community justice vary, all share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems.

1. Informality

Most fundamentally, ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems. It is also important for reducing the delay and cost of dispute resolution. Most systems operate without formal representation.

2. Application of Equity

Equally important, ADR programs are instruments for the application of equity rather than the rule of law. Each case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that seem equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedent or implement changes in legal and social norms. ADR systems tend to achieve

efficient settlements at the expense of consistent and uniform justice.

In societies where large parts of the population do not receive any real measure of justice under the formal legal system, the drawbacks of an informal approach to justice may not cause significant concern. Furthermore, the overall system of justice can mitigate the problems by ensuring that disputants have recourse to formal legal protections if the result of the informal system is unfair, and by monitoring the outcomes of the informal system to test for consistency and fairness.

3. Direct Participation and Communication between Disputants

Other characteristics of ADR systems include more direct participation by the disputants in the process and in designing settlements, more direct dialogue and opportunity for reconciliation between disputants, potentially higher levels of confidentiality since public records are not typically kept, more flexibility in designing creative settlements, less power to subpoena information, and less direct power of enforcement.

The impact of these characteristics is not clear, even in the United States where ADR systems have been used and studied more extensively than in most developing countries. Many argue, however, that compliance and satisfaction with negotiated and mediated settlements exceed those measures for court-ordered decisions. The participation of disputants in the settlement decision, the opportunity for reconciliation, and the flexibility in settlement design seem to be important factors in the higher reported rates of compliance and satisfaction.

IV. WHAT CAN ADR DO? GOALS AND POSSIBLE USES OF ADR

ADR systems may be designed to meet a wide variety of different goals. Some of these goals are directly related to improving the administration of justice and the settlement of particular disputes. Some, however, are related to other development objectives, such as economic restructuring, or the management of tensions and conflicts in communities. For instance, developing an efficient, consensual way to resolve land disputes may be critical to an AID mission not because of its commitment to strengthening the rule of law, but because land disputes threaten the social and economic stability of the country. Likewise, efficient dispute resolution procedures may be critical to economic development objectives where court delays or corruption inhibit foreign investment and economic restructuring.

Within the context of rule of law initiatives, ADR programs can

- Support and complement court reform
- By-pass ineffective and discredited courts
- Increase popular satisfaction with dispute resolution
- Increase access to justice for disadvantaged groups
- Reduce delay in the resolution of disputes
- Reduce the cost of resolving disputes

In the context of other development objectives, ADR programs can

- Increase civic engagement and create public processes to facilitate economic restructuring and other social change
- Help reduce the level of tension and conflict in a community
- Manage disputes and conflicts that may directly impair development initiatives

Experience suggests that ADR programs can have a positive impact on each of these development objectives, although the extent of the impact is very much dependent on other conditions within the country and the fit of the design and implementation of the program with the development objectives. (See the table, "Developing an ADR Program.")

The following matrix matches the general ADR systems with the purposes and development objectives to which they are best suited. Although any one ADR system can be designed in a variety of ways, this matrix may provide general guidance on which ADR model to choose.

A. How Can ADR Help Accomplish Rule of Law Objectives?

1. ADR Can Support and Complement Court Reform

Use ADR When

- Case backlog impairs court effectiveness
- Complex procedures impair court effectiveness
- Illiterate or poor cannot afford the courts or manage their way within them
- Small informal systems can better reach geographically dispersed population

Do Not Use ADR When

- The courts' reputation is sufficiently tainted to suggest that independent programs may enjoy more popular support.

ADR programs can support a mission objective to reform the court system in several ways. ADR can be used by the judiciary to test and demonstrate new procedures that might later be

COMPARING ADR AND COURT PROCEDURES:
HOW LIKELY ARE THEY TO ACHIEVE DISPUTANTS' GOALS?

Disputant's Goals	**ADR Procedures**			**Court Procedure**
	Mediation/ Conciliation	**Non-Binding Arbitration**	**Binding Arbitration**	**Adjudication**
Minimize Costs	3	2	1	0
Resolve Quickly	2	2	3	0
Maintain Privacy	2	2	2	0
Maintain Relationships	3	2	1	0
Involve Constituencies	3	1	1	0
Link Issues	3	1	1	0
Get Neutral Opinion	0	3	3	3
Set Precedent	0	0	1	3

Key:
3 = Highly likely to satisfy goal
2 = Likely to satisfy goal
1 = Unlikely to satisfy goal
0 = Highly unlikely to satisfy goal

This table is intended to give a general sense of the relative advantages of different dispute resolution procedures under a wide range of conditions. The likelihood that a procedure will satisfy a goal in a given case depends on the details of its design, the skill and perceived legitimacy of the dispute resolution provider, and the behavior and beliefs of the disputants.

Adapted from Frank Sander and Stephen Goldberg, "Fitting the Forum to the Fuss: A User-friendly Guide to Selecting an ADR Procedure, "*Negotiation Journal,* January 1994, pp. 49-68.

ADR Center as Dispute Clearinghouse In Puerto Rico

The San Juan Dispute Resolution Center in Puerto Rico is an interesting model for using an ADR service center to increase access to dispute resolution systems by directing disputes to appropriate fora. The center, which has been operating since 1983, acts as a clearinghouse for complaints, providing advice to users and referrals to other agencies and courts, as well as mediation services for appropriate disputes. The center provides more than 2000 referrals each year, and use of the center has increased regularly since its founding. The center claims to have had a significant impact on reducing court backlogs. Although the lack of documentation of the center precludes clear conclusions about its success, the concept of using a mediation center to assess cases, provide advice, make referrals, and mediate appropriate disputes is attractive for reaching poor and uneducated populations who may be intimidated by formal court systems. (See Marques, 1994.)

extended to or integrated with existing court procedures. ADR systems can be created as an option within the judicial system, either associated with the courts as a way of managing existing caseloads, or separate from the courts to provide dispute resolution for conflicts or constituencies not well served by the courts.

If the main problems with the courts are complex and inappropriate procedures, rather than institutional corruption or bias, ADR programs can provide streamlined procedures to accelerate case disposition. In some cases, these procedures may serve as models that can later be incorporated into formal court procedures. If so, court-annexed ADR may turn out to be a catalyst for more extensive court reform. Court-annexed ADR programs in Argentina, Colombia, and Uruguay are evolving as an integral part of programs for overall court reform (Blair, et al. 1994; Blair and Hansen 1994; see also McHugh 1996).

ADR programs can also be designed to deal with cases that could enter the court system but may be resolved more efficiently (and perhaps with greater satisfaction) through ADR procedures. In these cases, ADR programs can complement court reform by reducing caseloads. They can also complement court reform by increasing access to dispute resolution services for disadvantaged groups (e.g., urban neighborhood and rural centers), providing legal advice to members of disadvantaged groups on whether and how to use the court system, and/or dealing with specialized cases that the courts are not well-equipped to handle (e.g., complex commercial disputes, labor-management disputes).

2. ADR Can By-pass Ineffective or Discredited Courts

Use ADR When

- Working with or within the existing judicial system is unlikely to be effective or receive popular support.
- Complex or technical disputes can be handled more effectively by specialized private ADR systems.

Do Not Use ADR When

- Official opposition is sufficiently strong and controlling to suppress competing programs. In these cases, links to the official judicial and legal system may be necessary for success.

When the civil court system has so many institutional weaknesses and failures (inadequate resources, corruption, systemic bias) that there is no near-term prospect of successful civil court reform, ADR programs may be an appropriate way to provide an alternative forum.

a) Justice for populations not well-served by the courts

In Bangladesh, India, and South Africa, ADR programs were developed to by-pass corrupt, biased, or otherwise discredited court systems that could not provide reasonable justice for at least certain parts of the population (blacks, the poor, or women). In Sri Lanka, the reputation of the courts is relatively good, but they were ineffective in resolving many local and small disputes because of high costs and long delays. The Mediation Boards there have evolved as a substitute for the courts, but enjoy the support of the judicial system. Bolivia, Haiti, Ecuador, and El Salvador are developing systems involving government support for independent, local, informal dispute resolution panels to serve parts of the population for whom the courts are ineffective (Davis and Crohn, 1996).

Some ADR programs function as the primary institutions for resolving civil disputes, and have effectively replaced or preempted courts. Taiwan and China have the best examples of broadly and deeply institutionalized, community-based ADR (Huang 1996; Jandt and Pedersen 1996b). In both countries, local government officials and well-respected citizens act as conciliators, mediators, and arbitrators for the vast majority of local disputes. Taiwan's ADR system appears to be growing more popular over time, despite social changes that have begun to erode Confucian norms of deference to local notables.

In China, there are now more than one million village-based People's Mediation Courts, which were created by the 1982 constitution. Participation in mediation is voluntary in principle and disputants can take their cases to court if mediation fails. The PMCs handle more than seven million civil cases each year, including family disputes, inheritance issues, land claims, business disputes, and neighbor conflicts. These ADR institutions have evolved not as attempts to substitute for a failing court system, but rather as an outgrowth of traditional, local institutions that have long functioned as alternatives to the civil courts.

b. Efficient and satisfactory resolution in highly-technical, specialized areas

Specialized ADR programs focused on particular types of technical or complex disputes can be more effective and produce better settlements than courts. In the United States, specialized ADR programs deal with construction, environmental, and patent disputes, among others. These programs act as substitutes for the courts, which may not have the expertise necessary to make the best decisions. In developing countries, specialized ADR programs for commercial disputes are being tried in Uruguay, Thailand, Bolivia, and Ukraine. Private labor-management ADR in South Africa has been so successful that the government has adopted mediation and arbitration as the primary mechanisms for resolving labor-management disputes.

c. *Ethnically-based, public and family disputes*

ADR programs may also be more effective than the courts for addressing particular types of disputes, such as ethnic conflicts, public environmental disputes, or family disputes. In such cases, specifically designed ADR programs may create more attractive alternatives to the courts even when the courts are functioning reasonably well.

National government agencies may develop issue-specific ADR systems designed to precede or parallel formal administrative hearings. In the Philippines, the Department of Environment and Natural Resources has created provincial multi-stakeholder committees to receive and resolve land claims by indigenous peoples (NRMP 1993). In Malaysia, national government officials are being trained by the Department of National Affairs to manage inter-ethnic disputes that arise in the course of their work (Othman 1996).

ADR Moves from Outside to Inside Government in South Africa

The experience in South Africa indicates that ADR systems may be implemented initially as a substitute for a poorly functioning formal dispute resolution system, but may later be adopted as part of a widespread reform process. Prior to and during the transition in government, many NGOs, financed by numerous donors, undertook ADR efforts for a variety of purposes throughout South Africa. One of the earliest and most effective NGOs was the Independent Mediation Service of South Africa (IMSSA), which started in the early 1980's to focus on resolving labor-management disputes.

Later, the African Centre for the Constructive Resolution of Disputes (ACCORD), the Vuleka Trust, the Community Law Center, the Wilgespruit Fellowship Centre, the Community Dispute Resolution Trust (CDRT), the Institute for Multi-party Democracy (MPD), and the Community Peace Foundation (CPF), among others, implemented a variety of training, mediation, and community reconciliation programs to help manage community tension, resolve neighborhood disputes, train community leaders in negotiation and conflict management techniques, and establish neighborhood justice centers.

After the peaceful transition of power, the government saw these ADR programs as models for new governmental dispute management mechanisms. The Commission for Conciliation, Mediation, and Arbitration (CCMA), established to resolve labor disputes, has been patterned after the success of IMSSA (and is directed by Charles Nupen, the founder and former president of IMSSA). The Department of Justice is planning to establish local community courts, and to create a system of family mediation boards to help resolve local and family disputes. The Department of Land Affairs has created the National Land Reform Mediation Panel to help resolve disputed land claims. The Department of Public Works, the Department of Mineral Affairs, and several other national and state agencies are considering their own dispute resolution mechanisms.

Although many of the original NGOs are now struggling to adapt to a situation in which government agencies have taken on many of their responsibilities and have hired many of their experienced personnel, the impact of the NGO ADR community on the transitional government has been one of the most important and lasting effects of the NGO programs.

Although the NGO programs were established initially to provide a substitute for ineffective, biased, and corrupt government judicial structures, they became laboratories for a new national system of justice. The impact on social change of the variety of ADR programs, while difficult to measure, has been important in South Africa. As Roelf Meyer, the lead National Party negotiator, noted at the end of the transition negotiations, the success of those negotiations and the success of private ADR services helped redirect the country from a culture of violence to a culture of negotiation. (See South Africa Case Study.)

3. ADR Can Increase Satisfaction of Disputants with Outcomes

Use ADR When

- High cost, long delay, and limited access undermine satisfaction with existing judicial processes
- Cultural norms emphasize the importance of reconciliation and relationships over "winning" in dispute resolution
- Considerations of equity indicate that creativity and flexibility are needed to produce outcomes satisfactory to the parties
- Low rates of compliance with court judgments (or a high rate of enforcement

actions) indicate a need for systems that maximize the likelihood of voluntary compliance

- The legal system is not very responsive to local conditions or local conditions vary

Do Not Use ADR When

- Cultural norms suggest a preference for formal, deterministic solutions

- Cultural norms are discriminatory or biased and would be perpetuated in the ADR system

Although increasing the satisfaction of disputants is one of the development objectives identified by earlier USAID studies, user satisfaction is often an indirect proxy for more focused concerns such as cost, access, and delay. The impact of ADR programs on these development objectives is addressed in other sections. Beyond these aspects, disputant satisfaction is also affected by more subtle factors, such as the creativity of outcomes, the impact of the ADR process on the ongoing business or personal relationships, and disputant confidence that the system is responsive to their needs. ADR programs can have a positive influence on all of these components of disputant satisfaction.

When evaluations of ADR systems have included an assessment of overall user satisfaction, the ADR systems have generally compared favorably to formal legal structures. In Sri Lanka, for example, satisfaction with the Mediation Board system is quite high. In addition to the accessibility of the system, and the low cost, disputants indicate that the way they are treated, the disputants' control of the process, and the community-based nature of the system are all factors leading to high satisfaction. Satisfaction is also reflected in the settlement and compliance rates. Nearly 65% of all mediated cases are settled, and compliance rates, while not accurately measured, are reported to be quite high. The chairman of one Mediation Board indicated that compliance with debtor dispute settlements, which constitute a large proportion of the cases, is nearly 95%. The monthly caseload of the Boards more than doubled between the first and third years of operation, indicating high satisfaction. (See Sri Lanka Case Study.)

Likewise, in Bangladesh, almost all users indicate that they prefer mediation to the formal court system and would use the mediation process again. In South Africa, users of commercial labor-management mediation and arbitration cite the positive impact of ADR, relative to litigation, on ongoing labor-management relations. And throughout Southeast Asia, disputants cite a general cultural preference for informal dispute resolution because of its ability to help reconcile and preserve personal and commercial relationships. (See Case Studies; Jandt and Pederson, 1996.)

In the United States, many users of ADR services cite the flexibility and creativity of the process, and note that the settlements are generally better for both parties than decisions produced through litigation. This advantage is reflected in the comments of users in Sri Lanka and Bangladesh who note the benefits of a local mediator who understands local conditions, knows the parties, and can help guide a settlement that fits the situation. (See Case Studies.)

4. ADR Programs Can Increase Access to Justice for Disadvantaged Groups

Use ADR When

- Use of formal court systems requires resources unavailable to sectors of the population

- Formal court systems are biased against women, minorities, or other groups

- Illiteracy prevents part of the population from using formal court systems

- Distance from the courts impairs effective use for rural populations

Do Not Use ADR When

- Disadvantaged groups need to establish rights in order to reduce power imbalances

- Local elites have the power to control program implementation

- A number of barriers to access to the justice system can be addressed effectively in an ADR program

a. Reducing the cost to parties

Many poor are denied access simply because they cannot afford to pay the registration and representation fees necessary to enter the formal legal system. Since cost is probably the largest barrier to formal dispute resolution for many people in developing countries, that issue is addressed separately in Section VI below.

b. Reducing the formality of the legal process

Several studies indicate that the formality of court systems intimidates and discourages use. In India and Bangladesh, for example, the court requirement of legal representation is both costly and intimidating for people who may not be comfortable interacting with lawyers from a different caste or class. In these and other countries, users of ADR programs have expressed a preference for submitting cases to mediators who are local residents and understand the local community. In Sri Lanka, users expressed their satisfaction at having their "stories" heard in an informal process. All of these factors contribute to greater usage of and preference for informal processes. (See Case Studies.)

c. Overcoming the barrier of illiteracy

In some countries, access is effectively denied because the formal system requires a level of literacy that many in the country do not have. In these countries, the formal legal processes are especially intimidating for large numbers of illiterate citizens. In Bangladesh, the Madaripur Legal Aid Association was originally established to provide assistance and representation for the poor and illiterate. Their services are now dominated by their mediation program, in part because they found mediation to be more effective and accessible for this part of the population. ADR programs can be designed to rely on oral representations. Oral agreements may be enforced by traditional means of community peer pressure, eliminating the need for written documentation or formal enforcement mechanisms. (See Bangladesh Case Study.)

d. Serving rural populations

Access may be impaired because the courts are located far from the homes of those who need them. One advantage of ADR programs is the ability to set them up with relatively little cost to local communities. The lok adalat ("people's court") system in India succeeded in reaching a large part of the population because they were located in villages (see Whitson, 1992). Similarly, the Mediation Boards in Sri Lanka are distributed throughout rural villages, as well as larger cities and towns. In China, more than one million People's Mediation Centers are located in villages and serve parts of the population that could not easily reach existing courts (see Jandt and Pederson, 1996).

e. Counteracting discrimination and bias in the system

When courts are systematically biased against particular groups, such as minorities or women, ADR programs can sometimes help provide some measure of justice. In Bangladesh, for example, women are often poorly protected by

the courts. The MLAA mediation program has recruited women to serve on mediation panels in the village mediation program. Women who have used the system believe that they receive better protection and more compensation from this system than from the formal court system. (See Bangladesh Case Study.)

In many circumstances, however, ADR will not improve access for discriminated-against populations and may, some argue, even worsen their situation. Informal dispute resolution services may offer "second-class" justice to users, particularly minorities and women who may be subject to bias in ADR programs as well as in the formal judicial system. Informal dispute resolution systems are ineffective at changing policy and systemic injustice since they deal with individual cases and do not establish legal precedent. (See Whitson, 1992.) Where, as in Bangladesh, the ADR program design is able to address the issue of bias through recruitment of minority mediators and thorough training, justice can be improved for these disadvantaged groups. (See Bangladesh Case Study.)

f. Public outreach to increase awareness of ADR

In some situations, the judicial system or new ADR mechanisms may have changed in ways that could increase access, but the disadvantaged may be unaware of the changes because of inadequate public outreach. If one of the goals of the ADR program is to increase access to justice for a particular target population, the program design must include adequate means for reaching that population. Stating the goal is not sufficient, and in the absence of specific design focus, there is a risk that the system can be co-opted by elites. For example, one of the original goals of the Colombian Conflict Resolution Project was to provide low cost services to the disadvantaged. The client base of the Bogota Chamber of Commerce, however, through which much of the program was managed, was comprised of business elites. The program became focused more on providing low cost services to small businesses than to poor populations. The original design of the project omitted a clear definition of the target client population, and failed to establish any goal for reaching the target population. This resulted in a failure to create any public outreach or publicity campaign to increase awareness and use of the services among the poor. (See DPK Consulting, Colombia, 1996.)

5. ADR Programs Can Reduce Delay in the Resolution of Disputes

Use ADR When

- Delays are caused by complex formal procedures
- Court resources are insufficient to keep up with case backlog

Do Not Use ADR When

- Official intervention will impose complex procedures on ADR programs

Delays are endemic in most court systems throughout the world and affect a number of development objectives. In some cases, delays are so extreme that they effectively deny justice, particularly to disadvantaged groups who may not be able to "grease the wheels" of the justice system. In other cases, delays in the resolution of commercial disputes impair economic development and undermine the efficiency of the economy. Informal dispute resolution (mediation and settlement programs), or simplified procedures for dispute resolution (arbitration systems), can significantly reduce dispute resolution delay, and indirectly reduce court backlog by redirecting cases that would otherwise go to court.

Reduction of dispute resolution delays may serve a variety of USAID strategic objectives outside the rule of law area. For example, in the Ukraine, support for mediation centers is

Delay Reduction: IMSSA in South Africa

The track record of IMSSA in South Africa represents some of the best evidence for the ability of ADR programs to reduce delay. Most simple cases of unfair dismissal or wage claims require only a day of mediation or arbitration, while larger scale or more complex cases may require 2-3 days. The government-run Conciliation Boards, Industrial Councils, and Industrial Courts operated by the apartheid government experienced significant backlogs, with delays of up to five months just to get to the Industrial Courts and appeals taking several years. A labor relations task force established by the new South African government in 1995 found that the government-run structures were hampered by highly cumbersome and legalistic procedures loaded with technicalities, along with poor pay and poor training for mediators and adjudicators.

Conciliation Boards were successful in settling only 20% of their cases, and the Industrial Councils only 30%. In contrast, IMSSA mediators are successful in resolving roughly 80% of their cases. User satisfaction is quite high, with repeat users accounting for approximately 80% of cases. (See South Africa Case Study.)

founded on the premise that mediation can serve economic development objectives by accelerating the resolution of commercial and labor-management disputes, as well as other civil disputes arising from the privatization process. (See Ukraine Case Study.) In South Africa, quick resolution of labor-management disputes serves both economic and social equity objectives.

Many studies of developing country ADR systems offer evidence that the systems have been effective in processing cases quickly, at least relative to traditional court systems. The mediation boards in Sri Lanka resolve 61 percent of cases within 30 days and 94 percent within 90 days, compared with months or years required by the court system. Court backlog in Sri Lanka was reduced by nearly 50% during the six years in which the mediation boards have operated there, although a direct empirical link has not been established. One judge in the Ukraine predicted that 90% of civil court cases could be successfully mediated, eliminating the backlog on the civil court dockets. (See Sri Lanka and Ukraine Case Studies, and Hansen, et al., 1994.) Studies of programs in China, India, Costa Rica, and Puerto Rico similarly indicate that ADR systems have been successful in handling large numbers of cases quickly and efficiently. However, studies showing that ADR systems deal with cases more quickly than the courts often do not address systematically the question of whether cases resolved by ADR are similar to or different from cases resolved by the courts, which could explain some differences in time to resolution.

Experience in the United States indicates that ADR can have a significant impact on the time required to reach a resolution. A study conducted by the State Justice Institute at the University of North Carolina compared cases assigned either to a mediated settlement conference (MSC) or directly to the superior court. The MSC program reduced the median filing-to-disposition time in similarly contested cases by about seven weeks, from 407 days to 360 days. In addition, participants were significantly more satisfied with the process and the outcomes of the MSC process than they were with the normal court process. (See Clark, et al., 1995.)

Some studies in the United States, however, indicate that ADR programs attached to the courts become burdened by the same administrative complexities and/or costs as the normal litigation process. A recent controversial study by the RAND Corporation indicates that federal district court ADR programs (specifically, mediation and early neutral evaluation) have not been effective in proving that ADR can reduce delays or costs associated with dispute resolution. (See Kakalik, et al.,

1996.) Certain types of ADR, like arbitration, may be susceptible to becoming as complex and costly as court litigation. Labor arbitration in the United States has also become encumbered with formal rules and regulations that limit its ability to operate efficiently. Delays in resolving disputes may increase when pilot or local ADR programs are expanded, if human resources are insufficient to handle the increased caseload efficiently.

6. ADR Programs Can Reduce the Cost of Resolving Disputes

Use ADR When

- High costs in the courts are driven by formal procedures or the requirement of legal representation
- Court filing costs are high
- Court delays impose high costs on parties

Do Not Use ADR When

- Official intervention will impose formal procedures or costs on ADR

Many ADR programs are designed with a goal of reducing the cost of resolving disputes both to the disputants and to the dispute resolution system. Whether ADR fulfills this goal is still under discussion even in the United States, where there have been many studies of the issue. Nevertheless, the experience of at least some of the ADR systems implemented in developing countries indicates that cost reduction is a reasonable goal for ADR systems, and that well-designed systems can effectively meet this goal.

Relatively few comparative studies have been concluded, in part because of the lack of data on the true costs of court dispute resolution. Several studies, however, indicate dramatic differences in cost. For example, during the 1980s, when the lok adalat system was operating successfully in India, a comparative study in Rajasthan indicated that the average cost of a case handled in a lok adalat court was 38 rupees, compared with an average litigation cost of 955 rupees. The primary reason for the difference in cost was the simplicity of the system and the lack of need for legal representation, compared with the extreme complexity of the formal court system and the requirement of expensive representation. (See Whitson, 1992.)

Many other ADR programs seem to be successful in reducing the cost of dispute resolution and providing access to justice for the poor. Most programs operate with only a modest fee, either because they are managed by volunteers or because they are supported by government or donor funds. In Sri Lanka, for example, the cost of filing for mediation is only 5 rupees, and the number of cases filed with the Mediation Boards has increased from 13,280 in 1991 to 101,639 in 1996. Almost all the cases involve disadvantaged and poor members of the population. (See Sri Lanka Case Study.)

B. How Can ADR Help Accomplish Other Development Objectives?

Although this guide focuses on ADR's ability to promote development objectives related to the rule of law, ADR programs can also help accomplish other development objectives, as briefly discussed below.

1. ADR Programs Can Prepare Community Leaders, Increase Civic Engagement, and Create Public Processes to Facilitate Economic Restructuring and Other Social Change

Use ADR When

- Initiatives are hindered by an absence of participatory public processes to build support for and help manage change

South Africa: Labor ADR Influenced Other Sectors

The experience of IMSSA itself demonstrates the power of an effective ADR program in one sector to influence other sectors of the community. When IMSSA began in the early 1980's, it focused exclusively on the labor sector through its Industrial Dispute Resolution Service. As the reputation of the IMSSA mediators and arbitrators grew, other parts of the community began to call on IMSSA to provide services. As a result, IMSSA created the Community Conflict Resolution Service (CCRS) to help resolve community conflicts, including inter-tribal violence in the taxi wars and disputes in schools. Later, it created the Project Management Unit (PMU) to manage umbrella donor grants intended to support community dispute resolution services of all types. (See South Africa Case Study.)

- Initiatives are hindered by a low number of trained leaders among disadvantaged group

Do Not Use ADR When

- Legal rights need to be established or enforced to reduce power imbalances
- Relationship between ADR and the formal legal system needs to be clarified to reduce uncertainty about dispute resolution options
- Change is needed quickly (the impact of ADR training and programming is incremental and long-term)

South Africa is an interesting, and in many ways unique, example of the potential impact of dispute resolution and conflict management systems on social structures. A number of ADR programs have been part of the social fabric in South Africa, both before and after the transition in government. Many observers credit the example set by black labor unions in their negotiations with mining company management with demonstrating the ability to work out differences between blacks and whites at the bargaining table. It was not a coincidence that the lead negotiator for the African National Congress in the transition talks was Cyril Ramaphosa, who had led negotiations for the miners unions.

Experience in other countries suggests similar usage of ADR to address a variety of social change and development issues through public processes in which facilitation and mediation skill play a major role. In the Philippines, conflict resolution processes are being used to manage land reform (COTRAIN 1996), and in Ukraine, mediation training and facilitators are helping to manage economic restructuring issues in the mining and steel industries. Past authoritarian governments in Ukraine did not encourage public participation or public processes to develop consensual initiatives or solutions to social problems. Mediation training in individual manufacturing enterprises is helping to develop an ethic of civic engagement that is not general in the society. (See Ukraine Case Study.)

The impact of ADR programs on social change is often felt through the increased skills and abilities of local leaders. In South Africa, observers note that NGO-sponsored ADR programs helped develop and train community leaders. Many of those trained as part of ADR programs have gone on to hold significant positions in the post-apartheid government. The ADR training and experience helped build skills in consensual approaches to problem-solving and policy development. As a further sign of the importance of the problem-solving and management skills associated with ADR experience, USAID and other international donors have supported IMSSA's dispute resolution training of industry groups and communities, as well as its elections and balloting project. USAID also gave IMSSA responsibility for supervising an umbrella grant for community-level dispute resolution activities. (See South Africa Case Study.)

ADR and Economic Restructuring in Ukraine

One objective of the Ukraine Mediation Group (UMG) is the facilitation of privatization and economic restructuring efforts. This work may involve mediation of specific disputes, but is more generally concerned with managing the process of negotiating change. (See the Ukraine Case Study.) UMG is working with a British NGO, Know How, and the World Bank to assist with the restructuring of the mining industry. An example of UMG work involved the negotiation of a charter to guide the disbursement of World Bank credit to facilitate the closing or restructuring of mines. The initial charter proposed by the World Bank was unacceptable to the mining industry. UMG mediated among the parties and helped draft an acceptable framework.

UMG has also established mediation training programs in large manufacturing plants to facilitate labor relations and restructuring. The administration of one plant, the largest manufacturing company in the country, credits the program with averting a strike in March 1997.

Programs aimed at providing dispute resolution and problem-solving skills for government leaders have been conducted in a variety of other transition countries, including Angola (CMG and Search for Common Ground (Search), Rwanda (e.g., Search), and Russia (e.g., CMG, International Alert, International Research and Exchanges Board). Programs have also been developed to pursue specific development objectives. For example, the World Health Organization has recently developed a negotiation training program for health officials in developing countries to help them negotiate more effectively with international donors to obtain a larger share of assistance for health care initiatives.

Like most capacity-building initiatives, ADR programs require a substantial amount of time to have a significant impact on leadership skills, the ethic of civic engagement, and public problem-solving processes. The significant impact felt in South Africa evolved over a decade, and only with the support of a variety of ADR initiatives.

2. ADR Programs Can Reduce the Level of Tension and Prevent Conflict in a Community

Use ADR When

- Ongoing structural conflicts heighten the level of tension in or between communities
- Unresolved individual disputes add to the level of tension in society
- Moderate ethnic or class conflict is focused around particular issues

Do Not Use ADR When

- Group leaders will not negotiate until there are structural changes in the balance of power between classes or ethnic groups
- Individual disputes cannot be resolved until some structural change takes place

ADR systems may be designed to have an impact on the level of social tension and latent conflict, as well as on individual disputes. The focus of these systems is somewhat different from the programs normally designed for rule of law projects. For example, conflict prevention efforts generally focus more on public conflicts (ethnic tensions, resource allocation, policy

issues, etc.) rather than private disputes. They may also focus on public education, early intervention in potentially explosive conflict, and outside intervention by third parties.

Many of the NGOs established to promote conflict management in South Africa prior to the transition of power were explicitly created with the goal of managing tension and fostering peaceful mechanisms for social transformation. Although many observers believe these efforts had a positive impact on the culture and contributed to the peaceful transition, the direct impact of these programs on the overall level of violence and tension in the community is difficult to assess. Nevertheless, other countries have undertaken similar efforts to manage social tension. In Cyprus, USAID through AMIDEAST and the Fulbright Commission, has fostered the development of a variety of conflict management efforts to reduce tension between the Greek and Turkish Cypriot communities, including joint camps for youth, bi-communal arts events, and other bi-communal activities Although the level of tension remains high, these efforts have been credited by the international community with reducing the potential for conflict.

Similar efforts to manage social tension, including ethnic and class conflict, are underway in many other countries, including projects in Estonia (Carter Center with the University of Virginia), Hungary (Project on Ethnic Relations, also known as PER), Slovakia (PER), Bosnia and Croatia (MercyCorps, Balkans Peace Project), and Rwanda (Search, Council on Foreign Relations). The evidence for managing conflict and tension around discrete policy issues, such as education policies (Foundation on Inter-Ethnic Relations) and land reform (Philippines Department of Environment and Natural Resources) is positive.

3. ADR Programs Can Help Manage Conflicts that May Directly Impair Development Initiatives

Use ADR When

- Issue-specific disputes or conflicts impede sectoral development efforts

Do Not Use ADR When

- No counter-indications

When issue-specific disputes impair development progress, specifically designed ADR programs may help. This is true for conflicts involving multiple or polarized stakeholders with vested interests. In the Middle East, for example, water resource disputes are a practical limit on economic development. Disputes over water are also the source of international and intranational tension. Preliminary work in Jordan and Egypt indicates that government officials recognize the need to manage these tensions as part of an overall development strategy. Training programs for government water development and resource officials are underway in those countries.

The success of labor-management mediation and arbitration in South Africa led to the creation of other NGO and government ADR programs to manage disputes in other areas critical to development. For example, mediation or arbitration initiatives are now developing to deal with land claims, economic development planning, conflict and tension in the schools, disputes within the health care system, and a variety of other issues. Certain ADR mechanisms, such as facilitated negotiation, conciliation, mediation, and regulatory negotiation are particularly suited to bringing stakeholders together to reach consensus on development initiatives.

ADR programs have been designed to address labor-management disputes in the Philippines (Department of Labor, National Conciliation and

Mediation Board), environmental disputes in Eastern Europe (RESOLVE, UNITAR), and commercial disputes in Ukraine (USAID funded, Search) and in Bulgaria, Hungary, and Poland (USAID funded, Partners for Democratic Change). In each case, the programs are designed to overcome specific barriers to development and social change.

V. THE LIMITATIONS OF ADR

Although ADR programs can play an important role in many development efforts, they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of law initiatives. In particular, ADR is not an effective means to

- Define, refine, establish, and promote a legal framework
- Redress pervasive injustice, discrimination, or human rights problems
- Resolve disputes between parties who possess greatly different levels of power or authority
- Resolve cases that require public sanction
- Resolve disputes involving disputants or interested parties who refuse to participate, or cannot participate, in the ADR process

A. ADR Programs do not Set Precedent, Refine Legal Norms, or Establish Broad Community or National Standards, nor do They Promote a Consistent Application of Legal Rules

As noted earlier, ADR programs are tools of equity rather than tools of law. They seek to resolve individual disputes on a case-by-case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms. Furthermore, ADR results are private and rarely published. As long as some other judicial mechanism exists to define, codify, and protect reasonable standards of justice, ADR programs can function well to resolve relatively minor, routine, and local disputes for which equity is a large measure of justice, and for which local and cultural norms may be more appropriate than national legal standards. These types of disputes may include family disputes, neighbor disputes, and small claims, among others.

In disputes for which no clear legal or normative standard has been established, ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants. On the other hand, in situations where there is no established legal process for dispute resolution, ADR may be the best possible alternative to violence. For example, in South Africa, a variety of ADR processes used before and during the transition appear to have prevented violence to some degree and helped set the foundation for peaceful political change.

B. ADR Programs Cannot Correct Systemic Injustice, Discrimination, or Violations of Human Rights

As noted above, ADR systems often reflect the accepted norms of society. These norms may include discrimination against certain groups and populations. When this is true, ADR systems may hinder efforts to change the discriminatory norms and establish new standards of group or individual rights. In India, for example, the lok adalats were generally credited with resolving large numbers of cases efficiently and cheaply in the mid-1980s before the system was taken over by the government judiciary. Women, however, did not like the system, especially for family disputes, because resolution of disputes was based on local norms, which were often discriminatory towards women, rather than on more recently defined legal rights. The same was true for members of lower castes. (See Whitson, 1992.)

C. ADR Programs do not Work Well in the Context of Extreme Power Imbalance Between Parties

These power imbalances are often the result of discriminatory norms in society, and may be reflected in ADR program results. Even when

the imbalance is not a reflection of discriminatory social norms, most ADR systems do not include legal or procedural protections for weaker parties. A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. For the same reason, ADR programs may not work well when one party is the government.

When the program design has been able to enhance the power or status of the weaker party, ADR has been effective in conditions of discrimination or power imbalance. In Bangladesh, for example, women who have submitted cases of spousal abuse to mediation have found that the village mediation system, which includes women mediators, provides better results than the court system which is even more biased against women in these cases. (See Bangladesh Case Study.) In general, however, ADR programs cannot substitute for stronger formal protections of group and class rights.

D. ADR Settlements do not Have Any Educational, Punitive, or Deterrent Effect on the Population

Since the results of ADR programs are not public, ADR programs are not appropriate for cases which ought to result in some form of public sanction or punishment. This is particularly true for cases involving violent and repeat offenders, such as in many cases of domestic violence. Societal and individual interests may be better served by court-sanctioned punishment, such as imprisonment. It is important to note, however, that victim-offender mediation or conciliation may be useful in some cases to deal with issues unresolved by criminal process.

E. It is Inappropriate to Use ADR to Resolve Multi-party Cases in Which Some of the Parties or Stakeholders do Not Participate

This is true because the results of most ADR programs are not subject to standards of fairness other than the acceptance of all the participants. When this happens, the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups, such as environmental disputes. When all interested parties cannot be brought into the process, however, ADR may not be appropriate for multi-stakeholder public or private disputes.

F. ADR May Undermine Other Judicial Reform Efforts

There is a concern that support for ADR may siphon money from needed court reforms, draw management and political attention from court reform efforts, or treat the symptoms rather than the underlying causes of problems. While these concerns are valid, they will rarely materialize if ADR programs are not designed to substitute for legal reform. In most cases, ADR programs will be far less expensive to start and operate than broad-scale judicial reform efforts. In Ukraine, for example, the USAID mission considers the mediation program to be very inexpensive compared with other rule of law programs. And, in Sri Lanka, the Mediation Boards resolve cases at a fraction of the cost the government would incur through the ordinary court system. In general, ADR programs reduce costs for the state, and therefore for donors, at least as much as they reduce costs for disputants.

In sum, ADR programs do not necessarily draw attention away from problems that can only be addressed through formal justice processes, as long as both development officers and government officials keep in mind the limitations of ADR programs.

VI. WHAT BACKGROUND CONDITIONS ARE IMPORTANT?

ADR programs, like any other development programs, are more likely to achieve their objectives when they operate within an hospitable context. The particular background conditions (i.e., conditions independent of the specifics of program design) that are especially relevant to ADR programs include: adequate political support, supportive institutional and cultural norms, adequate human resources, adequate financial resources, and rough parity in the power of disputants.

These conditions are almost too obvious to state, but the particular way they influence ADR programs is worth considering before deciding whether to launch an ADR effort. While no one of the conditions is alone sufficient to create a context in which ADR will succeed, the absence of any one of these contextual elements could prove fatal to an ADR program.

A. Adequate Political Support

Reasons for Needing Political Support:

- Securing legislative support to establish jurisdiction and authority
- Obtaining bureaucratic protection from resource cuts
- Obtaining financial support
- Building popular acceptance and use
- Overcoming opposition of vested interests

Constituencies Whose Support May be Necessary:

- Local community leaders (most critical for success)
- National and state government
- Judges and the bar
- Advocates and representatives of user groups
- Foreign donor nation/foundation(s)

The level and source of political support for dispute resolution programs is an important factor in determining the potential success of, and appropriate design for, an ADR system. Different kinds of ADR programs require support from different constituencies. Community-based programs will need at least the support of the beneficiaries and the local community leaders in which the programs will operate. For many programs, the local community leaders will also be important sources for design information and mediator or arbitrator nominations. They will also be influential in lending prestige to the program and supporting community enforcement of settlements. Their support is almost always critical for success.

1. Building Political Support

A national system, supported and managed by the national government, requires high level political support. Such support should be capable of ensuring the passage of an adequate statutory basis for the system, protecting the system from attacks by other programs that may feel threatened, and ensuring adequate financial resources. Such support should also be "popular" in the sense that the source of that support should hold the confidence of the people. If the program is fostered by an agency or government already discredited by corruption or ineffectiveness, the system will not gain popular acceptance.

Ideally, a high level official—a minister or agency head—will lead the effort, with a supporting coalition including representatives of

The Importance of Political Support: CEM in Costa Rica

Success is no guarantee of support. Programs that develop a successful reputation outside the formal government structures, with the hope and expectation that the government will adopt responsibility for the proven programs, remain vulnerable to jealous and threatened officials. In Costa Rica, the Centro de Mediación (CEM) was established to help resolve family disputes in poor neighborhoods. During the first year of operation, the Center achieved a high level of success in case resolution (60%), high penetration of disadvantaged parts of society that did not normally find access to the court system (71-78% of users had not completed high school and 25% were unemployed), and high indices of user satisfaction as measured in subsequent Gallup polls (100% said they would use CEM again, 81% said the mediation was "useful" or "highly useful" and 90% thought the mediation outcome was "just").

CEM was started as a joint venture between the Supreme Court and the Patronato Nacional de la Infancia (PANI), a family/child welfare agency of the national government. Although PANI signed the agreement with the Supreme Court to start the center, none of the bureau chiefs at PANI took responsibility for CEM. When the pilot period ended, the agreement called for PANI to take on institutional responsibility for CEM. Despite the documented success of CEM, the PANI bureaus refused to take responsibility for the CEM budget. None would reduce other areas of their budgets to accommodate CEM. More than 50% of the CEM staff were fired, and the lease was terminated.

The CEM experience suggests that successful experimentation with new judicial models is not enough. Individual and bureaucratic support remains essential (Eduardo Garro, 1995 and 1996).

the court system: administrators, judges and lawyers, representatives/advocates of potential ADR user groups, and foreign donors. The mediation program in Uruguay has successfully developed a strong coalition that has been able to build financial, political, and popular support for the program. So far, the strong coalition in Uruguay has been able to overcome opposition from judges. (See Blair and Hansen, 1994.)

Good program design can help build political support, intentionally or not. In Bolivia, for example, the USAID mission supported the first ADR program (commercial arbitration and conciliation) for the benefit of a politically influential sector (small business), and implemented it through a politically powerful ally, the Chamber of Commerce. Once the legal foundations for this program were established, other programs, such as community justice centers for disadvantaged parts of the population could be planned.

2. Dealing with Opposition

The source, level, and strength of political support must be sufficient to neutralize opponents of ADR who have the political power to block it. In addition to institutional opposition stemming from bureaucratic ego and issues of control, the more powerful sources of opposition are usually economic. Judges, lawyers, and interest groups that benefit from current institutional biases may all be sources of strong opposition to ADR programs. Lawyers felt they were losing cases and fees to the lok adalat ("people's court") system in India, for example, and probably helped persuade the government to take over the system and undermine it. (See Kassebaum, 1989.)

If initial analysis indicates opposition from such powerful groups, then program designers must choose whether to rely on high level supporters to overcome that opposition, build financial and other incentives into the program to reduce the opposition, or to bypass the opposition by establishing a program that functions locally and independently. It may be possible to co-opt opposite groups by involving them as ADR program supervisors and/or staff. This is a risky strategy, however, and has probably failed at least as often as it has succeeded. In India, the

lok adalat system was functioning well and widely supported when independent of the judiciary. When the government passed legislation forcing the lok adalats to be managed by the court system, it was thought that the judiciary would support the system once it was in control. Instead, the judiciary cut funding and mismanaged the program, which quickly lost the confidence of the users. (See Whitson, 1992.)

At a minimum, political support may be necessary to pass legislation authorizing ADR, especially binding arbitration systems. In Bolivia, for example, the Chamber of Commerce arbitration program could not establish itself with users until legislation authorized court enforcement of arbitral agreements. Mediation and conciliation programs can operate reasonably well on an independent basis since settlements are voluntary agreements between individuals, but these ADR systems may be strengthened by legal mechanisms to enforce these agreements. (See Bolivia Case Study.)

