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## ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE



March 1998

**Technical Publication Series**

**Office of Democracy and Governance  
Bureau for Democracy, Conflict, and Humanitarian Assistance  
U.S. Agency for International Development  
Washington, DC 20523-3100**

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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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Conflict Management Group (CMG) is dedicated to improving the methods of negotiation, conflict resolution, and cooperative decision-making as applied to issues of public concern. Public conflicts and ineffective means for dealing with them lead to wasted resources, social instability, reduced investment, chronic underdevelopment, and loss of life. CMG believes that good negotiation, joint problem-solving, facilitation, and dispute management skills can help those with differing interests, values, and cultures cope more effectively with their differences. CMG is an international non-profit organization. It is engaged in the training of negotiators, consulting, diagnostic research, process design, conflict analysis, facilitation, consensus-building, and mediation. CMG also facilitates the building of institutions for the prevention and ongoing management of conflicts. CMG is non-partisan and takes no stand on the substantive issues of a dispute.

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# ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE

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# I. INTRODUCTION

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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.<sup>1</sup> 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.

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<sup>1</sup> 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

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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?

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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 <sup>2</sup>

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 overcrowded 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

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<sup>2</sup> 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

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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

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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?

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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 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 a 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?

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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 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<sup>3</sup>. 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.

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<sup>3</sup> 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

### 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.)

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.

*(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

**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.)

resolving disputes. (See South Africa 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

#### 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.)

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.)

#### *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 (SVAFF), 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

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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 established
- 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<sup>1</sup>

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).

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<sup>1</sup>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/Voluntary:** 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

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

\* See Case Study

<sup>2</sup> DPK 1996

<sup>3</sup> NCMB 1996

<sup>4</sup> Worawattanamateekul 1996

<sup>5</sup> COTRAIN 1996

<sup>6</sup> Blair et al. 1994

<sup>7</sup> Huang 1996

<sup>8</sup> Bingham 1985

<sup>9</sup> Moore and Santosa 1995

<sup>10</sup> Othman 1996

<sup>11</sup> Foraker-Thompson 1992

<sup>12</sup> Huang 1996





## 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<sup>13</sup>

### 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, Gopalganj 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

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<sup>13</sup> 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,





























































































































































