3. Bypassing the National Level

Proponents of ADR may find opposition to the program at a national level, but support for the program at a local level. In such cases, it may still be possible to establish local ADR programs to address local concerns. Prior to the transition of government in South Africa, for example, local "people's courts" were established in a number of black townships to bypass illegitimate and ineffective government court systems. These courts and mediation programs succeeded in reducing levels of violence and resolving local conflicts, and maintained local township support, despite opposition from the national government. (See Foraker-Thompson, 1992.)

The lack of national political support is not necessarily the death knell of an ADR system. Local ADR systems can still function well as long as they have strong user support, adequate financial resources, and as long as they do not spark an "immune system" reaction from a national government that might seek to actively close such systems. The experience of IMSSA in particular, and of NGOs working in South Africa in general, has been that political support at the national level may not be necessary. In fact, in a system as politically illegitimate as the apartheid government was in South Africa, it may be unwise to seek political or official support for an ADR program. (See South Africa Case Study.)

4. Support for Issue-specific ADR

If the judiciary will not support ADR programs for all civil disputes, defined beneficiaries may support specific programs focused on particular types of disputes. In South Africa, IMSSA focused on labor-management disputes. Demand from both labor and management was high. Once the programs demonstrated their effectiveness, they were supported by the corporate community. Management found that informal NGO mediation and arbitration services could resolve cases more efficiently than the government structures. This corporate community support helped protect the NGOs from efforts to undermine the programs.

B. Supportive Cultural Norms

Reasons for needing supportive cultural norms:

- User acceptance of informal processes
- Appropriate standards for settlements
- Enforcement through community customs and sanctions

Important elements of cultural norms:

- Traditional usage of informal, community-based dispute resolution
- Shared, reasonable standards of fairness and equity

- An absence of generally accepted and strong discrimination or bias, at least regarding potential users of the ADR processes

- An absence of generally accepted or expected corruption, at least at a community level, or traditional mechanisms for dealing with corruption

- Values of honor or honesty which promote compliance

1. Cultural Norms Supportive of Informal Dispute Resolution

For ADR programs to be successful, the cultural norms of the community should support the concept of informal dispute settlement. Even in countries where the judicial system is discredited and where reforms are unlikely in the short term, ADR programs can provide a reasonable degree of justice if a tradition of informal dispute resolution exists. Many studies cite the importance of these traditions as a background condition for success. (See discussions regarding Taiwan, China, Sri Lanka, and Korea in Huang, 1996; Jandt and Pederson, 1996; Hanson, Said, Oberst and Vavre, 1994; Sohn and Wall, 1993.) Such favorable traditional and cultural norms are difficult to build if they do not exist, and should be considered carefully as a prerequisite background condition.

The absence of cultural norms which support informal third party dispute resolution should not automatically eliminate consideration of ADR programs. During the years of Communist Party control in the Ukraine, the only third party with authority to decide disputes was the local party leader. All other forms of traditional dispute resolution or informal village authority were squeezed out of the system. When the Communist Party structure collapsed, there were no traditional dispute resolution mechanisms on which to build. Experience with the authoritarian party dispute resolution system has made the population reluctant to submit disputes to a third party. In addition, the concept of voluntary mediation, in which the mediator has no authority to force a settlement, is foreign. If the program design is able to incorporate an effective way of building those norms in the long-run and operating despite their absence in the short-run, then it may be worth investing in ADR.

The UMG in Ukraine is a good example. The ADR program there addressed these challenges by starting in a sector more receptive to ADR methods and by focusing on a credible local mediator, whose familiarity with Western and Soviet-era ADR and whose commitment to the program have helped make it successful. (See Ukraine Case Study.)

2. Existence of Standards of Justice Widely-Perceived as Fair

Sufficient normative background conditions should include not only support for informal dispute resolution processes, but also reasonable standards of justice and equity. If the cultural norms of behavior are fair and reasonable, ADR may be an appropriate mechanism for applying those norms to resolve individual disputes in an informal manner. If the norms are unattractive or unfair, however, then mediators drawn from a pool of citizens reflecting those norms are likely to mediate or impose unfair settlements.

Fair and reasonable standards of justice should not include strong discrimination or bias against any potential user group. If the accepted standards of justice embrace discrimination against part of the population, or abuse the rights of certain individuals, informal dispute resolution systems will usually reflect these standards. In the absence of any legal requirement to resolve cases according to legal guidelines, mediation and arbitration systems will generally produce results that follow cultural norms of justice. On the other hand, as noted earlier, even in countries where discrimination is present, ADR programs specifically designed to compensate for such

Norms Supporting Discrimination: ADR in Japan

Following World War II, the reformed Japanese government established the Civil Liberties Bureau (CLB) to mediate disputes relating to social rights. One goal of the CLB was the creation and protection of individual and group rights for disadvantaged parts of the population. Although the strong normative culture of Japanese society helped the CLB resolve many disputes, cultural discrimination against certain groups was also part of the accepted normative systems and could not be redressed effectively through the CLB mediation and ombudsman processes. (See Rosch, 1987.)

discrimination may provide better justice than a biased court system. Many women found this to be true in Bangladesh. In general, however, ADR systems cannot be expected to reform attitudes about group or individual rights.

In some cases, the traditional conflict resolution processes embody levels of bias and class stratification that USAID would not want to promote. In Indonesia, for example, mediation efforts to resolve environmental disputes ran into opposition from some parts of the population who felt that traditional mediation, *musyawarah*, reinforced class hierarchy and authoritarianism. (See Moore and Santosa, 1995.) It is important, therefore, not to assume that the existence of traditional mediation implies that an expanded ADR effort will be widely accepted by the part of the population. Assessing the support for such informal dispute resolution among the target population is critical.

3. Cultural Norms Against Corruption

Corruption in the formal legal system may be a motivation for creating an alternative system. If local norms and local control of ADR systems can avoid corruption, and if alternative means of enforcement can avoid the need to depend on the formal judicial system for enforcement, ADR systems can succeed where formal systems have failed. Broad-based cultural norms which accept corruption even at a local level, however, will complicate program design, increase its cost, and reduce its chance of success.

4. Cultural Norms Favoring Voluntary Compliance

Although in general it is important that the particular ADR process employed should be consistent with broadly-held traditional norms, it is also important to ask why traditional dispute management systems have failed and whether the same conditions will undermine the proposed ADR system. Cultural norms regarding compliance with agreements are often important for ADR program success. In the Middle East, traditional cultural norms have held families responsible for the agreements of family members. This norm is extremely effective in promoting compliance. As Western law has taken precedence, and as families have become more mobile and less cohesive, this cultural norm is losing strength, and traditional mediation by village elders is losing prominence. It is not clear whether a community-based ADR system can reinforce or substitute for these traditional mediators.

C. Adequate Human Resources

Reasons for needing adequate human resources:

- A sufficient pool of skilled and respected mediators or arbitrators to manage caseload efficiently and effectively

Important elements of human resources:

- Community members and leaders who have the respect of the community
- Honesty and a sense of community service among potential mediators

- Resources and skills necessary to prepare an adequate training program

Adequate numbers of well-qualified and well-supervised ADR staff are essential to program success. Evidence from the U.S. suggests that the quality of ADR staff is much more important to participant satisfaction with ADR outcomes than ADR's cost, the time it takes, or its specific procedures (Rosenberg and Folberg, 1994). Similarly, user satisfaction with Sri Lanka's Mediation Boards is much higher than with the previous conciliation system, largely because much greater care has been taken to select, train, and supervise community mediators based on merit, not political connections. (See Sri Lanka Case Study and Hansen, et al., 1994.) Several factors affect the quality of the ADR staff.

1. Honest and Respected Personnel

A large pool of educated, honest, and respected personnel is not always available, but it may be critical for success. In Sri Lanka, the Mediation Board system has depended on high numbers of educated citizens who have volunteered to be mediators, including many school teachers, clerics, postal workers, and other civil servants respected in their communities. The strong sense of community service among these mediators has been important, and may not be present in all countries. Mediators must have a minimum level of education. However, the respect of the local community is often more important to success than substantive knowledge.

2. Training

Good training, and sufficient resources to maintain such training on an on-going basis, has been important to create a cadre of qualified and respected mediators. Many successful programs, like those in South Africa, Sri Lanka, Bangladesh, and Argentina, have had good training programs as an integral part of the design.

3. Literacy

In Sri Lanka, a high rate of literacy has also been important to the Mediation Board success. The high literacy rate and an active press help to hold public officials to a higher standard of performance than in other developing countries. In addition, a literate public is easier to reach and educate about mediation. (See Sri Lanka Case Study.)

4. Sufficient Numbers of Personnel

It is important that the pool of skilled ADR staff be large enough so that the system does not become overburdened and to avoid personnel frustration and burn-out. In South Africa, the large pool of mediators and arbitrators trained by IMSSA was a significant asset since it meant that the system gained a reputation for immediate response. Conversely, the enormous increase in the mediation caseload of the Commission for Conciliation, Mediation, and Arbitration (CCMA) following changes in the South African legal system threatens to overburden the mediators and erode confidence in the system. In Sri Lanka, the most pressing concern facing the Mediation Board system is the excessive level of work for the volunteer mediators and trainers. (See Sri Lanka and South Africa case studies.) Beyond such basic issues as honesty, training, literacy, and numbers, the program design will affect significantly the adequacy of human resources.

D. Financial Resources

Reasons for needing adequate financial resources:

- Costs of administration, third party personnel, evaluation, and outreach

Important elements of financial support:

- Sustainability

- Sufficient to avoid corruption or overwork for third parties or others implementing the ADR system

Compared with formal court processes, ADR programs are inexpensive for the state as well as the disputants. Many programs operate with volunteer mediators, and few have burdensome requirements for documentation or administration. Nevertheless, in some developing countries, governments have not allocated enough financial resources to pay for program administration, and/or have not trained enough volunteer mediators to make mediation a reasonably small time commitment for volunteers.

The Mediation Boards in Sri Lanka represent one of the most successful ADR programs among developing countries, particularly with regard to the development objectives of USAID. The system is in jeopardy, however, because of the low level of financial support and the increasing burdens on the volunteer mediators. Not only are the mediators unpaid, but they must often cover their own expenses. The mediators have no offices or staff, and may need to use their homes for mediations. They document their own work and pay for their own office supplies. Although the system has been successful at resolving increasing numbers of cases, the increasing burdens on the mediators are leading to a concern that mediators may quit and that new mediators may be difficult to find. In addition, some observers are concerned that some mediators may become susceptible to corruption unless they are paid, or at least their costs are covered. (See Sri Lanka Case Study and Hansen, et al., 1994.)

In some instances where the government is unwilling or unable to give sufficient resources, it can provide the framework for the programs to become self-sustaining. In Ukraine, for example, the sustainability of the UMG would be enhanced greatly if they could charge a fee for service, both for some mediations and for training to wealthier audiences.

E. Parity in the Power of Disputants

Reasons for needing parity:

- To avoid coercive results
- To persuade participants to use the process

Important elements of parity:

- Balanced legal rights for disputants as a context for ADR
- Parity between individual disputants in specific cases
- Procedural protection for those in weaker position

ADR systems are unlikely to overcome wide disparity in the power of disputants, or to redress discrimination, unless they can be specifically designed to do so. In most cases, informal processes are less able than formal judicial systems to produce fair outcomes in cases of wide power disparity. As noted earlier, powerful parties retain the ability to intimidate weaker parties in conciliation or mediation and coerce them into accepting unfair settlements. In addition, since participation of the disputants in most ADR programs is voluntary, stronger parties are unlikely to participate if they feel they can obtain better results by relying on their power and remaining outside the system. ADR programs that operate in a context of civil war (Cambodia), widespread repression (Philippines in the 1980s), or gross social and political inequalities (Guatemala), will be hard pressed to attract powerful disputants to use their services. For powerful disputants in these situations, bribing an government official or sending a thug may be the most certain and effective way to resolve the dispute on favorable terms.

Nonetheless, there are many civil disputes that could be resolved through ADR even in contexts of gross political inequality. First, if disputants in a particular case have roughly equal power to

manipulate the political, legal or social system, and ADR staff do not have incentives to favor one disputant over another, ADR programs should be able to resolve particular disputes despite systemic injustice. Village dispute resolution by local officials in Cambodia appears to be functioning effectively in many interpersonal cases, although it is problematic in cases involving the state, particularly land disputes. (See Collins, 1997.)

Second, a fairly balanced legal framework defining disputants' rights may allow ADR programs to deal with disputes despite power imbalances. One of the factors in the success of IMSSA in mediating labor disputes in South Africa, despite obvious discrimination against black and colored workers, was the relatively strong legal framework protecting the rights of workers. These legal protections helped balance the otherwise unequal power of the parties, and allowed IMSSA to mediate disputes effectively. In direct contrast, however, IMSSA has found that it is unable to mediate effectively disputes between landlords and tenants. Tenants have so few legal rights that mediators have not found landlords to be amenable to voluntary settlements. The lack of legal sanction means that landlords have little incentive to agree. (See South Africa Case Study.)

Third, carefully designed ADR programs operate effectively if they correct for situations of general social power imbalance. For example, although the traditional *shalish* mediation system in Bangladesh reflected the overall bias against women in society, the reformed system supported by USAID, which incorporated more women into the mediation committees, has tried to correct for this bias. Women users interviewed felt that the system was less biased than the court system in handling disputes between men and women. (See Bangladesh Case Study.)

Some ADR programs include procedural provisions to protect against the effects of undue disparities in power between parties. In Bolivia, for example, the Arbitration and Conciliation Law empowers the "weaker" party in a dispute to withdraw from a commercial arbitration or conciliation procedure unilaterally and resort to the formal court system. Furthermore, the structure of ADR in Bolivia has evolved to focus on disputes that are likely to occur between parties of similar backgrounds and power. Commercial conciliation and arbitration through the Chamber of Commerce Conciliation Centers is focused on disputes between commercial enterprises. Court-annexed conciliation focuses on family and labor disputes and is most likely to involve middle-class litigants. Extra-judicial community conciliation centers are being designed to provide dispute resolution for low income citizens. (See the Bolivia Case Study.)

VI. WHAT PROGRAM DESIGN CONSIDERATIONS ARE IMPORTANT?

This section describes program design considerations that will contribute to the success of ADR. Many of these design factors are common to all USAID program design strategies. The guide describes some of the particular considerations necessary in applying these design factors to ADR programs. Some of the design factors relate to the background conditions described in the preceding section, and suggest ways of designing successful ADR programs under more or less favorable background conditions.

Given the diversity of ADR programs and their institutional and cultural settings, it is impractical to define a standard set of ADR procedures or guidelines. On the other hand, an ADR program will be more likely to meet USAID development objectives and gain popular and political support if the design guidance provided here is followed wherever practical and possible.

Each design recommendation should be considered within the context of the background conditions of the country and the specific objectives of the program. While each recommendation should be correct in the absence of countervailing indications, in some cases, exceptions may be appropriate.

The design recommendations fall into two categories:

Planning and Preparation

- Assess dispute resolution needs and background conditions and define program goals
- Employ a participatory design process
- Establish adequate legal foundations to specify jurisdiction, procedures, and enforcement, and to define a relationship with the formal legal system
- Find an effective local partner

Operations and Implementation

- Establish effective procedures for selection, training, and oversight of mediators and arbitrators
- Find or create a sustainable source of financial support
- Create an effective outreach and education program to reach users
- Create support services to overcome user barriers
- Establish effective procedures for case selection and management
- Establish effective procedures for program evaluation

A. Planning and Preparation

This set of recommendations should be followed before making a decision regarding whether to create an ADR program. The planning process will inform development officials as to whether appropriate needs and conditions exist to support an ADR program, and may help determine the type of ADR program that will best meet the needs of the user population.

1. Assess Dispute Resolution Needs and Background Conditions, and Articulate Program Goals

Any program design should be grounded in an analysis of needs and the background conditions discussed in the previous section. The first step in a design process should, therefore, be a

Needs Assessment: Understanding Public Attitudes in Bangladesh

Prior to establishing the goals of the ADR program, or even establishing ADR as a viable program option, USAID-Bangladesh conducted an extensive study of needs. (See "The Democracy Needs of USAID/Bangladesh's Customers," May 1995.) Pairs of interviewers talked with approximately 320 people from a variety of occupations, religions, ethnic groups, backgrounds, and regions. After USAID had established initial goals based on this survey, a second round of interviews, including approximately 500 respondents of various backgrounds, tested the accuracy and desirability of the initial goals.

The validation assessment concluded: "As was made clear in the earlier needs assessment, the formal legal system has no attraction for [the poor, especially women]. Interviews and focus group meetings confirmed the preference for people involved in a dispute to keep the resolution process as close to home as possible.... By far and away the most accessible, most commonly used, and relatively trusted agency is that of the local *shalish* [traditional mediation]. ...

"While the *shalish* was accepted as appropriate for poor peoples' disputes, most respondents (and women were in general more critical than men) felt that this committee was usually biased, as well as ill-informed as to the law and to procedures."

The assessment concluded that a reformed *shalish* should incorporate more participation of women on mediation committees, more training, and better monitoring of judgments.
(See "Validation Synopsis Report," Democracy Partnership, August 1995, and the Bangladesh Case Study.)

careful analytical assessment, including, but certainly not limited to, the following elements:

a. Dispute resolution needs

What are the needs for dispute resolution in the country? What kinds of disputes are going unresolved? Are parts of the population excluded from or underserved by the existing formal structures? Are the costs of the existing system so high that many citizens cannot participate? What disputes are considered appropriate for informal resolution? All of these factors should be assessed as part of an evaluation of the needs of the country.

Once an analysis reveals a need for dispute resolution in certain areas, the assessment should investigate the barriers that prevent individuals from using existing formal legal structures to resolve these issues. As noted in the previous section, these barriers may include cost, illiteracy, discriminatory procedures, perceptions of unfairness, physical inaccessibility, and lack of proximity, or lack of awareness. An appropriate program design should address these conditions and make sure that they are not replicated in the design of any alternative system.

The needs may be assessed in a variety of ways. Public opinion polls may be the most effective means for reaching all components of society. In Costa Rica, a Gallup poll survey determined that Costa Rican citizens felt that family matters were the most appropriate disputes for a mediation program. The poll also indicated that only 3 percent of respondents felt that the courts alone could resolve disputes, suggesting that the public would accept non-judicial mediation. The subsequent public response to a new mediation center was high, with a large number of cases submitted for mediation. (See DPK Consulting, 1996.)

Surveys of users of the existing formal legal system may provide insights on user satisfaction, systemic bias, or corruption that will be important for ADR system design. Interviews of interest groups and advocacy organizations can provide information on illiterate or other underserved parts of the population who may not respond to public opinion polls or other surveys.

b. ADR goals

As in other development programs, a clear articulation of program goals and priorities based on the needs assessment is essential to the program's success. A single ADR program may not be able to accomplish simultaneously all the benefits enumerated in Part IV. A clearly articulated set of goals will allow program designers to make necessary trade-offs when ADR goals conflict with other development goals or when ADR goals are inconsistent.

c. Assess appropriate relationship to the judiciary

(i) Judicial training and attitudes toward ADR

An important question to ask is whether judicial attitudes and the legal culture in the country are friendly to ADR. Judicial acceptance of ADR in Uruguay was low, in part at least because judicial training leads judges to believe that disputes are zero sum equations, and that proper procedure requires application of legal principles by appropriate authorities. This has meant that judges have been skeptical about and resistant to the implementation of ADR practices as part of the court system. This understanding led to a design strategy of implementing ADR through the Ministry of Labor to deal with employer/labor disputes, rather than through the Ministry of Justice to deal with general civil claims. (See Blair, et al., 1994.)

(ii) Public attitudes towards the judiciary

If the public mistrusts the government, and/or the judiciary, it is unlikely that the public will patronize an ADR system that is managed by them. In India, the lok adalat system was first implemented outside of any judicial and governmental structure and gained wide acceptance by the people. When the system was taken over by the state, however, public confidence in the lok adalat system deteriorated, and usage declined dramatically. (See Whitson, 1992.)

Program designers should assess public trust in the government as a whole, and the judiciary in particular, before deciding whether to design a system annexed to the courts, one sponsored by the government but independent of the judiciary, or one entirely independent from the government.

d. Sources of potential opposition

As noted above in the discussion of the need for political support, several constituencies and interest groups may be threatened by new ADR systems. It is important to identify the source, strength, and reason for this opposition as part of the analysis before program design. Strong opposition from judges may indicate that the system should run outside the court system. In Uruguay, the opposition of judges to the implementation of ADR threatened to undermine the system. Strong political and popular support for the system, and the decision to use non-judges as mediators and arbitrators, saved the system despite this opposition. (See Blair et al., 1994.)

Strong opposition from powerful political interest groups may suggest that the system should be established without government support or oversight. Strong opposition from an elite national government, but support from local governments, may suggest a regional or locally-based system. In any case, the assessment should identify the most likely critics and opponents of any program and determine whether and how such opposition can be overcome.

e. The legal basis for informal dispute resolution

As noted elsewhere, ADR may need legal authorization for programs to operate. Some legal systems may prohibit dispute resolution by private groups, others may prohibit the collection of user fees for such services, still others may not provide for legal enforcement of settlements or arbitration awards. Understanding the legal context will be important for assessing the feasibility of an ADR program, and the appropriate design for such a program.

A related issue is whether the type of formal legal system—civil law, common law, based on indigenous traditions, or a hybrid of these—would affect the ADR program[3]. To the extent that the actors in ADR are linked to or informed by the formal legal system (e.g., neutrals with legal training, businesspersons in urban areas), they are likely to be more comfortable with ADR programs that are consistent with the underlying values of the formal system and that have a clear relationship to it (especially for enforcement of agreements). On the other hand, actors at the community or grass roots level are likely to be more comfortable with ADR programs consistent with traditional legal and conflict resolution systems than with civil or common law systems imposed by a colonial power with which they are unfamiliar.

[3] In gross terms, an important distinction between civil and common law systems is that civil law systems are largely driven by judges and their interpretation of written laws, while common law systems are driven by parties, who bring their disputes to the judge and that judge who then looks to written law, case precedent and distinctions that may be drawn to the particular dispute. The differences in the two systems have been stereotypically described as hierarchical v. decentralized, an active v. reactive role for the state, and emphasis on documentary v emphasis on testimonial evidence. These distinctions are blurred in most countries, especially as civil law countries adopt common law features. Some legal systems, like that of South Africa, are described as "hybrids" of the two.

2. Employ a participatory design process

The extent of participation needed in the design of a dispute resolution program depends on a number of factors: the nature of the program; the source and strength of political opposition to the project; the sophistication of the constituents; and the knowledge and sensitivity of experts who might otherwise design the program on their own. If the need and demand for the program is clear, political opposition low, and the sophistication of experts high, the design process may succeed well under the direction of experts. In general, however, broad participation by the affected population in the design of a program is more likely to result in a workable program. This is especially true when the needs are less clear, when the potential for political or popular opposition is high, when multiple constituencies may have an interest in the design of the system, or when traditional systems already exist and should be considered as potential models for a program.

In the Philippines, for example, where labor, management, and the government had long been frustrated by ineffective dispute resolution, a Tripartite Voluntary Arbitration Advisory Council composed of representatives from labor, employers, and the government helped guide the design and implementation of a new voluntary arbitration system administered by the National Conciliation and Mediation Board (NCMB). Observers credit the participation of the interested sectors in the design process, as well as the ongoing input of a participatory Advisory Council, with some of the success of the NCMB, which increased the number of cases handled from 58 in 1988 to 279 in 1994. (See NCMB, 1996.)

ADR systems designed to operate on a local community level may need to reflect local community norms and traditions. For such systems, participatory design may be very important. For example, in rural areas of Kwazulu Natal in South Africa, NGOs found that they needed to consult extensively with

Including and Excluding Stakeholder Groups in Project Design

USAID-Bangladesh used a highly participatory process to develop the ADR program based on traditional mediation committees, shalish. Two rounds of extensive interviews gathered the ideas and comments of potential users from a variety of backgrounds, religions, occupations, and regions. The government was consulted and was invited to participate in the implementation of the program. Although it declined participation, this initial consultation and periodic updates ensured government support, or at least defused any potential opposition. Local traditional and elected leaders were invited to submit their comments and design suggestions.

At the same time, certain stakeholder groups were purposely left out of the design process. Academic and legal experts were not consulted because it was felt that they would focus their input on issues related to court reform, which USAID had already decided against as ineffective in the short term for helping the poor. At the end of this process, most stakeholder groups actively supported the goals of the program. (See Bangladesh Case Study.)

traditional leaders and tribal chiefs who wanted to retain their jurisdiction over most family and community disputes. Some local traditions of mediation require multiple mediators, widespread participation of the community, or extensive rituals. Other traditions and community norms may limit the gender or status of those who will be accepted as mediators. Trade-offs may then emerge: the new ADR system may have to move beyond such restrictive traditions to further development objectives, such as access to justice. The experience with the community Mediation Boards in Bangladesh shows that a participatory design process can highlight such trade-offs and then help designers make the necessary choices.

Involvement of potential users in program design may also help build the political constituency for introducing ADR. Blair and Hansen (1994: 23-24) found that involving business representatives and NGOs with an interest in judicial reform in ADR program design helped build political support for reform.

3. Establish Adequate Legal Foundations to Specify Jurisdiction, Procedures, and Enforcement, and to Define a Relationship with the Formal Legal System

a. Clarify the relationship of ADR to the judicial system

ADR programs usually require a legal basis for operation, or at least a legal structure that allows ADR programs to operate. In addition, some explicit relationship with the judiciary may be appropriate. Potential relationships include full integration with court structures, a loose affiliation that may refer appropriate cases to ADR, the ability to enforce ADR program settlements in the courts, or a completely independent existence.

(i) Mandatory referral or voluntary?

When ADR programs are designed to handle cases in coordination with the judicial system, the ADR process can precede, follow, or intercede in formal legal processes. There is no obvious reason to prefer any one of these models. Arguably, the best model is one that gives disputants access to an ADR process at any point in the life of a dispute, without mandating that they use ADR.

Concerns about Government Control of ADR in Bangladesh

The initial assessment by USAID in Bangladesh indicated a clear preference for a system based on traditional local mediation—*shalish*—that would remain independent of the judicial system. The assessment process reported a deep suspicion of the court system, particularly on the part of women and the poor who felt that the courts were biased and inaccessible.

As the reformed village mediation system established with USAID support has become more successful, there is a desire on the part of the government to create a formal link between the village mediation and the judicial systems by replacing the *shalish* system with a network of local, or "grameen," courts. NGOs and donors believe that a formal link would undermine the success of the village mediation system by exposing it to the same corruption that has eroded confidence in the formal justice system, and by limiting access for the poor. (See the Bangladesh Case Study.)

In the United States, there is a sharp debate on whether judges or administrators should be able to require disputants to use ADR, and an equally sharp debate on whether and how ADR settlements should legally be enforced. Experience in the US suggests that mandatory referral to mediation does not necessarily reduce satisfaction with the mediation process or its outcomes (Stienstra, et. al., 1997.)

(ii) Degree of judicial control

The degree of connection to the court system should depend largely on the reputation and legitimacy of the courts and the nature of the ADR system. State control and support of the ADR process has been important and successful in some countries (for example, Argentina, Chile, Taiwan, and the Philippines). In others, however, state control and management have undermined the success of and confidence in the system (for example, India, Costa Rica, and Mexico). In India, for example, where the courts were widely discredited, making ADR settlements enforceable by the courts made disputants more reluctant to use ADR (Whitson, 1992). In South Africa, by contrast, the enforceability of arbitration decisions in the courts was important for the success of the labor arbitration system.

As the experience in Sri Lanka suggests, even where the courts enjoy a good reputation, ADR's links to the judicial system need to be designed carefully. The Conciliation Councils were established in Sri Lanka soon after the end of colonial power. These councils were managed by the judicial system and had many judicial powers, such as the power to subpoena testimony and issue decrees. The councils lost the confidence of the people, however, after they became increasingly corrupt and the appointment process became controlled by political patronage. The councils were abolished in 1978.

The failure of the conciliation councils, however, did not necessarily mean that any links with the judicial system would be fatal. The Mediation Boards Act of 1988 revised the relationship to the judiciary, so that the new Mediation Boards retain a clearly authorized relationship to the court system. First, uniform, mandatory referral to mediation before any court action could be initiated was established for disputes valued below 25,000 rupees and many minor offenses. Second, the Act provided for oversight by a Mediation Commission comprised of retired Supreme Court and Appeals Court justices. The act also provided that all appointments be based on merit rather than patronage and that all mediators be trained. Finally, the new Mediation Boards were deprived of the court-like powers of the old Conciliation Commissions, such as the power to subpoena or issue decrees. With these changes, the Mediation Boards have been widely

acclaimed as successful. (See Hansen, et al., 1994 and the Sri Lanka Case Study.)

(iii) The importance of clarity

Whatever the relationship between ADR and the legal system, it is essential that ADR users and providers understand that relationship. Providers should inform potential ADR users if using ADR means giving up options to use the formal legal system. They should also inform users if information they disclose during ADR might later be used by another party in a formal legal process.

b. Establish a clear legal foundation for ADR

In addition to a carefully defined relationship with the judiciary, ADR systems need enforcement mechanisms. Where the courts are seen as legitimate (even if costly and slow) by ADR users, the courts may be the appropriate recourse for enforcement.

Successful examples of ADR systems may be found operating with a variety of legal foundations. As long as informal dispute resolution is not prohibited or undermined by the legal system, and as long as some mechanism for informal enforcement exists if judicial enforcement does not exist, then informal dispute resolution can work well without support from the court system.

It is possible for an ADR system to operate without any legal foundation as long as some informal mechanism for enforcement exists. For example, in Bangladesh, traditional *shalish* agreements were enforced through village peer pressure. Agreements were announced and publicly proclaimed. Families would lose face if they did not comply with agreements. The reformed village mediation system relies on this traditional compliance mechanism and succeeds despite the lack of formal court enforcement. Likewise, in the Middle East, traditional village mediation systems rely upon family honor for enforcement. When a village elder mediates a dispute, the settlement is agreed between two families rather than between two individuals. If one party does not comply with the agreement, the honor of the entire family is discredited.

In general, however, it will be difficult to launch a successful ADR system when the relationship with the formal dispute resolution system is ambiguous, and potential users may believe the results of the ADR system may be overturned or undermined by the judicial system. The voluntary arbitration system of the National Conciliation and Mediation Board in the Philippines was created in 1986. Prior to 1989, however, the system attracted few of the many labor-management disputes for which the system was intended, in part at least because the laws creating the system did not articulate a clear legal jurisdiction or procedures for the system. In 1989, legal changes provided clearer legal foundations for the system, and provided for more active public promotion of the process. (See NCMB, 1996.)

Likewise in Bolivia, an absence of a legitimizing legal framework inhibited ADR operations prior to 1997. The new Arbitration and Conciliation Law, which establishes consistent arbitration and conciliation procedures and the ability to enforce arbitration awards in the courts, gives potential users confidence that they will not be wasting their time in ADR. Service providers also feel more confident marketing their services. (See Bolivia Case Study.)

In addition to clarifying any ambiguities in the legal foundations for ADR, program designers should assess the larger legal environment and work to remove laws that may negatively impact the use of ADR. In Ukraine, it is now illegal to negotiate or mediate settlement of a case once it has been submitted to a court. If the parties wish to settle outside the auspices of the court, they must withdraw the case and forfeit the filing fee. This legal construct discourages the mediation and settlement of cases that might be resolved. (See Ukraine Case Study.)

Other laws may have an indirect impact on ADR organizations. As noted below, Ukrainian laws forbid NGOs from charging fees for services. Although this law is not intended to affect ADR specifically, it has had the effect of threatening the financial sustainability of the Ukraine Mediation Group, which must now depend on charitable contributions or questionable kick-backs from mediators who receive direct payment from users. (See Ukraine Case Study.)

USAID influence can help create the legal foundations for ADR. In Bolivia, the USAID mission linked its support for judicial reform to the passage of the Arbitration and Conciliation Law. This linkage created a constituency of support for ADR and a clear legal foundation for operation and enforcement.

4. Find an Effective Local Partner

Dispute resolution and conflict management projects are more sensitive to local norms and culture than many other development projects. When choosing local partners for ADR program design and implementation, the normal considerations of sustainability, effective and honest management, and local acceptability are important. In addition, those implementing ADR programs must be carefully tuned to the political and social culture of the communities in which they operate. This suggests that a good design should identify a local organization, NGO, or government department that is well-managed, financially stable, broadly reflective of the diverse constituencies in the country or community, and sensitive to the cultural norms around conflict resolution. While filling all of these qualifications may be difficult, the most important consideration may be the enthusiasm, energy, talent and commitment of the director and staff, and their sensitivity to and ability to operate within the local community.

The USAID mission in Ukraine credits much of the success of the Ukraine Mediation Group to the enthusiasm and commitment of the director, as well as his intuitive understanding of the needs and norms of the society. His leadership has been critical to the growth and acceptance of the program, despite a culture that has been less receptive than many others to informal third-party dispute resolution. (See Ukraine Case Study.)

B. Operations and Implementation

1. Establish Effective Procedures for Selection, Training, and Oversight of Mediators and Arbitrators

The success of an ADR program depends on the quality and reputation of the mediators or arbitrators employed by the system. Selection and training are critical components of program design. In addition, ADR programs should incorporate safeguards to ensure mediator and arbitrator impartiality and quality, including procedures for regular evaluation and oversight.

a. Selection and training

The choice and training of mediators and arbitrators are probably the most crucial factors in the success of any ADR program because their credibility affects the confidence of the users. A number of considerations affect the credibility of ADR service providers:

(i) Selection of local notables

Some programs have succeeded because they have chosen highly respected local citizens to be the mediators. The Mediation Boards in Sri Lanka, for example, are staffed by respected local volunteers. In China, the People's Mediation Committees draw on highly regarded local citizens as members. Likewise in Taiwan, observers and participants attribute the success of the mediation committees, in part at least, to the fact that the mediators are respected residents of the local villages or towns (See Shir-Shing Huang, 1996.) The selection of notables or village elders bases the credibility of the system on the individual reputations of the mediators.

These local notables may have close relationships with and influence over disputants in particular cases, and may use their influence to push for settlements that uphold community norms. Notables may have little formal training in ADR techniques. Nevertheless, they may be widely respected and sought out because they represent and uphold community norms that disputants accept as fair standards for resolving disputes.

One of the several factors contributing to the decline of the lok adalat courts in India after they were placed under formal government management in 1988 was the change in the characteristics of the "conciliators." Whereas conciliators had been chosen from within the local community when the lok adalats were operated outside government control, the conciliators chosen by the government were frequently not members of the community in which they operated. This led to a decline in public confidence in the system. (See Whitson, 1992.)

In Bangladesh, the Madaripur Legal Aid Association (MLAA) selects mediators based on the recommendation of local elders and elected officials. As noted in MLAA documents, "a mediator worker must be familiar with the local/societal roots and belongings of the parties, as well as their specific traditions, customs, and values. By being locals, the mediators ensure that they are familiar with all the nuances of local lives, both of the parties directly involved and others who may be indirectly concerned with the outcome of the resolution process." ("Mediation: Concept, Techniques and Structures," MLAA, see Case Study.)

There may be a trade-off between choosing "notables" and choosing "progressives" or "representatives of disadvantaged groups" as ADR providers. Notables may have greater authority to resolve disputes according to existing norms, but little interest in mitigating power imbalances between parties in particular disputes. Progressives (e.g., social workers or teachers from outside the community) and representatives of disadvantaged groups (e.g., women, members of low-income or low-status groups) may have less authority, but greater interest in mitigating power imbalances.

Training at IMSSA

The extent of IMSSA's training for labor mediators (panelists) in South Africa is instructive. The training includes a number of formal courses with increasing levels of specialization, observations of actual mediations and arbitrations, and pairings with experienced mediators and arbitrators. The trainees are reviewed and assessed throughout the process, and must receive recommendations from the mediators they work with before they can receive accreditation. The training process takes approximately six months. An IMSSA code of professional conduct governs the work of accredited panelists. (See South Africa Case Study.)

(ii) Familiarity with the legal system may not be essential

Familiarity with the formal legal system may be another qualification trade-off. Where the legal system is widely agreed to be byzantine and unjust, it is not clear that familiarity with it should be a criterion for selecting third parties, even for court-annexed, labor or commercial disputes that are mediated or arbitrated in the shadow of the law. In the Philippines, labor arbitrators from a private voluntary association, who are generally less familiar with labor law than the official government labor arbitrators, appear to be more popular with disputants than the government labor arbitrators. Some disputants believe that the government's arbitrators are more likely to take bribes to manipulate regulations (USAID, 1994). On the other hand, training programs in Sri Lanka and Bangladesh include components designed to inform mediators about relevant laws.

Familiarity with legal standards is considered important by users. In Bangladesh in particular, users cite the training and familiarity with relevant laws as one of the advantages of the village mediation system over traditional *shalish*. (See Sri Lanka and Bangladesh Case Studies.)

(iii) Cultural norms affecting selection and credibility

Cultural norms may influence the criteria for selection of effective and appropriate mediators. For example, in many Asian cultures, the welfare of the whole community is seen as more important than the rights of individual members. In these cultures, the most widely respected and accepted mediators may be those who best promote community interests. Likewise, many Asian cultures focus on long-term reconciliation as a more important goal than short-term dispute resolution. Mediators who are more adept at promoting reconciliation will be more effective. Finally, Asian cultures often place more importance on credibility rather than neutrality, and highly respected community members may be more effective mediators, even if they are not completely neutral, than neutral mediators of lower community stature. (See Jandt and Pederson, 1996.)

(iv) Training as a means of establishing credibility

Some systems have been effective in establishing the credibility of third parties through effective training. The success of IMSSA in South Africa depended on the quality and intensity of its mediator and arbitrator training program, which contributed to a favorable reputation for quality and professionalism. Further, IMSSA trained a large number of mediators, which allowed it to respond in a timely manner to requests for services. These factors helped IMSSA develop an institutional reputation for quality and effectiveness, and helped contribute to a national reputation for ADR as an effective means for resolving disputes. (See South Africa Case Study.)

Oversight of Sri Lanka's Mediation Boards

The Mediation Boards in Sri Lanka operate with several forms of oversight. The failure of the Conciliation Boards ten years earlier taught the program designers to employ careful mechanisms for monitoring bias and performance. Each Mediation Board is overseen by a mediation coordinator. Each coordinator is responsible for approximately 20 Mediation Boards in a given area and visits 4-5 Boards every week. During these visits, the coordinator observes the mediators in action, offers advice, and interviews participants if problems are evident. Regular reports are submitted to the Mediation Commission (responsible for oversight of the entire system) based on these visits, and mediators are evaluated on their performance and their attendance record. If problems or complaints occur, the Commission may assign a team of three coordinators to investigate complaints. To ensure that the coordinators do not become partial to any given district or Mediation Board, the coordinators are rotated to a new district every three years.
(See Sri Lanka Case Study.)

b. Maintaining impartiality

The effectiveness of an ADR system depends not only on the selection and training of credible mediators or arbitrators, but also on procedures to maintain their impartiality (and the perception of impartiality), as well as procedures to monitor and correct poor performance.

Impartiality is a straightforward principle, but one that allows a wide range of interpretations in practice. For example, third parties in some cultures may take a very strong directive role to push disputants toward particular outcomes that meet their interests, while third parties in other cultures would be seen as biased if they

advocated for a particular outcome, even if they agreed on its fairness. Nevertheless, some guidelines on impartiality (or non-partisanship) may apply across cultures:

- In general, mediators and arbitrators should not favor the interests of one disputant over others in any dispute.
- ADR providers should be required to inform all disputants of financial or personal relationships with any disputant.
- Disputants should agree jointly on the choice of an ADR provider, or have a veto over that choice.
- Salaries or fees for ADR providers should be paid by an intermediary organization, or shared with some rough equality (straight or income-adjusted) by all parties to a dispute.

It is not always necessary or appropriate, however, for ADR third parties to recuse themselves simply because they have ongoing relationships with one or more of the disputants. As discussed above, those ongoing relationships (and even the social pressure that the neutral may bring to bear on some of the parties) may be critical to their ability to resolve the dispute in a way that satisfies the parties. In fact, as noted in the Bangladesh Case Study, some systems intentionally choose mediators who are likely to have a relationship with the parties to the disputes.

Cultural norms may help inform the design of mechanisms for preserving impartiality. In Bangladesh, village mediation committees are composed of a minimum of three members for each mediation. Not only does this comport with the traditions of the region, but the use of a panel of mediators helps limit systematic corruption or bias.

In some countries, the laws authorizing ADR include provisions designed to prevent conflicts of interest and bias. In Bolivia, for example, the Arbitration and Conciliation Law includes criteria for the disqualification of an arbitrator. These criteria include: economic interest in the case or financial relationship with one of the parties, defined legal or blood relationships, known opinions on the dispute that would prejudice the outcome, and intimate friendship or hostility with one of the parties. (See Bolivia Case Study.)

IMSSA's Funding Mix

In South Africa, IMSSA has developed several sources of financial support for its work mediating labor disputes. About 20% of its revenues come from fees for mediation services paid by corporations and labor unions. The remainder of its budget has been funded by various donors, including the European Union and USAID. The majority of the funds are used to pay mediators and arbitrators, about $450-600 per case. (See the South Africa Case Study.)

c. Oversight

Most effective systems employ some form of ongoing oversight of ADR mediators and arbitrators, including observation by case managers, investigation of complaints from parties, and monitoring of results. Retraining and re-certification is advisable to maintain ADR third parties' commitment and ability to remain impartial. The Madaripur Legal Aid Association (MLAA) in Bangladesh has established a system for observation of mediations, and of oversight of the mediators by a "monitoring cell" within the service. This group has a target of 550 monitoring visits each year.

Mediation workers can be terminated if too many complaints are filed against them, or if the monitoring cell believes they are not functioning properly. (See Bangladesh Case Study.)

2. *Find or create a sustainable source of financial support*

Several potentially successful ADR systems have been crippled by lack of sustainable financial support. The financial cost of operating an ADR system can vary widely. One of the most widely respected systems, the Mediation Boards in Sri Lanka, operates very inexpensively with volunteer mediators (although as noted elsewhere, the increasing burdens on these mediators call into question the long-term viability of the volunteer system). Other systems operate as permanent centers, incurring rent, staff, and other operational costs. Whatever the cost of the system, the source of ongoing funding, either government budgetary support or long-term donor support, should be identified as part of the design process.

The project design team should consider creative models for financial support. For example, in the Philippines, the voluntary arbitration service of the National Conciliation and Arbitration Board (NCMB) is supported by a Special Voluntary Arbitration Fund (SVAF), which subsidizes the costs of the arbitration process for union-management disputes. The Fund receives registration fees, which employers pay when registering a Collective Bargaining Agreements with the Ministry of Labor.

As noted above, the legal framework for ADR may influence the financial sustainability of the system. In Ukraine, it is illegal for NGOs to charge fees for services. The Ukraine Mediation Group depends on charitable donations from donors, membership dues, and contributions from mediators who receive direct payment for their services from users. The constraints of the current legal system threaten the sustainability of the program. (See Ukraine Case Study.)

3. *Create an effective outreach and education program to reach users*

The success of a system is linked to the level of confidence users have in the system. This level of confidence can be increased by the amount of energy focused on education of potential users. In addition, disadvantaged members of societies are sometimes effectively denied access to public processes because they are unaware of their options. Outreach efforts can help increase their access to dispute resolution programs.

a. Outreach and education for users

Sometimes, simple publicity campaigns to raise public awareness of the ADR option is the most important factor for success. In Uruguay and Argentina, lack of public awareness of court-annexed ADR in the past seemed to have been a major factor limiting the impact of the system (Blair et al., 1994). In Ecuador, coordinated public relations support from the press and government was important in establishing four mediation centers between 1993 and 1996. (See CIDES, 1993-1996.)

Outreach and education efforts may require innovative techniques, particularly to reach populations with low levels of literacy. In Sri Lanka, radio and television programs have helped inform and educate the population about the Mediation Boards and their procedures. Handbills, community workshops, and union and workplace presentations have also been used effectively in many countries.

When new ADR systems are based on improvements to existing structures, the information campaign may need to focus on the changes to those structures under the new system. The outreach efforts in Bangladesh focused less on notifying potential users about the service than on informing women about the changes in the system. (See Bangladesh Case Study.)

Extensive outreach and education campaigns may be unnecessary for grassroots community programs, or for programs focused on particular sectors of the community where information about the program may spread by word of mouth. The widespread use of the IMSSA

mediation and arbitration services in South Africa and the use of community justice centers in local neighborhoods both succeeded without extensive outreach campaigns. User satisfaction and a positive reputation were essential for this development. (See South Africa Case Study.)

b. Education for stakeholders

Even when a system is widely known, and when it fits traditional and cultural norms, a public relations effort can be important to the success of the program. In Sri Lanka, for example, the Mediation Boards are quite widely known by the public. A public education campaign has been important, however, for winning over the support of community officials who are critical to the implementation of the program. More than 900 stakeholder workshops have been conducted across Sri Lanka during the past six years with the intent of educating local magistrates, police chiefs, judges, and village leaders. Winning the support of village leaders has been important since they are responsible for both publicizing the Mediation Boards as well as encouraging "defendant" parties to attend. They are also important monitors and enforcers of the agreements.

Likewise, education and public relations efforts are aimed at the legal profession in Sri Lanka to encourage their support of the Mediation Boards. Some lawyers have expressed concern that settlements have not followed legal precedents or requirements. Education efforts are now aimed at bringing lawyers into the system to help inform mediators of legal requirements, and to gain legal community support for the system. (See Sri Lanka Case Study.)

4. Site ADR programs in convenient locations and create support services to overcome barriers

Outreach and education may be insufficient to enable disadvantaged parts of the population to use ADR programs if they are unable to travel to ADR program sites or cannot effectively use the programs. Once the initial needs assessment identifies barriers to usage, program designers should identify ways of overcoming those barriers. Siting the programs in locations convenient, hospitable, and accessible for the target population will be important.

Many users may need guidance on their dispute resolution options, including their legal rights and the steps necessary to ensure them. In Bangladesh, the Madaripur Legal Aid Association provides counseling for disputants to educate them about their legal options, advice regarding the best use of those options, information about the relationship between ADR and the court system, and assistance in preparing themselves for either mediation or litigation. Although the MLAA was initially established to provide assistance for users of the formal court system, mediation services now form the majority of its work. The program continues to provide legal assistance in the courts for impoverished clients who are unable to resolve their dispute through mediation. This range of services and advice improves the real access for disadvantaged users to the full range of legal options. (See Bangladesh Case Study.)

Some users may be deterred by conditions unrelated to the design of the system itself. For example, some workers are unable to take time away from work to appear before a court. Others may face intimidation, loss of wages, or dismissal if they bring labor-related grievances to the attention of any authority. Program designers should consider whether they need to implement legal protections for users of the system to prevent such intimidation.

In 1969, Mexico established the Boards of Arbitration and Conciliation to help resolve labor disputes. The boards failed for a variety of reasons, including corruption, lack of enforcement, and the existence of unethical agents who would skim a large part of any award as compensation for representation before the boards. The system did provide, however,

for workers' travel costs, the postponement of attorneys' fees until after a settlement had been reached, and the continuation of employment and wages during the course of the proceedings. These legal protections were inadequate to make the system successful, but they were essential to ensure worker participation in the system. (See Volkmar Gessner, 1986.)

5. Establish effective procedures for case selection and management

ADR systems can develop a poor reputation if they attempt to resolve disputes for which they are not designed or intended. Effective screening procedures are important to ensure the efficiency of the system and a reputation for effective case management.

Any ADR system will fail in resolving disputes which do not fit the criteria for which the system is designed. For example, mediation cannot succeed when the parties to the dispute do not accept mediation and do not actively participate in the process. Likewise, facilitated negotiation systems are likely to fail when one party has a superior level of power or education and can outmaneuver the other party. Similarly, a dispute in which one party benefits from delay is also unlikely to be resolved through a process in which participation is voluntary.

A successful program design should develop case selection criteria that will fit the design and purpose of the process, and ensure that cases which are not likely to be resolved through the ADR process are referred to the courts or some other forum. The Centro de Mediación, in Costa Rica, created clear criteria for screening cases prior to acceptance. This filter ensured that the mediators had a reasonable chance of success in the cases that came before them, and kept out cases that were more suited to a formal legal process. The careful evaluation of cases prior to acceptance led to a high level of successful case resolution for the center and a positive reputation among the target population of disadvantaged and unemployed residents. (See Eduardo Garro, 1995 and 1996.)

6. Establish effective procedures for program evaluation

Evidence of program impact is important for building users' confidence in the system, and for persuading donors to invest in the system. Program evaluation is also critical for ongoing improvement of the program. ADR systems are, however, notoriously difficult to assess and evaluate, even in the United States where data are relatively available and reliable.

Baseline data are especially important to collect prior to program implementation. These data should include: the number of cases of various types processed each year; the target constituencies involved in each type of case; the average time between case filing and disposition for a variety of types of cases; the average cost of litigation; and the users' perception of fairness of outcome. This data may be gathered as part of the initial assessment process.

The ADR system itself should establish procedures for collecting and processing data regarding its operation. This data should include the same information noted above, as well as any case management and disposition data necessary to monitor the performance of individual mediators or arbitrators. Additional information relevant to specific desired outcomes or development objectives should also be collected. The program design should include a process for reviewing the data on a regular basis.

Cultural norms may influence the design of appropriate evaluation systems. In Ukraine, the years of authoritarian rule contributed to a closed society and a general fear of disclosure. The Ukraine Mediation Group has found that users of mediation services are often reluctant to share information or data about the mediation process. Efforts to gather data have been thwarted by a general reluctance to disclose

information in surveys or follow-up calls. In such circumstances, program designers may need to develop creative alternatives to follow-up surveys. (See Ukraine Case Study.)

VII. CONCLUSION

As discussed in the guide, ADR programs can serve as useful vehicles for promoting many rule of law and other development objectives. Properly designed ADR programs, undertaken under appropriate conditions, can support court reform, improve access to justice, increase disputant satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes. In addition, ADR programs can help prepare community leaders, increase civic engagement, facilitate public processes for managing change, reduce the level of community tension, and resolve development conflicts. The chart on page 50, **Developing an ADR Program**, provides in graphic form an overview of the issues covered in the guide.

An advantage of informal ADR systems is that they are less costly and intimidating for underprivileged communities, and therefore tend to increase access to justice for the poor. These systems are also less expensive for the state, and can be more easily placed in locations that will improve access for underserved populations. It is not possible, based on available data, to measure accurately ADR's ability to increase access or ADR's cost relative to formal litigation systems. This inability to measure accurately, however, does not mean that the impact is not observable or significant.

Although ADR programs can accomplish a great deal, no single program can accomplish all these goals. They cannot replace formal judicial systems, which are necessary to establish a legal code, redress fundamental social injustice, provide governmental sanction, or provide a court of last resort for disputes that cannot be resolved by voluntary, informal systems. Furthermore, even the best-designed ADR programs under ideal conditions are labor intensive and require extensive management.

In the development context, particular issues arise in considering the potential impacts of ADR. First, some are concerned that ADR programs will divert citizens from traditional, community-based dispute resolution systems. This study has found a number of instances in which ADR programs have been effectively designed to build upon, and in some cases improve, traditional informal systems. Second, while ADR programs cannot handle well disputes between parties with greatly differing levels of power, they can be designed to mitigate class differences; in particular, third parties may be chosen to balance out inequalities among disputants. Third, there is no clear correlation between national income distribution and ADR effectiveness. ADR programs are serving important social functions in economies as diverse as those of the United States, Bangladesh, South Africa, and Argentina. Finally, it is not clear from the evidence to date whether ADR programs are more suitable for civil or common-law jurisdictions. ADR programs are operating effectively within both, but not enough data exists to compare success rates under the two types of legal systems.

This guide is a first step in understanding the strengths and limitations of introducing ADR within rule of law programs. While past and present ADR projects have provided some significant insights into ADR, there is much still to be learned. More analysis is needed on the range of possible strategies for using ADR to support judicial reform, reduce power imbalances, and overcome discriminatory norms among disputants. Another important issue for study is how ADR programs may be replicated and expanded to the national level while maintaining sufficient human and financial resources.

These and other questions about ADR's effectiveness can only be answered well by analyzing evidence gathered from ADR projects. Effective monitoring and evaluation of ADR systems are hard to find in developing and developed countries alike. Present and future ADR projects should have systematic monitoring and evaluation processes in place to ensure not only effective programs, but also continued learning.

This guide mentions ADR's ability to advance development objectives other than the rule of law, such as facilitating economic, social and political change, reducing tension in a

community, and managing conflicts hindering development initiatives. Further exploration of non-rule of law uses of ADR is critical to complete the picture of the range of ADR's applications. More in-depth research and analysis in this area would be extremely useful to development professionals and others seeking to understand the strengths and limitations of ADR programs in developing and transitional societies.

Developing an ADR Program

What are Dispute Resolution Needs?

Issues

- Access?
- Cost?
- Time?
- Fairness?

Venues

1. In Civil Justice System

2. Other Sectors

- Commercial
- Labor
- Land
- Community
- Environmental
- Other

Is ADR Appropriate?

Probably Appropriate

- Cost limits access
- Delays cripple courts
- Complex procedures or geography limits access
- Court reform is not possible

Probably Not Appropriate

- Real need is protection of individual or group rights
- Legal standards need to be establish
- Public sanctions required
- Extreme power imbalance

Is ADR Feasible?

Important Considerations

- Adequate political support
- Trained/trainable ADR providers
- Sustainable financing
- Supportive cultural/ institutional norms
- Relative parity in power of potential users
- Adequate legal foundations

What Are Key Design Criteria?

Recommendations

- Use participatory design process
- Establish procedures to ensure ADR providers' impartiality
- Establish effective monitoring, oversight and retraining for ADR providers
- Create education and outreach for potential users
- Develop a system for effective case selection and management
- Establish program evaluation and easement procedures

APPENDIX A: Taxonomy of ADR Models from the Developed and Developing Worlds[1]

Alternative dispute resolution (ADR) includes practices, techniques, and approaches for resolving and managing conflicts short of, or alternative to, full-scale court process. The variety of ADR models found in developed and developing countries may be described in two fundamental ways: ***basic*** ADR processes, which include negotiation, conciliation, mediation, and arbitration; and ***hybrid*** ADR processes, in which specific elements of the basic processes have been combined to create a wide variety of ADR methods (e.g., mediation is combined with arbitration in *med-arb.*). Hybrid ADR processes may also incorporate features found in court-based adjudication; for example, the minitrial mixes an adjudication-like presentation of arguments and proofs with negotiation.

This taxonomy provides definitions of basic and hybrid ADR methods used in private, governmental, and court-connected ADR. The definitions reflect common usage among ADR professionals, the majority of whom are from developed countries. Wherever possible, an example of a country which has implemented individual ADR models is indicated, along with a short citation to a relevant case study or document in the Working Bibliography for further reference. While this taxonomy is not a catalogue of traditional or indigenous dispute resolution methods, an effort has been made to direct readers to developing world examples in which features of traditional dispute resolution have been incorporated in ADR.

Following the definitions section is an **ADR Chart** which provides an overview of ADR processes. They are organized on a continuum reflecting the role of a third-party in the process: first, *unassisted negotiation* (without third party involvement); second, *facilitated negotiation without advisory opinion* (a third party assists the parties in resolving their dispute, but provides no advisory opinion); third, *facilitated negotiation with advisory opinion* (third party does issue a non-binding, advisory opinion); and fourth, *ADR with binding opinion* (third party issues opinion binding the disputing parties). Another chart, **Examples of ADR in Action**, lists examples of ADR programs by type of dispute and ADR provider.

A. Definitions of ADR Models

1. Basic ADR Models

a. Negotiation

The most common form of dispute resolution, negotiation is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with processes involving third parties, generally negotiation allows the disputants themselves to control the process and the solution.

Examples: Nicaragua—negotiation training (Lytton 1997); South Africa Case Study—negotiation of community disputes; Indonesia—environmental conflict (Moore 1995).

[1]The definitions and concepts provided below are drawn from a number of sources listed in Appendix D, Working Bibliography, Section III., C.

Background ADR Terms and Concepts

Court-connected ADR: ADR processes that are linked formally to the governmental justice system; such ADR activities are authorized, offered, used, referred by, or based in the court system. Court-based programs and court referrals to private ADR services are covered by this term. Agreements arising out of court-connected ADR may be enforceable as court orders.

Court-annexed ADR: ADR programs or practices authorized and used by the court system.

Facilitation: Refers to a process by which a third-party neutral helps the parties reach consensus on disputed issues. "A mediator is a facilitator; an arbitrator is not." (CPR Deskbook 1993, p. 31.)

Impartiality/Neutrality: When discussing the third party intervener, ***impartiality*** refers to the third party's disinterestedness in the dispute—s/he has no personal stake or interest (financial or otherwise) in the situation. On the other hand, a ***neutral*** third party has no inclination one way or another regarding the dispute or the disputants. It may be said that finding an impartial third party is easier than finding a neutral one.

Mandatory/VVoluntary: These terms refer to how disputes enter ADR processes. If the parties are compelled to use ADR (by the court or statute, for example), then the use is ***mandatory***. If the use is based wholly on the consent of all the parties, then it is ***voluntary***.

Nonbinding/Binding: Where the disputants are required to accept and respect the outcome of the ADR process, such as third party opinions, that process is ***binding***. ADR outcomes that are advisory only are a feature of ***nonbinding*** processes. As a rule, disputants are not bound by an outcome or resolution in ADR, unless they agree to be bound. (There are exceptional situations of mandatory binding arbitration.)

b. Conciliation

A process in which a third party meets with the disputants separately in an effort to establish mutual understanding of the underlying causes of the dispute and thereby promote settlement in a friendly, unantagonistic manner. Often the first step, and at times sufficient, to resolve disputes.

Examples: South Africa Case Study—Commission for Conciliation, Mediation, and Arbitration; Bolivia Case Study; Colombia—Bogota Chamber of Commerce centers (DPK Consulting 1994); U.S.A.—historically used in some labor disputes as a step prior to arbitration; India—People's Courts "Lok Adalat" (Whitson 1992); Japan—auto accident victims and insurance companies (Moriya 1997) (NB: some practitioners use the term "conciliation" to describe processes that range from the above definition of conciliation to mediation.)

c. Mediation

A voluntary and informal process in which the disputing parties select a neutral third party (one or more individuals) to assist them in reaching a mutually-acceptable settlement. Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests. The mediator's role and the mediation process may vary significantly, depending on the type of dispute and mediator's approach.

Mediators can employ a wide-range of techniques, e.g., assist parties to communicate effectively and to develop a cooperative, problem-solving attitude; identify parties' underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and the consequences of non-settlement.

Examples: South Africa—Case Study—IMSSA, victim-offender mediation; Sri Lanka Case Study—Mediation Boards; Indonesia—environmental disputes (Moore 1995); Malaysia—inter-ethnic disputes (Othman 1996); India—civil and criminal cases (Kassebaum 1989);USA—community mediation (McGillis 1997), mandatory civil case mediation in North Carolina (Clarke et al. 1995); Bangladesh Case Study—community mediation based on indigenous practice.

d. Arbitration

An adjudicatory dispute resolution process in which one or more arbitrators issues a judgment on the merits (which may be binding or non-binding) after an expedited, adversarial hearing, in which each party has the opportunity to present proofs and arguments. Arbitration is procedurally less formal than court adjudication; procedural rules and substantive law may be set by the parties.

In ***court-annexed arbitration***, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed in the event the appellant does not improve his/her position in court. This process may be mandatory or voluntary.

Examples: USA—used in federal and state courts, mainly in small and moderate-sized tort and contract cases, where the costs of litigation are often much greater than the amounts at stake; Japan—appellate ADR (Iwai 1991); Bolivia Case Study—pilot project.

Private (v. court-annexed) arbitration may be "administered"—managed—by private organizations, or "non-administered" and managed by the parties. The decisions of arbitrators in private arbitration may be *non-binding* or *binding*. ***Binding arbitration*** decisions typically are enforceable by courts and not subject to appellate review, except in the cases of fraud or other defect in the process. Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes.

Examples: South Africa Case Study—IMSSA; Thailand—commercial arbitration (Worawattanamateekul 1996); Bolivia case study—Chambers of Commerce centers.

2. Examples of Hybrid ADR Models

A wide variety of hybrid models have emerged in developed and developing countries. Below are some examples of hybrids found connected to courts in commercial and government settings.

Appellate ADR: Appellate court programs use mediation in mandatory, pre-argument conferences in cases that appear most likely to settle; mediators are typically staff attorneys or outside lawyers.

Example: USA—common in federal and state appeals courts.

Early Neutral Evaluation (ENE): A court-based ADR process applied to civil cases, ENE brings parties and their lawyers together early in the pretrial phase to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral attorney with expertise in the substance of the dispute, or by a magistrate judge. The evaluator may also provide case planning guidance and settlement assistance; in some courts, it is used purely as a settlement device and resembles *evaluative mediation*.

Example: USA—Developed during the mid-1980s in the San Francisco federal court, ENE is now used in the U.S. in state and federal courts.

Fact-finding: A process by which a third party renders binding or advisory opinions regarding facts relevant to a dispute. The third party neutral may be an expert on technical or legal questions, may be representatives designated by the parties to work together, or may be appointed by the court.

Judge-Hosted Settlement Conference: In this court-based ADR process, the settlement judge (or magistrate) presides over a meeting of the parties in an effort to help them reach a settlement. Judges have played a variety of roles in such conferences, articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as a mediator.

Examples: USA—This is the most common form of ADR used in US federal and state courts; Japan—judge as neutral may implement three ADR procedures (Jardine 1996).

Med-Arb., or Mediation-Arbitration: An example of multi-step ADR, parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved by arbitration, using the same individual to act as both mediator and arbitrator. Having the same individual act in both roles, however, may have a chilling effect on the parties participating fully in mediation. They might believe that the arbitrator will not be able to set aside unfavorable information learned during the previous mediation. Additional related methods have evolved to address this problem:

In ***Co-Med-Arb,*** different individuals serve as neutrals in the arbitration and mediation sessions, although they both may participate in the parties' initial exchange of information. In ***Arb-Med***, the neutral first acts as arbitrator, writing up an award and placing it in a sealed envelope. The neutral then proceeds to a mediation stage, and if the case is settled in mediation, the envelope is never opened.

Minitrial: A voluntary process in which cases are heard by a panel of high-level principals from the disputing sides with full settlement authority; a neutral may or may not oversee this stage. First, parties have a summary hearing, each side presenting the essence of their case. Each party thereby can learn the strengths and weaknesses of its own case, as well as that of the other parties. Second, the panel of party representatives attempts to resolve the dispute by negotiation. The neutral presider may offer her opinion about the likely outcome in court.

Court-based minitrial: a similar procedure generally reserved for large disputes, in which a judge, magistrate or nonjudicial neutral presides over a one- or two- day hearing like that described above. If negotiations fail, the parties proceed to trial.

Examples: Used in some US federal districts. (CPR 1993, p. 25.)

Negotiated Rule-making, Regulatory Negotiation or "Reg-Neg": Used by governmental agencies as an alternative to the more traditional approach of issuing regulations after a lengthy notice and comment period. Instead, "agency officials and affected private parties meet under the guidance of a neutral

facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting, proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule." (CPR 1993, p. 149.)

Ombudsperson: An informal dispute resolution tool used by organizations. A third-party ombudsperson is appointed by the organization to investigate complaints within the institution and prevent disputes or facilitate their resolution. The ombudsperson may use various ADR mechanisms (e.g., fact-finding, mediation) in the process of resolving disputes.

Examples: Japan—Civil Liberties Bureau (Rosch 1987).

Private Judging: A private or court-connected process in which parties empower a private individual to hear and issue a binding, principled decision in their case. The process may be agreed upon by contract between the parties, or authorized by statute (in which case it is sometimes called "***Rent-a-Judge***").

Settlement Week: Typically, a court suspends normal trial activity for the week and with the help of volunteer lawyers, mediates long-pending civil cases. Mediation sessions may last an hour or two. Unresolved cases go back on the court's docket.

Examples: USA—used more widely in state than federal courts.

Summary Jury Trial: A flexible, voluntary or involuntary non-binding process used mainly to promote settlement in order to avoid protracted jury trials. After a short hearing in which the evidence is provided by counsel in abbreviated form (but usually following fixed procedural rules), the mock jury gives a non-binding verdict, which may then be used as a basis for subsequent settlement negotiations.

Summary Bench Trial: Like summary jury trial, except that presiding neutral provides an advisory opinion.

Two-track Approach: Used in conjunction with litigation, representatives of disputing parties who are not involved in the litigation conduct settlement negotiations or engage in other ADR processes. The ADR track may proceed concurrently with litigation or during an agreed-upon hiatus in litigation.

Examples: USA and Japan—useful when litigation has become acrimonious or when suggestion of settlement would be perceived as a sign of weakness (Jardine 1996).

EXAMPLES OF ADR IN ACTION

TYPE OF DISPUTE	ADR PROVIDER		
	Private Firms/ NGOs	**Courts/Justice Ministries**	**Other Government Agencies**
Family/Community	Bangladesh MLLA local mediation committees*	Sri Lanka Mediation Commission/local boards*	Costa Rica Mediation Centers[2]
Youth/ Education	South Africa (various NGOs) youth conflict resolution training*		
Labor	South Africa IMSSA Industrial Dispute Resolution Service, Ukraine Mediation Group*		Philippines Dept. of Labor, National Conciliation and Mediation Board[3]
Commercial	Bolivia Chambers of Commerce, Ukraine Mediation Group*	Thailand MOJ mediation of international trade disputes[4]	
Land Claims	Bangladesh MLLA local mediation committees*	Sri Lanka local mediation boards*	Philippines Dept. of Agrarian Reform mediation committees[5]
Other civil disputes	Ukraine Mediation Group*	Argentina, Uruguay court-annexed mediation programs[6]	ROC (Taiwan) – boards – MOJ and interior[7]
Environmental/ Natural resource Management	US ADR providers[8]		Indonesia Environment Ministry mediations[9]
Conflicts between social groups	South Africa (various NGOs) township mediations*		Malaysia Dept. of National Unity mediation training for civil servants[10]
Victim – Offender (minor criminal cases)	South Africa People's Courts[11]	Sri Lanka local mediation boards*	ROC (Taiwan) boards – MOJ and Interior[12]

* See Case Study

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[2] DPK 1996
[3] NCMB 1996
[4] Worawattanamateekul 1996
[5] COTRAIN 1996
[6] Blair et al. 1994
[7] Huang 1996
[8] Bingham 1985
[9] Moore and Santosa 1995
[10] Othman 1996
[11] Foraker-Thompson 1992
[12] Huang 1996

ADR Taxonomy

Unassisted Negotiation	**Facilitated Negotiation** (No Advisory Opinion)	**Facilitated Negotiation** (Advisory Opinion)	**Binding Opinion**
• **NEGOTIATION** • Minitrial (without neutral) • Two-track Approach	• **CONCILIATION** • **MEDIATION** • Appellate ADR • Judge-hosted Settlement Conference • Minitrial (with neutral/no evaluation) • Reg-Neg • Ombudsperson (without report)	• **NON-BINDING ARBITRATION** • Early Neutral Evaluation • Fact-finding—Advisory • Summary Bench Trial • Summary Jury Trial • Ombudsperson (with report) • Minitrial (neutral, evaluation)	• **BINDING ARBITRATION** • Fact-finding—Binding • Private Judging

→→→→→→→→→→→→→Third Party's Role in Crafting Outcome Increases→→→→→→→→→→→→

APPENDIX B: Introduction to Case Studies

There are five case studies annexed to this guide. Each case study examines an ADR program in a developing/transition country.

The five case studies are

Bangladesh:	NGO-supported Community Mediation
Bolivia:	Private Mediation and Arbitration of Commercial Disputes
South Africa:	NGO Mediation and Arbitration of Labor Disputes
Sri Lanka:	Government-Supported Community Mediation
Ukraine:	NGO Mediation of Civil and Commercial Disputes

The cases are designed to

- Give USAID staff concrete examples of ADR in action
- Highlight key issues that USAID staff need to consider when deciding whether to support an ADR program
- Draw lessons on program design and implementation strategies from field experience

The case studies use the following format:

Key Points: A one-page summary of the case. The *Key Points* page briefly describes the ADR program, and highlights the most important lessons about program goals, design, operations and impacts.

Program Description: A short description of the ADR program's origins, goals, design, operation and impact.

Program Analysis: An explanation of key factors that influenced program goal-setting, design, operation and impact.

Program Assessment: An assessment of the program's success in meeting its goals, the most important challenges the program must meet to maintain/increase its impacts, and steps that program staff might take to meet these challenges.

Bangladesh: NGO-supported Community Mediation
Key Points

Description: Bangladesh's court system is unresponsive to the needs of the poor, and its traditional village dispute resolution institutions are biased against the interests of women. Based on a 1995 national customer needs survey, USAID-Bangladesh defined local participation and increased access to justice (especially for women) as a strategic objective, and improved ADR as an intermediate result (IR).

The case profiles a community mediation program developed to meet USAID's ADR IR. The program is managed by the Maduripur Legal Aid Association (MLAA), a Bangladeshi NGO. The MLAA community mediation program uses a multi-tier structure of village mediation committees supported by MLAA field workers to deliver ADR services. Local mediators are selected, trained and supervised by MLAA field workers in consultation with local officials, religious, and social leaders. The local committees meet twice a month to mediate village disputes, free of charge. Most disputes involve property or marital problems. Agreements are voluntary and are not enforceable in court. The MLAA program currently mediates roughly 5000 disputes annually and resolves roughly two-thirds of them. Satisfaction with the program is high. Most users prefer the program both to the traditional village dispute resolution system and to the courts.

Goals: Reform of the court system is considered politically and institutionally unattainable for the foreseeable future. The ADR program seeks to improve access to justice by providing a substitute for the courts and for traditional dispute resolution systems which are biased against women. Program goals and design were driven by a needs survey that focused directly on potential user groups.

Design: The program design builds on the traditional (*shalish*) system of community dispute resolution, which has much greater legitimacy than the court system. The MLAA program reduces the *shalish* system's cultural bias against women through legal education for local mediators and disputants, and through the selection of women as mediators.

Operation: To ensure the quality of dispute resolution services, the program provides training and ongoing oversight for mediators and field workers. To minimize costs, the program uses a word-of-mouth outreach strategy, volunteer mediators, and simple procedures with a minimum of written documentation. Although it is highly cost-effective compared to the courts, the program is not financially self-sustaining. To ensure sustainability, it must continue to secure grants, begin charging user fees, or both.

Impact: MLAA's community mediation program has demonstrated the potential for community mediation to increase access to justice for disadvantaged rural groups, especially women. Its impact is limited primarily by the small scale of the program relative to national needs. Scaling-up to the national level would require substantial additional financial and human resources.

BANGLADESH CASE STUDY

I. DESCRIPTION[13]

A. Program Origins and Goals

Five Bangladeshi NGOs have been sub-contracted by the Democracy Partnership (which includes USAID, the Asia Foundation, and BRAC—Bangladesh's largest NGO) to deliver on Intermediate Result 5 within USAID's strategic objective "broadened participation in local decision making and more equitable justice, especially for women." IR5 states that the "quality of alternative dispute resolution [in Bangladesh be] improved." Each of the organizations has designed their delivery vehicle slightly different. Of these five, two NGO programs were observed and one of them will be described in detail here—the Madaripur Legal Aid Association (MLAA).

MLAA was established in 1978 as a legal aid foundation. In 1981, MLAA began filing cases in court on behalf of their clients. The founder, however, was not satisfied with either the treatment or the results that the poor received in court. Therefore, in 1988, MLAA began to focus on mediation as a means of addressing client needs. In responding to the Democracy Partnership's RFP, MLAA was seeking the resources to continue this mediation work. According to the MLAA staff, the law is not a sufficient means of redress for the poor, predominantly due to the fact that the poor do not have the resources to effectively manipulate the court system. In addition, corruption is rampant (adding to the financial burden of anyone seeking redress through the courts) and the poor do not perceive that they are treated fairly by the system.

The procedures used by MLAA are based on a long tradition of mediation in Bangladesh, an indigenous method called "*shalish*." The MLAA has constructed a program which builds on the existing indigenous system and in a sense, "remodels" it. The MLAA program is especially sensitive to issues of religion and tradition, while being careful to operate within the law.

MLAA has recently expanded their program beyond providing legal aid and mediation services directly to rural populations. In 1996, they began to offer training to other NGOs who are interested in incorporating mediation into their projects. In 1996 MLAA identified 21 organizations as partners in 17 districts throughout Bangladesh.

The budget for 1996-97 was $70,000 and the budget for 1997-98 is $94,315. Sixty percent of MLAA's total budget comes from the Ford Foundation, with just under 33 percent coming from The Asia Foundation (TAF) and USAID. As the Ford Foundation has indicated it will soon terminate its activities in Bangladesh, it is uncertain as to how the MLAA will cover this funding gap in the future.

B. Program Design

1. Structure and Staffing

The organizational structure of the MLAA is an elaborate multi-tier structure: the head office is located in New Town, Madaripur; there are three district offices, Shariatpur, Gopalgonj and Madaripur (the Madaripur District Office is subsumed into the head office); and within each district there are "thana" offices to oversee activities at the "union" level (collections of 10-15 villages). The district offices have

[13] Conducted by Elizabeth McClintock, CMG Consultant, September, 1997.

small staffs of 3-5 people. Thana level offices are staffed by 2-3 people who are the direct supervisors of the mediation workers. These supervisors are required to spend 16 days in the field every month, both attending to administrative duties as well as sitting in on mediations. The MLAA desires to have their program replicate many traditional characteristics of *shalish*; therefore there is no office at either the union level or the village level. There are 140 total staff members at MLAA, 25-30 of whom are located at the head office. This does not include the volunteers - of which all mediation committees are made up.

The MLAA has formed central mediation committees in each union comprised of 10-12 members selected from the MLAA village committees. The central mediation committee members receive a three-day training in mediation and legal awareness at the MLAA head office. This year, the MLAA held a three-day training for all the women in the union Parishads (local governmental municipal bodies) to raise their awareness about their legal rights, increase their understanding of mediation, increase the number of women implicated in the public education process about mediation, and to prepare them to be potential mediators in the future.

Each union has one mediation worker assigned to it. Candidates for the position of mediation worker are required to be from the union that they will serve in and have at least an 11th grade education. An application is submitted to the MLAA and the five member sub-committee of the governing board (which includes influential citizens like prominent Bangladeshi social activists, lawyers, etc.) then hires the staff person. The mediation workers receive approximately ten days of training from the head office prior to taking up their positions. The MLAA also tries to send some staff overseas to receive additional training. For example, two women were sent to a training in India last year.

The mediation worker is required to travel throughout the union 15 days per month. The exception to this is in the Shariatpur District, where a lack of resources prevents the Mediation Workers from traveling as frequently. The responsibilities of the Mediation Worker include investigating potential cases, which might come to mediation, encouraging participation in the program, and sharing information about laws, regulations, etc. at the village level. The Mediation Worker must be present at all mediations because s/he maintains all records and the "calendar" of all mediations within the union.

Within each village in the union an MLAA mediation committee of 8-10 people is established. The mediation committee members are chosen in consultation with the elites of a given village (socially influential people, teachers, elected officials, social workers, the imam, or religious leader). MLAA focuses on recruiting women and people from a number of religions, especially if the village is a mixed one. The MLAA village mediation committee members receive a one-day training in mediation for approximately 50 people, with additional refresher courses. Not all committee members are generally present at each mediation (although they can be if they wish) due to work and family obligations.

2. Mediation Process

The intake process for mediations is quite straightforward. A poor person will seek out the Mediation Worker or a member of the mediation committee in his/her village, who assists the disputant in filling out the necessary forms. MLAA specifically targets the poor and disadvantaged for its services (and this corresponds to the objectives set out by USAID), and so the forms include information regarding education and income. The mediation worker then posts a letter to the other party and sets a date for mediation.

Once a mediation begins, the mediation worker will explain the process to the parties and inform them of their right to pursue their case in court. The mediation worker will sometimes act as the chairperson,

although this honor is often given to the most respected "elder" on the committee. Clients have some say as to who is on their committee and can request that someone be excluded. Clients are also permitted to bring anyone they choose to the mediation. (In four of the six mediations observed, the women clients brought along a male relative for support and credibility.) A major focus of the mediation process is allowing the clients to share their stories.[14] The mediation committee members do a lot of inquiry and generally police the disputants as they struggle for time to express their views. During the mediations observed, clients were never cut short because time might be running out. Instead, the mediation was simply extended to a next meeting. It generally takes at least 3 months to resolve a land dispute and approximately one month to resolve a family problem.[15]

While complete data is not available for the entire MLAA program relating to the kinds and number of cases,[16] figures are available on the Shariatpur District. (According to the MLAA staff, these findings can be generalized to the overall program.) Between July 1996 and June 1997, new and pending applications for mediation totaled 1737. Of these, 944 were resolved through mediation, 202 disputes were referred to court, 222 were dropped due to an absence of necessary papers or the non-appearance of a party, and 396 have been carried over to the next reporting year.[17]

An overwhelming number of cases brought to the MLAA village mediation committees are disputes involving property or family matters (and sometimes the land disputes involve members of the same family). Approximately 59 percent of the disputes involved family matters and over half of these dealt with dowry payments. Thirteen percent of the total dealt with property/land and 28 percent had to do with miscellaneous matters (e.g., conflicts between neighbors).

Agreements are signed by the parties but are never submitted to the court unless the district judge issues a subpoena. Clients put much importance on documentation and sign the agreements in front of a crowd. This puts pressure on parties to abide by the agreement. (The documentation is a difference from traditional mediation where no documentation exists.) No data is available on how many disputants return to mediation if the settlement is not respected. Anecdotal evidence indicates that a large majority of the settlements are respected because of the fact that they are reached in the full view of the community. The mediation worker is responsible for overseeing the implementation of the agreements. The final paperwork is not done (i.e., the case closed) until the agreement has been respected. In the case of non-settlement, the mediators will make several efforts to try to resolve the problem before referring it to the next level or to court.

If a mediation cannot be resolved at the village level, it is referred to the central union committee (also trained by MLAA), then to the thana level, to the district level and finally to the head office. A case will be referred to district court (the lowest level of courts) if it has gone through mediation and failed, if it is a criminal offense, or if it ends up being a complex land dispute that requires extensive legal knowledge. If a case has gone through the MLAA referral system and the MLAA staff decide to refer it to court, the MLAA will pick up the court costs for the disputant. The case is then referred to MLAA's legal aid

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[14] This was especially true in the Banchte Shekha mediation committees. The women interviewed indicated that the mediation committees sponsored by BS were considered to be "safe spaces" where the women could tell their stories without fear of redress. In this and the MLAA project, women clients seemed to respond much more actively when there were a number of women on the mediation committee.

[15] Although, the district coordinator in Shariatpur indicated that it took approximately 5 sittings (2 months) to resolve a family matter and approximately 12 sittings (6 months) to resolve a land dispute. Land disputes take at least one year to resolve in court and the costs to the client are much higher than those they incur by using the shalish system.

[16] The MLAA mediated a total of 5,050 cases last year and referred 727 to the courts. The MLAA staff indicated that they mediate approximately 5,000 cases every year.

[17] *Yearly Activities Report, July 1996 - June 1997*, p. 17. Madaripur Legal Aid Association.

division. It costs between 200-250 tka to file a case and then costs mount from there. On average, it takes 2-4 years to reach a resolution for almost any kind of case in the courts.

Surveys indicate that user satisfaction with the MLAA mediation system is quite high. Two hundred villagers in five thanas (in two districts) were interviewed about the social impact of the MLAA mediation system. As compared to traditional shalish, the villagers felt that the training of mediators impacted on the lawfulness of the resolutions reached in the MLAA mediation system. In addition, respondents said that the MLAA mediation system provides them with more "accurate resolutions"—especially since disputes are resolved by consensus.[18]

II. ANALYSIS

A. USAID/Bangladesh's Approach to Project Design

In examining the USAID-funded ADR program in Bangladesh, it is important to understand the context in which it was developed. USAID Bangladesh has enthusiastically embraced USAID Washington's "re-engineering goals," including customer focus, managing for results, teamwork, empowerment, and diversity. A second important factor is the principle goal of the mission: reduction of poverty. The ADR-related relevant strategic objective for reaching this overall goal is: "Broadened participation in local decision making and more equitable justice, especially for women."

USAID-Bangladesh's approach to project design is to be more involved in project design, monitoring, and evaluation and rely less on outside consultants and sub-grantees. The first step USAID-B took to develop the IRs for the relevant SO was to conduct a rapid appraisal of the needs of the target population. In this appraisal, respondents were asked to define what democracy meant for them in their daily lives. USAID-B deliberately avoided involving academics or others traditionally recognized as experts in the survey. The concern was that these "experts" might identify needs that did not resonate with those USAID-B hopes to serve. Following the rapid appraisal in April 1995, USAID-B developed several results targets or IRs. The IRs and the project design process were then used to develop a Request For Application (RFA) to solicit partners in achieving the stated IRs.

The Asia Foundation (TAF) and BRAC responded with a joint application which was accepted by USAID-B; together, the three organizations formed the Democracy Partnership. In August 1995 the Democracy Partnership conducted another survey to determine if the IRs were still accurate. Having further refined the IRs, the Partnership then began choosing NGOs to provide the services. The selection process included using the Association of Development Agencies of Bangladesh (ADAB) as a forum for describing the proposed IRs and what the Partnership wanted to accomplish. TAF subsequently hosted follow-up meetings to explain the results framework developed by the Partnership and to choose the NGOs to deliver the IRs. The Asia Foundation is responsible for entering into and documenting subgrant relationships with all the NGOs selected.

In Bangladesh, government involvement in the development of the program was quite limited. The Division of External Resource Development of the Ministry of Finance (ERD) was consulted when the RFA was initially developed and USAID-B proposed that they join the partnership. However, there is no specific government agency assigned to oversee work in democracy and governance (as it is a non-traditional area of donor assistance), so ERD gave the go ahead to the program but declined to get involved. The government felt that they did not have the resources or the experience to get involved in DG projects and recommended that

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[18] *Evaluation on Social Impact of Mediation,* p.11. A report prepared by the monitoring and evaluation cell of the Madaripur Legal Aid Association. (1995-96.)

USAID-B use NGOs as service providers. The partnership continues to consult and inform government officials who are involved in the election commission and the locally elected bodies (LEBs) of the progress of the program and has shared the USAID results framework with them.

The preceding discussion provides an important context for understanding how program goals were set in Bangladesh. They are very much driven by USAID goals and objectives and informed by the rapid appraisals conducted by the Democracy Partnership. The mediation programs observed were established under Intermediate Result 5, which states that "the quality of alternative dispute resolution be improved" by the end of the grant period. Very broadly, activities under this IR help make dispute resolution through the village mediation committees more accessible, equitable, and effective. Attention is also given to improving the quality of dispute resolution conducted through union parishads.

More specifically, the goals of the program could be categorized under the following three headings: reform of the legal system; addressing more pressing social problems; and improving the quality of the dispute resolution process. The goals of the program with respect to each of these categories are described below.

Reform of the courts: The ADR programs implemented by Bangladeshi NGOs serve as a substitute to an ineffectual justice system, especially for women and the poor. In Bangladesh, the poor have no confidence in the allegedly corrupt formal legal system, nor do they have the resources to take advantage of it. Knowledgeable observers comment that ultimately, the reformed community mediation system may have some impact on reform in the formal system but that realistically, reform will only happen with overall government reform, which is a long way off. Indeed, in Bangladesh the link between institutionalizing some form of ADR and addressing pressing social problems is far stronger. The explicit way in which the ADR programs are coupled with other social services provided by NGOs clearly demonstrates this.

It is interesting to consider whether or not improving the *shalish* committees serves to create a "second class" justice system or prompt the disadvantaged to give up their right to pursue cases that might have larger social or political implications for themselves or their communities. The IRs articulated by the Democracy Partnership and the way in which the two programs observed were structured are attempts to promote the availability of unbiased, quality ADR programs, available to ALL classes of disputants. Program designers face an important tradeoff: increasing immediate access to a system, which provides tangible relief in the daily lives of users, versus championing the rights of the poor, especially women, in the larger forum of the national court system. Interviews with both users and NGO staff implementing the programs indicated that the population feels they need to be informed about their rights before advocating for those rights. The reformed mediation committees have provided them with an opportunity to initiate this education process.[19]

Address social problems: The primary social goal is increased access to justice for the poor, as well as more equitable and effective justice for them. The additional reasons given by the NGOs surveyed for setting up ADR programs included ensuring the more effective implementation of their own programs, such as better access to and use of family planning, or the improvement of conditions for women. ADR is just one of a number of services offered by these NGOs to fulfill their overall program goals.

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[19] The MLAA and BS programs both incorporate a significant amount of legal aid and education about rights. BS actually has a team which documents all cases, especially of abuse, which they are called upon to investigate and provide legal counsel. Both organizations are especially concerned about creating precedents, either through court cases or by institutionalizing a reformed *shalish* system, which promote and affirm the rights of the poor.

Improve process of dispute resolution: Certainly, the directors of the programs examined indicated a desire to improve the dispute resolution process itself—e.g., make it cheaper for users, increase fairness and equitable outcomes and therefore satisfaction of the users. This goal achieves importance, however, in so much as it is related to the issue of access to justice for the poor. A collateral benefit is that the mediation committee process tends to take far less time than court.

B. Insights from Field Work and Setting Program Goals

The field work to determine the "needs of USAID/Bangladesh's customers" and then to test resulting IRs provided key information used in goal-setting and project design. The needs assessment was conducted by men and women fluent in Bangla. The teams interviewed the sample group of hundreds of people in pairs and were sensitive to gender issues: men interviewed men and women interviewed women. The interviews revealed a number of important insights affecting any ADR program:

- Associations contribute greatly to an improved quality of life for women and by extension for the very poor by giving members a greater voice and ability to participate in community affairs, as well as often providing tangible economic benefits.

- Access to justice for both men and women follows a fairly predictable pattern: it is sought first at the local level through the traditional "*shalish*" system. If the problem is not resolved, the parties then seek out local government leaders, and finally seek redress through the courts if the issue is not resolved at the lower levels. An overwhelming number of disputes are solved by traditional "*shalish*" as the poor feel that they are handicapped when seeking justice at the other two levels—both in terms of access and impartiality.

- Interviewees, and women in particular, expressed an interest in continuing to seek redress for their problems at the local level, if the local, informal dispute resolution systems were strengthened.

- Regarding women's concerns, most respondents (and women were in general more critical than men) felt that the "*shalish*" committee was usually biased, as well as ill informed as to the law and to procedures. Education about legal rights, especially in marriage and divorce and specific assistance in resolving problems of dowry payments were of greatest concern.

- Several suggestions were made for encouraging the participation of women on local committees, for training of *shalish*, local elders and union parishad members, and for better monitoring of *shalish* judgments.[20] Stakeholders believed that the five IRs currently articulated met their needs and that it was unnecessary, and perhaps even counter-productive, to formulate an IR focusing on women that was not connected to the other goals (such as greater participation of women in locally elected bodies, voter education, an improved *shalish* system, etc.).

- Finally, government is uniformly considered to be corrupt and because of this, the poor are doubly disadvantaged in terms of access to justice; services or resources intended for them are absconded by officials and a lack of funds implies an inability to buy influence.[21]

USAID then used these insights to develop the intermediate results framework. ADR programs designed by local NGOs have corresponded to the intermediate results framework and seem to be delivering on the needs identified by the ultimate users.

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[20] Validation Synopsis Report submitted by the Democracy Partnership, August 1995.
[21] USAID "D" Team Report. May, 1995 (pp. 1-4).

C. Other Factors in Goal-Setting

The decision to initiate ADR programs in Bangladesh was driven by two factors: first, USAID-B has determined that the funding of ADR programs is one way in which their overall objective of reducing poverty in Bangladesh can be achieved. In this case, ADR is simply a means of addressing larger social issues, especially access to justice for the poor and the empowerment of women. Second, the local and international NGO community in Bangladesh has recognized the value-added that ADR programs bring to their other programming activities.

Perhaps the single most important background factor considered in the goal- setting process was the program's fit with cultural and institutional norms. The *shalish* corresponds to the traditions of all religions represented in Bangladesh. In addition, access to the *shalish* does not require a high degree of literacy (in fact, most of those who use the system are illiterate) and, given the tight communities in which most Bangladesh citizens live, the *shalish* process conforms to a basic need to involve the community in any reconciliation process. Despite the distrust of the justice system, building a constituency for ADR, while challenging, has been relatively easy when both traditional and elected local leaders are captured by the education process.

Rough parity in the power of classes of disputants is another background factor which contributes to the success of the system in Bangladesh. The system does not really provide for the equalization of power with respect to class—the middle and upper classes are not currently users of the mediation committee system but neither are they the target population—but an important goal is to provide disputants with an opportunity for redress before a dispute festers and escalates. According to many of the mediation committee members interviewed, this is a significant improvement over the *shalish* system.

More importantly, according to the women who participate as disputants, the mediation committees provide a means of equalizing power imbalances caused by gender. Most of the women interviewed felt that the mediation committee system provides them with a fair and relatively unbiased forum in which their grievances can be addressed—a forum that has not existed in the past.

The goal-setting process undertaken by USAID-B initially and ultimately with the members of the Democracy Partnership greatly contributed to the buy-in of program goals by most stakeholders. Ongoing consultation with end users and the government supported the program goals. Another step was taken to build a constituency at the local level for the implementation of the ADR programs. Traditional and elected local leaders were sought out for their opinions and suggestions, and in the design process, an education component was developed. Traditional leaders are also targeted as potential participants in the mediation committees and in many of the programs, the Union Parishads also receive training in mediation skills, as well as Bangladeshi law and the rights of citizens.

D. Design Issues

There are four program design issues which impact the effectiveness of the ADR programs in Bangladesh: relation to the court system; outreach and education; ensuring that third parties are neutral; and monitoring and evaluation. The design and implementation of outreach programs and the selection of third party neutrals are design factors that are within the purview of the implementing agencies. The monitoring and evaluation aspects of these programs are driven by requirements from the Democracy Partnership, but the evaluation itself is left to the NGO.

1. Relation to the Court System

There is no formal relationship between mediation committees and the official justice system. Therefore, this was not an issue the NGOs had to address when designing their projects. It may be said that the very success of the mediation system is a result of a failed justice system (especially in the eyes of those serving the very poor in Bangladesh).

The relationship between the two systems is governed by two things: 1) whether a disputant chooses to pay for court when mediation fails or when they feel that the court is a more appropriate form of redress; and 2) whether the NGO providing mediation services and legal aid will cover the costs of taking a client's case to court. The NGOs which provide mediation services (including training) to the poor all explicitly state that they operate within the law. Indeed, a large part of the training of mediators in the programs observed includes informing the candidates about the general laws within which they are expected to operate, the legal rights of the clients who come to them, and the process that should be followed should a client decide that they do not want to pursue mediation. In addition, all clients are informed of their right to pursue their case in court and their court case is not prejudiced should they have chosen to go to mediation first.[22]

Another issue for design is sequencing of the ADR processes vis-a-vis the court process, which is left completely up to the user. Once a court proceeding has been initiated, the case may go to the mediation forum only with the written consent of both parties in the presence of the judge. A judge does have the right to subpoena documents that have been presented as evidence in a mediation, although this happens very rarely.

The absence of a formal link between the justice system and the mediation committee, while not currently an issue, may become problematic in the future. The tenuous link makes it more difficult to ensure that clients have a means of seeking redress if agreements are not abided by. In addition, it means that wealthier people are able to take advantage of the poor by taking a case to court that they know will not be resolved in a timely manner, thus potentially tying up the resources and disputed property of the poorer client for years.[23] At the same time, until the court system is reformed to provide more consistent (and real) justice for the poor, there is not much incentive for NGOs and others providing mediation services to push for a more formal link. They are meeting the immediate needs of their client irrespective of the problems of the court system. That seems to be the first priority of all the organizations interviewed.

However, as ADR programs are becoming more successful in the rural areas, there is a move on the part of government and justice officials to institutionalize dispute resolution at the village level—creating something called the "grameen" or local court. This would create a formal link between the mediation services currently delivered by NGOs and/or people they train and the official justice system. Informed observers in Dhaka feel that it is premature to create these Grameen courts as they would only create another layer of bureaucracy and would only serve to deny justice to those very people who need it (and who are currently benefiting from the mediation systems provided by the NGOs). Because the system has not yet been reformed, nor is there sufficient impetus for reform at the national level, there is no means of ensuring that the Grameen courts do not fall prey to the same corrupt influences affecting the other parts of the justice system.

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[22] *The Training on Legal Awareness* observed in New Town, Madaripur, offered by the MLAA included topics such as family law, Muslim law, implementation of human rights through shalish, the significance of women participation in shalish committees, and strategies and techniques to manage the mediation session. Training offered 9/16 - 9/18 1997. Thirteen men and seven women participated.

[23] Interview with Sufia. 9/16/97, Shariatpur, Bangladesh. (See sidebar.)

Mediation of a Land Dispute

Sufia had gone to court to recover land that had been rented by her family to a tenant farmer and his sons. At the time she went to reclaim the rights to her land, her husband had died and so she had to pursue the case on her own. After six years in the judicial system, her case was finally resolved and she was granted the rights to her land. Unfortunately, the man and his sons refused to vacate so Sufia had to return to court to get an eviction notice to give to the police. This often takes 10 or more years.

Soon after Sufia had submitted her eviction request to the courts, she decided to go to the MLAA *shalish*, to see if the matter could be resolved more quickly. Upon hearing that Sufia had sought redress, the sons came and tortured her. She has terrible scars on her arms (they used a scythe) as a result of their abuse. She spent many days in the hospital and the cost to her was 10,000 tka. When the man found out what his sons had done, he contributed 2000 tka to her hospital bills and agreed to come to mediation.

At the conclusion of the mediation, (which lasted 11 months, with either 8 or 9 sittings—she doesn't recall the exact number) Sufia was paid 120,000 tka for her land. This amount is far below the value of the land. The payment was framed as a lease—because in mediation, Sufia did not give up her rights to the land and the eviction notice is still pending in court. Sufia feels that she received some measure of justice from the MLAA *shalish* that she did not receive in court and the results of the *shalish* are tangible. Before, she would have received nothing, especially as she has no male relative to help her pursue her case.

2. Strategies for Outreach and Education

There are two important issues with regards to outreach and education. On the one hand, excellent structures exist for the promotion of ADR efforts. On the other hand, suspicion of the traditional *shalish* system, to say nothing of the formal court system, remains a challenge that NGOs must overcome when offering mediation services. Without a doubt, the high rate of illiteracy, poverty, and the distance of a portion of the target population from village centers would prevent users from taking advantage of the mediation system if there were not active outreach programs.

The MLAA and indeed most if not all of the other implementing agencies are building on legal aid and other social programs and therefore have more or less "built in" outreach programs. The packaging of ADR with other services is essential to success here when trying to reach the very poor. Because these programs are built on the existing *shalish* system, there is less of a need to overcome cultural suspicion of ADR; education campaigns are focused on changing the attitudes of users with regard to the perceived biases of these traditional systems (especially against women). Other outreach activities include awareness raising workshops for local elites and union parishad chairmen, encouraging users to share their experiences with the uninitiated, the more traditional posters and leaflets, as well as training of other NGOs in mediation skills—whether for their use internally or so that they are then able to train others. In the MLAA program, part of the mediation workers' responsibilities include outreach as they travel around the union. Other NGOs delivering on IR5 offer training to local bar associations and invite district judges to participate in portions of these trainings. This serves to broaden understanding of mediation and its potential.

3. Impartiality of Third Parties

In Bangladesh, the choice of mediators is very much culturally driven. Traditional *shalish* is conducted by elders and respected members of a community. It is seen as a fairly directive process in which parties are "encouraged", with substantial input from the *shalish* committee, to come to consensus—often framed as "what is good for the community." Mediation is traditionally done by committee but these committee members rarely have education in legal issues or women's rights. There is not a human resource pool of experts in family law or land regulation issues which can be drawn upon in rural areas. Indeed, the respect that a person commands from his or her community is a far more important qualification than substantive expertise. In addition, due to cultural norms, women have very little voice in the community and therefore do not feel comfortable advocating for themselves in traditional *shalish*. Many of the women interviewed indicated that it is biased against them.

In developing the village mediation system, NGOs providing training and mediation services are trying to work within this traditional system. In addition, the qualifications and training required of mediators under the mediation committee system contribute to the perception of impartiality of mediators. For example, MLAA mediation workers must have an eleventh grade education and must be from the union where they intend to work.[24] mediation workers are given 7–10 days of training and receive regular refresher courses. They are also monitored regularly to ensure that they are fulfilling their duties and any complaints are dealt with. The role of the mediation worker is one of an administrator, and mediations are conducted under their supervision by the village or union mediation committees. The committee structure helps ensure impartiality. According to the staff at MLAA, a committee is viewed as more fair and democratic than a single person. This contributes to the credibility of the process as the committee structure reflects a relevant social norm with regards to how problems are resolved within a community.

The MLAA has also improved the effectiveness of the mediation committees by reducing the perception of bias at the village level. The selection and training of mediators at both the village and union level also helps to ensure a more neutral, unbiased process (in addition to contributing to community buy-in of the reformed system). This is accomplished by ensuring that village mediators receive at least one day of mediation training and that the union mediators receive a three-day course.

This last point is especially important, as women are a large portion of the target population and have experienced the most discrimination at the hands of the traditional *shalish*. In order to increase female participation as mediation committee members, MLAA has trained the selected (as opposed to elected) female members of the union parishad committees in the three districts in which they work. The objective of these three-day trainings is to offer legal education, to raise their awareness about mediation, and to encourage more women to participate in the new community mediation process.

Initially, Banchte Shekha (the other program observed in detail) followed the MLAA model and established mediation committees at the village level with no special consideration of women. This proved to be ineffective precisely because of the reasons mentioned above: women feel that the traditional system is biased against them. So creating a system that essentially replicates the previous one did little to encourage their participation. In order to increase women's participation, the program was redesigned. The new design served not only to empower women, both as participants and as mediators, it has

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[24] "One of the cardinal principles of [the Madaripur Mediation Model - MMM] for engagement of mediators is the **local affiliation** of the personnel. In other words, the mediators are chosen from amongst the local people. Mediators live and work amongst the people whose disputes they are called upon to mediate. Unlike judicial pronouncements or third (sic) party arbitration, a mediation worker must be familiar with the local/societal roots and belongings of the parties, as well as their specific traditions, customs, and values. By being locals, the MMM mediators ensure that they are familiar with all the nuances of local lives, both of the parties directly involved and others who may be indirectly concerned with the outcome of the resolution process." *Mediation: Concept, Techniques and Structures*. MLAA, p. 10.

contributed greatly to the sustainability of the program as it is now more directly linked to Banchte Shekha's other activities.

Some disputes continue to be mediated outside the reformed system in the three districts. The small amount of data available indicates that availability of the traditional *shalish* coupled with the lack of information about the MLAA is probably the biggest reason some disputants still seek out the traditional shalish.

4. Monitoring and Evaluation

In general, monitoring and evaluation targets for the Bangladesh ADR programs are set by USAID. At the same time, each NGO is free to operationalize methods for achieving these targets. While improvements are necessary in the MLAA monitoring system (specifically, increasing the number of staff available to conduct evaluations and monitor the quality of the services provided by the mediation workers), they have established a fairly effective evaluation mechanism.

There is a monitoring cell as part of the MLAA program, with a staff of four and a target of 550 visits per year. The staff is required to monitor not only the mediation program but all the other programs that MLAA offers. They observe mediations as part of the monitoring process and ensure that data on the mediation process is collected correctly. For example, the mediation worker collects all the applications for the potential mediation of a dispute and also keeps all records regarding which have been accepted and which have been referred to court, the duration of each mediation, and the results of the mediations. This information is provided to the coordinator at the head office on a monthly basis. Open format, monthly coordination meetings are also held at the head office and one representative from each thana attends.

Mediation workers can be terminated. This is generally client driven. Once the supervisor receives a complaint, the monitoring cell comes for a visit and interviews people to determine what the problems with mediation worker might be. There is then a review of the mediation worker’s performance and depending on the problem, a grace period established so that the Mediation Worker has an opportunity to correct the problem. Should the problem persist, the final decision is taken at the headquarter level. In 1997, five MLAA staff were terminated, and two have left to take new jobs.

Dealing with the mediation committee members is more problematic because they are volunteers. The mediation committee members cannot be terminated, but if the mediation worker receives complaints or witnesses inappropriate behavior or simply poor mediation skills, then that committee member is sidelined. This happens by discouraging them from participating and by not inviting them to sit on the committee for mediations.

III. ASSESSMENT

As set out in USAID's strategic objectives and as enumerated in Intermediate Result 5, a cornerstone of USAID's work in Bangladesh is ensuring that the poor and disadvantaged have access to justice. In conceiving of the framework for the ADR program, the Democracy Partnership has developed an innovative way for that goal to be achieved. As with any program of this size and certainly given the obstacles faced in Bangladesh, there is room for improvement. The question of resources poses the greatest challenge to the success of the ADR program. In particular, there are three categories of issues that must be addressed if the ADR program administered by NGOs is to be sustained: structural design, funding, and availability of qualified human resources.

At present, the provision of ADR services is linked to the other activities that NGOs offer to poor communities. This is imperative if the program is to survive. The challenge lies in creating a clear link between ADR and the other programmatic activities and in ensuring that the other activities explicitly support and sustain that ADR program. For example, the MLAA community mediation program is built on a legal aid and human rights education program. The MLAA continues to offer those services but ADR has become the centerpiece of their efforts. While this is admirable, it is unclear as yet as to whether or not this will be sustainable, especially given that the other programs do not generate income to support the activities of the MLAA.

On the other hand, in two programs observed, Banchte Shekha and PSF ("Rural Children and Mothers"), mediation skills and training are used as a means of improving the quality of other services. At Banchte Shekha, for example, the reformed shalish system (based on the MLAA model) helps to empower women by offering them a prestigious role in their communities and a means of dealing with disputes effectively so that their other work might continue. At PSF, the family planning professionals use the ADR skills to spread information about family planning more effectively and also use them when dealing with disputes within families about this same issue.[25]

A second major challenge to the survival of ADR programs in Bangladesh, especially those that serve the poor, is funding. Currently, the MLAA budget is entirely supported by external funds (i.e., the Democracy Partnership, the Ford Foundation, and NORAD). Admittedly, the target population in Bangladesh is too poor to warrant instituting a user fee system—anything initiated at this time would probably kill the program. At the same time, NGOs must get creative as to how they will survive should their sources of external funding be eliminated. As mentioned earlier, it is unclear how MLAA will sustain itself once the Ford Foundation leaves. A better model for financing may be the one that Banchte Shekha has developed, using the income-generating projects in each community to help sustain their programs.[26] Not all NGOs will be able to link their projects to income generating endeavors, but coupling the ADR programs with other, popular issues (e.g., family planning) may help to ensure their longevity.

Finally, the low levels of literacy and the lack of understanding of ADR, human rights, and legal issues make it difficult to ensure that high quality staff will always be available to deliver the programs. The credibility of the program is impacted by the reputation of the mediators and the mediation workers—adequate training in both ADR techniques as well as the law is essential to maintaining that reputation. Also, women are by far the most disadvantaged population (economically, socially, and educationally) which poses a significant barrier to recruiting women mediators. (According to the MLAA district

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[25] Both the head of PSF and the staff at Banchte Shekha emphasized in their interviews how the ADR program, and in particular the MLAA model, would enhance the quality of their other programs as opposed to highlighting the benefits of ADR as a stand alone project.

[26] Approximately 40 percent of their total budget is supported by income generating projects. (Interview, 9/17/97)

coordinator in Shariatpur, the number of women using the reformed shalish system is increasing rapidly as they become more confident in the results obtained there.) Perhaps the biggest challenge to the ADR program is that it is too expensive to reach all parts of Bangladesh both in terms of funding and available human resources to implement projects. At present, only 15 percent of Bangladesh's population is served by NGOs and only 0.5 percent are covered by ADR programs. Replicating the MLAA model across Bangladesh will be an uphill battle.

The news in Bangladesh, however, is encouraging. In general, the efforts of NGOs to provide ADR services to the poor have been quite successful. The MLAA model is a workable one and more and more NGOs are requesting training in ADR skills. Due to the paucity of resources in Bangladesh, perhaps the most important contributors to the success of the ADR program are the clearly articulated goals set out by USAID and the Democracy Partnership—most importantly providing the poor and disadvantaged with access to justice.

In choosing to fund efforts that improve upon an indigenous system, the partnership is directly addressing a potentially crippling barrier—public education about mediation. Literacy rates are so low and the poor's access to other media so limited that introducing a whole new system of ADR would be problematic at best. Instead, the delivery agencies are able to build on an existing concept, with the challenge of proving that reformed shalish is an effective way for the rural poor to deal with their problems. Since entire communities are often present at the mediation sessions, this can be done effectively by ensuring a high quality of staff and consequently a credible shalish system, along with public education.

In addition, the partnership implemented a program design process that successfully incorporated the views of the users. This meant that ultimately the focus of the programs has remained on the most needy, consistent with USAID's overall goals. More and more women are using the reformed shalish system and as ADR programs are coupled with projects like Banchte Shekha's, more women will become involved as mediators as well. Given the challenges faced by any aid agency implementing ADR programs in a country like Bangladesh, the mediation committee system is a successful step towards achieving greater access to justice.

Bolivia: Private Arbitration and "Conciliation" of Commercial Disputes
Key Points

Description: Since the 1980s, USAID/Bolivia has pursued reform of the justice system to support both anti-narcotics and democratization objectives. In 1990, USAID began to support the use of ADR, especially commercial arbitration and conciliation, as a way to reduce the backlog of cases in the court system. By reducing the backlog, ADR could support both anti-narcotics and broader judicial reform objectives.

This case study profiles the development and operation of the commercial arbitration and conciliation program. USAID's implementing partners, the Inter-American Bar Foundation (IABF) and the Bolivian Chamber of Commerce, established Conciliation and Arbitration Centers within the chambers of commerce in Bolivia's three major cities. Starting in 1994, the centers recruited and trained conciliators and arbitrators from the business community, provided education and outreach to potential users of their services, and helped draft a new Arbitration and Conciliation Law to make conciliation agreements and arbitration decisions enforceable by the courts.

The centers provide both conciliation (an opportunity for disputants to reach a voluntary agreement with the help of a neutral party, the equivalent to mediation in the U.S.), and arbitration (a binding decision by a panel of three arbitrators with expertise on the disputed issues). Users pay a fee based on the monetary value of the dispute; the fees are supposed to cover operating costs. The demand for their services is still small: the La Paz Center, the largest of the three centers, has conciliated 10–25 cases annually since 1994, and arbitrated 1–8 cases a year, with a high resolution rate and high levels of compliance and user satisfaction. The major obstacle to increased use of commercial ADR seems to be the business community's low level of awareness and understanding of ADR.

Goals: The program's primary goal—reducing court backlogs—was set by USAID in the context of its anti-narcotics and democratization objectives. In practice, the program has contributed only very indirectly to this goal, though it has the potential to meet business sector goals by reducing the cost and time to resolve commercial disputes.

Design: Though the program's designers recognized the need to make conciliation agreements and arbitration decisions legally enforceable, they did not accomplish this goal until three years after the program began operation. Potential users' uncertainty about the enforceability of ADR may have constrained the demand for the centers' services. In addition, the design did not establish any clear links between the program and the courts. It might have been possible to use the courts to provide information about ADR services to commercial litigants.

Operations: Despite the lack of legal sanction for their work, the centers have been able to attract enough paying clients to cover their direct operating costs. USAID support has covered their outreach and training costs. In the fall of 1997, USAID decided to discontinue its funding for the centers; the centers therefore may need to increase demand and/or fees to make the centers financially self-sustaining.

BOLIVIA CASE STUDY

I. DESCRIPTION[27]

Alternative dispute resolution mechanisms in Bolivia address an extraordinarily broad range of social needs, reflecting the limited ability of state judicial institutions to address those needs over time. Several factors have spurred ADR developments in Bolivia: ongoing political democratization; a national ADR law package passed in March of 1997; a new criminal code reform passed in October of 1997; rapid urbanization and rural flight; increasing national consciousness of the multiple and distinguishable cultural and ethnic layers that constitute the Bolivian population; as well as the ever-present national debate on the links between subsistence cultivation of the coca plant and the need to cultivate favorable bilateral relations with the United States.

In Bolivia, ADR services fall into three categories: chamber of commerce conciliation and arbitration centers, court-annexed pilot programs, and extrajudicial community conciliation for marginalized communities. The court-annexed pilot program for civil cases in the city of Cochabamba is not yet operational, but was interviewing candidates for conciliator positions in October 1997. Future operation is uncertain at this time, due to the inability of the Supreme Court to authorize funding for it beyond the end of 1997. USAID/B has supported the extrajudicial community conciliation work, such as a pilot university-affiliated conciliation center and conciliation centers in marginal communities.

This case study focuses on the chamber of commerce's commercial ADR centers. Commercial ADR was the first ADR activity supported by USAID/B and therefore has received more support and for longer duration than the other areas. These centers operate in a context in which large sectors of Bolivian society do not participate in government, do not have access to state institutions regarding dispute resolution, are not aware of their rights, and continue to be marginal participants in the economy.

A. Program Goals

USAID-funded ADR activities in Bolivia were originally designed to assist in the creation and strengthening of an independent judiciary which, it was thought, could not face the strength of the drug traffickers, nor hold its own institutionally against a powerful executive branch. USAID/Bolivia's support for ADR began in 1988, but took more concrete form in 1990. One of the five components of AID's justice sector project was to "provide information on modern commercial arbitration practices and institutions," which would be demonstrated by the adoption of arbitration mechanisms for commercial disputes. USAID/B subcontracted with the IABF to sponsor commercial arbitration seminars in Bolivia. Declared US policy priorities were the strengthening of democracy, promotion of economic stability/recovery, and control of illegal drug production/trafficking.

In 1992, USAID/B began a new project entitled "Bolivia Administration of Justice" to "improve the effectiveness and accessibility of key democratic institutions in Bolivia." USAID had broader objectives as well: the creation of "a more expeditious judicial process to make court managed conflict resolution and criminal prosecution more efficient;" and "a more accessible and public judicial system through alternative dispute resolution and delay reduction programs." The key concern was the removal of institutional obstacles to effective criminal (especially narcotics) prosecution. One core activity contemplated under this project was the institution of private commercial ADR.

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[27] Conducted by Anthony Wanis St. John, Research Consultant for CMG's USAID/ADR Project.

As a part of its goal to promote commercial ADR activities, USAID/B supports conciliation and arbitration centers in three cities—La Paz, Cochabamba, and Santa Cruz. USAID/B targeted these centers in an effort to develop ADR as a means of saving time and money in the resolution of commercial disputes, promoting stable conditions for private investment, and relieving the backlog in the official justice system. The IABF, with the chambers, are USAID/B's implementing partners in this project.

B. Program Activities

USAID/Bolivia supported the following commercial ADR activities: visits to Colombia so that future arbitrators could observe arbitration; support for attendance at two ADR seminars in 1993 in Argentina; sponsoring three national ADR seminars in 1993; a series of roundtable discussions to promote commercial arbitration; and provision of equipment and presentation materials to set up three arbitration centers via their respective chambers of commerce.

USAID/Bolivia's work began with the introduction of arbitration concepts among the chambers' business membership. Arbitration, though legally sanctioned, was not formally practiced in Bolivia until recently and was not well-known or accepted in the business sector. USAID/B, with IABF, sponsored several seminars for chamber of commerce business members, lawyers and other professionals, development professionals, and government officials. IABF also supported the passing of the Arbitration and Conciliation Law of 1997, which gave commercial ADR its essential legal framework. After promoting and supporting the concept of commercial ADR, IABF coordinated the training of arbitrators and conciliators (through the provision of training workshops, and study trips to other Latin American arbitration centers), as well as the physical set-up of each center.

In all three cases, the center operates within the organizational framework of the corresponding chamber, and IABF has provided basically similar types of support to all three. All three currently have operational centers and trained professionals arbitrating and conciliating commercial disputes. The centers will be examined collectively, except where required to highlight important features of a particular center.

The centers target disputes of commercial nature for resolution: payment disputes for goods/raw materials purchased or sold, problems within partnerships, heavy equipment sales/leasing disputes, construction contract disputes, corporate dissolutions, and numerous other types of civil/commercial causes of action. Types of disputants targeted include domestic business enterprises (of any size), private parties involved in disputes with business entities, foreign and international investors and businesses, domestic local government agencies, and the state itself (when it is party to a contract or otherwise subject to private law).[28]

The criteria for selection of arbitrators and conciliators are similar in all the centers. Potential arbitrators and conciliators are drawn from the following groups: business professionals of diverse fields of specialization (engineering, accounting, economists, general managers, bankers, doctors, architects, insurance experts), lawyers, ADR experts (foreign or national). The available list of arbitrators/conciliators is made public by the centers so that potential users may choose from this list, or the center may choose the arbitrator/conciliator(s) in the absence of agreement. The critical legal framework (supplemented by internal institutional rules of procedure) provides guidance on who exactly

[28] Screening of cases must be based on the criteria set forth in the Arbitration and Conciliation Law (arts. 3, 6), which include any contractual/extra-contractual matter that arises between parties and which is not a matter of public interest or law. Explicitly excluded are: labor disputes, state actions governed by public law, any matter in which a judgment has been issued (with some exceptions), matrimonial matters, estate matters where one party is considered incompetent.

is excluded from serving on an arbitral panel in the interests of maintaining impartiality. There is also an 'implied' criterion for third parties: to be known to the community (in the sense of being recognized and of distinguished stature in the business community), rather than simply trained in the techniques of dispute resolution. There is a related emphasis on arbitrator specialization (as compared to the non-specialization of judges in the Bolivian court system,) which leads to more intimate familiarity with the issue in dispute and methods of arriving at adequate resolution.

The centers offer arbitration, set up with the composition of an institutional arbitral tribunal temporarily vested with adjudicative powers, which considers documentary, expert, and testimonial evidence and issues a judgment and/or an arbitral award. The centers also provide conciliation, a less adversarial procedure similar in design to US-style mediation. It is less structured than arbitral procedures, relying on cooperative, joint problem-solving by the parties with greater or lesser degrees of intervention by the conciliator and resulting in a written agreement totally or partially settling the dispute.

Conciliation is considered to meet many goals of commercial dispute resolution. For one, it keeps open the possibility of renewed commercial interaction between the parties. Other reasons include the fact that complex legal regulation is not needed for conciliation and the process itself, as practiced in Bolivia, is informal and uncomplicated. The absence of attorneys in conciliation processes is also cited as a factor affecting the positive impact of conciliation, since attorneys' legal training/culture has not included ADR concepts or emphasized settlement. The power of commercial conciliation lies in the fact that it stays judicial or arbitral proceedings on the same dispute. Unilateral withdrawal from a conciliation procedure is permissible, and can have the effect of delaying resolution of the case.

In terms of enforcement, arbitral awards and conciliation agreements are recognized as *cosa juzgada* (the legal principle of res judicata) law and are thus legally-binding, subject to limited judicial review. Arbitrations and conciliations can be initiated at almost any stage of an ordinary litigation and have the effect of temporarily suspending such action. One or more of the parties may end the ADR process and resort to the courts by unilateral or joint declaration (for a conciliation) and joint declaration (for arbitration).

C. Operation of Centers

The organizational structure of the centers is similar: each has a director who is a lawyer and works closely with the general counsel of the chamber. The director manages the center, maintaining case databases and marketing services to chamber members, and coordinating the assignment of conciliators or arbitrators to a given case.

Program funding is mainly provided by user fees and subsidized by the budget of the respective chamber of commerce. Fees are set as a percentage of the amount in dispute [e.g., US$5000 (.5 percent) if the disputed amount were $1,000,000]. Additional costs include expert witness fees, a nominal amount for administrative costs to the center (ranging from $200 to .3 percent of disputes valued over $1,000,000), and any costs incurred by the tribunal itself (e.g., for travel to a case site for visual inspection). The tribunal also determines the portion of costs each side is responsible for and includes it in the arbitral award. Conciliator fees (per conciliator) are also calculated along a range according to the amount in dispute. Administrative costs for conciliations are set at half the amount of arbitration fees. Total costs of the conciliation are split evenly among the parties. Members of the National Chamber receive a 20 percent discount on all assessed costs.

Continued financial support for the centers is unclear. The initial support provided by USAID/B will be discontinued as of the end of 1997. This decision has been attributed to the need to cut the USAID/B

budget, and the resulting shift in funding priority to activities more directly linked to anti-drug programs. USAID/B funds to date have furnished the centers, trained conciliators/arbitrators, and informed potential users. Actual operations may not be affected, given user fees and the centers' reliance on physical space, resources, personnel, and supplies provided by the chambers of commerce.

The National Chamber has a "Commission on Conciliation and Arbitration", which acts as a kind of board of directors and includes the principal officers of the chamber; all conciliators, arbitrators, and administrative staff of the center. This body collectively supervises the operations of the center and its compliance with the internal rules. It receives applications for conciliator/arbitrator positions, fixes the fee schedule, and designates conciliators or arbitrators in the absence of party consensus. This commission supervises the centers and provides procedural oversight for arbitrations and maintains the power to intervene and correct procedural errors or delays.

Generally speaking, the demand for the centers' services is low. For example, in the largest center in La Paz, from 1994, when ADR activities started, to October 1997, the center had taken in 77 cases for conciliation, of which 59 were brought to a final written conciliation agreement. This center has arbitrated 1 to 8 cases per year.

In terms of time, the Santa Cruz Center reports that its conciliations require an average of 4 to 7 meetings, each meeting lasting up to three hours, and scheduled on a weekly basis, yielding an approximately one month to two month duration for conciliations. Arbitrations, by law, are to last no more than six months, and upon application of the parties, can extend their activities for another two months. Regarding satisfaction, all three centers claim high rates of satisfaction with conciliation/arbitration for users who reached an accord, and all claim that there is 100 percent compliance with agreements and arbitral awards.

II. ANALYSIS

A. Setting Program Goals: Political, Legal, and Cultural Factors

The goals of commercial ADR are defined differently by different stakeholders. USAID/B's main goal is the alleviation of the court backlog, with a view to more efficient judicial handling of the counternarcotic caseload. The chambers of commerce and their members' goal is to provide a service that they do not consider otherwise available—speedy, efficient, and inexpensive resolution of commercial controversies.

The convergence of ADR interests between USAID/B and the Bolivian business sector stems from regional (and global) economic integration and increased competition for foreign private investment, both contributing to the increased need to resolve commercial disputes quickly, cheaply, and fairly in Bolivia. Regarding political support, backing of the Ministry of Justice and a government-originated emphasis on popular participation in government are key conditions to USAID/B funding in Bolivia.

Political support, cultural fit and adequate resources were and continue to be relevant contextual factors in ADR goal-setting in Bolivia. Political support was also critical in the passage of the Arbitration and Conciliation Law, drafted by the previous administration (by Bolivia's first Minister of Justice). High level political support for ADR was galvanized by linking USAID/B support for ADR to the passing of the Arbitration and Conciliation Law, which in turn was part of a much broader package of legal system reforms. This approach by USAID/B appears to have successfully linked legislative aspects of judicial reform and ADR. Thus, while Bolivian government officials and congressional deputies worked to gain support for broad judicial reforms and the international development resources they required, they also built support for ADR and provided it with a critical legal framework. By using the chambers of

commerce as a forum for the outreach, marketing, and education about commercial ADR concepts, IABF created political advocates for the centers. Since chamber members are themselves private sector actors, the chambers provided a built-in constituency of potential beneficiaries of services.

Concerning resources, centers may need to increase demand and/or user fees to have sufficient financial resources once USAID funding ends. The three conciliation and arbitration centers are increasing provision of services, but are not, by their own estimates, at capacity yet. They seek to both create and meet new demand, as well as act as a truly alternative avenue to the court system for contractual disputes. Qualitative assessments by program stakeholders indicate that the growing number of cases denotes increasing awareness by potential users of commercial ADR services. Still, in interviews with local business managers, it was apparent that there is still great growth potential for commercial ADR. People do not know about the services and still need to learn how to best utilize the commercial ADR services (inclusion of arbitral/conciliation clauses in contracts, execution of arbitral/conciliation agreements in the absence of pre-existing contractual clauses, etc.). Much material distributed by the three centers focuses on education of the potential market.

One concern with increased demand expressed in interviews with the centers' personnel is that to grow, they need to have adequate numbers of trained service providers (conciliators and arbitrators), which is precisely the kind of expense they do not feel capable of funding. Their case load has grown over the last several years, although absolute numbers of cases resolved do not amount to more than approximately 75 per center to date. Aggressive marketing and educational activities, some feel, will enhance demand for services before there are adequate numbers of trained ADR professionals there to handle it.

The greatest issue facing the program designers in terms of commercial ADR was, for several years, the lack of a unifying, legitimizing legal framework. While the new law addresses both arbitration and conciliation, its main regulatory value is in the elaboration of arbitration procedures and enforcing awards. The existence of the law now gives service users the confidence that a reforming judicial system will back up their investment in arbitration or conciliation. Service providers similarly feel more confident that they can market ADR now as a bundle of services. Early on, the absence of the law led to examination of the trade-off between applying program resources to either arbitration or conciliation. Conciliation, relying on cooperative dynamics rather than the handing down of a judgment, began to be practiced even without the backing of a legal framework. The centers felt that they could not really offer arbitration services widely until there was assurance that an arbitral award would be recognized as the final determination of a disputed matter (res judicata) and thereby prevent re-litigation. As a direct result of the lack of such official legal support for arbitration until 1997, there was considerably more experience gained in conciliation as compared with arbitration in all the centers.

From the progress made on commercial (and other) ADR during the previous administration in Bolivia, it is apparent that political will to support ADR implementation is a key background condition. The prior (and first) minister of justice was easily accessible to key stakeholders in ADR planning. This was evident in his ability to personally attend their meetings, entertain funding requests, and receive criticisms of relevant legislation. The implications of the recent change in administration are not yet known, and the absence of a national level body promoting ADR as part of wider reform may affect the progress and continued funding of ADR programs, especially in light of the USAID/B change in funding priorities (although this may not impact non-commercial ADR due to its nonprofit nature). The new minister of justice is a member of the Cochabamba Chamber of Commerce and is reportedly a conciliator with its center, leading some to believe that there is hope for continued political support which has not yet become apparent.

Cultural fit is another consideration in goal-setting regarding commercial ADR.[29] The background condition most widely cited by ADR stakeholders in Bolivia, regardless of sector, is a self-perceived predisposition of the population to seek out absolute, judicial/legal style resolutions for their disputes. Similarly, the Bolivian legal profession's training has traditionally been highly formalistic, procedural, and adversarial, requiring education and outreach to change. The Santa Cruz Center is partnering with its chamber-operated Universidad Privada to spread ADR concepts at the community level and thus sell non-adversarial approaches to dispute resolution to the larger population.[30] The centers' arbitral/conciliation clauses in all new business contracts have been designed to multiply awareness and use of commercial ADR.

B. Monitoring and Evaluation

Monitoring and oversight received little emphasis in the operations of the centers. The National Center in La Paz functions under the oversight of a commission, but the commission is partly made up of some of the people who actually participate in the center's operations. Monitoring is done through informal interviews with users, conducted to determine satisfaction. This information is not systematically gathered, stored, or analyzed. There is a complaint procedure against conciliators/arbitrators but it does not appear to have been used to date in any center.

The lack of attention to monitoring and evaluation means that the centers' work has no effect on the official court system. Results and lessons learned are not systematically channeled into any restructuring of the judicial system, or for example, into the education and training of lawyers and judges. The need for systematic monitoring of cases is illustrated by the debate as to whether or not the cases heard by the centers would have ended up in the court system at all, with USAID/B generally maintaining that they indicate the creation and satisfaction of new demand and the centers generally pointing to their case load to show they alleviate the burden on the court system.

USAID/B, given its oversight role, and as a stakeholder in both the broader judicial reform program and the various ADR activities, has the potential to be a channel for such learning. IABF, by the nature of its role as executive agency involved in court-annexed and commercial ADR, also has the potential to link courts with lessons learned in the centers.

III. ASSESSMENT

Commercial ADR responds to a well-defined need in Bolivia, that of creating the conditions which encourage investment. The centers have tried to provide a low cost, speedy alternative to litigation that also has the capability to preserve commercial relations among disputants. In terms of relieving the backlog in the judicial system, hard evidence of this must await the completion of other USAID/B-sponsored modernizations to the court system, including the current project to computerize case management information. This will enable interested parties to measure decreases in backlogs and theorize as to the source of the reduced backlog, whether it be commercial, extrajudicial, or court-annexed ADR, or general improvements to court procedures, or some combination of these.

Commercial ADR service providers do believe that they have created a service with the potential to both alleviate court backlog and satisfy new demand by providing services to those who would otherwise not seek out judicial resolution. This goal of satisfying a new demand is not explicitly supported by USAID/B

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[29] Cultural fit is a factor in community conciliation and where parties come from different ethnic /linguistic groups.

[30] Similarly, the Universidad Mayor de San Simon's Law School is introducing mandatory ADR coursework into the curriculum for existing and incoming students, which should have a broad impact on lawyering in Bolivia in the long run.

as one of its development aims. It might be wise to link commercial ADR to the broader judicial reforms which are USAID/B-supported in order to capture the lessons of case management, speedy resolution, specialization, and others and transfer such learning to the court system. Only an agency that has promoted both of these activities and has active connections to both could play such a role and that agency would be USAID/B (or IABF).

Also, such linkage of goals could expand funding sources. The counternarcotics-driven policy goal of alleviating the burden on the court system is laudable and should be supplemented with a valuation of commercial ADR, for its own sake, as a facilitator of conditions that encourage private investment that fuels economic growth and supports democracy. It may be appropriate to link rule of law reform, including ADR activities, more directly to the broader development aims that they accomplish, such as facilitation of international private investment and adoption of respect for rule of law in foreign business dealings.

There are other serious social concerns in Bolivia that are not, of course, addressed by commercial ADR. The magnitude of such social problems leaves room for many players and even the chambers of commerce want to help out, by establishing community conciliation centers (Santa Cruz) and interacting in some way with the district courts (Cochabamba). Without comment on the appropriateness or feasibility of such plans, they indicate that the latent need for access to justice is great in Bolivia and that USAID/B's initial support for such initiatives was certainly on track insofar as creating services and constituencies for them. A redefinition of administration of justice and development goals might fruitfully acknowledge this reality and should be founded on data indicating what the potential market for ADR in Bolivia is.

One may argue that power imbalances are not a significant problem in commercial ADR services at present, since they are used by relatively homogenous parties. Regarding conciliation, should one party exercise unduly coercive power to resolve a dispute, the law empowers the "weaker" party to withdraw from a commercial conciliation unilaterally and resort to the official court system. Arbitrations were designed to be binding procedures and so unilateral withdrawal is impossible, which may help weaker parties keep stronger parties in the ADR process.

The power imbalance in cases involving state agencies may affect implementation of commercial ADR in the future: while the centers claim that conciliation has the potential to even the power disparity between parties due to the requirement for a cooperative posture that it implies, one center notes that state enterprises, while legally subject to arbitration regarding contract law issues, may indeed prove too powerful for the arbitration system as it presently exists. The only other recourse a private party would have is the official court system, which is still in the process of strengthening itself and becoming independent and modernized. Explicit anticipation of state submission to commercial ADR procedures was laudable, but effective implementation may still need a stronger court system, where arbitral awards will have to be enforced in case of non-compliance. While elaborate planning in the Arbitration and Conciliation Law links arbitral awards to the courts, it remains to be seen whether or not the broader USAID/B-supported judicial reforms will suffice to make the judiciary independent enough to enforce awards against the power of the state itself.

Concerning the centers' operations, the first requirement for assessing staff and case management adequacy is sufficient financial resources to maintain separate, as opposed to seconded, commercial ADR staff. Independent third party evaluation may be required in order to periodically assess impartiality, third party performance and competency. Staffing levels at the centers are currently minimal and increased staff will be a requirement for proper growth of each center. Obtaining alternative sources of development funding, in the absence of USAID/B funding, and moving toward financial self-sufficiency are the

obvious recommendations in this regard. Better measurement of data on case duration, number of sessions, length of sessions, and ultimate costs to parties are all needed and should be maintained in database form by each center. Each center has access to computer and software resources that could be used for this purpose. What is required is the systematic design of a process to capture this information and a process for sharing and utilizing it.

Cultural legitimacy is not a serious obstacle for commercial ADR in Bolivia at present. It will become an issue if and when commercial ADR providers reach the micro-enterprise level of business activity, where the different characteristics of the Quechua and Aymara indigenous peoples are cited as examples of cultural differences that can generate conflict.[31] At that time, commercial ADR providers will face the cultural issues facing ADR providers in other sectors: how to integrate indigenous norms in a national rule of law framework and how to respect customs and practices that may or may not be consistent with democratic rule of law initiatives; and how to deal with cross-cultural conflict dynamics that are present but not controlling issues in commercial ADR. Commercial ADR providers will need to learn from the other ADR providers in the court-annexed or community ADR sectors already grappling or about to grapple with these issues.

Political support is, on the one hand, a product of constituency building and advocacy. At the same time, it derives from having key government players lend their prestige and support to reforms. In terms of constituency building, the sector approach to ADR tends to naturally build constituencies for each sector and the business community is one of the better prepared constituencies available, compared to other social groupings.

Maintaining political support through the democratic changes of administration in Bolivia will require sufficient bureaucratic investment in ADR so that such support survives changes of political leadership. It will also be a matter of encouraging new leaders in the government to endorse and actively promote ADR. Exploiting links to the newly formed ministry of justice and to its new justice minister are essential. The lack of a formal link between commercial ADR and the court system is an obstacle to obtaining such political support. By transferring knowledge from the commercial ADR sector to the government, such a link can be created and can then be the basis of new relationships with the government.

[31] Commercial ADR via the Centers does not as yet impact this level of business activity, most likely due to the economic and social marginalization of such parties, and their consequent lack of participation in the ADR planning process.

South Africa: NGO Mediation and Arbitration of Labor Disputes
Key Points

Description: This case profiles the ADR work of an NGO, the Independent Mediation Services of South Africa (IMSSA), in the mediation and arbitration of labor disputes. The program works to resolve union-management disputes, primarily in the organized labor sector. Participation in the ADR processes is voluntary, and arbitration agreements are legally enforceable. Mediated agreements are not enforceable, but are reported to enjoy a high compliance rate. Panelists are well-trained, and they may collect fees for their work. IMSSA finances its ADR work through a mix of fee-for-service (about 20 percent) and donor funding. Its caseload has grown from 44 cases in 1984 to almost 1500 in 1996. Cases can be handled within a few days. There is no systematic follow-up or monitoring, although satisfaction appears to be high.

Goals: IMSSA's program began in the 1980s to address tensions and poor relations between management and labor. It was established to overcome the ineffectiveness (costly, time-consuming with low user satisfaction) of the government-run labor dispute resolution system. With the political transition in South Africa, IMSSA's ADR program has served as a model for the new governmental structure for addressing labor disputes—the Commission for Conciliation, Mediation, and Arbitration (CCMA).

Design: IMSSA's program uses Western ADR models, which fit well with the institutional and cultural norms within the industrial relations sector. IMSSA's organizational and institutional creativity has been instrumental in its continuing success, as these qualities have helped it to adapt its program to meet challenges to its financial resources and to its mandate posed by the recent political transition and accompanying changes.

Operation: Other factors important to IMSSA's success include: the large number and good training of the panelists; the high unmet demand for dispute resolution services in this sector; and the consequent support for the program from labor and management, its key constituents. Its relationship to legal structures has been clarified and strengthened with a 1995 law; IMSSA's clear independence from an ineffective and illegitimate legal system and government structure was critical to its success at the time of IMSSA's origins and until the transition to the new government, though it is now working closely with the new CCMA.

Impact: In terms of providing cheaper, quicker, more satisfactory resolution of labor disputes, IMSSA cites its ever-increasing caseload as evidence, although there is no systematic evaluation of its work. IMSSA's impact in the ADR field is established by the proliferation of ADR programs and particularly by the creation of CCMA. IMSSA can also take credit for developing leadership at the grassroots level. One of its former founders and director is now the head of the CCMA. IMSSA faces new challenges in the face of the new government ADR system, and plans to complement and supplement CCMA work, and branch out into more specialized services. Modifications of the funding sources to rely more on fee-for-service work is also planned.

Key Acronyms Used in Case Study

CCMA	Commission for Conciliation, Mediation, and Arbitration
CCRS	Community Conflict Resolution Service (IMSSA project)
DOJ	Department of Justice
IDRS	Industrial Dispute Resolution Service (IMSSA project)
IMSSA	Independent Mediation Services of South Africa
PMU	Project Management Unit (IMSSA group managing USAID grant)
USAID/SA	USAID/ South Africa

SOUTH AFRICA CASE STUDY

I. DESCRIPTION[32]

A. Background on the NGO Sector

Since the beginning of South Africa's political transition in the early 1990s, the country has become one of the world's most active arenas for experimentation with ADR systems. These efforts have arisen out of a foundation laid in the early 1980s with the establishment of Independent Mediation Services of South Africa (IMSSA), an NGO originally devoted to expanding the use of ADR in the resolution of labor disputes.[33] ADR mechanisms are now seen as an important component of both government and NGO efforts to rapidly expand the provision of services, including broadening access to justice, and to reduce the high levels of conflict and violence in the country, transforming the current culture of confrontation into a culture of tolerance and conciliation.

This case focuses on IMSSA's ADR work in the labor sector, which began during the apartheid era in the 1980s in an environment in which South Africa's justice system was unable and unwilling to meet the needs of the population as a whole, and in which the mechanisms for meeting dispute resolution needs in the labor sector in particular were woefully inadequate. Meanwhile, USAID/SA and other donors in the country were interested in providing support to talented individuals and organizations that could promote and help to develop democratic attitudes and practices in preparation for an eventual political transition, and so supported IMSSA.

IMSSA began its work in 1984 under the leadership of Charles Nupen and a group of founders who had been trained in ADR in the U.S. and U.K., and who have maintained close links with ADR pioneers in both of those countries and with the "Western" models of ADR that they developed. Although IMSSA's main work has long been in the field of industrial relations, the organization actually works in four main sectors or project areas: 1) the Industrial Dispute Resolution Service (IDRS) handles labor issues; 2) the Community Conflict Resolution Service (CCRS) handles ad hoc negotiations of community disputes (especially taxi wars and disputes in schools) and houses the Project Management Unit (PMU), a team that manages a relatively new USAID/SA umbrella grant that provides support for community-level dispute resolution activities; 3) an elections and balloting project and; 4) a training department that provides training in conflict resolution on an as-requested basis to communities, industry groups, and occasionally to the government. IMSSA is, however, currently in the process of reorganizing; the above four units are being dissolved, and the organization will be restructured based on processes or functional group (arbitration, mediation, facilitation, training, etc.). Its work in the industrial relations sector has been going on the longest, and has been the most influential during the transition, and so will serve as the focus of this report.

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[32] Conducted by Carolyn Logan, Research Consultant to CMG's USAID/ADR Project, September 1997.

[33] Over the years, both before and after the start of the transition period, a number of other NGOs have begun to take up the development of ADR mechanisms in other sectors. Some of these include: the African Centre for the Constructive Resolution of Disputes (ACCORD) and Vuleka Trust, both of which initially provided ADR services directly to parties on an ad hoc basis, and which have since moved into specific sectors such as conflict resolution in educational institutions; Community Law Center (CLC) and Vuleka/Diakonia, which have trained paralegals to provide a variety of community-level problem-solving and facilitation services, including basic dispute resolution; the Institute for Multiparty Democracy (MPD) and Vuleka Trust, which have provided conflict resolution training to a broad cross-section of community members; and Community Dispute Resolution Trust (CDRT) and Community Peace Foundation (CPF), both of which have helped to develop community justice centers.

With the political transition in South Africa, the context for provision of ADR services in the country has also changed dramatically, and it continues to do so. The most notable change has been the radical shift in the level of government interest in the use of ADR, and the consequent shifts in resources, responsibilities, and personnel. Until the new government was elected in 1994, interest in and provision of ADR services was almost entirely limited to the NGO sector. NGOs for the most part provided these services as an alternative to state systems, which were either inadequate and ineffective, or even entirely non-existent, and there were almost no linkages between the ADR systems and the formal legal system.

The new government, however, brought in new personnel and introduced new goals, both of which have led to rapidly mounting interest in developing ADR mechanisms within a variety of state systems, including the formal legal system. A number of top government officials came out of the NGO sector, and are thus familiar with ADR; most significantly, Dulla Omar, the new minister of justice, formerly worked for an NGO called Community Law Centre in Cape Town, and he has been instrumental in efforts to bring about wider provision of ADR services. Within the Department of Justice (DOJ) and the formal legal system, plans are under way to develop a community courts system which would provide justice at the community-level, largely through ADR-type services, and to develop a system of family mediation boards or of family courts that offer conciliation and mediation as a first option. The Department of Land Affairs has recently created a National Land Reform Mediation Panel for the resolution of land disputes, and a number of other departments are considering following suit. The evidence of this government interest can be seen most significantly in the creation of the new Commission for Conciliation, Mediation, and Arbitration (CCMA), a statutory body designed to provide ADR services for the resolution of certain types of labor disputes, based largely on the model developed by IMSSA.

This transition has had profound impacts on the NGOs that have long been the key providers of ADR services. Many have lost personnel, often including their top leadership, to government departments. In addition to Dulla Omar, Charles Nupen, director and one of the original founders of IMSSA, left to head the newly created CCMA. IMSSA also lost a number of its panelists (mediators and arbitrators) to government positions, including Fikile Bam, who is now president of the Land Claims Court, and Wallace Mgoqi, who is now a land commissioner. Edwin Molahlehi, former director of CDRT, also left his organization for a government post. Also, since 1994, the funding priorities of many donors have shifted away from NGOs and toward direct support for the government's new initiatives (although in USAID/SA's case, the level of support available for NGOs has remained roughly constant).

B. Program Goals

One of IMMSA's initial goals was to facilitate the development of constructive channels of communication between management and organized labor in a sector that, like many others in South Africa, was characterized by tension and poor relations. Nupen hoped that an ADR approach could help to improve and preserve relationships, a vitally important issue in South Africa then and now. Another primary goal was to reduce the cost and time of resolving disputes in this sector, and increase the satisfaction of the parties involved with the outcomes achieved. In this sense, IMSSA aimed to meet a very concrete need in the country. The state-run dispute resolution mechanisms available at the time—which remained in place until the Labor Relations Act (LRA) of 1995 created the CCMA and other new mechanisms—were highly ineffective, involving high costs and long time delays, and often providing unsatisfactory resolution of disputes. The previous system for handling labor disputes consisted of conciliation boards, industrial councils, and industrial courts.[34]

[34]Conciliation boards and industrial councils were created within specific sectors as a first mechanism for resolving disputes in those sectors, but they were functioning only poorly at best. Conciliation boards had only been successfully settling some 20 percent of the disputes that were referred to them, and industrial councils were achieving just a 30 percent success rate. (Note these figures

Many of the ADR facilities that were developed by NGOs in South Africa in the 1980s and early 1990s were specifically developed in response to a perception that the legal system was illegitimate and unjust, and were thus intended to serve as independent alternatives to the formal legal process. This was not, however, the case with IMSSA, for which overcoming the ineffectiveness—rather than the illegitimacy—of the existing system was the primary motivation. However, while IMSSA's services were initially seen as an alternative system, as the country moved towards political transition, the organization's interest in seeing its work serve as a catalyst for change in the government's system also grew. IMSSA has generally been very supportive of the government's recent reform efforts and the creation of the CCMA, which provides dispute resolution services using a similar model, despite the fact that this development has forced IMSSA to reevaluate its own role and develop its skills in some new areas.

C. Project Design

IMSSA's goal setting and project design appears to have followed a path similar to that of many other NGOs in South Africa, in the sense that its creation process was largely "expert-led" rather than participatory. Nupen and the other founders had been well trained in ADR development in the U.S. and the U.K., and they were well connected with ADR experts in those countries. Their introduction of ADR in South Africa appears to have been based largely on these models and on the founders' own understandings of the needs in South Africa. There is little evidence of a highly participatory process in the creation of IMSSA's CCRS. This appears to be typical of the NGOs working in the ADR sector in South Africa more generally.

At least until recently, USAID/SA has gone along with this "expert-led" approach, focusing on identifying and supporting good individuals and organizations. Given the fact that South Africa has long had a highly trained, and often underutilized, cadre of professionals, this has been a relatively effective approach in the country. As expectations of NGO impacts increase, however, this approach appears to be changing in at least some cases, such as with the umbrella grant administered by IMSSA's PMU.

Specific aspects of project design are discussed below:

Categories of disputes handled. IMSSA's industrial relations work has focused on resolving union-management disputes, usually over cases involving treatment of individual employees. Its work is limited primarily to the organized labor sector, and to the cases of individuals who have union representation; agricultural and domestic labor disputes are not normally handled.

Methods. IMSSA provides both mediation and arbitration services. Participation in both processes is entirely voluntary for both parties. All arbitration agreements are legally enforceable in South Africa under the country's Arbitration Act. Mediation agreements are not enforceable, although IMSSA believes that most do get implemented.

Panelists. IMSSA's work is organized by a core staff at its main office in Johannesburg and its three regional offices, but the mediations and arbitrations themselves are conducted by IMSSA "panelists." The

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were estimates provided by various interviewees and were based on the status of these boards and councils in the early 1990s, just before the passage of the LRA. Some estimates of their success rates were even lower.) Both of these bodies were often seen merely as unwelcome hurdles on the way to litigation, and they may even have been contributing to conflict and creating additional disputes. A labor relations task force created in 1995 to evaluate these issues identified the key problems in this system as highly cumbersome and legalistic procedures loaded with technicalities, lack of resources, and poor remuneration and lack of training for adjudicators. The result was lengthy delays—it could take 2-3 years just to get to the industrial courts, and they often had backlogs of up to five months, while the appeals process could also drag on for several years.

panelists are a network that now includes more than 300 individuals from a wide variety of mostly professional backgrounds. Many, particularly those who have focused on labor/industrial relations, are lawyers, but there are also many with social science backgrounds (e.g., psychology, business administration, industrial relations, etc.).

Prospective panelists enter into a fairly rigorous training process that includes a number of courses with increasing levels of specialization, observations of actual mediations and arbitrations, and twinnings with experienced mediators and arbitrators. Their progress is regularly reviewed, and trainers and the mediators and arbitrators that they work with must recommend them to IMSSA's board of directors before it will accredit them as panelists. The entire process takes a minimum of six months. IMSSA also has a professional code of conduct for its accredited panelists. Most panelists also have other jobs. IMSSA used to require that they only could provide mediation and arbitration services for IMSSA, but panelists now can provide services both to IMSSA and to the CCMA. Lack of diversity among the panelists has been an issue in the past, but since the transition IMSSA has had an aggressive affirmative action plan, and it has succeeded in substantially increasing the representation of blacks and women among both panelists and permanent staff.

Case management. Most panelists specialize in particular sectors, particular types of disputes, and in either mediation or arbitration. The parties jointly select a panelist; if they cannot agree, they can request that IMSSA appoint one. IMSSA then makes necessary arrangements and supplies the venue if necessary at one of its four offices around the country.

Financial resources. IMSSA funds it services in two ways: through fee-for-service work (about 20 percent), and through donor funding. For labor arbitrations, for example, the arbitrator's fee typically runs about R2,300 per day (approximately $450-600), though some cost more, and all of this goes to the panelist. IMSSA then collects an additional 10 percent for administration, as well as other minor fees. The costs are usually split evenly between the parties. The remaining 80 percent has historically come from donor support. Roughly 50 percent of this support is provided by the Royal Danish Government and the European Union, and the remainder is provided by USAID and several other donors.

Caseload. Since IMSSA began its work, the demand for its services has steadily increased; its caseload has grown from five arbitrations and 39 mediations in 1984, to 857 arbitrations and 627 mediations in 1996. IMSSA staff estimate that they have roughly an 80 percent success rate in reaching settlements in mediation. In addition, IMSSA conducts "relationship-building interventions," which have increased from 1 in 1986 to 81 in 1996; in 1993 it began facilitations of organizational change in the industrial sector, with a case load ranging from 9 to 43 cases per year in the last four years. At this point, the types of services that IMSSA provides are relatively well known, so parties usually come to IMSSA on their own, and the organization does not need to do a great deal of case screening;[35] about 80 percent of current users have used IMSSA's services before.

Time and cost for resolution. IMSSA could not provide any detailed statistical information on the time and cost required for settling cases, but some very general information is available. The length of time for settlement varies depending on the type of case, but staff indicated that simple cases such as unfair dismissals can usually be handled within a day, while larger scale or somewhat more complex cases may

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[35] Note that this applies to the IDRS services. The same does not necessarily apply to the community disputes brought to IMSSA that have been handled by CCRS.

take 2-3 days for resolution. Due to the high number of panelists relative to the number of cases handled, there is no problem with backlogs. The conciliation boards and industrial councils have a much lower settlement rate, and parties experience much longer delays; no information is available, however, on the average costs of settling cases using these state-run mechanisms. Nonetheless, the advantages in terms of time and success in achieving settlement are substantial enough that they could justifying paying for IMSSA's services even if they proved to be more expensive than the state-run system.

Evaluation and monitoring. IMSSA does keep good records on the "incoming side" of the cases that it handles, including the parties involved, the nature of the dispute and the industrial sector that it is in, the panelist who handles it, and the settlement reached, if any, as well as the costs incurred at IMSSA. There is, however, no follow-up monitoring concerning the satisfaction of disputants who use IMSSA's services, or on the rate of successful implementation of mediated settlements.

II. ANALYSIS

A. Impact

Although good comparative statistical data is not available with respect to many of IMSSA's specific impacts, overall trends in the ADR sector in South Africa do suggest that the organization has had a far reaching impact in several ways. First, there is little question that IMSSA has succeeded in providing an improved dispute resolution alternative for certain types of cases and certain classes of disputants in the labor/industrial relations sector. In particular, IMSSA's services proved to be a vast improvement over those formerly provided by the state system with respect to both the time required to resolve disputes and the overall success rate in achieving settlement. Thus, while the conciliatory dispute resolution services provided by IMSSA were not new in principle (the state's conciliation boards should have been providing similar services), in practice they did create a new and effective option for dispute resolution. They did not, however, do much to increase the access of poor or unrepresented workers to justice.

The evidence that IMSSA's services have increased the satisfaction of disputants with the resolution of their cases is also substantial. IMSSA has earned a high degree of respect within the donor and NGO communities and government, and the high and growing levels of use, as well as the large percentage of repeat users (estimated at 80 percent) suggest that they are satisfying disputants in unions and industrial management as well. Moreover, IMSSA's impacts now spread far beyond just those parties that have been assisted in resolving disputes, as its work has come to serve in effect as a pilot program or a laboratory for experimentation for new state-run dispute resolution systems. The organization's work has contributed substantially to the high credibility of ADR services in South Africa in general, and to the widespread adoption of these methods by a variety of government departments and private-sector actors. Most noticeably, the creation of the CCMA, the first of several planned expansions of ADR services to a broad, national scope, directly reflects IMSSA's success and the satisfaction of labor, management, and government with this approach.

The role of IMSSA's work in the creation of the CCMA is apparent in its design and operation, which are heavily influenced by the IMSSA model. The CCMA's mandate is to do work similar to IMSSA's, although it will cover a somewhat broader range of disputes, serve a broader array of workers, protecting the rights of both unionized and non-unionized labor, and it will provide its services free of charge. Most importantly, a training program has been set up for the CCMA's commissioners (the third parties) that aims to provide a foundation similar to that of the IMSSA panelists; IMSSA actually trained the first group of commissioners. In its first year of operation, the CCMA has seen its caseload grow very rapidly to levels well above those predicted.

Finally, IMSSA's work has contributed to the development of leadership within both the ADR sector, and within society as a whole, as demonstrated by the leading role the organization is taking in the debates about and implementation of the rapidly expanding network of ADR services nationwide, and by the role that a number of IMSSA panelists and members of the organization's leadership have had in the new government. In addition, IMSSA and a number of other NGOs in the ADR sector have been active in providing conflict resolution training to a broad cross-section of community leaders throughout the country. These leadership impacts have been among the clearest and most widespread benefits of the various ADR programs implemented in South Africa, including IMSSA's.

B. Factors Affecting Successful Program Design and Operation

Some of the key factors contributing to the failure of the government's labor dispute resolution system included highly cumbersome and legalistic procedures loaded with technicalities, lack of resources, and poor remuneration and lack of training for adjudicators. Some of the key factors explaining IMSSA's contrasting success are directly linked to aspects of the project design and implementation that allowed it to avoid some of these problems. The background conditions and design conditions that were particularly important to the success of IMSSA's IDRS program are described below.

***Sufficient human resources and effective training*:** Perhaps most importantly, IMSSA succeeded in creating a highly competent cadre of panelists to serve as third parties who could provide high quality dispute resolution services with an excellent reputation for fairness and impartiality. The combination of IMSSA's extensive training program and the diversity and skills of its panelists, supported by IMSSA's code of conduct for panelists, has allowed it to develop an excellent reputation that has been the key source of its success and its growing caseload over the years. In addition, the fact that IMSSA has been able to create a sizable cadre—now numbering more than 300—of panelists, has allowed it to consistently handle its caseload in a timely manner.

Good fit with institutional and cultural norms: In contrast to the technical complexity of the government's dispute resolution processes, all of IMSSA's work was based on the well-developed Western models of mediation and arbitration. This does not appear to have been a problem in the relatively modernized and globalized industrial relations sector.[36]

Political support: The experience of IMSSA in particular, and of NGOs working in ADR in South Africa in general, has been that political support at "higher" levels may not be necessary to develop an effective program. In fact, in a system that was as politically illegitimate to much of the population as that of South Africa, political support (and in some cases even USAID/SA support) was seen as a thing to be avoided. The South African experience suggests that it may still be beneficial to support independent ADR and conflict resolution activities via the NGO sector in societies before and during transitions to a more open and democratic form of government.

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[36] In South Africa, it appears that a participatory design process and a good fit of both the ADR mechanisms used and the overall program design with institutional and cultural norms becomes increasingly important as one moves from the modernized industrial/institutional sector down to community level work, and from urban to rural areas. The experiences of a number of NGOs provide particular examples of this. In its work with paralegals in rural areas of Kwazulu-Natal, CLC has found that it must consult extensively with local leaders, coming to agreement about which types of cases and issues will continue to be handled by traditional leaders, and which types of cases the paralegals can assist the community to resolve. Many types of family and community disputes remain under the jurisdiction of the local chiefs, while the paralegals limit their work to cases involving provision of government services and similar "external" issues.

Since the transition, the government has recognized that in addition to dealing with the overall level of conflict in society, it needs to enable its citizens and businesses to participate in the global economy, and that this requires stability and the ability to manage conflicts, rather than having them deteriorate into strikes or violence. The business community has also recognized this need, as have the unions at least to some extent. Thus, there is a coalition of support for legal and institutional reform in the country, and a consensus that the best models such as those developed by IMSSA must be examined and utilized.

There has been some resistance to ADR as a way to resolve conflict in some of the most modernized, and thus most "legalized" sectors of South African society—lawyers have been the most resistant group, and mid-size businesses have also taken more convincing (although larger businesses accustomed to working in the global environment have welcomed ADR), but the success of IMSSA and other organizations that have recently entered this market is increasingly convincing them of the value of ADR. But at the grassroots level, there is much less resistance to conciliatory approaches to conflict resolution and problem solving, since these tend to be much more consistent with traditional practices than adversarial litigation methods. Outreach and education has not been a focus, as IMSSA relies on word-of-mouth promotion based on the effective provision of services.

Rough parity in the power of classes of disputants: ADR work in the labor sector benefits from the fact that there is a legal framework in place that at least to a reasonable extent, especially since the passage of the LRA, protects workers' rights.[37] The earlier framework was not necessarily adequate, but was at least sufficient to give workers some status or power in a dispute.

Clearly-defined relationship to the formal legal system: IMSSA's IDRS program probably also benefited from its clearly defined—and clearly independent—relation to the formal legal system, which was failing so completely at the time its work began. The only link IMSSA's work had to the formal system at that time was via the enforceability of IMSSA's arbitrated settlements. Given the lack of credibility of the formal legal system, it was almost certainly best for IMSSA that it was clearly independent of this system. At the same time, this relationship has changed over time in positive ways and IMSSA's work served as a model and catalyst for change once the government decided to reform its own system. Thus, in many respects, IMSSA achieved the best of both worlds—it had independence from a failing system, but nevertheless was able to serve as the basis for changing that system. It is also worth noting that IMSSA's relationship to the government system will be substantially different since the creation of the CCMA. IMSSA's services are no longer so much an alternative to the government's as a supplement or complement to them. IMSSA expects both to sub-contract to CCMA to help it handle some of its caseload, and to specialize in complex or new, cutting-edge types of labor disputes that the CCMA cannot handle.

Sufficient financial resources*:* Until recently, raising sufficient financial resources has not been a serious problem either for IMSSA or for many of the other NGOs working in the ADR sector. The financial environment for NGOs has changed radically during the transition, and many have faced serious financial crises. IMSSA has fared better than most, due to its particularly good reputation with donors and its long history of raising some funds through fee-for-service work (possible in this sector). Historically, IMSSA has obtained 20 percent of its resources from fee for services, and 80 percent from donors.

Nevertheless, the pressure is also on IMSSA to increase its self-sufficiency, and the organization hopes to

[37] IMSSA has not found this to be the case in some other sectors, such as in landlord-tenant disputes, where tenants have so few legal rights, and the legal framework is so weak, that almost all of the power is in the hands of landlords, and disputes are therefore not very amenable to mediation.

reverse its current funding ratio over the next few years to the point where it relies on donors for just 20 percent of its resources, earning 80 percent itself through other means. In this respect the organization's creativity and adaptability have served it well in developing a number of plans for generating more revenues, some of which are already being implemented. For example, IMSSA may start requiring panelists to pay for the services and benefits that they receive, which are currently free. IMSSA has also already begun to more aggressively market its training services to government and other potential customers (winning, for example, the contract to provide training for the first group of CCMA commissioners), and its project management skills (winning supervision of USAID/SA's umbrella grant for community-level conflict resolution work).

In addition, as the CCMA begins to take on some of the caseload that IMSSA traditionally handled, the organization is looking to develop its skills in new areas to continue drawing paying clients from the labor and industrial sectors. These new areas include specializing in particularly complex labor disputes, developing expertise in some new areas of conflict arising in the labor sector such as HIV/AIDS issues, and increasingly working in the area of facilitation of organizational change to help businesses adapt to meet the needs of entering the global market and of the new political situation in the country. Unfortunately, despite these efforts, one effect of tightening financial constraints is that IMSSA may have to cut back or eliminate entirely the ad hoc work it does in resolving community disputes such as taxi wars, because it may not be able to subsidize these activities as it has in the past, and the parties are frequently unable to pay themselves.

Effective evaluation procedures: IMSSA, like many other NGOs, does keep relatively good records on the "input side" of their work, i.e., what parties are using their services and for what types of disputes. However, there does not appear to be a great deal of monitoring on the "output side," e.g., monitoring the level of satisfaction of users, gathering suggestions for improvement, and monitoring the implementation of mediation agreements. IMSSA's experience is representative of that of most organizations in that their main source of feedback is the level of use of their system—as long as their case load is increasing, they can continue to assume that they are doing a good job. While this is not a bad indicator of success, it should not be the only one. USAID/SA is currently pushing all NGOs that it works with to implement much more extensive monitoring and evaluation systems—the PMU has elaborate plans for monitoring grantees' impacts under the umbrella grant, in part because USAID/SA is providing substantial funds specifically for this purpose—but these programs are only now being put into place. As South Africa continues to expand its use of ADR into new sectors and reviews current ADR activities as demonstration projects that can help identify effective models for future use, careful monitoring of impacts is becoming increasingly important.

III. ASSESSMENT

A. Time and Cost Reduction

Before comparing the time and cost of reaching settlement between the two systems, it must first be reiterated that IMSSA has simply been much more successful in helping parties to reach settlements at *any* cost or length of time—a 70 to 80 percent success rate, compared to 15 to 30 percent for the state system. Thus, parties might want to use IMSSA's services even if they cost more or take longer, although it does not appear that this is the case.

Despite the lack of detailed statistical data on the time necessary to resolve disputes in either IMSSA's IDRS or the conciliation boards and industrial councils, it appears that IMSSA is resolving cases more quickly. IMSSA is able to handle all of the cases brought to it in a timely manner, without developing a backlog. Data is not available, however, on the proportion of the total industrial relations caseload being

handled by IMSSA, and it may only be handling a relatively small proportion of all labor disputes (see below), so this must be taken into account in measuring its success against government dispute resolution processes. The cost advantages of IMSSA's services are less clear. The higher rate of settlements and the relatively fast process compared to the industrial courts system would lead to substantial savings, but it is not clear how these savings compare to the fees that parties pay to use the IDRS's services. Nevertheless, the growing number of users of IMSSA's services suggests that these fees are not prohibitive, especially given the time savings and success rate. However, these fees do limit access to the system, as discussed below.

B. Access and Options

The nature of the option for dispute resolution provided by IMSSA is not necessarily new or unique in the industrial relations sector—the conciliation boards and industrial councils were also in part based on the use of ADR techniques. Thus, the IMSSA did not increase the options available *per se*, but IMSSA does provide this option much more effectively, so the organization has, in effect, increased options.

IMSSA has not, however, done much to expand access to justice—this was never really one of its key goals. In fact, IMSSA's services, while highly effective, may only be meeting the needs of a relatively small proportion of labor disputants. The fees that IMSSA charges, in combination with its habit of working primarily with unionized labor, exclude some sectors such as agricultural and domestic laborers almost entirely, and these sectors are also the ones that are likely to be most uncomfortable or unfamiliar with the mostly Western model of ADR used by IMSSA.

C. Satisfaction

Because of a lack of follow-up monitoring and evaluation, IMSSA cannot provide very much direct evidence concerning the levels of satisfaction with its services. Nevertheless, there are a number of indicators that suggest that the level of satisfaction with IMSSA's services has been high—the continuously growing caseload and high esteem in which IMSSA is held by other NGOs,[38] donors, and the government, and perhaps most significantly, the creation of the CCMA.

D. Preserving or Improving Relationships

Improving communications and relations between labor unions and management was one of the key motivations for the creation of IMSSA and the IDRS. It is, however, difficult to measure this impact, and no monitoring or evaluation directly related to it has been done.

E. Community and Leadership Development

One of the benefits not only of IMSSA's work, but of other NGOs working in this sector as well, has been the development of leadership within the country from the grassroots to the national level. Moreover, the leaders coming out of these programs are well versed in conciliatory approaches to problem solving and policy development, a particularly critical skill in helping South Africa manage the complex political demands of the post-transition era. This benefit can also be seen in programs working at the grassroots level. (One conflict resolution NGO, CDRT, for example, has found that a number of the mediators who have worked in its community justice centers have gone on, even after being laid off by

[38] Although this does not mean that IMSSA is universally loved, as many NGOs that work on cooperative projects with IMSSA fear that they will be overpowered by it.

CDRT due to its financial difficulties, to serve in other positions in local government.)

F. Laboratory for Experimentation: IMSSA and CCMA

IMSSA's most important impact, and the most obvious example of its success, has been the fact that via the LRA of 1995, the government chose to disband the existing state structures for dispute resolution that had been so ineffective, and build a new system that has its roots, in part, in the model and approach developed by IMSSA. The emergence of the CCMA, while a success for IMSSA, provides new challenges as well.

As mentioned earlier, the CCMA's mandate under the LRA is similar to that of IMSSA, although the CCMA will cover a wider range of disputes and workers, incorporating especially protection of rights for domestic and agricultural workers who have previously had few rights and even fewer resources with which to protect them. Like IMSSA, the CCMA is primarily designed to handle the cases of individual workers, such as those that arise under collective bargaining agreements, but it does not adjudicate conflicts concerning the agreements and labor contracts themselves. The LRA does require that contracts and collective bargaining agreements now include specifications regarding the dispute resolution mechanisms that will be used by the parties.

IMSSA expects to be able to handle some of the cases under CCMA jurisdiction. IMSSA has been forced to reevaluate its role, and it is sharpening its skills to provide services in some new areas. Disputants will still have the option of using private dispute resolution services such as IMSSA's rather than the CCMA if they so chose, and such arrangements can be stipulated in labor contracts. The CCMA can accredit private providers, like IMSSA, and the CCMA will cover at least some of the costs for cases that are under its jurisdiction that are taken by the parties to a private provider. This represents a relatively unique mix of public and private dispute resolution services that could prove to be very mutually reinforcing. For example, IMSSA prepares itself to specialize and handle particularly complex cases, while anticipating that the CCMA will handle the bulk of the routine cases.

The CCMA has seen its caseload grow phenomenally since it started its work in November 1996, rising from 834 cases in the first month, to 5871 in July 1997—nearly 34,000 cases were brought to the organization within its first 9 months. This caseload is much greater than expected, and not surprisingly, it has challenged the capacity and capabilities of the new organization. While this in part suggests that IMSSA had only been handling a relatively small proportion of labor disputes in the past, it must also be recognized that the passage of the LRA and the creation of the CCMA have expanded the total caseload, perhaps drastically. New rights have been created, and new sectors of workers offered the services of the organization. In addition, particularly because the CCMA's services are free, some analysts believe that many parties are choosing to use the CCMA first, and giving up too easily on trying to resolve their disputes themselves. They predict that as the functions and role of the CCMA and the types of cases that it should handle become better understood, the more spurious cases being brought before the commission will decline.

The CCMA faces some daunting challenges, and may continue to learn from IMSSA's experience. IMSSA's experience has demonstrated that the quality of its panelists has been the most fundamental factor in its success. CCMA has felt forced to speed up its training process and cut corners to increase the number of commissioners and handle the caseload. While timely resolution of disputes is important, it may be better to ensure that commissioners are well trained, even if it means delaying some cases for now. The CCMA also faces the challenge of reaching out to its new constituents, especially agricultural and domestic workers who have not previously been well represented in labor disputes. This may require a more extensive program of outreach than either IMSSA or the CCMA have found necessary in the past, and it may also require some

adaptation of the current model in order to meet the needs of these workers, who are less familiar with the ADR Western models.

The continued provision and expansion of ADR services in South Africa in the next few years presents a number of challenges both for individual NGOs and organizations such as IMSSA, for government bodies such as the CCMA, and for the government as a whole. Financial sustainability, defining missions, and monitoring impacts are clearly the most important challenges faced. IMSSA appears to have the human and institutional capacity that has been necessary to think creatively and develop ways to meet all of these challenges, having outlined a detailed plan for achieving financial sustainability, identified new, cutting-edge niches that it can fill to continue to generate demand for its services, and working with USAID to improve monitoring and evaluation of the work that it supports.

Sri Lanka: Government-supported Community Mediation
Key Points

Description: This case profiles Sri Lanka's community mediation program, which dates to 1990. The Sri Lankan program operates in all but the Northern and Eastern provinces, which are affected by civil war. It includes 218 mediation boards, with 5,400 trained mediators, and has handled about half a million cases since 1990. The program is based on a comprehensive Mediation Boards Act of 1988 (amended in 1997), and operates within a clear legal framework. The mediation boards are appointed and operate at the community level, with immediate oversight by commissioners and general oversight by the National Mediation Boards Commission.

Cases appropriate for mediation include civil disputes and minor criminal offenses; certain kinds of cases in fact need certificates of non-settlement from the mediation boards before they may be heard in court. Mediations are free to users; program costs are covered by the Sri Lankan government, with some funding from foundations. The mediation boards meet about once a week for approximately four to eight hours, using public buildings. Each mediation board is comprised of a chair and 12-30 mediators; individual panels for cases have three mediators. Satisfaction with the program is high.

Goals: The boards were established by the ministry of justice for a number of reasons: increase access to justice by reducing court backlog; increase access to the economically disadvantaged; replace the failed conciliation boards with a better ADR program.

Design: The program attempts to improve on the failed conciliation boards by incorporating lessons learned from that experiment, especially problems of politicization of personnel. Mediation is accepted by the population, and builds on indigenous conflict resolution systems.

Operation: To ensure the quality of dispute resolution services, the program provides training and ongoing oversight for mediators. The program relies heavily on volunteer staff, and so is extremely cost-effective. However, stipends provided to staff should be increased to ensure their costs are covered. Trainers are critical to operations but also overburdened, and so additional training staff should be hired. High literacy facilitates outreach and education, as well as the operation of the boards themselves.

Impact: Satisfaction by the mediation board users is very high; related compliance rates are also high. Court delays have been reduced. The government needs to ensure long-term financing as external funding becomes uncertain. Confidentiality of the mediation process needs to be improved. A lurking problem to continued success is the developing backlog of cases to be mediated.

SRI LANKA CASE STUDY

I. DESCRIPTION[39]

A. Program Origins and Goals

Sri Lanka's mediation program is based on the Mediation Boards Act No. 72 of 1988. The act was written in response to concern that: 1) the backlog in the courts was preventing Sri Lankans from accessing justice effectively and efficiently (which was linked to a desire to keep minor crimes from becoming major ones); 2) the current justice system needed to be improved, especially to provide access to the economically disadvantaged; and 3) that Sri Lanka has a long history of community mediation and the failure of the Conciliation Boards Act of 1958 did not, in the minds of those working at the ministry of justice (MOJ), indicate that mediation was a failure. In fact, the MOJ asked that an analysis of the failed conciliation boards be conducted and the new program was designed based on that analysis. The MOJ then drove the process of writing the Mediation Boards Act No. 72 of 1988.

The act provides the legal framework necessary to institutionalize the mediation boards. The boards are empowered to use the process of mediation to resolve all disputes referred to them by disputing parties, as well as those referred by courts. The mediation boards are appointed at the community level and their members are persons respected in the community. Disputes over movable or immovable property valued below 25,000 rupees (e.g., collection of bank loans, property disputes) have to be referred to mediation prior to filing an action in court; disputes involving minor offenses must also be referred to mediation prior to the police instituting action in court. Disputes between family members are also frequently brought to the mediation boards for resolution. The program's goal is to divert minor disputes away from court for settlement if possible, in an atmosphere that is both free from the constraints of court procedure and which is also conducive to the amicable settlement of a dispute—the nature of which does not require the application of technical legal concepts.

The mediation board has no jurisdiction to mediate in matters where one of the disputants is the state, a public officer or the attorney general, or where the offence is one in which proceedings have to be instituted by the attorney general. If an action has already been filed in court, the dispute can be referred to mediation with the written consent of both parties. No lawyers or agents are permitted to appear before the board and "no statement made by any person before a mediation board shall be admissible in evidence in any civil or criminal proceeding."[40]

The 1997 amendment to the act further defines the procedures to be followed in bringing a case from mediation to court (i.e., what kinds of cases need certificates of non-settlement before being allowed to be heard in court) and further clarifies how the mediation boards are constituted for any given case. (In the past, disputants chose the mediation panel with direction from the chair. Now, the panels are pre-constituted but the disputants have the right to change the membership. It was found that disputants rarely had an opinion about the mediators themselves and this amendment was written to expedite the process.) The amendment to the act came in part from feedback from the mediators themselves about how the process was working and what improvements might be made.

Oversight falls within the purview of the mediation boards commission. The mediation boards commission consists of five members, three of whom at least shall be from among persons who have held

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[39] Conducted by Elizabeth McClintock, CMG Consultant, September 1997.
[40] Mediation Boards Act, No. 72 of 1988, Section 16 (2).

judicial office in the Supreme Court or the Court of Appeal. The chairman of the commission is nominated by the president. Commission members serve for three years. The commission meets once a week to discuss key issues, review the performance of mediation coordinators and mediators, as well as keep up to date on the progress of the boards.

The mediation boards program began functioning in 1990. At present there are 218 mediation boards in operation throughout most of Sri Lanka and approximately 5,400 trained mediators. It is hoped that mediation boards will be set up in the Northern and Eastern provinces in the near future (they are prevented from operating there at present because of the civil war). The number of cases referred to the boards has steadily increased since the inception of the program, from 13,280 in 1991 to 101,639 in 1996. Through July 1997 a total of 522,307 cases had been referred to mediation boards. Of these, 31,739 were rejected as not suitable for mediation, 17,279 were withdrawn by the applicants, and 13,925 were carried over until August 1997. A total of 459,364 disputes were taken for mediation and of these, 295,302 disputes were settled amicably. The settlement rate is 64.2 percent.

The program costs are covered predominantly by the Sri Lankan government. The government has demonstrated its commitment to continuing the program by providing at least the minimum budget—covering salaries of the mediation trainers, administrative costs at the MOJ, and the small stipends that mediators receive to cover costs of managing the mediation boards (e.g., travel, postage, stationary). The total budget for the mediation boards in 1997 was Rupees 24 million (less than $500,000). The same amount has been budgeted for 1998. Additional training, public awareness programs, and media campaigns have been funded by the Asia Foundation (TAF) and USAID through TAF's Citizen's Participation (CIPART) Project. Between September 1995 and December 1997, USAID has contributed approximately $110,000 to the Mediation Boards Program through TAF.

B. Program Activities

The Sri Lankan ADR program is composed of several parts to ensure the success of the mediation boards:

1. The training of mediation trainers

There are 13 mediation trainer/coordinators, who hold their jobs until retirement. The 13 coordinators are predominantly former family counselors (a few were probation officers), and received a five day basic mediation course and a five day advanced Training Of Trainers course from Dr. Christopher Moore of CDR Associates, Boulder, Colorado. In addition, six of the 13 trainers were given the opportunity to travel to the USA, Malaysia, or India for exposure to other mediation techniques. Mediation coordinators also participate in regular refresher meetings once a month at the MOJ.

Each coordinator is responsible for overseeing approximately 20 community mediation boards, visiting three to four boards every week. Their duties include monitoring the mediators, giving feedback to the mediators and the chairpersons, answering questions and giving advice about the mediation process, and dealing with any administrative issues.

2. The recruitment and training of mediators (panel members)

Panel members are chosen according to the guidelines set out in the Mediation Boards Act.[41] Individuals and non-political organizations nominate candidates for a position on the mediation board. The candidates

[41]"The persons who shall be eligible for appointment to any panel of mediators are n/a.
(a) any person resident in a mediation board area or engaged in any work in that area;

are required then to submit an application to the Mediation Boards Commission and are then interviewed. The overwhelming majority of mediators are men (for example, at each of the boards attended, only two or three of a total of 30 panel members were women; approximately 2 percent of all mediation board chairs are women) and are well-respected local community members. Mediators are generally retired civil servants, such as teachers, school principals, postmasters, or district commissioners. Religious leaders, farmers, doctors, businessmen, and lawyers are also prominent as panel members. In theory, mediators serve for three years. They can be reappointed indefinitely, though their performance must be reviewed every three years, and on any given board, there must be a turnover of one-third of the staff every three years. Each mediator receives five days of initial training and a one-day refresher every six months. The board chairs receive a two-day refresher every six months. All mediators are volunteers and a small stipend is provided to them for travel (to and from the sites of land disputes, etc.) and to cover administrative costs such as sending letters to the parties to the dispute informing of their mediation date.

3. Awareness raising and educational programs for police, local officials, school children, social workers

The mediation coordinators are responsible for giving this training. These programs are divided into two types. In one type, stakeholders (e.g., judges, police chiefs) implicated in the implementation of the Mediation Boards Act are given training, and approximately 5,000 stakeholders have participated in a one-day "awareness raising" program. The content of the program includes the presentation of the act, the role of the stakeholders in the implementation of the act, and a question and answer session. The second type of program are those conducted within organizations or constituencies to educate the participants about the mediation process. To date, programs have been offered to police officers, local bar associations, and local school children.

4. Regular monitoring and evaluation of panel members by the mediation trainers and the mediation boards commission members

See the Analysis Section for a further discussion of monitoring and evaluation.)

5. Training for law school students at the Sri Lanka Law College

A six-month program was implemented to educate law students about mediation. The students participate in a three-day mediation workshop and then use the techniques they have learned in the legal aid clinics. Students are also given the opportunity to observe mediations conducted by the mediation boards. Approximately 1,500 students have participated in the mediation workshop to date.

(b) any person resident or engaged in any work outside such mediation board area if the commission so decides, in exceptional circumstances; and

(c) any public officer nominated by the government agent of the administrative district within which such mediation board area is situated:

Provided however that an officer nominated under this paragraph shall be eligible for appointment to the panel appointed for every mediation area within that administrative district." Mediation Boards Act, No. 72 of 1988, Section 5.

6. Posters to advertise the boards in each community were produced in Sinhala, Tamil, and English

The posters include the address of the local mediation board. In addition, a public television documentary on mediation was produced and aired on national television. The police also refer cases to mediation, thus increasing the visibility of the program.

C. Operation of Mediation Boards

Each mediation board is composed of a chairperson and a panel of 12-30 mediators. The chair is chosen by the mediation boards commission (based on input from the mediation coordinators) and serves for three years (with the opportunity for renewal). The mediation boards tend to meet once a week, generally one day on the weekend or after working hours during the week. The boards meet for anywhere from four to eight hours. In general, classrooms in schools or other public buildings are used as the venues for the mediations. The chairs are responsible for conducting the intake of all mediation cases, contacting the second party, informing the disputants about the process of mediation, assigning mediation panels, administration of the case load, and just generally managing their mediation board.

Approximately 25 cases are dealt with on any given day at a mediation board. Some of these cases are new, and some have been carried over from the last session. The MOJ has asked that all cases be dealt with within 60 days of the complaint being submitted to the chair. The chair can extend that time if necessary. The majority of cases dealt with at the mediation boards are land disputes, minor criminal offenses, debt collection, and family disputes.

When a disputant comes to the mediation board for assistance, he or she is required to fill out a standard application, issued by the MOJ, and provide a five rupee judicial stamp. Upon arrival at the mediation board, disputants are given a short presentation on the mediation process. The chair then matches disputants with a panel of three mediators.

Mediations continue until the case is settled or the session ends for the day. The majority of cases dealt with are land disputes and family matters. (At one mediation board observed, the chair estimated that 75 percent of his cases were land disputes.) Disputes between debtors and banks constitute the other major category of issues. In the urban areas, disputes involving drunk and disorderly behavior or assault are also common.

Satisfaction with the mediation boards was quite high among the disputants interviewed. While most have confidence in the justice system, what makes mediation attractive is its accessibility, the low cost (both in terms of time and money), how they are treated, their control over the process, and the fact that it is a community-based solution. (Almost everyone interviewed mentioned that the mediation process provided the disputants with an opportunity to save face because, in their view, the mediators better understand their problems—they are from the same community—and agreements are based on consensus.)

Satisfaction is also reflected in the compliance rates. Anecdotal evidence indicates that a vast majority of bank-debtor settlements are respected. At the Moratuwa Mediation Board, the chairman said that 95 percent of the loan cases are resolved and the settlements abided by because both sides feel that mediation is more conducive to resolution. Interviews revealed that settlements reached in minor criminal offenses and assaults also had a fairly high compliance rate. Interviewees implied that mediation was far preferable to dealing with the police or the courts and that compliance was a small price to pay for resolving the issue. No data is available regarding land disputes and family matters although the mediation chairpersons

implied that they have a lower rate of compliance, since people returned to the board to ensure compliance with a settlement.

The mediation boards enjoy an enormous amount of political support in Sri Lanka—all the way up to the Supreme Court. This support contributes to the success of the program both in terms of the funding it receives from the government and the reputation that the program enjoys amongst Sri Lankan citizens. The clear relationship between the mediation boards and the formal judicial system, outlined in the Mediation Boards Act, has also been a factor in the program's success.

II. ANALYSIS

A. Background Factors

In Sri Lanka, the mediation boards were not established as a substitute for the formal judicial system. Indeed, the formal judicial system enjoys a fairly good reputation in Sri Lanka. While there are several areas in need of reform, especially with respect to the modernization of the legal system (such as improving court administration and enhancing in-service training for young lawyers and the attorney general's department), recent surveys indicate that 98 percent of Sri Lankan citizens would still resort to the legal system if they had a legal problem. Instead, the mediation boards were created as a complement to the existing system, in an attempt to address court backlog. Approximately 8,700 court cases are currently pending nationwide[42] resulting in a feeling of user dissatisfaction.

In addition to the judicial environment that formed the backdrop for the creation of the mediation boards, there are several background factors that have contributed to the strength of the program. First, success of the mediation boards system is rooted in the clear link between the mediation boards and the formal judicial system. The Mediation Boards Act, No. 72 of 1988, clearly spells out the structure and jurisdiction of the boards. More importantly, it delineates the types of cases which must have a certificate of non-settlement issued by the mediation board before it can be referred for court action. This has resulted in a more rapid popularization of mediation boards than otherwise might have occurred, had that link not been as clear. It has also meant that user confidence in both the mediation boards and the courts has increased as well-functioning mediation boards have resulted in greater user satisfaction with results, as well as a decrease in court backlog—thus reducing court delays.

A second, related background factor is the high quality of human resources available to staff the mediation boards. There is a strong sense of community service and responsibility among the generation of mediators who are currently serving on the mediation boards. This is complimented by the fact that the Mediation Boards Commission has made a strong commitment to ensuring that the boards are not politicized. Thus the quality of mediators has remained consistently high. This has reflected positively on the reputation of panel members and the perception that they are well trained and relatively impartial. In their 1994 report, Hansen, et al. argued that user satisfaction with the mediation boards was higher than with the previous conciliation boards, largely because much greater care has been taken to select, train, and supervise community mediators. Observations here support this hypothesis.

In addition, the high rate of literacy in Sri Lanka has had a significant impact on the success of the mediation boards program. The health of the overall system of government is reflected in the literacy rate, as mediators, judges, and other public officials seem to be held to a higher standard of performance. In addition, the high literacy rate in Sri Lanka makes it easier to reach the target population.

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[42] The backlog has been reduced from 13,000 cases, p. 6 CIPART Quarterly Report, April, 1997 - June 30, 1997.

A final background factor is the cultural fit of mediation with established social norms. Mediation has a long history in Sri Lanka. During the time of the kings the mediator was called the *duk gana rala*—loosely translated as "one who listens to the sorrows and woes of others." Seeking the counsel of elders and well-respected members of one's community is seen as an appropriate means of resolving disputes. In fact, prior to the establishment of the conciliation boards and in the intervening period between their abolition and the creation of the current mediation boards system, the local public servants, the Grama Seva Niladhari (GSN), were called upon to resolve disputes. Villagers continue to go to them as a first resort, but an aggressive information campaign has resulted in the GSNs referring cases to the mediation boards. The GSNs interviewed indicated that they were supportive of the mediation boards system because: 1) they have an enormous number of responsibilities and do not have time to properly dispose of such disputes; 2) the mediators have demonstrated that they are trained to help parties to effectively resolve disputes; and 3) the GSNs are involved in the process—as they are often recruited to ensure that a settlement is abided by.

Parties themselves also emphasized that mediation—defined as a process of having others assist you in solving your problems—is a common and welcome means of keeping the peace in small communities. According to those interviewed, parties felt that they were treated better in the mediation process than they might have been in court or by the police and the fact that the resolution is based on consensus allowed them to save face. "The process was explained to me in great detail and was easy to follow. I felt the panel was balanced in their roles—those who listened to me and others who responded to my concerns. I was treated politely and I felt like my problems were understood by the mediators. I have learned something today and would do it again [participate in the mediation process], if necessary."[43]

The various religious traditions in Sri Lanka also promote consensus as a means of problem solving. Because many priests and imams also serve as mediators, parties feel that the mediation boards process not only respects those traditions but improves upon them. "Initially, we went to our imam to help settle our dispute but our perception was that the imam was not impartial so the settlement was not valid. Therefore we decided to come to the mediation board because we have heard that they [the mediators] are impartial and neutral."[44] When asked if he felt the imams who serve on this mediation board were impartial he replied affirmatively, "because of the training they receive."

B. Program Design

With respect to program design, by far the most significant issue was the conscious decision to analyze the shortcomings of the Conciliation Boards Act of 1958 and to create a system that did not replicate the problems of the former system.[45] There were three major drawbacks to the conciliation boards system which were identified by the drafters of the Mediation Act of 1988. First, the MOJ had the power to remove panel members if they had demonstrated incompetence. While this was important from an administrative standpoint, the act was worded so that the minister had power to remove members "without assigning any reason," leaving the system open to criticism (apparently justified) that this power might be used for political reasons.

A second area of concern revolved around the breadth of the panel's jurisdiction. Lawyers especially felt that the panels' power to deal with issues like divorce, child custody, and estate administration and to

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[43] A young man who came to the Moratuwa Mediation Board in the Colombo district with his uncle when they had a dispute about the uncle's drunk and disorderly behavior at home (9/24/97).

[44] A young man who, along with five other parties, had a land dispute come before the mediation boards. Akurana Mediation Board (9/21/97).

[45] P.B. Heart, From Conciliation to Adjudication in Sri Lanka: Causes and Problems.

issue the equivalent of a decree of court was a dangerous precedent. The unavailability of extraordinary relief (i.e., injunction) caused delays because parties were required to seek redress at the conciliation board level prior to pursuing their case in court, thus replicating the very same problems the mediation system had been established to resolve. Also, a number of critics expressed concern that the settlements reached bore no relationship to the parties' legal rights. Finally, and perhaps most importantly, people were dissatisfied with the quality of panel members. Not only were they untrained, but there seemed to be a heavy element of politics in the selection process thus leaving the conciliators open to undue influence.

In setting up the mediation boards, the drafters of the 1998 Mediation Boards Act took great pains to ensure that these issues were dealt with.[46] The establishment of the commission and its role in oversight of the system has removed the taint of politics from both the selection process and from the mechanism established to monitor, evaluate, and discipline mediators. The jurisdiction of the mediation boards is limited and clearly spelled out in the act. The relationship between the mediation boards and the judicial system is straightforward and the mediators must not only understand it themselves but must communicate that relationship and their rights to the disputants. And finally, the training that coordinators, chairpersons, and mediators receive has improved the quality of the services offered to parties and the perception of impartiality that the panel members enjoy.

C. Personnel and Training

The tension that mediation trainers face is that they want to encourage well-respected people to serve on the boards—usually people who have been in positions of authority (teachers, school principals, priests)—yet are now asking these people to behave differently than they are accustomed to. In other words, they are no longer supposed to make decisions based on their position of authority but instead are to help others make those decisions. In addition, the parties themselves will frequently come to the mediation with the expectation that the panel members will solve their problem for them. The mediators need to learn how to manage this expectation as well as train themselves to think differently about their own role in the community and more specifically in the mediation process.

Linked to this challenge is the impact that a mediation board chair can have on the tenor of a mediation board. One of the mediation trainers interviewed indicated that if chairs have very strong personalities, they will often leave their mark on the functioning of the mediation board. Two of the three mediation boards observed bore this out. In both cases, the authoritative way in which the chair ran the board was reflected in the tone that mediators took with their clients. In conversations with disputants, this authoritative tone seemed to impact negatively on their perception that the mediators were impartial third parties. The mediation coordinators are trying to address this problem. The third mediation board observed was run by a woman who had excellent facilitation and organizational skills and her collaborative style resulted in an extremely well-run mediation board.[47]

D. Monitoring and Evaluation

Another aspect of program design that has contributed to the success of the mediation boards and to the confidence that users have in the program is the system to monitor the mediators. During regular visits, the mediation coordinator observes the mediators in action, offers advice, and interviews participants if problems are evident. Regular reports are submitted to the commission based on these visits and

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[46] Despite the experience with the conciliation boards, there are still some who want to give the mediation boards the power of summons and to give their settlements the status of decrees of court. Interviewees insisted that it would be a mistake to institute these measures, as the voluntary and consensual nature of the process are keys to the mediation boards' success.

[47] Mrs. Murial Nilaweera is the chairperson of the Udunuwara Village Mediation Board near Kandy.

mediators are evaluated on their performance. If the coordinator observes a problem, s/he will follow up with the mediator. For serious problems, the commission may then assign a team of three coordinators to investigate the complaint.

If disciplinary action is necessary, the commission will generally first warn the mediator, counsel, and terminate if necessary. Disputants also have the right to submit a letter of complaint directly to the commission which is then dealt with as described above. In order to ensure that the coordinators do not become partial to any given district or mediation board, they are rotated to a new district every three years.

E. Education and Outreach

Despite the fact that mediation fits well with cultural norms in Sri Lanka, it has been necessary to design an extensive public education program in order to publicize the mediation boards. Not all of these education efforts have been funded by the government and they have comprised a significant part of the grants that TAF has provided to Sri Lanka for support of the ADR program. There are three significant benefits to this education program: 1) co-opting those who are involved in implementation; 2) winning over those who might influence the reputation of the mediation boards from afar, and 3) widening the target audience reached by mediation board efforts.

First and perhaps most importantly, the education efforts have been incredibly successful at winning over those members of the community who are implicated in the implementation of the mediation system. This would include local magistrates, chiefs of police, judges, divisional secretaries, and the Grama Seva Niladhari (village headmen). Over 900 stakeholder workshops have been conducted across Sri Lanka with the intent of familiarizing participants with the Mediation Act and their role in ensuring its success. Bringing the village headmen on board has been especially important because they are not only involved in publicizing the mediation boards but are often called upon to "encourage" second parties to attend mediation and are integral to the enforcement of settlements, as they are a well-known and respected authority at the village level.

A second benefit of the education program is its potential for securing the support of respected members of the legal profession who, because of their stature in society, could play a crucial role in bolstering the reputation of the mediation boards. At present, there are rumblings within the legal profession that the mediation boards are "a step to deny access to courts of law."[48] In fact, the concerns expressed by some detractors of the mediation board system have some validity. In particular, decisions are sometimes reached with respect to land disputes where the mediators and the parties may not have a clear understanding of the relevant laws. What the education programs seek to accomplish is to bring the legal professionals into the process so that their advice can be more constructively integrated into the system. To this end, the mediation trainers have organized workshops for students at the Sri Lanka Law College and sessions for local bar associations. While there is strong support within parliament for the continued operation of the mediation boards, the risk is that the support will be eroded unless efforts are continued to enlist the support of prominent professionals, such as lawyers.

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[48]Open letter to the Sri Lankan Bar Association, submitted June 1997 to the *BASL News* by Neil Dias, Attorney-at-Law. In the letter, Mr. Dias expressed grave concern that parties were being denied adequate justice because they were required to seek a certificate of non-settlement from the mediation boards under certain conditions, prior to having their case heard in court. Mr. Dias had five major complaints. First, mediations are conducted in secret. Second, he felt that mediators did not have the proper training to be dealing with the kinds of cases that came before them. Third, "what the mediators do during [a mediation] is done arbitrarily in that there is no observance of any law or legal or other precedent resulting in the same offense being settled in hundred or even thousand different ways and terms." Fourth, parties are not allowed legal representation at the mediation, and fifth, the settlements are not subject to review or appeal by another body.

Finally, incorporating education efforts into the program design helps to widen the target audience for mediation. One of the main goals of the mediation boards program is to provide access to justice for the disadvantaged. However, sustenance of the program will depend on both increasing the number of people who have an understanding of the mediation process, such as school children and police officers, and increasing the number and type of voices advocating for the use of mediation as a means of alternative dispute resolution. Programs are currently being offered in schools and in police stations and reports from the coordinators indicate that they are very successful. Teachers have expressed interest in beginning peer mediation programs which will not only expand the practice of mediation but will provide fertile ground for developing a constituency of future mediators.

There is talk of getting the middle and upper classes more interested in the mediation boards with two direct benefits: a large number of more powerful advocates involved in the program; and bringing in businessmen, lawyers, and other professionals may help to push mediation into other arenas such as labor, environmental, and commercial disputes. A more active education campaign needs to be mounted and would benefit from external funding, as the government does not have the funds at present to pay for them.

F. Finances and Staffing

The issue of funding brings to the fore some significant operational issues. At present, the costs of the mediation boards program are very low. As mentioned above, the total government budget is approximately 24 million rupees. Each mediator is given between 50-250 rupees per month for travel and each chairperson receives 500 rupees per year for stationary and 250 rupees per month as a clerical allowance (to cover the costs of stamps, etc.). As all the mediators are volunteers, the only other costs incurred are the salaries of the 13 full-time mediation coordinators and any pre- and in-service training offered to the mediators. There is no talk of instituting a user fee, as it is still a primary goal that the system be made available to the disadvantaged. At the same time, the small stipend given to the mediators and the chairpersons is not adequate to cover all their costs. This stipend should be increased in order to alleviate the risk of corruption as mediators may be tempted to seek to cover their costs through other means.

A second, related issue is the cost of training mediators. The consistent, high quality training offered to mediators has been a key to the success of the current program. The mediation coordinator/trainers interviewed are all very talented and overworked. It is critical that new trainers be hired in order to alleviate the burden on these people. In addition, further advanced training will keep both the mediators and the coordinators up to par. Presently, one-day in-service refresher courses are offered once every six months, but the length of these courses could be extended and the choice of topics broadened. In addition, as mediators are required to be retrained if they are re-appointed every three years, it is critical that the trainers have a wider range of tools that they can then share with the mediators so that the training does not become stale. These operational issues are inextricably linked to a consistent source of funding.

The mediation boards program benefits from an extremely dedicated pool of people who are committed to the idea of community service and whose reward for participating as mediators is simply the prestige they enjoy in their towns and villages. However, these people will not be able to serve on the boards forever. On the one hand, this is a positive thing as they will not then become “burned out” or disenchanted. On the other hand, it poses a risk for the continued operation of the boards if there is no money to train new mediators as they are needed. In addition, the current commitment of these mediators and especially of the chairpersons may be tested if they cannot rotate out of their positions periodically. The chairpersons must deal with additional administrative responsibilities, which means that their investment in the program is

not simply one day a week but often requires several days each week.

Further training of new mediators will help to alleviate some of the pressure on the current program. The MOJ has also considered some incentives to reward the mediators. None of the ideas, at present, includes monetary compensation, which is wise. One incentive under consideration is to give the mediators the title of "Justice of the Peace." According to both the mediation board chairpersons and the MOJ administrators interviewed, this title would provide them with the recognition that they deserve for their efforts.

G. Confidentiality

A final operational issue that deserves special attention is the issue of confidentiality during the mediation process. In general, the structure of the mediation process is well thought-out and consistent across the boards observed. The chairpersons were efficient administrators and structural constraints, e.g., three mediators per panel, were respected. Unfortunately, confidentiality was extremely problematic in all of the mediations observed. At the three mediation boards attended mediations took place in the same space and between four and six mediations were happening at a given time in either a classroom or a hallway. The more contentious disputes impinged upon others as the angry voices would permeate the room. The Moratuwa Mediation Board was an exception with the more difficult and potentially volatile cases conducted inside the single classroom available—the rest of the mediations, usually six others, took place in the corridor outside.

Only one of the disputants interviewed mentioned that the lack of confidentiality was a problem but every mediator (including the chairpersons) and all the coordinators indicated that this was one of the biggest problems the mediation boards face. And while disputants may have been reluctant to speak about the issue, their body language during the mediation sent clear signals that they were often uncomfortable discussing their problems in such a public forum.[49] There was some sense that some disputants felt somewhat coerced since they were forced to deal with their problems in front of the larger community.[50] These conditions not only make it difficult for the parties and the mediators to caucus but mediators in Udunuwara also said that they would probably get more family disputes if the mediations took place in more private settings.

Presently, the desire and perceived need for mediation as an alternative means of dispute resolution outweigh the discontent expressed with the lack of confidentiality. However, most observers of the mediation boards, supporters and detractors alike, recognize that this could become a serious problem—negatively impacting on the credibility of the mediation process. Suggestions for dealing with the issue have included giving the mediation boards their own space but to date this has been rejected as there is a fear that space will translate into another layer of bureaucracy which will doom the Mediation Boards. More operational suggestions include asking schools to give up more space for the use of the Mediation Boards on the weekends.

III. ASSESSMENT

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[49] In Moratuwa, for example, disputants leaned forward over the tables to share their stories with the mediators. Often the mediators had to ask the disputants to speak up. Many disputants glanced around the room or space as they told their story, as if to check and see who might be listening.

[50] At the Moratuwa Mediation Board there were between forty and fifty people milling around, only a portion of whom were actually there to participate in a mediation. The others were there to give moral support to the parties and it looked as if some were there out of simple curiosity.

The Sri Lankan mediation boards system seems to be an efficient and effective way to administer justice. Building on a culture of mediation and learning from the mistakes of the past, the MOJ has succeeded in meeting the goals it articulated in the formulation of these boards. Delays in the court system have been reduced, minor offenses are dealt with in an expeditious way—preventing smaller crimes from becoming major problems, and the poor and disadvantaged have greater access to justice.

Particular strengths of the Sri Lankan program include the close fit of this system with traditional means of resolving disputes. This has simplified educating the public about the boards and it has reinforced the value of modeling ADR programs on indigenous methods of conflict resolution. Structurally, the clear delegation of authority for the purposes of oversight, the mechanisms for monitoring and evaluation, and the consistent, high quality training offered to the mediators have resulted in a system with a deservedly excellent reputation, both nationally and internationally. In addition, the voluntary nature of the process, both from the perspective of the participation of the parties and the fact that the mediators are volunteers have meant that people are more willing to use the system and abide by the settlements reached in there.

Two other especially important aspects of the Sri Lankan ADR system are its low cost to the user and the government, and the wide-ranging education programs. The low cost ensures that the disadvantaged have access and that the system can be sustainable over the long-term. The education programs have several benefits: the populations of potential users and mediators are increased, and perhaps most importantly a culture of peaceful, consensual dispute resolution is re-established in Sri Lanka.

While the mediation boards system is very successful, there are three areas which merit improvement: funding, structure, and the reach of the program. With regards to funding, external resources will not always be available and therefore the government needs to evaluate its commitment to the program and build some long term guarantees into the budget to ensure the mediation boards' continued existence. Without that commitment, the government runs the risk that the mediation boards will lose credibility and ultimately users because of a lack of training and a lack of new mediators.

There are two structural weaknesses that the Sri Lankan government will have to address in the near future. The first is providing adequate training to ensure that mediators remain intellectually stimulated and mediation coordinators are able to evaluate and coach mediators using the most up-to-date skills. The greatest structural weakness in the mediation boards program is the lack of confidentiality in the mediation process. As discussed above, this problem must be dealt with soon or it will severely impact the credibility of mediation boards. Increased access to more public space, such as classrooms, could help. The lack of confidentiality also limits the kinds of disputes that are dealt with at the boards.

The final issue that must be dealt with if the mediation boards program is to thrive is the limited reach that the boards currently have. This applies to both the types of cases that are referred to mediation and to the kinds of people who avail themselves of the mediation services. At present, the mediation boards function predominantly in the rural areas, serve the lower socio-economic classes, and address minor disputes. Increasing the reach of mediation would then increase the number of voices advocating for the use of mediation in all kinds of disputes and perhaps, in turn, broaden the base of users.

Power imbalances might become an issue in the case of banks using mediation boards as a means of collecting from debtors. During interviews at the mediation boards individuals were asked how the boards could avoid appearing to be a collection agency for the banks. Mediators and disputants alike replied that they feel empowered by the mediation boards: the focus is on the debtors and their stories, and so they perceive that they are treated more fairly than if they dealt directly with the bank or had to go to court. Perhaps most importantly, the options that can be created at the mediation are often more flexible and favorable to the debtors. An indication that the system is working lies in the fact that compliance rates

with settlements reached with banks seem to be quite high.[51]

Power imbalances with respect to women do not seem to have been addressed in Sri Lanka. It is unclear as to whether this is because women do not experience discrimination at the hands of the justice system or simply because women have not been given the voice to express their dissatisfaction with the system. It is noteworthy, however, that a large number of women are in positions of influence at the MOJ and women mediators and chairpersons were treated fairly at the mediation boards observed. Increasing the number of women mediators is a goal of the administrators of the mediation boards program and much of the resistance that they encounter comes from the women themselves, who claim that the mediation board is too time-consuming. At the same time, while the number of women seeking redress at the mediation boards is rising, the overwhelming number of disputants are still men. If more women were recruited as mediators, there might be an increase in the number of disputes that tend to involve women (e.g., family disputes). All in all, due to the similarity in the kinds of people who are currently choosing to use the mediation boards, there exists a relative parity in power of the disputants.

Another important issue is that of funding. Given the resources available in Sri Lanka at the present time, the mediation boards will continue to need external funds in order to ensure a quality program. The government ought to be able to maintain the system, but the funds that the Asia Foundation and USAID have provided for training have been much-needed and well-used. The system which has USAID providing the funds and TAF administering the disbursement of those funds and monitoring their use on the ground seems to have been working quite successfully. TAF has the resources to follow the program and to assist the government in the development of support programs (such as public education campaigns and legal literacy programs). This has been an important part of the successful partnership between USAID, the government of Sri Lanka, and the Asia Foundation.

It has been proposed that USAID disburse funds directly to the Sri Lankan government, without TAF acting as an intermediary. Should USAID decide to do this, one consideration to keep in mind is that TAF provides an important oversight function which USAID is not currently positioned to undertake in Sri Lanka, especially given that USAID will phase out of Sri Lanka in the year 2000. If responsibilities for maintaining this program are then transferred to the State Department, TAF could conceivably provide much needed consistency in the program. Regardless of the form the external assistance takes, USAID and the U.S. Government are getting a high return on a relatively small investment in Sri Lanka.

Finally, the mediation boards have successfully dealt with a large number of the cases that are brought to them. Unfortunately, this success may lead to larger problem: a backlog is developing in this system which begins to replicate one of the very problems the Boards were established to address in the first place—delays in the court system. While no immediate solutions have been proposed, the MOJ and the mediation coordinators are well aware of the problem and are trying to develop ways to address it.

While not perfect, the Sri Lankan mediation boards have been incredibly successful at providing low cost, accessible justice to a majority of Sri Lanka's rural poor. The system is well-administered and enjoys an outstanding reputation. If the few problems outlined above are dealt with in a timely manner, Sri Lankans will continue to benefit from a well-trained cadre of mediators.

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[51] Both the mediation coordinator in Akurana and the Chairman of the Moratuwa Mediation Board indicated that settlement and compliance rates in debtor cases were as high as 95 percent. While this figure may be inflated, it seems to be well above compliance rates for other kinds of cases.

Ukraine: NGO Mediation of Civil and Commercial Disputes
Key Points

Description: As Ukraine emerges from the Soviet system and attempts to privatize, build civil society, and move to reform its justice system, a well-functioning ADR system may help further these goals. USAID is supporting an NGO, the Ukraine Mediation Group (UMG), in its work mediating commercial disputes as well as a broad range of civil disputes, consistent with strategic objectives aimed at legal and economic reform and increased democratic participation. USAID recently began to support the UMG, which had previously secured funding through grants from other foundations and organizations.

This case profiles the UMG's mediation program, which is essentially a network of mediation organizations now in four cities: Donetsk (the first), Lugansk, Odessa, and a new office in Kiev. UMG trains mediators, offers a clearinghouse for those seeking mediation (matching mediators with clients), and consults with enterprises. Although commercial and labor disputes, as well as disputes related to privatization, will eventually be the target of UMG efforts, UMG will take any type of civil case. Mediators in the network are trained and certified by the UMG. The program is still relatively small: from January 1996 to March 1997, the three active offices accepted a total of 61 applications for mediation, and 26 were actually mediated.

Goals: UMG's stated goal is "creating conditions for peaceful work and the stable development of national industries, the essential factors in building a healthy economy." This goal is consistent with a number of USAID's SOs, with the hope that the UMG's programs will help expedite the process of privatization and help move other economic restructuring projects forward more effectively. Potential users are the businessmen and others involved in commercial disputes who are loath to use the court system, which is plagued by delays and high costs.

Design: The mediation program follows developed country mediation models. Outreach is through UMG's collateral activities, such as university-based seminars on ADR. The greatest design challenges include developing monitoring and evaluation in a society fearful of providing the necessary information, as well as financial sustainability.

Operation: The program provides extensive training of mediators, although quality control is difficult due to the problems in monitoring mentioned above. Current laws severely limiting permissible sources of NGO funding have spawned insufficient and unsustainable funding strategies, and laws must be changed to permit fee for service charges. The relationship between ADR and the court system must also be clarified through legislation.

Impact: UMG's mediation program has great potential to impact the commercial sector, as well as developing civil society, particularly as interest and enthusiasm for it grows. It must first overcome significant legal obstacles in securing sustainable funding, as well as cultural obstacles to open sharing of information and effective monitoring of mediations.

UKRAINE CASE STUDY

I. DESCRIPTION[52]

A. Program Origins and Goals

Emerging from the oppressive Soviet system, it has been a challenge for Ukrainians to respond to the new policies of a democratic society. Generally speaking, Ukrainian citizens are notably cynical and apathetic about their ability to effect change in government—especially the political and judicial systems. These attitudes manifest themselves in many ways. People are reluctant to share information about themselves or their programs, as they are uncertain as to how that information will be used. This in turn impacts the establishment of new processes like mediation, since suspicion and ignorance prevent clients from using the system. These attitudes also impact the design of mediation systems, as mediators try to accommodate the extremely cautious response of potential clients. As a result, there are few statistics shared with strangers as to numbers and kinds of cases mediated and even less data on client satisfaction and mediator performance.

In this climate, Mr. Nicholai Borisov has started a program to introduce a means of alternative dispute resolution to the citizens of Ukraine. Mr. Borisov began his work in ADR under the Soviet government. He is trained as a psychologist and he, along with several colleagues, was asked to work with miners in the coal industry in the early 1980s to develop methods for resolving conflicts within the industry. In 1989, when social enterprises were permitted to establish themselves, Mr. Borisov and his colleagues founded an organization called the Donetsk Scientific Applied Association (the "Psychological Center").

Mr. Borisov's past experience with the mining industry lead the government to seek his assistance when strikes broke out in Donetsk in 1989. These were some of the worst strikes that had ever been experienced in Ukrainian labor history. Borisov invited three US mediators from the American Arbitration Association (AAA) visiting Ukraine at the time to assist him. Together they offered three seminars to strike participants on mediation and conflict resolution skills.

Mr. Borisov was greatly influenced by this experience. Until now, the Psychology Center had been teaching people to solve their own problems. The visitors from the AAA introduced the idea of having a third party intervene in disputes. Borisov found this to be a "simple and effective" means of resolving conflict, and then began practicing mediation and attempting to build his skills.

In 1993, during a debate over a new labor law, the trade unions threatened to strike and Borisov was asked by the government to mediate. Borisov invited the AAA back to Ukraine to assist him and they successfully mediated an agreement. The idea for a network of mediation centers grew from this experience and was ultimately discussed at a seminar offered to many different parts of the government, trade unions, etc., in Kiev later in 1993. The Soros Foundation gave $2,000 to develop the project and the Ukraine Mediation Group (UMG) was born.

Since 1993, the Psychological Center has received a succession of grants (Soros, Mott, Carnegie), portions of which have been dedicated to sustaining the UMG. Search for Common Ground (SCG) is the most recent American NGO to offer support. SCG began working with UMG in 1995 and was instrumental in negotiating the grant that UMG received from USAID in August 1997.

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[52] Conducted by Elizabeth McClintock, CMG Consultant, December 1997.

B. Program Design and Operation

The UMG is really an umbrella organization for a network of mediation organizations. At present there are four regional offices: Donetsk, Lugansk, Odessa, and Kiev. The first three have been in operation almost three years and the Kiev office was registered in November 1997. The UMG is involved in training mediators, offering a "clearinghouse" for those seeking mediation (matching mediators with clients), and consulting to enterprises who wish to set up systems within their organizations to deal with conflicts before they erupt. The number of staff varies at each office but in all cases, it is quite small. For example, in Donetsk there are three permanent staff (an accountant, a project assistant, and the executive director) and approximately 60 volunteers, 15 of whom are very active.

The UMG has a council consisting of representatives from each of the four regions. It meets once every six months at one of the regional offices. They discuss policy affecting all four regional groups and generally keep one another informed of developments. In addition, they are linked by e-mail. The Psychological Center is responsible for finding grants to support the UMG and for developing new project ideas.

At present, the UMG is willing to take any kind of case, including family disputes, labor disputes, commercial disputes, consumer disputes, property disputes, and landlord/tenant problems. However, the impetus for the founding of the organization and the real need in Ukraine has meant that commercial disputes, disputes resulting from privatization, and labor-management disputes will eventually be the target of the efforts of UMG. In offering funding, USAID also encouraged them to target these kinds of disputes as they most closely correspond to USAID's strategic objectives.

People learn of the UMG's services by word of mouth, through the members of the group, through recommendations from those who have attended the trainings or who have used the group's consultation services, or through seminars held to raise awareness about mediation and the mediation group. For example, UMG might hold a workshop for staff of an enterprise that is being privatized, or for the teachers, students, and parents of a particular school. A small number of cases are referred to the UMG by "enlightened" judges who are cognizant of the mediation group and the benefits of mediation.

Each mediation group has their own intake process. This may change over time. When the seven mediation groups are established (three more regions will receive funding under this USAID grant), the UMG council hopes to work out a common set of intake guidelines. In general, however, disputants register at the regional office with the case coordinator. The coordinator gathers the data about the case and then contacts the other party (or parties) to determine if they want to engage in the mediation process. Part of the coordinator's responsibility is to explain the mediation process, fees, etc. This is done in a private caucus—if mediation is agreed to, then the final fees are often discussed jointly. If a party does not wish to participate, they are asked to put their rejection in writing and the case will be closed.

Once the coordinator has determined that they will take the case and the parties have agreed to mediation, they ask the initiating party to choose a mediator from their list. Information is included on that list such as how many cases the person has mediated, what kinds of cases, etc. A date and place is then set for the mediation. Mediations never happen in the regional offices but at some other venue (this is due in part to the fact that the office facilities are usually quite small).

Between January 1996 and March 1997, the three regional mediation groups accepted a total of 61 applications for mediation. Of these, 26 were actually mediated and 25 of those resulted in settlement. Of the remaining applications, eight went to court; three have been continued; five were resolved during case administration; five were dropped; and in 14 cases, the second party refused mediation.

The cost of the mediation depends on the case. If the case is about money (e.g., a dispute between a customer and an enterprise that can be valued) then the mediator will get some percentage of the settlement, between 1% and 7%. In general, mediation is free for small cases for the elderly poor (e.g., an old woman that is having trouble with her neighbors). All the mediation groups interviewed are working towards a fee for service system and targeting commercial clients. The Psychological Center generates fundraising ideas for the regional mediation groups and also develops other project ideas. Thus far, they have received grants from $1,000 to $500,000 for the Ukraine Mediation Group project.

Ukrainian legislation dictates that NGOs can only get money from members of their organizations or from grants; the mediation groups are NGOs. This legislation is being reviewed and the new draft law may change the status of NGOs. It is unclear at present what will happen. The Psychological Center is a commercial center and therefore it can charge for its services. It is the mediators who get paid, not the mediation group. The mediators may offer the mediation group a "charitable donation," because it would be against the law to have a formal agreement requiring the mediators to give the mediation group a certain percentage of what they make on a particular mediation.

There is no financial support from the government for the mediation groups and political support is building slowly. Some regional mediation groups have been more aggressive at bringing the regional government on board than others. And the national government is supportive of ADR in principle, and even has an office that serves as an ombudsman for labor disputes. They also participated in a workshop that the UMG group organized in 1993. In practice, however, there still seems to be some suspicion around independent third parties intervening in conflict —especially conflict that involves the government or trade unions.

Agreements are only recorded if the parties ask that they be written down. Mediators will help craft the agreement, if asked. The UMG council is going to come up with some guidelines for crafting such agreements for the mediators to follow based on input from each of the regional groups. It takes anywhere from three days to six months to settle a case. Divorces tend to be resolved more quickly. There are not yet any statistics regarding compliance with settlements or the satisfaction of parties. The DRMG intends to begin a 3–6 month follow-up program during which the parties will be contacted and interviewed about the success of the mediation process, their opinions about the mediator, and compliance with the agreement.

Each regional organization is responsible for distributing information about themselves to advertise, recruit members, potential mediators, etc. Potential mediators are generally recruited from a pool of members of the mediation group who have volunteered on particular projects, and individuals from the community who have participated in the seminars and lectures offered at the university. Anyone can apply to be a member of the mediation group. It is characterized as a social organization and the annual fee is ten dollars. Organizations can also become members of the UMG and their membership fee varies depending on the size of the enterprise.

All mediators in the network have gone through a training and certification process offered by the UMG. Fourteen mediators are certified in the UMG, seven of whom are in the Donetsk database. The training consists of several parts: first they participate in four workshops which account for approximately 160 hours of in-house training, followed by a two-month practicum with the supervision of a mentor. Then they conduct two mediations. Following this training process, which takes approximately one year, the candidate goes through a certification process. A panel comprised of some of the UMG council members, the mentor, and other mediators interviews the candidate, reviews the results of the mediations he or she conducted and, if merited, issues a certificate.

The mediation group also offers a one-time consultation on approaching problems, usually if a client is unable to pay for mediation services. The mediation group does not advertise this because they are concerned that others will come seeking only consultation and not the full mediation service. This one-time consultation is distinguished from the consulting services that the mediation group is offering to enterprises, especially those going through the privatization process. In the latter, the group will act more like a management consultant and work with the client to set up an internal dispute resolution system and charge for this.

At present, there is very little data on client satisfaction with the mediation process or with mediators themselves, which makes it virtually impossible to determine the impact of the mediation program overall. In addition, very little evaluation or monitoring of agreements and/or mediators has been conducted. The implications of this for the program will be discussed in greater detail in the analysis section.

II. ANALYSIS

A. Setting Program Goals

USAID program officers did not design the ADR project in Ukraine that they are currently funding. It was driven by the Psychological Center with the help of Search for Common Ground. Therefore, USAID has had little impact on the stated goal of the UMG: *"Creating conditions for peaceful work and the stable development of national industries [which are] the essential factors in building [a] healthy economy. [The] Ukrainian Psychological Center contributes to [the] Ukrainian Mediation Group project, a system of training and supervising of independent practicing neutrals, educated and certified for mediation, arbitration and negotiation of labor disputes."*[53] At the same time, the size of the USAID program in Ukraine and the extent, in particular of the Democracy and Governance program, has meant that this ADR program complements several of USAID's strategic objectives.

Of particular interest are SO 2.1—*Increased, better-informed citizens' participation in political and economic decision-making*, and SO 2.2—*Legal systems that better support democratic processes and market reforms*. Of associated interest is SO 1.3— *Legal, regulatory and political environment conducive to sustainable growth*. It appears that although ADR may not fit within any one strategic objective, nonetheless as Ukraine struggles to privatize, build a civil society, and move to reform its justice system, there are many ways in which a well-functioning ADR system might help USAID reach those strategic objectives. More specifically, USAID officials indicated that they hope the mediation program will help to expedite the process of privatization and help to move other economic restructuring projects forward more effectively and efficiently.

When Nicholai Borisov and Scott Adams of Search for Common Ground made their presentation to a USAID review committee for an unsolicited grant, there was some initial uncertainty on the part of USAID officials as to whether or not this program would be a good fit.[54] Of particular concern to officials was whether or not funding a mediation program might undermine legal reforms already being supported by USAID. These fears were quickly allayed when the presenters were able to demonstrate that the intended target audience for the mediation system was not currently using the judicial system—this would include businessmen and others involved in commercial disputes who are loath to use the court system

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[53] "Program of Intensifying Human Resource in Donbass through Support and Development of Democracy in Labor Relations". Donetsk Scientific Applied Association, ("Psychological Center"), Donetsk, Ukraine 1994.

[54] The committee was composed of USAID officials from the Democracy and Governance, Privatization, Economic Restructuring units. Interview, 12/5/97.

because of the delays and the cost. Consequently, while the other members of the review panel decided against sharing the costs of the program (other than DG), they expressed considerable support for the concept of ADR—and mediation in particular—and its potential fit with their own projects.[55]

B. Relation to the Courts

The nascent mediation system is shaping up to be more of a complement to the court system rather than a substitute or a catalyst for change. Because mediation is such a new idea, it is hardly used as a substitute. At the same time, it is finding advocates in businessmen and others who find the courts too time-intensive and incredibly inefficient. If a few successful commercial mediations are concluded and publicized, the willingness of entrepreneurs to turn to mediation as a means of resolving their disputes will greatly be enhanced.[56]

Currently, there is very little legislation governing mediation in Ukraine. As a result, the relationship between the mediation system and the court system lacks clarity. While this does not currently present a problem, it will become an issue in the future. As mediation is legislated (which it will be—it is only a matter of time according to the government officials interviewed), clients will need to have a clear understanding of what their rights are with respect to choosing mediation over litigation. At present, a major drawback in the development of a constructive and efficient relationship between the two systems is that it is illegal to negotiate or mediate settlement to a case once it has been filed in court. If the parties wish to settle outside the auspices of the court, they must withdraw the case and forfeit their filing fee. The lack of coherency in this policy may cause clients to shy away from mediation and it will certainly undermine the potential effectiveness of mediation as a means of resolving disputes that could easily be settled.

However, there is enthusiasm for the judicial and mediation systems to be more closely linked. Interviews with a judge from Donetsk indicate that the younger generation of justices is excited about the possibility of mediation and perhaps even the establishment of a court referral process for civil suits. This judge indicated that mediation had the potential for resolving many of the civil suits that come before her far more satisfactorily for the parties than do the courts. In fact, she is participating in the training offered by the Donetsk group in order to improve her skills at dealing with disputants in court. Unfortunately, older judges continue to express resistance to the idea of mediation, as they contend that mediation has no legal basis in Ukraine.

C. Political, Cultural, and Financial Factors

In addition to its relationship to the court system, there are several other factors that impact the future growth and sustainability of a mediation system in Ukraine. First, political support, which is critical for the survival of the mediation programs, is building slowly. Depending on the location of the regional office, support has been gained at various levels of government. From Kiev, for example, the UMG has the tacit support of the national government and several government officials have participated in training programs. In Lugansk, efforts have been made to build a constituency within the oblast, or regional

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[55] In particular, the privatization officials identified several areas in which they envisioned ADR skills might be used, e.g., training trade union officials involved in the restructuring of enterprises in facilitation skills or training those involved in the enterprise land sales (formerly state-owned enterprises selling off parts of their property) in process design and mediation skills. Interview, 12/4/97.

[56] "It is understandable that an effective alternative to the court system at least in civil cases will definitely find a market in Ukraine, especially new businessmen who do not have time and wish to deal with our legislation, but are in a hurry to make money." Op cit. Kiselyova, p.3.

government circles. This government support is necessary if legislation conducive to an effective mediation program is going to be written. At the same time, Ukrainians remain distrustful of the government and too much government intervention may kill the program. This is especially true if the government were to be overly involved in the administration of a mediation program.[57] Borisov, for example, maintains that mediation should be within the purview of independent organizations—not government. Nonetheless, without the political support to generate the momentum for legislation to operate legally, the mediation groups will not be able to expand as rapidly as they might.

Another factor that will influence the success of a mediation program in the Ukraine is the need to overcome Soviet-era norms and culture. While the use of third parties to resolve disputes is not unheard of in Ukraine—indeed, the Communist Party committees used to be charged with resolving disputes in the community—the voluntary and consensual process advocated by the UMG is very new. The acceptance of this idea requires an attitudinal shift by an individual and his or her perception of their ability to effect change in their world, which is nascent at best.[58] In addition, there is a tension between the concepts of transparency and confidentiality: keeping the substantive issues in mediation confidential while sharing information about the mediation process itself. An example of this is the underdeveloped monitoring and evaluation process. The process is extremely problematic and as yet no systems are in place to gather data on the quality of either the process or the mediators. This largely results from people's attitudes towards information and how it is used. In general, they are reluctant to share details of the mediation process, to say nothing of giving an opinion of the mediator, as they have no confidence that that information might not jeopardize them at a later date. Unfortunately, without this information, the credibility of the system may ultimately be compromised.

As factors in the success of Ukraine's mediation system, human and financial resources will be somewhat less significant than those mentioned above. First of all, Ukraine has an extremely well-educated population, which will greatly affect how the concept of mediation is popularized. Indeed, there are many options available to those involved in the advertising and marketing of mediation, given the high rates of literacy and Ukraine's relatively well developed access to technology. This will be especially important in generating a client base for mediation services. With regard to generating a cadre of individuals from which mediators can be recruited, Ukraine's human resources also make this a manageable challenge. Thus far, there has been a very positive reception of the concepts of mediation at universities and law schools where courses and lectures have been offered as well as in the commercial enterprises where the DRMG has done consulting. These make for fertile ground for the recruitment of quality mediators.

Financial resources present more of a challenge. Until legislation is changed to permit NGOs like the UMG to generate income, they will depend on charitable donations (i.e., membership dues), contributions from mediators, and grants from outside organizations into the foreseeable future. The UMG seems to be spending the money they receive wisely and are accomplishing a lot for the relatively small investment

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57. There are two government "sponsored" mediation programs learned of during the visit: one run out of the office of the President and a second run out of the Ministry of Labor. The President's initiative is not well-thought of simply because it is associated too closely with government (and hence susceptible to corruption). The MOL efforts have met with some success, partly due to a limited mandate. The MOL officials interviewed indicated that the creation of a mediation system would be a positive development in Ukraine and that the government should support the efforts of independent mediation groups. Interview, 12/4/97.

58 "[From] the absence of belief in rule of law in people's minds emerged the disbelief in universal fairness and justice and consequently the disbelief in any form of fair resolution…. The main reason that mediation as well as other new democratic institutions may not work within the transitional system is that having lost faith in prior institutions, people do not understand or have confidence in new, democratic institutions." **For and Against Mediation in Ukraine,** by Tatiana Kiselyova, Donetsk State University.

made by donors. Even the USAID officials expressed that this is a "fairly cheap investment" for a relatively high return.[59]

An encouraging sign for the financial sustainability of the mediation program is the move towards a fee-for-service system. Not only does this seem inevitable, it is even expected. Certainly this will make it possible for individual mediators to sustain themselves—at present, individuals can get permission from the government to set up as a small business but those individuals often do not have the resources to do the accompanying advertising, marketing, and educational outreach that is necessary to keep them afloat. As for the mediation groups, a change in the legislation will impact their ability to sustain themselves by charging clients and selling training and other services.

There are several program design factors which contribute to the potential success of the mediation program in Ukraine, the most important of which is probably the strength of the local partner and its commitment to the idea of making a mediation system work. While the concept of the UMG has been influenced by input from the American Arbitration Association and Search for Common Ground, it is really Borisov's commitment that will ensure the longevity of the program. This is especially true, given that the mediation program will succeed almost *in spite of* a lack of cultural familiarity with this particular form of third party intervention. The UMG was developed by people who have experience in mediating labor disputes in the Soviet and post-Soviet environments and it is grounded in a cultural reality that cannot be readily replicated by outsiders.

D. Impartiality/Neutrality of Third Parties

Another program design issue confronted by the UMG is that of neutrality. In the Ukraine, it is expected that bias will play a role in any decision that is reached in a problem-solving endeavor and that the parties will not have control—certainly not full control—over the process. In addition, public perceptions of the justice system coupled with the public's reluctance to embrace new ideas make the concept of neutrality a particularly difficult one to disseminate. The UMG and its regional counterparts have taken steps to introduce the idea of neutrality into the vocabulary of their potential clients as well as to the mediator candidates. This is especially clear in the training process.[60] The style of mediation that UMG advocates is one in which the client has complete control over the process, especially over the potential solutions that are generated in that process. The importance of neutrality is emphasized, particularly the clients' perception of that neutrality. There is also consistency in how all UMG mediators are trained, thus ensuring that different styles of mediation—and hence differing concepts of neutrality—are not being taught and implemented.

E. Outreach and Education

A critical component in the program design process has been, and will continue to be, outreach and education. This is true for both attracting clients and for recruiting mediators. The regional mediation

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[59] The overall budget for Democracy and Governance programs in Ukraine is approximately $15 million. Of this, $500 thousand has been allocated for the Ukraine Mediation Group. The UMG is the only ADR program independent of those within the judicial reform program that is being funded by USAID in Ukraine.

[60] "The answer to this point probably is inherent in the process itself. First, a mediator, being or attempting to be impartial and objective (that is the main requirement of the procedure) should have undoubtful (sic) trust from both parties. Second, a mediator should have a strong public image that will attract clients, but having made a mistake once he will be refused this image probably till the end of his/her days, regardless of any formal punishments imposed by professional organizations and codes of conduct. Third, the technique of mediation itself makes no sense for bribing, since any party may reject a mediator without any explanation at any moment it suspects anything wrong. The process is completely voluntary, and the most important aspect of the process is that mediator has no power to decide anything, so it is futile to bribe mediator." Op cit. Kiselyova, p.5.

groups are struggling against suspicious attitudes towards third party intervention, especially intervention that gives the parties control over the process. While this will be a challenge, the problem has been identified and it is being addressed in many ways. Funding of these efforts is an issue for the regional organizations and they are trying to be innovative as to what media and other educational vehicles they use to publicize mediation. In Donetsk, for example, the DRMG offers seminars, gives lectures at the local university and law school, encourages judges to participate in the training, and relies on word of mouth through its volunteers. In Lugansk, the regional mediation group is using a wider range of media to reach the population and in Kiev, the group has developed plans to target trade union and government officials with informational seminars.[61]

F. Monitoring and Evaluation

A final piece of the program design process is the monitoring and evaluation system. At the present time, there are virtually no systems in place for monitoring the performance of mediators, monitoring compliance with agreements, or judging client satisfaction. The UMG intends to develop a follow-up protocol for the purposes of gaining information about compliance and to determine client satisfaction, but that has not yet been completed. The difficulty lies in attitudes towards information sharing—according to the executive director of the UMG, many participants in the process have expressed a lack of willingness to be contacted following mediation. This largely seems to be due to confusion about what kinds of information will be collected for the evaluation. The fear seems to be that information about the substantive outcome of the case will be sought, thus making clients nervous about participating in the process. USAID and the UMG are now negotiating evaluation guidelines that seek to highlight process issues, not substantive ones.

Given that the program designers are facing a number of challenges as they implement the mediation program, the issues of monitoring and evaluation seem even more critical. Without some means of getting feedback from clients as to their impressions of the process and the quality of the mediator, it will be very difficult to maintain the credibility of the system and indeed, the entire concept of mediation. It will also be difficult to make mid-course corrections in the training in order to improve the quality of the mediators or to respond to the needs of the client populations. The UMG's ability to attract donors may also be compromised, as donors generally like to see a clear system of measuring client satisfaction in place.

At the same time, as a system is developed, the designers will have to work within the parameters of the culture. There may be other means of collecting data and disseminating information about mediators that do not overstep cultural bounds or threaten the sustainability of the system. The test will be the success of the monitoring and evaluation system that the UMG is currently developing.

III. ASSESSMENT

The mediation program in Ukraine is relatively new and is operating in a dynamic, changing culture. As such, there are many challenges that must be overcome for the program to succeed. There are three areas which will be critical to the success of the program: the government support that mediation and other

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[61]The Lugansk Regional Mediation Group has been more innovative in its advertising and awareness- raising efforts. In order to advertise their mediation services better, they have joined with other agencies to form a coordination council of social organizations in the Lugansk region. These other organizations (i.e. family planning programs, the society of psychologists, etc.) are helping to spread the word about mediation and the mediation group. In addition, the LRMG has established a relationship with several newspapers and articles have been written about the activities of the LRMG and the mediation committee at the plant. The LRMG also arranged to have the final day of a three-day seminar on mediation televised in order to publicize their work.

ADR programs receive; the cultural attitudes towards new ideas, especially those that involve the sharing of information; and the quality of monitoring and evaluation systems. Without government support, the mediation program will operate on the margins of newly emerging judicial and economic cultures. At present, it is incredibly difficult for the regional organizations to build capacity or infrastructure because of the lack of appropriate legislation.

A second area which will impact the success of the program are cultural attitudes. In a sense, if it is to succeed, the UMG will do so *in spite of* prevailing attitudes. There are other factors that will drive the success of the program. These include the expressed needs of entrepreneurs for some access to ADR, the needs of enterprises which are privatizing to have some internal means of conflict resolution to deal with the resulting social upheaval, and general frustration with an ineffectual justice system. USAID and other donors should look for strong local partners to ensure that these cultural attitudes are addressed via informed project designs that are rooted in the cultural realities on the ground.

Finally, the lack of a monitoring and evaluation system is an important drawback to the current system, making it very difficult to maintain the credibility of mediation as an effective means of conflict resolution. In addition, the reputation of the program may suffer because there are no readily available means to discipline mediators who behave inappropriately, marketing and advertising will be less credible because of a lack of hard data on compliance rates, and there will be no means of feeding client evaluations back into the system. This being said, a system is being developed and it remains to be seen how successful the UMG will be in making that system operational.

Despite these drawbacks, the mediation program has a lot of potential. There are three factors which will contribute to the UMG's success: the quality of available human resources; the potential for financial sustainability; and perhaps most importantly, innovative approaches towards the kinds of cases targeted, the kinds of services offered, and marketing strategies. As mentioned before, Ukraine has a very well educated population that will provide an excellent pool of potential mediators. A well-educated client base also means that the advertising and marketing will be made easier. Perhaps most importantly, there is a profound sense of commitment and enthusiasm on the part of the founder and those who work in the regional organizations to both the concept of third party intervention and to educating Ukrainians about ADR.

The mediation program in Ukraine is moving towards a fee-for-service model that will greatly enhance its sustainability. The interest of young, enterprising entrepreneurs in ADR, and their apparent willingness to pay for the services, bodes well for the program's financial future.

Finally, the UMG is very innovative in several key areas. First, the regional groups are attempting to meet a stated need within the commercial sector. At the same time, they are not limiting themselves to those cases initially so that they might build their skills and popularize the idea of mediation. Second, the UMG is expanding beyond simply offering mediation services to individual clients. The consulting services, seminars, and courses offered at universities and law schools are providing much needed revenue and exposure to all of the regional groups. Third, the groups are targeting some very specific audiences to market the idea of mediation. They have accessed trade unions in Kiev as a means of disseminating information about mediation and the other services of the organization and are using the privatization process to access large, state-owned organizations. This marketing strategy will help reach a great number of the target audience.

This program could potentially have collateral impact on government processes, both in terms of legislation about ADR and in terms of influencing reform in the court system. Admittedly, that may be a

long way off, but there is great impetus to find more efficient means of resolving conflict than what the courts currently offer. There also seems to be potential to influence how government operates. In Lugansk, the regional government is on board and has even asked for training for a government ombudsman. The same could be done on the national level, continuing to target officials like those in the Ministry of Labor to include in training and other seminars.

Another impact that the mediation program might have is contributing to improving conditions within Ukraine's industrial sector. It is a sector that is experiencing extensive change and the mediation groups are providing a wide range of services that could make that transition smoother. The UMG mediation program's success could also spur interest in other potential uses of ADR (especially mediation) in connection with other USAID projects, such as those linked to privatization of state-owned enterprises. Lessons from the UMG experience are especially significant as USAID thinks about the kinds of programs it wants to support and the relatively good return made, to date, on the investment in ADR.

APPENDIX C: Methodology

As directed by the USAID work order, this guide was developed using information from several sources. The three primary sources of information were: existing studies on the use of ADR, field research in five developing countries, and guidance from ADR experts and USAID staff.

We began by developing an overall research strategy. As suggested by USAID, we designed the literature review to generate hypotheses about the conditions under which ADR programs are likely to meet USAID's development objectives. We then gathered available studies (both published and unpublished) on the use of ADR in developed and developing countries, and analyzed them using a standardized protocol.[62] We summarized our preliminary findings from the literature review and presented them to an advisory group of ADR experts[63] and to USAID staff. We also prepared a *Working Bibliography* of the developing country studies we reviewed.

As we completed the literature review, we began selecting the countries for our case studies. As suggested by USAID staff and the Advisory Group, our primary criteria for country and case selection were

- Including countries at similar levels of social and economic development, but differing in their legal systems (i.e. some with civil and others with common law systems)
- Including countries at different levels of development but with similar legal systems
- The existence of one or more USAID-supported ADR programs that had been operating for long enough to provide useful operational and impact data
- Interest among USAID mission staff in helping our field researchers to conduct a field study.
- Representation of a variety of ADR procedures
- Representation of a variety of disputes to which ADR procedures were being applied
- Regional diversity (representation of countries in Africa, Asia, Latin America, Eastern Europe/New Independent States).
- Diversity in national levels of economic development and legal institutions

After identifying countries and ADR programs to research, we developed guidance for our field researchers based on our preliminary findings.[64] We asked the field researchers to explore whether and how the background and program design factors we hypothesized as having the greatest effect on program impacts had in fact influenced the program(s) they researched. We also encouraged them to identify and explain other background and program design factors that helped explain levels of impact in the cases they studied. With assistance from USAID's Office of Democracy and Governance, our field researchers then contacted USAID mission staff with ADR program management responsibility, planned, and carried out their field visits.

The field researchers spent between four and ten days in each country they studied. During their field

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[62] Our literature review team included Carolyn Logan and Anthony Wanis St. John, graduate students at the Fletcher School of Law and Diplomacy at Tufts University, and Christian Duve, graduate student at Harvard's John F. Kennedy School of Government. Jane McCluskey, an independent consultant, and Alfredo Larrea of CMG assisted the team in collecting documents.

[63] CMG's Advisory Group includes Professors Frank Sander and David Smith of Harvard Law School, Robert Ricigliano, CMG Executive Director, Diana Chigas, CMG Regional Director, and Antonia Handler Chayes, CMG Senior Advisor. The Group was called upon to provide advice at key points in the project, as described in the text.

[64] Our field research team included Elizabeth McClintock, CMG Consultant (Bangladesh, Sri Lanka and Ukraine); and Carolyn Logan (South Africa), and Anthony Wanis St. John (Bolivia), graduate students at the Fletcher School of Law and Diplomacy at Tufts University.

visits, they interviewed

- USAID Mission staff with ADR program management responsibilities
- Country counterparts responsible for ADR program goal-setting, design, and management
- ADR program service providers and service users
- Informed observers of ADR program operations

The field researchers summarized their findings in the case studies attached as Appendix B, with guidance from the CMG management team and USAID staff.

Based on the comments we received from USAID staff and the CMG Advisory Group, and on the findings from the case studies, we revised our preliminary findings and rewrote them as the ADR Guide. We presented the guide in draft form to USAID staff and the advisory group, and revised it to reflect their comments before submitting the final draft to USAID.

As directed by USAID, we have worked to make the guide as concise and readable as possible, without glossing over important issues in the design and implementation of ADR programs in developing countries. We have included the *Working Bibliography*, a taxonomy of ADR terms, and *Case Studies* for readers who wish to probe more deeply into the range of ADR processes and the use of ADR in individual countries and programs.

APPENDIX D: Working Bibliography

This working bibliography was generated from an extensive review of literature on ADR from developing and developed countries.[65] In Parts I and II below, an abstract of each document is provided. The abstracts summarize these documents' insights into the effectiveness of ADR programs in achieving the development objectives discussed in the guide (i.e., delay reduction, increase satisfaction of disputants, increase access to justice, reduce monetary cost, increase options for disputants, and provide laboratories for experimentation in dispute resolution).

A. Summaries of Evaluative Documents from Developing Countries

Bingham, Gail; Wolf, Aaron; and Wohlgenant, Tim. November 1994. *Resolving Water Disputes: Conflict and Cooperation in the United States, the Near East, and Asia.* Arlington, VA: Irrigation Support Project for Asia and the Near East (ISPAN) (sponsored by USAID) (PN-ABT-448).

Countries: U.S., Middle East, and countries in the Danube, Nile, Indus, Ganges, and Mekong River basins
Years: Varied
Objectives: Resolution of disputes over management, distribution, and use in water disputes
Design: Target governments (local and national) and other interested corporate entities using interest-based negotiation methods and varied participants and facilitators.
Impacts: Most successful in developing and allowing an exploration of more innovative/creative solutions to water disputes; allowing the participants to shape the decision, thus increasing the likelihood that it will satisfy their interests; improving likelihood of successful implementation of agreements; improving likelihood of achieving solutions, due to the direct participation of parties in reaching an agreement, and their knowledge and understanding of the technical issues involved in the conflict. (The combination of a consensual negotiation process and technical or policy solution options was very effective.) Also, the process is voluntary, increasing the commitment to reach a positive outcome. **It was least successful in** cases lacking certain preconditions including: political commitment; willingness to permit the open interchange of views; and the transparency necessary to ensure adequate information exchange.
Evidence: Relatively detailed case studies of four water dispute negotiations in the U.S. and six international cases.
Other aspects: The report's final conclusions are: 1) that it would be appropriate to use negotiation-based processes and other tools for consensus-building more often in addressing water disputes, both transnationally and within different countries; 2) that the process and the outcome of efforts to resolve water conflicts can be qualitatively enhanced through the application of interest-based, dispute resolution principles and processes; and 3) that attempts at resolving water conflicts would benefit from a variety of capacity-building activities and the greater institutionalization of dispute resolution processes.

Blair, Harry; Staples Said, Mary; Thome, Joseph; Sabatini, Christopher. September 1994. *A Strategic Assessment of Legal Systems Development in Uruguay and Argentina*. USAID Working Paper No. 192, Center for Development Information and Evaluation. Washington, DC: USAID. (PN-ABT-455)

[65] In conducting the literature review, we collected and analyzed published and unpublished literature on ADR in developed and developing countries, focusing on documents evaluating ADR programs, and drawing on the resources of universities, international organizations, bilateral donors, for-profit and non-profit firms, foundations, and other institutes and organizations in the ADR field. In collecting documents, we canvassed all geographical regions, contacted over 100 entities and conducted extensive library research.

Country: Argentina
Years: Roughly 1992–1994
Objectives: 1) Achieve the successful implementation of an ADR pilot program in Argentina; 2) finance unofficial mediation for low income populations by helping to establish legal aid/mediation centers; 3) train and educate judges and allay fears about ADR; and 4) promote institutionalization of ADR in Argentine courts in order to deal with backlog and provide more timely access to justice addressing small claims, family law, business/labor, and other disputes.
Design: Target low income people, investors, and businesses by using training, negotiation, mediation, arbitration, and conciliation methods. Also involve legal aid staff, judges, justices of the peace, lawyers, and ministry of justice officials.
Impacts: Most successful in working with the ministry of justice and the court system to provide access to services, and in working with NGOs to build coalitions that lobby for judicial reforms such as ADR. **It was least successful in** increasing the number of users of services. It was also difficult to overcome official reluctance to publicize the ADR work. This was due to the "intransigence" of lawyers and judges who are part of an authoritarian and highly politicized judicial system that is not held accountable by civil society.
Evidence: Qualitative data about the types of national programs in existence and the AID efforts to bolster them, based on extensive interviewing, empirical observation, and review of statistics maintained by the institutions studied, as well as diagnostic studies and opinion polls.
Other aspects: 1) Its synchronization with overall AID and other donor-supported judicial reform projects; and 2) its strategic focus on building support where it is most likely to succeed and develop into advocacy for reform.

Blair, Harry; Staples Said, Mary; Thome, Joseph; Sabatini, Christopher. September 1994. *A Strategic Assessment of Legal Systems Development in Uruguay and Argentina*. USAID Working Paper No. 192, Center for Development Information and Evaluation. Washington, DC: USAID. (PN-ABT-455)

Countries: Uruguay
Years: Roughly 1992-1994
Objectives: Improvement of access to justice for the commercial sector; change of perception of commercial ADR among judges and lawyers; empowerment of non-judges to practice commercial negotiation, arbitration and mediation; improvement of the investment climate by providing alternative fora for resolving business disputes and locating ADR outside of the courts in small claims, business/labor and other commercial disputes.
Design: Target investors, businesses, and judges, by using training classes, court integration of negotiation, mediation, arbitration, and conciliation methods; also, provision of classes to judges, legal aid staff, judges, justices of the peace and lawyers, ministry of justice officials.
Impacts: Most successful in providing short term methods for improving legal and regulatory climate for investment due to diminishing of delay and resolution of other unspecified difficulties associated with the courts. **It was least successful in** overcoming opposition of judges in Uruguay despite the introduction of judicial reforms.
Evidence: Includes qualitative data about the types of national programs in existence and the AID efforts to bolster them, based on extensive interviewing and empirical observation; one or more polls of judges, justices of the peace and lawyers; interviews with business leaders and commercial sector NGOs. The evidence **is generally** persuasive.
Other aspects: Synchronizing ADR efforts with overall efforts at judicial reform that would obviously facilitate certain ADR techniques in court, such as the initiation of oral procedures and other reforms.

AID's strategy has been to identify the source of resistance to ADR (judges) and to focus on getting ADR into the hands of non-judges.

Blair, Harry, and Hansen, Gary. February 1994. *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*. USAID Program and Operations Assessment Report No. 7. Arlington, VA: USAID, Office of Evaluation, Center for Development Information and Evaluation (CDIE). (PN-AAX-280)

Countries: Argentina, Columbia, Philippines, Sri Lanka, Uruguay (Honduras is included in the report, but did not include ADR-support activities in its ROL program).
Years: Roughly mid-1980s to 1994
Objectives: ADR activities were generally seen as contributing to two of the four specific strategies identified for ROL programs -- structural reform and access creation.
Design: Target the public in general, and groups that historically face problems of access in particular. Target those directly involved in the legal system (attorneys, judges, court staff, etc.) using a wide range of activities, including (but not limited to) support for ADR, training programs for judges, lawyers, etc. (Participants varied according to activity.) **The program was administered by** USAID, host country NGOs and governments, UNDP, The Asia Foundation (TAF).
Impacts: Most successful in beginning with constituency and coalition building (if they do not already exist) as the most effective strategy. Found that using a political economy approach to analysis and strategy planning was the most effective tool, due to the fact that legal system changes affect power relations. Technical changes are ineffective when supply (elites) and demand (public) constituencies are not supportive of the changes. **It was least successful in** attempting legal system strengthening in the absence of necessary preconditions. Also, technical fixes or engineering approaches to institutional change were least effective for understanding and prescribing processes of ROL reform.
Evidence: The authors provide a thorough review of a variety of ROL programs (in progress and completed) in these six countries. Evidence **is generally** persuasive.

Centro Sobre Derecho y Sociedad, CIDES. 1993-96. "Evaluation Report" (four reports covering 1993-1996). Quito, Ecuador: CIDES.

Country: Ecuador
Years: 1993-1996
Objectives: Increase access to democratic participation in conflict resolution in civil disputes.
Design: Targets lower income urban and rural populations, using mediation training methods and capacity-building among local, pre-existing neighborhood organizations to build local centers for mediation of conflict.
Impacts: Most successful in establishing four permanent functioning mediation centers linked to local organizations. It was successful in resolving neighborhood and local disputes while beginning to facilitate the acceptance of mediation. **It was least successful in** establishing its stated goal of establishing a national mediator network.
Evidence: Includes interviews/questionnaires
Other aspects: The mediators represented groups of indigenous communities who were organized into two distinct "federations". The mediators worked across federation lines. Also, the mediators used customary practices of symbolic reconciliation and punishment, among other practices drawn from the local culture.

Chodosh, Hiram E., and Mayo, Stephen A. Forthcoming 1998. "Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process", *NYU Journal of International Law and Policy,* vol. 30.

Country: India
Years: 1997/1998 recommendations for reform
Objectives: To overcome huge backlog (25 million cases) and delay (up to 20 years) problems, improve accountability, discipline, and versatility of the justice system to more effectively resolve disputes in the civil justice system.
Design: Target the general population that uses the civil justice system, using improved court administration and case management procedures, and expanding (ADR) options to include judicial settlement, early neutral evaluation, and mediation, in addition to already existing ADR options of arbitration and conciliatory settlement in Lok Adalats.
Impacts: Most successful in developing a realistic set of recommendations and creating a sound, two-phase implementation plan for carrying out the reforms. Success is due to the widespread consensus among Indian legal professionals and the public that reform is desperately needed.

Community Organization Training and Research Advocacy Institute (COTRAIN). 1996. *Toward an Enhanced Mediation of Agrarian Disputes.* Manila: COTRAIN.

Country: Philippines
Years: 1996
Objectives: To reduce case backlog, speedier and more just resolution of disputes in land reform cases.
Design: Target landowners, tenants, and land claimants using mediation training methods for 700+ members of local mediation committees representing the Dept. of Agrarian Reform, local government and community based NGOs.
Impacts: Most successful in building participants' knowledge of the mandated mediation process and their mediation skills, thanks to a skilled mediation team with high level support within the Dept. of Agrarian Reform, and the training of 20 new mediation trainers. **It was least successful** in catalyzing additional financial or institutional support for local committees, because of tight agency budgets.
Evidence: Evaluation of the current mediation system and its shortcomings (including quantitative backlog data and qualitative evaluation of problems), description of the training program (including process, description, and quantitative data on numbers trained) and evaluation of initial results (including quantitative data on number of mediations undertaken by trained committees and qualitative data on changes in mediation practices). Evidence is generally persuasive.
Other aspects: Strong grounding of the training in both Filipino community and interest-based mediation practices developed in the U.S.

Development Associates, Inc. (**DAI**). April 21, 1993. *Asia Democracy Program Evaluation Report.* Arlington, VA: DAI (PD ABG-648).

Countries: Thailand, Nepal, Sri Lanka, and the Philippines
Years: 1988- 1992 (Many of the projects were short-term.)
Objectives: Strengthening democratic institution and practices in concert with advancing economic development in political and economic decision making and administration of justice.

Design: Targets the entire population of these countries, using a wide variety of activities, including: public education regarding rights and the law; support for ADR mechanisms; and reviving traditional dispute resolution processes. **The program was administered** primarily by indigenous NGOs, sometimes via US PVOs, especially The Asia Foundation (TAF), the Asian-American Free Labor Institute (AAFLI), and Private Agencies Collaborating Together (PACT), **and supported/funded by** USAID's regional Asia Democracy Project (ADP), as well as individual country missions.
Impacts: Most successful in overall design and implementation of the ADP, thanks to good working relations with governments and implementing NGOs, and good support from the regional office. **It was least successful in** providing adequate basis for evaluation, because of difficulty in identifying adequate indicators, the short duration and/or early stage of many projects, and the need for better statistics and better information sharing.
Evidence: Interviews, review of 43 projects at various stages of implementation, visits to country offices.

DPK Consulting. (No publication date, approximately 1994-1996). *Proyecto BID: Colombia: Resolución de Conflictos.* San Francisco: DPK Consulting.

Countries: Colombia, funded by the IDB.
Years: Approximately 1994-1996.
Objectives: Low cost access to increased conflict resolution services in private sector disputes.
Design: Targets users of the Bogota Chamber of Commerce (BCC) and users of Ministry of Justice (MOJ)-created centers using a combination of institution-building, capacity-building, training ADR 'multipliers' who were to go out and sponsor their own events on ADR, as well as providing unspecified conciliation services using locally trained personnel.
Impacts: Most successful in helping the BCC to become a model ADR institution for all of Latin America, thanks to having a nucleus of highly trained people, and thanks to its previous (pre-IDB funding) ADR program experience, dating to 1991. **It was least successful** in reaching middle and low-income clients through the BCC project, due to failure to define client population in the original project design and failure to conduct appropriate public relations campaign. **In general, the projects failed to** address the problem of extreme social violence and the consequent need for ADR to be an agent of social transformation, due to its failure to explicitly acknowledge this reality in the project proposal.
Evidence: Narrative analysis of the aspects of the IDB-financed programs.
Other aspects: 1) while there is some validity to the conclusion that there has been a sustained increase in the options available to disputants, only 20 of the initial 150 national centers are or were functioning; 2) MOJ centers also seem to have set out to prepare community leaders, but problems arose when community leader candidates were accused of links to guerrillas or narco-traffickers.

DPK Consulting. January 1996. *Evaluación del Centro de Mediación Para La Resolución de Conflictos*. San Francisco: DPK Consulting.

Countries: Costa Rica
Years: May-September 1995.
Objectives: Resolution of family disputes without recourse to the courts
Design: Targets families using mediation and a mediation center under the executive branch agency known as Patronato Nacional de la Infancia.
Impacts: Most successful in attaining high indices of successful case resolutions (60%), without attributing this success to any cause. **It was least successful in** resolving a significant number of disputes and therefore alleviating the burden on the court system due to an over-filtering of cases that were

permitted into the mediation center, which the authors claim is due to the preoccupation with successful resolution of cases. The authors also were concerned with the proper handling of domestic and child abuse cases, and whether such cases should be mediated at all.
Evidence: A Gallup poll of the users of the mediation center and the self-generated reports that came from the Center itself **is generally** persuasive.
Other aspects: The seemingly national debate over whether the mediation centers should be administered by the Executive or the Judicial Branch. The authors thought this to be of great significance due to the Gallup poll's indication that public trust was placed in the judicial branch, with respect to the provision of these types of services.

Foraker-Thompson. 1992. "Traditional Conflict Resolution Methods Used in Black Townships in South Africa, " *International Journal of Group Tensions,* vol. 22, no. 3, pp. 165-190.

Country: South Africa
Years: 1980s and early 1990s.
Objectives: An alternative to the violence in the townships on which media have focused. As the institutions of the state were increasingly rejected, the community sought to create community cohesion/social solidarity, build alternative structures to deal with major issues, give expression to the will of the people, and wrest the initiative from the state structures (the state responded with increased repression). The alternative institutions included systems of "people's justice" such as "people's courts" in any issues of community conflict, including cases of assault, theft, and robbery.
Design: Targets all of the members of a given community or township using a mix of court-style (judicial or committee judgment) and ADR methods, especially mediation with people chosen by the local community. **The program was administered by** community members, **and supported/funded by** local communities.
Impacts: Most successful in helping to control crime and violence in the townships, due to the courts being run by members of the community in ways consistent with community norms. Met a major community need, filling a gap that the government was unwilling or unable to fill. **It was least successful** after the government cracked down on local political organizations in 1985 (feeling that local communities were encroaching on the state's territory). Many of the organizations could no longer function, and some of the participants/leaders were even jailed. As a result, *tsotsis*, or local thieves, ran rampant in many of the townships (with police collusion), and crime and violence increased. Even at their best, these alternative methods of self-government and dispute resolution were not always strong enough to maintain peace in community, due to the state being viewed as both illegitimate and ineffective as a forum for justice. Levels of social and political turmoil were very high, and the white government deliberately worked to undermine black efforts at self-government.
Evidence: Largely descriptive, covering the history, evolution, and political foundations of the courts.
Other aspects: Includes discussion of traditional African social solidarity and as it relates to the dynamics in present-day neighborhoods and townships.

Garro, Eduardo. 1995-1996. *Informe Operativo I, Informe Operativo II*, (plus other untitled documents by this author). San José, Costa Rica: Centro de Mediación.

Country: Costa Rica
Years: 1995-1996
Objectives: Resolution of family disputes without recourse to the courts

Design: Targets poorer families using mediation methods and an interdisciplinary mediation center under the government agency, Patronato Nacional de la Infancia.
Impacts: Most successful in attaining high indices of successful case resolutions (60%); providing access to less advantaged sectors of society (those with low education levels, the unemployed). Attained high indices of user satisfaction, thanks to the active listening of disputing parties which took place in the elaborate "filter" stage, and the work of the mediators, who facilitated just agreements. **It was least successful in** sustaining itself as a functioning part of government services due to the refusal of relevant authorities to take fiscal and administrative responsibility for the center's operations.
Evidence: A Gallup poll of the users of the mediation center; intake and exit information on cases; and the self-generated reports**. The evidence is generally** persuasive.
Other aspects: Clear criteria concerning cases that were not to be mediated and their evaluation through an elaborate and stringent "filter" process.

Gessner, Volkmar. 1986. "Los Conflictos Sociales y la Administración de Justicia en Mexico" (Social Conflict and the Administration of Justice in Mexico). Mexico, DF:Universidad Autonoma de Mexico.

This document is fundamentally a sociological dissertation on social conflict in Mexico and ADR programs.
Country: Mexico
Years: 1969-1970
Objectives: Resolution of labor disputes
Design: Targets businesses and workers using conciliation and arbitration methods with government agencies and government officials as arbitrators.
Impacts: Most successful in disposing of disputes (not necessarily resolving them) often in less than one year's time, at most in four years with appeals. **It was least successful in** informing workers of their rights, adequate enforcement, equitable procedure, provision of counsel, due process, and orderly procedure due to corruption, etc.
Evidence: Empirical observation, extensive surveys, quantitative summaries, as well as sociological analyses of these. Evidence is generally persuasive, although only of historical use.
Other aspects: At the federal level the distance required for workers from all over the country to travel to the capital in order to use the Federal Conciliation and Arbitration institutions. Also, the reimbursement of the workers' travel costs, the lack of court costs, the postponement of attorneys' fees until a favorable determination, the continuation of salary during the proceedings.

Hanson, Gary; Said, Mary Staples; Oberst, Robert; Vavre, Jacki. February 1994. *A Strategic Assessment of Legal Systems Development in Sri Lanka.* USAID Working Paper No. 196. Washington, DC: USAID. (PN-ABT-456)

Country: Sri Lanka
Years: 1990-93
Objectives: Strengthening of the country's democratic institutions, including restoring the stature of the legal system by making it more accessible and responsive**.** No limits on cases were identified, but those handled, in order of importance/volume, are loan cases, land disputes, minor crimes, license/tax cases, and family issues.
Design: Targets the general populace, but especially those of moderate or low income using mediation boards trained by local volunteers. **The program was administered by** the Government of Sri Lanka,

and supported/funded by the Sri Lankan government with support from the Asia Foundation and USAID .
Impacts: Most successful in creating an effective, inexpensive, and popular alternative forum for dispute resolution, due to: 1) the ability to learn from and correct the mistakes of the failed conciliation councils (an earlier effort to provide a mediation alternative) to ensure that the boards did high quality work and did not become overly politicized or too much like courts themselves; and 2) the dedication of the volunteer mediators and the fact that they are respected community members. **It was least successful in** assuring long-term sustainability, remaining independent, and not becoming either a political tool or a tool of the banks for collecting on defaulted loans (although both of these problems are just dangers at this point, not reality).
Evidence: Responses to interviews with board chairs, direct observation of the boards' activities, and a review of 1528 cases handled. Evidence **is generally** very persuasive.
Other aspects: History--the use of mediation has a long history in Sri Lanka (dating to the pre-colonial era), and conciliation councils were set up early in the post-colonial period. However, these councils were abolished in 1978 as they had become politicized and suffered from other problems that led to a decline in their effectiveness and credibility. The courts soon became over-burdened, so a second attempt was made to develop alternative systems. The mediation boards were established in 1988 (although they did not become active until 1990), but with new rules that tried to avoid the conditions that had led to the earlier failure of the conciliation councils.

Huang, Shir-Shing. 1996. " The Reconciliation System of the Republic of China," in Eds. Fred E. Jandt and Paul B. Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 43-50. Thousand Oaks, London and New Delhi: Sage Publications.

Country: Republic of China (Taiwan)
Years: 1955-present
Objectives: To provide for dispute resolution in a manner consistent with local norms and customs; prevent courts from becoming overburdened in civil and criminal cases.
Design: Targets the general public using mediation committees of 7 to 15 people established in each village, town, district and city ("reconciliation commission" seems to be used interchangeably with mediation committee); volunteer mediators who are respected (and often personally known to disputants), have knowledge of the law, and live in the village/town/city; at least one woman per commission; chiefs, mayors and civil servants are not eligible. **The program was administered by** Ministries of Justice and Interior in conjunction with local governments, **and supported/funded by** local government, with some assistance from the national government.
Impacts: Most successful in resolving many cases in a manner consistent with local norms and preferences, thanks to a long history of mediation in China and the preference for peaceful/harmonious resolution of disputes rather than litigation. Mediators are respected individuals; regular supervision and assessment of mediators' work; seminars for and training of mediators each year; government efforts to promote this mechanism for conflict resolution; system is free, open, convenient and "as effective as court decisions".
Evidence: The numbers of cases being handled, some other data, and one case study. Evidence **is generally** sparse, but what there is, is persuasive.
Other aspects: Cases are brought to the mediators by formal application if at least one party; both parties must consent in civil cases, and the victim must consent in criminal cases, before the process can begin. In general, the process is public; courts handle primarily criminal cases, they do few civil cases.

Jandt, Fred E., and Pedersen, Paul B. 1996. *Constructive Conflict Management: Asia-Pacific Cases*. Thousand Oaks, London and New Delhi: Sage Publications. Summary of a number of case studies on China.

This book includes several case studies on China. None of them has sufficient specific information to warrant a separate summary, but points about the various mediation systems used there are discussed: the role of village mediators; cultural roots of mediation; features of court mediation (more than 70% of civil cases handled in the People's Court are settled via mediation); over 1 million village-based People's Mediation Committees (PMC) handling more than 7 million civil disputes annually, created by the 1982 constitution with 3-11 volunteer members each.

Jandt, Fred E., and Pedersen, Paul B. 1996. "The Cultural Context of Mediation and Constructive Conflict Management," in eds. Fred E. Jandt and Paul B. Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 249-275. Thousand Oaks, London and New Delhi: Sage Publications.

This chapter provides an excellent overview of the title subject, drawing lessons related to ADR and, e.g., high v. low context cultures, effective third parties, neutrals, mediation in Asian-Pacific cultures.

Jones, Christopher B. August 1991. *Exploring Alternative Dispute Resolution Techniques in the Asia-Pacific Region.* Honolulu, HI : Hawaii Research Center for Future Studies, University of Hawaii.

Based on a review of multiple case studies of ADR programs in the countries of the Pacific Basin, in a study that was designed to examine the potential for incorporating cultural dispute resolution processes into formal legal systems, the author highlights the following dichotomies pertaining to ADR: informal/formal types of ADR; rural/urban; agricultural/industrial societies; proximity/distance between the disputants, and between mediators and the disputants; voluntary/coercive ADR; authoritarianism/participation of third parties.

Kassebaum, Gene. 1989. *ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India*. Working Paper Series 1989-5. Honolulu: University of Hawaii at Manoa, Program on Conflict Resolution (PCR).

Country: India
Years: 1974/82 - 1988 (The Lok Adalats first started in some parts of the country in 1974, but in many states they were not established until 1982.)
Objectives: Reduce the caseload on courts, reduce costs and increase speed of resolution of cases; increase access to and equality of justice for ordinary people, especially for personal injury cases involving vehicles, protect the weak from unnecessary litigation in personal injury cases (especially pedestrian-vehicle), and in some criminal and civil cases.
Design: Usually cases are between a relatively poor pedestrian and a relatively wealthy company/vehicle owner. **The program was administered by** state Legal Aid Boards, **and supported/funded by** state Legal Aid Boards, apparently.
Impacts: Most successful in achieving faster and lower cost resolution of many cases (though still only about 20% of all personal injury/vehicle cases); better chances of achieving some resolution of claims (victims generally have low expectations of recovery from accidents), due to simplicity of the process, respectability and expertise of the mediators, long tradition of community-based mediation, active

promotion of the program by some of the state legal aid boards. **It was least successful in** providing real benefits and better access to justice for the poor, because cases have to be filed in the courts first, which involves some costs. The poorest are still not likely to be assisted when they are injured; power relations can also influence outcomes; there may be too much emphasis on clearing dockets, and not enough on insuring justice for the poor.
Evidence: Numbers and types of cases and outcomes from Lok Adalat records; interviews and conversations with many mediators, lawyers/advocates, members of District Legal Aid Boards; direct observations of Lok Adalat proceedings. The author notes the problem with the lack of systematic data on many aspects of the program, and on comparisons with the court system, which would be costly to obtain, but is necessary to properly evaluate the effectiveness of Lok Adalats. Evidence **is generally** persuasive.

Lytton, Timothy and Centeno Rivas, Salvador. Upcoming 1998. "La Resolución de los Conflictos en Nicaragua." In upcoming DPK Publication (William Davis, ed.)

Country: Nicaragua
Years: 1990 to 1997
Objectives: Improvement of access to dispute resolution services in the absence of strong legal infrastructure and due to the social and political deterioration caused by civil war in labor, human rights, land title, property, personal, and political disputes.
Design: Targets civil society (educating the public and even primary/secondary school), training practitioners of ADR using education concerning a new "culture of peace", education about conflict resolution, negotiation training, arbitration, mediation training methods and "local peace and justice commissions", peasant leaders, police, lawyers and judges.
Impacts: Most successful in affecting the cultural environment of conflict and anarchy in Nicaragua, though no explanation is offered. **They were least successful in** actually realizing conflict resolution goals for the public because of the weakness of legal infrastructure, inadequate laws, and insufficient numbers of trained ADR practitioners.
Evidence: Minimal data which is primarily descriptive. It is **generally** persuasive. (The purpose of the article is not to evaluate these programs per se, but to offer insights into the cultural and institutional obstacles that ADR faces in Nicaragua.)
Other aspects: The educational aspect/cultural transformation dimensions which the author seems to imply are a necessary first step in achieving ADR gains. The article's principle contribution is to describe various ADR programs in existence in Nicaragua.

Marques, Juan. May 1994. *Institutionalization and Expansion of Court Connected Civil Dispute Resolution in Puerto Rico: Mediation and Other Mechanisms.* Unpublished LLM Thesis, Harvard Law School.

Country: The Commonwealth of Puerto Rico
Years: 1983-1988
Objectives: Lowering of costs, diminishing of delays and alleviation of congestion in the courts, and to act as a referral center for certain disputes in civil and criminal cases.
Design: Targets various groups of complainants using mediation methods and experimental government agency.
Impact: Most successful in all objectives.

Evidence: Review/analysis of two internal studies done by the Office of Court Administration of Puerto Rico. It **is generally** persuasive but is criticized by the author for lack of empirical bases for some findings.

Moore, Christopher and Santosa, Mas Achmad. 1995. "Developing Appropriate Environmental Conflict Management Procedures in Indonesia: Integrating Traditional and New Approaches," *Cultural Survival Quarterly,* Fall 1995, pp. 23-29.

Country: Indonesia
Years: 1993-1995
Objectives: Cultural compatibility of dispute resolution methods, achieve negotiated settlements of environmental disputes by face-to-face participation by all stakeholders, achieve increased voluntary compliance with settlements, public participation in monitoring and implementation in the area of environmental (water pollution) disputes between government/people and private sector.
Design: Targets local population, environmental NGOs, industrial polluter/company using mediation and mediation training methods and ministry staff as mediators.
Impacts: Most successful in introducing mediation as a culturally relevant alternative/complement to litigation, and in introducing the idea of institutionalizing mediation and dispute resolution systems design, due to the resolution of two prototypical pollution cases. **It was least successful in** improving relationships, increasing enforcement, overcoming perception of impartiality, and implementation/monitoring of agreements due to failure to include local government parties, cultural factors including rank and social status that frustrated mediation, government officials as mediators with interest in the outcome, failure to effect enforcement measures against non-compliant parties due to judicial system, confusion regarding the end result (appeasement v. decision-making).

Evidence: Descriptive narrative of the process and outcomes of several cases. Evidence **is generally** persuasive.
Other aspects: Peripheral efforts to overcome the patterns of social stratification inherent in traditional dispute resolution "musyawarah".

National Conciliation and Mediation Board (NCMB), Department of Labor and Employment, Government of The Philippines. Report, circa 1996. *AAFLI and the Voluntary Arbitration System in the Philippines*.

Country: Philippines
Years: 1989-1996
Objectives: Prevention and improved resolution of labor disputes to enhance political, economic and social stability in labor-management relations (initially primarily in unionized, private-sector relations).
Design: Targets labor unions and management using voluntary arbitration methods and volunteer arbitrators (including trade unionists, academics, law practitioners, personnel managers, and industrial relations practitioners). **The program was administered by** the National Conciliation and Mediation Board (NCMB) of the Department of Labor and Employment, **and supported/funded by** USAID and AAFLI.
Impacts: Most successful in strengthening collective bargaining, serving as an alternative to strikes, speeding up the delivery of labor justice, and unclogging the compulsory arbitration system, thanks to: 1) active promotion of the approach by the government (with the support of AAFLI and USAID), including promotional material and workshops; and (2) the success in speeding up resolution of cases.

Evidence: Numbers/amount of promotional and educational material prepared, arbitrators trained, and cases handled by the system. Evidence **is generally** persuasive, though limited. More information on the total number of labor disputes, numbers of strikes, etc., would be helpful for assessment.
Other aspects: Activities currently under way or planned to expand this approach to non-unionized workers and public-sector workers, and there is also interest in expanding the use of voluntary arbitration beyond labor-relations issues into the domain of regular courts.

Nina, Daniel. Fall-Winter 1993. "Community Justice in a Volatile South Africa: Containing Community Conflict, Clermont, Natal," *Social Justice*, vol. 20., nos. 3 - 4, pp. 129 - 142.

Countries: Clermont, Natal, South Africa
Years: May – July, 1992
Objectives: All types of internal community disputes
Design: Targets all community members using mediation and many other methods and elected members of the local community. **The program was administered/ supported/funded** by the local community.
Impacts: Most successful in (in theory) maintaining community cohesiveness and autonomy from the state, because those responsible for dispensing justice are elected by and are accountable to the community. Thus their approaches and values are consistent with and aim to preserve community norms.
Evidence: Compares mediation/ADR in general, with a variety of mechanisms of popular justice. Also reflects on the author's experience with one such system of popular justice, a case committee in Clermont township. Evidence **is generally** relatively persuasive -- the author succeeds in making the case that the systems of popular justice, which are often ignored, need to be studied more carefully.
Other aspects: Explores the nature of organic mechanisms of community conflict resolution (also known as "popular justice" or "community justice"), and the relation between these mechanisms and the new trends toward facilitation, mediation, and negotiation (i.e., ADR).

Othman, Wan Halim. 1996. "Community Mediation in Malaysia: A Pilot Program for the Department of National Unity" in eds. Fred E. Jandt and Paul B. Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 29-42. Thousand Oaks, London and New Delhi: Sage Publications.

Country: Malaysia
Years: 1980-present
Objectives: The programs known as the Social Relations Management System (SRMS) (ADR was one part of this system) was designed to contribute to efforts to promote better ethnic relations; give the Department of National Unity (DNU) a more clear and effective role in this effort; reduce/resolve both inter-communal and intra-communal conflict and tension; and introduce mediation services into the civil service in all types of conflict, but especially those with inter-ethnic aspects.
Design: Targets everyone using extensive training in mediation and related skills (including basic counseling, and courses on conflict prevention and post-conflict rehabilitation). **The program was administered by** the Social Relations Management System within the DNU, **and supported/funded by** the Government of Malaysia.
Impacts: Most successful in providing elaborate and continuous in-service training to several hundred officers (new courses are still being planned for them). No other outcomes of the program are reported, despite its relatively long history.
Other aspects: 1) In addition to the conflict resolution/mediation component, the SRMS also included efforts to promote inter-ethnic contact, engage in preventive activities in conflict prone areas, and involvement with the post-conflict rehabilitation of relations. 2) The author notes that a problem for

conflict resolution is the very negative view of conflict in the country, which causes people to conceal and deny it. There is also pressure for individuals to conform to accepted behavior patterns and to avoid causing or bringing forth conflicts.

Sohn, Dong-Won, and Wall, James A., Jr. September 1993. "Community Mediation in South Korea: A City-Village Comparison," *Journal of Conflict Resolution*, vol. 37, no. 3, pp. 536 - 543.

Country: Korea
Years: The early 1990s (although mediation has been used for centuries in Korea).
Objectives: Application of the Confucian principles of seeking harmony in interpersonal relations, and of saving face both for oneself and for others **in** all types of intra- and inter-family disputes in the community.
Design: Targets all community members using community-based mediation methods as well as respected members of the local community or friends of the disputants who are willing to assist. **The program is administered by** local communities -- there is no government involvement in this practice.
Impacts: Most successful in resolving disputes.
Evidence: Interviews with 34 city and 19 village mediators, with examples of two cases from each. Evidence **is generally** persuasive.
Other aspects: Discussion of the historical bases for mediation in Korea. Also, this study aims to test the hypothesis of one analyst who has proposed that the traditional mode of community mediation cannot survive in communities larger than a village, since it is a process by which the whole community enforces its "standards of propriety and decency," and these standards weaken in towns and cities. The study also compares mediation in inter-family versus intra-family disputes. Korean mediators consistently rely heavily on ten main techniques, such as controlling the agenda, separating and/or meeting together with the disputants, advising the parties as to how they should think or behave in general, and arguing for specific concessions (this is a relatively aggressive mediation approach). There were few significant differences in the handling of inter-and intra-family disputes.

Ulloa Gonzalez, Mirtha, and Vargas Pavez, Macarena. 1997. *Mecanismos Alternativos de Resolución de Conflictos: La Experiencia Chilena*. Corporación de Promoción Universitaria Report.

Country: Chile
Years: 1990-1997
Objectives: Increased access to justice, legal services to the poor, quicker resolution of legal problems outside of the courts in family, labor, consumer concerns, land conflicts, children's rights and commercial disputes.
Design: Targets families, the poorer classes, indigenous people, businesses, and agricultural collectives using arbitration, mediation and conciliation methods. Involves local volunteers, lawyers, ministry staff, psychologists, social workers and others.
Impacts: Most successful in meeting their objectives, although there is no significant evaluation.
Evidence: The judgment of the authors: evidence **is generally** informative, but not predicated on solid data.
Other aspects: The sheer plurality of types of ADR programs that are government-supported, semi-official, and private. The report describes existing laws that facilitate ADR and current legislative proposals that would further ADR. The organization which did this study (the CPU) dedicated itself to studying and promoting ADR in Chile and contracted with USAID in 1995 to coordinate the training of ADR professionals in Chile. The presence of this group appears to have been essential in the ongoing

development of ADR options and programs in Chile. As a result of CPR's work, Chile opened two mediation centers in 1996 which have been functioning and resolving high numbers of cases as a percentage of cases brought in. CPU seems to be playing a role as national ADR coordinator, insofar as it is a driving force for the study, training, education, legislative proposals and execution of ADR in Chile. The prominent role provided to non-lawyers as providers of ADR services is also interesting to note.

USAID. Post-1994. *Needs Assessment for Alternative Dispute Resolution in the Philippines*. Washington DC: USAID (PN-ABX 322)

Country: Philippines
Years: 1980s - 1990s
Objectives: To overcome the problems associated with the formal, adjudicated legal system, especially: delay; high cost; the incomprehensibility of the legal system to many people; and the unsuitability of adjudication for the resolution of minor disputes, especially because they are adversarial and focus on blame and punishment, rather than on preserving or restoring long-term relationships. The authors note that ADR is especially applicable to so called “minor disputes” (e.g., family and community disputes); labor, commercial, and construction industry disputes are also discussed.
Design: Targets the general population, but especially those who are poorer and less educated and so have the most difficulty maneuvering through the formal legal system. In theory the program uses all types of ADR. In practice, the main methods currently available are mediation, conciliation and arbitration methods.
Evidence: The paper is primarily descriptive, not evaluative or analytical. It describes the need and the current legal framework for the use of ADR, as well as impediments to greater use.

Whitson, Sarah Leah. Spring 1992. "'Neither Fish, Nor Flesh, Nor Good Red Herring' Lok Adalats: An Experiment in Informal Dispute Resolution in India," *Hastings International and Comparative Law Review*, vol. 15, no. 3, pp. 391-445.

Country: India
Years: Mid-1980s to 1992.
Objectives: Faster, more accessible and more approachable forums for achieving justice, especially for the poor (the explicit objective), while at the same time expanding the domain of state control by replacing non-state ADR systems with state ones (the implicit objective). In theory, sought to stave off the collapse of the formal legal system in most types of conflict, though in practice family law issues and motor vehicle claims were the main cases covered.
Design: Targets the population at large, and poor individuals in particular using mediation and conciliation in ad hoc *Lok Adalat* courts ("people's courts", also knows as LA courts).
Impacts: Most successful in handling a large number of cases, especially motor vehicle claims (initially), thanks to the speed of resolution, the local acceptance of the processes used to settle disputes, and dissatisfaction with the formal court system. **It was least successful in** setting up a permanent, effective ADR system and extending legal protection to the poor, due to the increasing control taken by the state; the tension between the formal norms of the court system and the informality of the LA courts; and the fact that the poor may actually fare better under a system of formal, procedural law.
Evidence: The rapid decline in use of LA courts after an initial boom; a brief description of LA courts in four states, and the findings of several other studies. Evidence **is generally** persuasive with respect to the effects of increasing state control on the effectiveness of the courts.

Other aspects: The LA courts started in 1982 as a non-state means of dispute resolution. They had a brief but intense period of popularity in the mid-1980s, but then declined very rapidly, within a year in many cases. This experience is not fully explained by the author, though the timing of the decline is closely linked to the passage of the controversial Legal Services Act in 1987, which "defeated the spirit and purpose of LA courts as informal, grass-roots courts that existed almost apart from state authority" by giving them statutory status and putting them under state control. However, the linkages/causal relationship between passage of the act and the rapid failure of the courts is not fully analyzed. The LA court experiment has essentially repeated the earlier experiment in the 1950s and 1960s with *Nyaya Panchayats* (NPs), which also failed for similar reasons.

Worawattanamateekul, Nacha. 1996. "Arbitration in Thailand" in eds. Fred E. Jandt and Paul B. Pedersen, *Constructive Conflict Management: Asia-Pacific Cases*, pp. 183-187. Thousand Oaks, London and New Delhi: Sage Publications. (This case study just describes a program; nothing is included about how implementation has progressed).

Country: Thailand
Years: 1987-present
Objectives: To establish and promote arbitration as a means of ADR. Through successful arbitration of international commercial disputes, make Thailand the regional commercial leader; reduce the backlog of cases in the legal system; resolve commercial disputes faster, in private, and inexpensively.
Design: Targets business people using arbitration methods and 128 arbitrators, both eminent lawyers and other professionals. Parties can also nominate other qualified professionals to serve as arbitrators. Arbitrators are categorized into 15 specialties. **The program was administered by** the Arbitration Office established within the Ministry of Justice, which is under the supervision of an advisory board composed of representatives from MOJ and other public and private sectors (the Law Society, Ministry of Commerce, the attorney general's office, Federation of Industries, chamber of commerce), **and supported/funded by** internal government funds (though in some other case studies the authors just did not mention funding sources, so it is possible that there was some unmentioned external support as well).
Impacts: Most successful in promoting and establishing arbitration. Increasingly gaining acceptance for this approach, thanks to the growing role of the business sector in Thai society; the increasing experience with and need for arbitration facilities; and the government's active efforts to promote this approach. **It was least successful in** gaining acceptance during the early stages of the program (this has also been a problem with past efforts at arbitration, but steps are being taken to overcome this), due to a public that values the integrity, acceptability and enforceability of court awards. Some problems may also have arisen because different parties had competing ideas about how the national arbitration center should be established.
Other aspects: Facilities for international commercial arbitration have been increasing in Thailand, and business contracts have increasingly included arbitration clauses. Parties are free to choose any language for arbitration (English and Thai are most common, but Chinese is also used). Foreign lawyers are welcome as arbitrators or legal advisers. The arbitrators' decisions are independent of the arbitration office and government control. The arbitration office also runs the Centre of Promotion of Commercial Law and Alternative Dispute Resolution.

B. Summaries of Evaluative Documents from Developed Countries (including aboriginal communities)

Clarke, Stevens H.; Ellen, Elizabeth D.; McCormick, Kelly. 1995. *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects, Prepared for The North Carolina Administrative Office of the Courts.* Chapel Hill, NC: State Justice Institute, Institute of Government, University of North Carolina at Chapel Hill.

Country: Superior court civil cases in North Carolina, USA
Years: March 1992 to January 1993
Objectives: Make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants by using mediated settlement conference (MSC) methods and by comparing cases assigned to either a mediation group or a control group to civil cases filed with a pre-program group.
Impacts: Most successful in increasing litigants' satisfaction with the process, thanks to the perception that the conferences were the best way to handle cases like theirs. **It was least successful in** reducing the court workload in terms of the numbers of motions processed by judges and orders issued by judges or clerks. It was not successful in increasing the settlement rate beyond a 41-50% and in reducing the time spent at the meetings, due to presumably too little participation of the parties and not enough case management.
Evidence: Data from four of 13 counties involved in the program which accounted for 72-75% of all superior court cases filed in the 13 counties in 1991-93, using control group, pre-program group and mediation group cases as well as court record data, litigant/attorney questionnaire data, the AOC civil case database and compliance questionnaire data. The evidence **is generally** persuasive.
Other aspects: The conclusion that the MSC Program achieved its goals of greater efficiency and satisfaction to some degree, but not as much as its proponents may have hoped. The state's earlier (1987) experiment with court arbitration was more effective, but it involved much simpler, smaller cases than did the MSC program.

Hirano, Toshihiko, unpublished speech, given at a conference in Tubingen, Germany, April 25, 1997. Öber die Verhandlungskultur in Japan (About Negotiation Culture in Japan).

Country: Japan
The speaker addressed some of the fundamental reasons why negotiation and consensus-oriented dispute resolution outside the courts are more common in Japan than in other Western countries. The arguments include the scarcity of lawyers and the traditional Japanese legal culture which has basically been unfamiliar with the scheme of rights and duties, as it was imported from Europe a century ago.

Iwai, Nobuaki. 1991. " Alternative Dispute Resolution in Court: The Japanese Experience," *Journal on Dispute Resolution,* vol. 6, no. 2.

Country: Japan
Years: Since 1951
Objectives: Settlements in the court system
Design: Targets the parties, using persuasion to convince litigants to switch to various dispute resolution methods and drawing on judges. Two models are explained in the article. Under the first approach, *wakai* (settlement-in-court), it is the judge who decides to switch to a settlement mode and acts as a mediator. The second model, *chotei* (conciliation-in-court), bears some resemblance to elements of mediation and of evaluation. As an intermediate model, *benron-ken-wakai* (pleading-and-settlement), is described.
Impacts: Most successful in the appellate courts, due to the highly persuasive power of prominent judges and the fact-finding which had previously been done by the trial courts.

Evidence: Some quantitative data from the 1980s, though mainly a qualitative description. Evidence **is generally** persuasive.
Other aspects: It may be interesting to note that, as opposed to the common rule in American courts which prohibits the same judge from presiding over the settlement conference and the trial of a case, the Japanese judge assumes the double function of a director of the settlement procedure and of a screening officer.

Jardine, Elizabeth J. 1996. "Alternative Dispute Resolution in the Japanese Court System" in *Australian Dispute Resolution Journal*.

Country: Japan
Years: Since the Act of 1951
Objectives: Settlements in courts
Design: Targets litigants using three different types of ADR (chootei or conciliation-in-court, wakia or settlement in court, benron-ken-wakai or pleading-and-settlement) methods and the function of the judge as neutral.
Impacts: Most successful in chootei if it is voluntary and is just one of several remedies available, although an element of compulsion can be involved. However, the author notes that there are serious doubts as to the degree of voluntariness involved with chootei as the courts are heavily congested, expensive and incur time-consuming trials.
Evidence: Generally persuasive.
Other aspects: Chootei is a separate procedure from litigation, whereas wakai blends litigation and outside negotiation.

Lajeunesse, Therese. 1991. *Cross Cultural Issues in the Justice System: The Case of the Aboriginal People in Canada.* Working Paper 1991-1. Manoa, HI: Program on Conflict Resolution (PCR) at the University of Hawaii at Manoa.

Country: The case of Aboriginal People in Canada
Years: 1991
Objectives: Strengthening of traditional approaches to dispute resolution in Aboriginal communities and between Aboriginals and others. Lajeunesse lays out the differences in Western and Aboriginal approaches to conflict resolution.

LeResche, Diane. Summer 1992. “Comparison of the American Mediation Process with a Korean-American Harmony Restoration Process,” in *Mediation Quarterly*, vol. 9, no. 4, pp. 323-339.

This paper describes the mediation process used by community-based mediation centers in the US with the formal process for handling conflicts used by Korean-Americans. The issue has not yet become important because many community-based mediation centers find that their services are not widely used by members of diverse ethnic populations. The study found extensive differences between the two with respects to all of the categories identified for analysis: perceptions of types of conflicts and their origins; the goals and objectives of the processes; how they are initiated; the roles and responsibilities of the people in conflict and of the third-parties; the type and extent of third party preparation; the structure of third-party meetings with the conflicting parties; the generation and selection of solutions; and how the processes are concluded. The author argues that these findings suggest that mediation centers must

expand their approaches if they are to serve all ethnic groups in their communities, and rather than providing a specific alternative–mediation–for dispute resolution, they should perhaps focus on providing "optional processes" more broadly defined.

Lowry, Kem. 1989. *Mediation of Complex and Public Interest Cases: An Evaluation Report to the Judiciary*. PCR Working Paper Series, Department of Urban and Regional Planning and Program on Conflict Resolution, 1989-1992. Manoa, HI: University of Hawaii.

Country: Hawaii, USA
Years: 1986-1989
Objectives: Identify at least ten public or otherwise complex disputes; attempt to facilitate the entry of mediators in those cases; and assist the parties in those cases as well as the court in resolving as many issues as possible in state courts.
Design: Targets stakeholders in complex cases using mediation and other ADR methods.
Impacts: Most successful in reducing costs due to significantly lower number of hours charged by mediators, as compared to litigated cases.
Evidence: Quantitative: the evidence **is generally** persuasive.
McGillis, Daniel. July 1997. *Community Mediation Programs: Developments and Challenges.* Washington, DC: US Department of Justice, National Institute of Justice.

Country: United States
Years: Past twenty years
Objectives: Improved access to justice, to balance the reduced role of traditional informal dispute resolvers and to change perceptions regarding the appropriateness of the court process in community mediation programs.
Design: Targets all parts of the community using training, mediation and group dialogue methods and drawing on NGOs and volunteers.
Impacts: Most successful in founding neighborhood justice centers and in handling public and intergroup disputes, thanks to their knowledge of the community. **It was least successful in** achieving financial stability, due to the ebb and flow of federal and foundation funding to support innovations and the transition to local funding support.
Evidence: Statistics on the overall growth of community mediation (such as exhibits showing the number of programs begun per year between 1969 and 1995, or displaying the distribution of numbers of volunteer mediators or annual budgets). The report also contains abstracts of the development of particular neighborhood justice centers. Evidence **is generally** very persuasive.
Other aspects: A description of the increased interest in the role of community members in resolving conflicts; a general overview of developments; an account of the diversification of dispute resolution services; a presentation of the sources for program design, support, and funding; a summary of studies on the impact of programs on the quality of justice, as well as an outline of major issues confronting the community mediation field.

Moriya, Akira. 1997. **Out of Court ADR in Japan** (unpublished).

Country: Japan
Years: Recent years
Objectives: The settlement of disputes in which the government is interested.

Design: Targets illegal labor practices and various labor disputes between employers and employees; environmental victims; consumers using adjudication and non-binding methods; central and local labor-relations commissions; and reconciliatory commissions for environmental disputes as well as consumer centers.
Impacts: Most successful in procedures such as reconciliation or mediation, thanks to the acceptance by the public. **It was least successful in** arbitration, due to the formality of the process.
Evidence: A general description. Evidence **is generally persuasive**.
Other aspects: This document also reviews experience with ADR in the private sector.
Objectives: improved access to legal knowledge in automobile accidents.
Design: Targets victims of such accidents by promoting negotiation methods and legal advice centers. These centers are operating mainly as a reconciliatory agent between the victims of automobile accidents and the insurance companies. They also give counsel to the injured parties and recommend a compensation amount when requested.
Impacts: Most successful in reconciling the parties, thanks to the informality of the process.
Evidence: descriptive; **generally persuasive**. The author emphasizes that, as compared to the court procedure, each ADR procedure is usually assigned more narrowly defined purposes, such as the protection of consumers' interests and the recovery of compensation for victims of car accidents.

Mowatt, J.G. March 1992. "Alternative Dispute Resolution: Some Points to Ponder," *The Comparative and International Law Journal of Southern Africa*, vol. 25, no. 1, pp. 44-58.

Country: Texas, USA
Years: 1987-1992
Objectives: Reduce cost and delays; increase satisfaction associated with dispute resolution; involve more of the community in dispute settlement in all kinds of cases, both civil and criminal.
Design: Targets the general population using mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration (settlements are enforceable) methods and "dispute-resolution service organizations" (or "providers"), which may be private profit or non-profit organizations, county dispute resolution centers, or other informal, impartial third parties (some training qualifications required, but they are relatively minimal). **The program was administered by** State of Texas, **and supported/funded by** State of Texas.
Impacts: It was least successful in establishing ADR-court linkages.
Evidence: Is largely theoretical, based on the differences in nature and principles of ADR and court litigation, **and generally** has some good points and interesting questions and issues.

Plapinger, Elizabeth and Stienstra, Donna. 1996. *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers.* Washington, DC:Federal Judicial Center and the CPR Institute for Dispute Resolution.

Country: Each of the ninety-four federal district courts of the United States
Years: 1994 - 1996
Objectives: Cost and delay reductions in the nation's 94 federal courts.
Design: Targets the behavior of judges and parties using a wide variety of ADR methods and judicial and non-judicial neutrals.
Evidence: Detailed program descriptions of each of the ninety-four federal districts as well as comparative tables and overviews.

Other aspects: Most of the 94 federal districts have authorized or established at least one court-wide ADR program. Although this very elaborate study is probably the most encompassing sourcebook on ADR in the federal courts, it does not contain any indicators of success or failure, since it is almost impossible at this time to draw any conclusions about the effectiveness of ADR from these ADR caseload figures.

Price, Richard T. and Dunnigan, Cynthia. 1995. *Toward an Understanding of Aboriginal Peacemaking*. Victoria, British Columbia: University of Victoria Institute for Dispute Resolution.

Countries: Native American communities in **Canada** and the **United States**
Years: Past ten years, but starts with a detailed account of historical patterns of peaceful inter-tribal and inter-cultural relations in the Canadian and Great Lakes Region.
Objectives: Peaceful resolutions in inter-tribal and intra-tribal affairs.
Design: Targets Native Americans using peacemaking methods and respected community individuals.
Impacts: May be more successful in being more culturally appropriate, due to the use of respected elders as neutrals and the reference to traditional forms of dispute resolution, possible under the informal dispute resolution procedures.
Evidence: Both quantitative and qualitative data. Evidence **is generally** persuasive.

Rosch, Joel. 1987. " Institutionalizing Mediation: The Evolution of the Civil Liberties Bureau in Japan," *Law and Society Review,* vol. 21, no. 2, pp. 243-266.

Countries: Japan
Years: The post-WWII period
Objectives: Investigation of human rights violations and promotion of the individual "rights consciousness" (set up under the guidance of Americans and Japanese reformers after WWII) to counter the feared reemergence of totalitarianism in all types of cases (though not to interfere with cases being litigated in the courts or handled by other agencies).

Design: Targeted average Japanese citizens using mediation, and to a much lesser extent, the role of ombudsman, in a civil liberties bureau (CLB) and appointed respected citizens and a small professional staff.
Impacts: Most successful in providing a forum for resolution of disputes relating to social (or group) rights; offering a variety of forums for dispute resolution; and handling large numbers of cases. Success was due to the costs and difficulties of resolving disputes in the formal legal system; the high status of the commissioners and their strong national network; the strong normative sense of proper behavior; the persistence of notions of group and social rights among Japanese; and a tradition of reliance on conciliation to resolve disputes (although in practice the nature of the conciliation process has changed substantially, from enforced to voluntary conciliation);
It was least successful in promoting the concept of individual human rights, and resolving the problems of groups that have traditionally been discriminated against, due to the still weak conception of civil liberties and individual rights among Japanese; the reliance on traditional normative systems as a basis for resolution; and the tendency to individualize cases, rather than to try and build a consistent, precedent-stetting foundation for changing or advancing conceptions of rights.
Evidence: The large number of cases being successfully handled by the CLB. Evidence **is generally** persuasive.

Other aspects: First, the authors argue that the low levels of court-based litigation in Japan may not be due to the supposed non-litigious culture in Japan, but to the presence of alternative forums such as the CLB for handling complaints. It is not the number of disputes that is different, but the nature of the agencies for handling them. Second, they also comment extensively on how cultural attitudes toward dispute resolution both shape and are *shaped by* the available institutions—that is, traditional institutions and attitudes have proved both persistent and adaptable, so the CLB could build on them while at the same time changing/improving them. Third, the CLB has no formal/legal enforcement powers, but successfully relies on informal/social means to enforce its decisions. Fourth, the authors also discuss the concern that the CLB individualizes cases rather than working on the basis of consistency and setting broader precedents, and that this may inhibit the growth of law and the development of rights consciousness in the country, delegitimize conflict, and impede democracy.

Stienstra, Donna; Johnson, Molly; Lombard, Patricia. January 1997. *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990.* Washington, D.C.: Federal Judicial Center.

Country: Five U.S. demonstration programs, established under the Civil Justice Reform Act of 1990
Years: 1993-1996.
Objectives: Experiment in two programs with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time-frames for the completion of discovery and for trial. The other three districts were instructed to experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution.

Weiss, Stephen E.; Goldstein, Susan B. September 1987. " Culture's Consequences in Dispute Resolution," *Dispute Resolution*. Washington, DC: National Institute for Dispute Resolution (NIDR).

Countries: Northern Ireland and the Texas Gulf Coast
Years: The last two decades
Other aspects: The review is brief and general. It basically stresses the significance of different perceptions. The article discusses three types of descriptive models of the negotiation process: universal models, comparisons of cultural models, and multicultural models. Based on these models, questions as to the integration into community mediation practice are raised.

C. Other Selected Documents

1. ADR in Developing Countries

Aldea Moscoso, Rodolfo Alejandro. 1989. *De la Autocomposición: Una Contribución al Estudio de la Solución de los Conflictos Jurídicos*. Santiago, Chile: Editorial Juridica de Chile.

Bingham, Gail. 1995. “Resolving Environmental Disputes: A Decade of Experience” Washington, DC: Conservation Fund.

Cappelletti, Mauro. May 1993. "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to Justice Movement," ***The Modern Law Review,*** vol. 56.

Chadosh, Hiram; Mayo, Stephen A.; Naguib, Fathi; and El Sadek, Ali. Summer 1996. "Egyptian Civil Justice Process Modernization: A Functional and Systematic Approach," 17 *Michigan Journal of International Law*, vol. 17, pp. 865-915.

Collins, William. 1997. *Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers*. Preliminary Assessment for USAID. Project no. 442-0111. Washington, DC: USAID.

McHugh, Heather. November 1996. *Alternative Dispute Resolution: The Democratization of Law?* Washington, DC: Center for Development of Information and Evaluation, USAID.

Natural Resources Management Program (NRMP), Department of Environment and Natural Resources, Rep. of the Philippines. 1993. *A Review of the Applicability of Current DENR Tenurial Instruments to Issues Related to Ancestral Domains*. Report 93-05. Manila: NRMP/DENR/USAID.

Rosenberg, S. and H. Folberg. 1994. "ADR: An Empirical Analysis," *Stanford Law Review,* vol. 46, pp. 1497-1526.

USAID. 1992. "Project Paper: Nepal Democracy Project." Project no. 3670163, Washington, DC: USAID.

USAID. 1993. "Trade Practices and Productivity Improvement Project," USAID Project Design Document. Doc. PD-ABH-209. Washington, DC: USAID.

2. ADR in Developed Countries

American Bar Association Section of Dispute Resolution. Summer 1997. “Focus on the Rand Report," *Dispute Resolution Magazine*, vol. 3, no. 4.

CPR Institute for Dispute Resolution. 1997. "Concerns and Recommendations,” *Alternatives to the High Cost of Litigation*, (hereinafter "*Alternatives*") vol. 15, pp. 72-73.

Davis, William and Crohn, Madeleine. May 1996. “Lessons Learned: Experiences with Alternative Dispute Resolution.” Prepared for Judicial Roundtable II. Williamsburg, VA: National Center for State Courts.

Hensler, Deborah R. 1997. " Rand’s Rebuttal: CJRA Study Results Reflect Court ADR Usage–Not Perceptions," *Alternatives*, vol 15, p. 79.

Jaffe, Sanford M. and Stamato, Linda. 1997. "No Short Cuts to Justice," *Alternatives*, vol. 15, p. 67.

Lind, E. Allan. 1990. *Arbitrating High-Stakes Cases, An Evaluation of Court-Annexed Arbitration in a United States District Court*, RAND Institute for Civil Justice Report, R-3809-ICJ.

Kakalik, James S.; Dunworth, Terence; Hill, Laural A; McCaffrey, Daniel; Oshiro, Marian; Pace, Nicholas M. ; Vaiana, Mary E. 1996. *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*. Santa Monica, CA: RAND.

Meierhoefer, Barbara S. 1990. *Court-Annexed Arbitration in Ten District Courts* Washington, DC: Federal Judicial Center.

Press, Sharon and Filner, Judy. March/April 1996. "Getting to Excellence in Court System ADR," *NIDR News*. Washington, DC: National Institute for Dispute Resolution.

Rauma, David and Krafka, Carol. 1994. *Voluntary Arbitration in Eight Federal District Courts: An Evaluation.* Washington, DC: Federal Judicial Center.

Rolph, Elizabeth and Moller, Erik. 1995. *Evaluating Agency Alternative Dispute Resolution Programs: A User's Guide to Data Collection and Use.* Santa Monica, CA: RAND.

Sander, Frank. "Varieties of Dispute Processing," 70 F.R.D. 111, 131.

Stempel, Jeffrey W. 1996. "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" *Ohio State Journal on Dispute Resolution,* vol. 11, p. 297.

3. Taxonomy of ADR Models

Center for Public Resources/CPR Legal Program. 1993. *Judge's Deskbook on Court ADR..* New York: Federal Judicial Center.

CPR Institute for Dispute Resolution, "The ABCs of ADR: A Dispute Resolution Glossary," *Alternatives,* vol. 13, no. 11, pp. 147-151.

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APPENDIX E: Dispute Resolution Institutional Problems, DR/ADR Solutions and Conditions for Success

This matrix highlights central issues relevant to dispute resolution and potential solutions. While not intended to be a "cookbook" for addressing problems in dispute resolution, the matrix identifies major factors for consideration.

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Civil Court System					
Low supply of judges/ staff	Access (A) Time (T) Cost (C) Satisfaction (S)	1. Hire additional judges/ staff (Uruguay) 2. Provide adequate salaries/ benefits/ working conditions to retain judges/staff	1. Adequate political support for expanding court DR capacity (ideally through cabinet-level leadership and active participation of judges, staff, user reps. and independent experts in capacity planning) 2. Adequate supply of trained/ trainable judges/ staff exists 3. Adequate and sustainable funding available	Provide non-court neutrals through ADR programs (Argentina, Uruguay; compare McHugh (1996: 13) and RAND: ADR impact on court delays not established).	1. Adequate political support exists for institutionalizing non-court neutrals (ideally through cabinet-level leadership and active participation of judicial system DR providers, users and independent experts in ADR development) (Argentina) OR 2. Court system opposition can be reduced by using judges/court staff as ADR staff (Argentina) 3. Adequate pool of trained/ trainable neutrals and staff exists 4. Adequate, sustainable funding for neutrals and staff is available

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Low quality of judges/ staff (competence and/or integrity)	S, T, C	1. Retrain existing judges/staff 2. Introduce performance requirements, incentives and monitoring systems (Uruguay, Colombia, Honduras, Philippines) 3. Increase selectivity in new hires	1. Adequate political support for retraining/performance requirements (ideally through cabinet-level leadership and active participation of judges/staff/users/experts in design of training programs and performance standards) OR 2. Staff opposition can be reduced by offering early retirement/ transfers/ outplacement/ grandfathering 3. Adequate pool of trainers/independent assessors is available 4. If integrity is an issue, investigators can be protected and findings can be publicized (Philippines law student Court Watch)	Provide well-trained non-court neutrals	1-4 to left and 5. Adequate pool of skilled trainers is available to train/periodically assess ADR neutrals (Sri Lanka mediation boards)

Dispute resolution (DR) institutions and problems	Problems for DR institution users (AID objectives)	Solutions directed at reforming DR institution	Conditions for success of DR institution reforms	Solutions directed at creating ADR institutions	Conditions for success of ADR institutions
High fees	C,A	1. Reduce court operating costs (e.g. by simplifying procedures, retraining judges/staff, eliminating redundant judges/staff) and/or 2. Offer court services at reduced fees	1. Adequate political support for cost-cutting and fee reduction (cabinet, judge, staff, user and expert participation) 2. Court operating costs can be reduced while maintaining/improving DR service delivery and/or 3. Adequate and sustainable funding available to subsidize users (possibly through cross-subsidies)	Offer non-court DR services at lower cost (target low-cost services to lower-income users)	1. ADR program can be designed to run at lower cost (e.g. simple rules, "piggy-back" on existing buildings/programs/staff) (Philippines barangay justice) and/or 2. Adequate and sustainable funding to subsidize user costs is available (Philippines labor arbitration) (sliding scale can be used for higher income users to cross-subsidize lower-income users) 3. If low-cost services are restricted to lower-income users, there are simple and transparent criteria and procedures for deciding user eligibility

Dispute resolution (DR) institutions and problems	Problems for DR institution users (AID objectives)	Solutions directed at reforming DR institution	Conditions for success of DR institution reforms	Solutions directed at creating ADR institutions	Conditions for success of ADR institutions
Complex procedures	T,C,A,S	1. Simplify/ expedite court procedures (Uruguay and Argentina oral procedures, Philippines continuous trials)	1. Adequate political support for simplification (cabinet, judge, staff/ advocates, users, experts) in procedural review 2. Adequate judicial/administrative expertise to simplify procedures while maintaining integrity of rules of action, standing, fact-finding, decision and appeal	Offer simple DR procedures in non-court fora, and educate users on these procedures (neighborhood ADR centers with independent/ volunteer staff in Argentina, Bolivia, Colombia, Costa Rica, Sri Lanka, Taiwan; local government – staffed ADR programs in China, Philippines, Taiwan)	1. ADR program designers can identify potential users 2. Program designers/staff can work with user reps. to assess DR needs and capacities and provide appropriate DR procedures and supporting information 3. Disputes are screened so that only those that can be resolved using simple procedures go to ADR

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
No specialized neutrals for technically complex disputes such as specialized commercial (intellectual property) administrative (taxation, product/occupational safety), constitutional cases	S,T,C	1. Recruit current judges/staff for technical training and/or 2. Establish new judicial venue(s) for specific types of cases	1. Clear rationale for public role in providing specialized DR (e.g. for administrative cases, need for appeal of administrative agency decisions to independent authority) 2. Adequate user demand/political support to justify specialized fora 3. Adequate pool of motivated and trainable judges/staff available 4. Adequate and sustainable funding available (possibly through surcharges on users of specialized fora)	Provide non-court fora for these disputes, and provide neutrals with appropriate technical expertise (Philippines and Dom. Rep. labor arbitration; Philippines land title; Thailand commercial disputes; Uruguay commercial disputes)	1. Adequate political support for institutionalizing non-court fora for these disputes (Blair et al. (1994) cite lack of business support in Uruguay) 2. Adequate pool of neutrals with process expertise can be trained to deal with technical issues and/or 3. Adequate pool of technical experts can be trained in ADR process skills 4. When technical experts are used as neutrals, ADR neutral selection procedures can be designed to minimize potential conflicts of interest (e.g. neutrals must disclose; parties must agree on neutral)

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Location bias (e.g. lg. cities or central locations within cities only)	A,C,T (for location-disadvantaged groups)	Site court facilities (for filing and hearings) in under-served areas	1. Adequate political support (including current and potential users from under-served areas) 2. Adequate and sustainable funding for siting and operating new facilities 3. Adequate pool of judges/staff (with preference for residents of under-served areas)	Provide non-court DR centers/neutrals in areas where disadvantaged groups are concentrated (US neighborhood ADR centers; Colombia casas de justicia; Philippines barangay justice; Sri Lanka mediation boards; Argentina neighborhood justice centers)	1. Adequate political support for targeting ADR services to disadvantaged group(s) 2. ADR program designers can identify disadvantaged groups, assess needs, select locations, procedures and neutrals to meet group needs 3. Adequate pool of qualified neutrals is willing to work in under-served locations

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Culture bias (e.g. court uses only one language in multi-lingual society; courts refuse to recognize traditional/ informal DR systems of some cultural groups)	A,C,T,S (for disadvantaged groups)	1. Revise court procedures and materials, retrain staff and recruit new staff from under-served cultural groups (Malaysia DNU) 2. Give legal recognition to informal/ traditional DR practices (e.g. require courts and law enforcement agencies to recognize and enforce agreements reached using traditional/ informal DR procedures)	1 and 2 to left and 3. Redesign of court procedures and material, staff selection and training actively involves representatives of under-served cultural groups 4. Laws/ rules can be written to support traditional/ informal DR practices without "judicializing" them	1. Provide non-court fora, procedures and neutrals that meet needs of under-served cultural groups (Ecuador) 2. Give legal recognition to these new fora and procedures (Philippines indigenous people's claims)	1 and 2 to left and 3. ADR design phase actively involves representatives of under-served cultural groups in needs assessment, procedural design, neutral selection and training 4. Laws/ rules can be written to support ADR fora and procedures without "judicializing" them (India lok adalats vs. Sri Lanka mediation boards) 5. ADR users maintain right of appeal to formal system (n.b. McHugh (1996: 24) points out sharp debate on this issue)

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Social, economic and/or cultural imbalance in power of parties in class of disputes (e.g. women in domestic abuse cases, low-income debtors in collection cases, low-income tenants/squatters in eviction cases, indigenous people in land rights cases; private parties in disputes with public regulatory agencies)	S,A (for disadvantaged parties)	1. Change laws and procedures to increase legal rights/ protections for disadvantaged parties 2. Provide counseling/ social services/ legal advocates to disadvantaged parties	1. Adequate political support (including mobilization and involvement of representatives/advocates for disadvantaged groups) 2. Changes in laws/ procedures are supported by legal education/ and broader social programs to reduce underlying socio-economic and cultural disparities 3. Adequate and sustainable funding for programs targeted at disadvantaged groups	Create non-court fora and procedures that require voluntary settlement and minimize ability of more powerful parties to coerce settlement (Nepal Women's legal services)	1. Adequate political support (including mobilization and involvement of disadvantaged groups' representatives/ advocates) 2. Safeguards against coercion are adequate (very difficult to assess--questions raised by Whitson (1992) about women in India lok adalats, and by Hansen et al. (1994) about debtors in Sri Lanka mediation boards) 3. All parties retain option to seek court judgments if unable to reach/ keep voluntary agreement (n.b. McHugh (1996: 24) points out sharp debate on this issue) 4. Adequate counseling and support for disadvantaged parties

Dispute resolution (DR) institutions and problems	Problems for DR institution users (AID objectives)	Solutions directed at reforming DR institution	Conditions for success of DR institution reforms	Solutions directed at creating ADR institutions	Conditions for success of ADR institutions
Civil advocates					
Low supply and/or high cost	A,C,T	1. Increase supply of advocates by increasing access to legal education (e.g. establish new law schools, subsidize tuition (possible sliding scale/cross-subsidy), reduce time required to graduate), and/or reducing licensing requirements 2. Reduce advocate costs by increasing supply, simplifying procedures (see above), requiring pro bono work, regulating fees	1. Adequate political support OR 2. Phased introduction (e.g. first simplify procedures, then if necessary increase number of law graduates, then if necessary reduce licensing requirements, and only then regulate fees if still necessary)	Reduce need for advocates through design of ADR procedures; and/or provide individual counseling in ADR forum	1. Adequate political support exists to reduce demand for advocates OR 2. Advocates' opposition can be reduced by using them as ADR staff 3. ADR procedures can be designed to substantially reduce need for advocates (e.g. case screening, simple procedures, counseling for parties by ADR staff, ADR users do not waive right to seek legal advice or go to court) 4. Adequate pool of ADR staff available to provide individual counseling 5. ADR procedures designed to maintain parties' confidentiality (e.g. staff who counsel a party do not act as neutrals in that case)
Low quality	S,T,C	Improve legal training, introduce performance requirements and monitoring systems (Philippines alternative law schools)	1. Adequate political support 2. Changes in legal training/ performance requirement linked to improvement in legal procedures (simplification, codification etc.)	Provide well-trained ADR counseling staff	1-3 above and adequate pool of skilled trainers to train/periodically assess ADR staff

Dispute resolution (DR) institutions and problems	**Problems for DR institution users (AID objectives)**	**Solutions directed at reforming DR institution**	**Conditions for success of DR institution reforms**	**Solutions directed at creating ADR institutions**	**Conditions for success of ADR institutions**
Location bias	A,C,T	Create incentives and requirements for advocates to practice in under-served areas (e.g. in exchange for tuition subsidies)	As above under civil court system location bias	Site ADR centers/staff in under-served areas	As above under civil court system location bias
Culture bias	A,C,T,S	Recruit law students from culturally under-served groups, give incentives for advocates to serve culturally under-served groups, train advocates to be aware of and responsive to culturally-specific DR norms and behaviors	As above under civil court system culture bias	Recruit ADR staff from the parties' culture and/or train them to be aware of and responsive to culturally-specific DR norms and behaviors	As above under civil court system culture bias

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