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Lessons Learned From Practice

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I. INTRODUCTION

Alternate dispute resolution mechanisms play an increasingly important role in four kinds of transitioning states: i) states transitioning from military to civilian rule, ii) countries undertaking peacebuilding efforts following a civil or interstate war, iii) states converting to a market economy from a centralized economy, and iv) territories that are newly emerging as states. These "transitioning states" face numerous institutional challenges in order to ensure their survival in a complex world. Some of these include strengthening civilian rule and curbing military influence on governance, creating government institutions whose viability does not rely on personalities of individual leaders or other affiliations, developing dependable and mutually beneficial relationships with foreign governments, foreign investors and multilateral organizations, and of course, satisfying the competing needs, rights and interests of citizens and constituent groups.

One critical factor affecting such challenges to transitioning states is the strengthening of rule of law ("ROL"). Where the "rule of force" has prevailed due to civil war, foreign military occupation, military government, or other political instability, the development of a functioning legal order has often been impeded or distorted. In the developing world, this began to change with the return to democratic, civilian rule of governments in Latin America, Africa, East and Central Europe and elsewhere.

Donors such as international organizations and government development agencies have expressed an interest in assisting emerging democracies in their efforts to strengthen ROL by supporting judicial

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reform efforts world-wide. One aspect of ROL programs that continues to grow in importance for both donors and recipients of development assistance is alternative dispute resolution (ADR). There is nothing novel about the use of non-judicial methods to resolve disputes and almost all societies have evolved their own mechanisms to do so. The inclusion of ADR as an explicit tool of international development programs, especially judicial reforms, is a relatively new phenomenon.

This article explores the implementation of ADR programs within the broader ROL program context. It examines important aspects of implementing ADR programs in transitioning states and makes use of analyses conducted by and for the United States Agency for International Development (USAID), the World Bank and other development agencies. We employ a case study using field research and primary sources of one well-developed commercial ADR program in Bolivia supported by USAID and which served as part of the empirical research for a comprehensive guide submitted to USAID.¹

While ADR programs have proliferated on a global scale, few efforts have been made to assess such programs and discern patterns of development, innovations, and challenges. It is important to note that ADR program design, implementation and operation are in many cases, qualitatively different in the context of transitioning states.² The reasons for this include incomplete legal frameworks in which ADR functions, weak rule of law, power disparities among disputants which can affect the process and outcome of legal disputes, new frameworks for international investment in the economies of such states, the existence of strong extra-legal indigenous norms of conflict management, and finally, the variation in amount and quality of financial and human resources. While some internal evaluations exist, until recently, no systematic study has examined the design, implementation, strengths, weaknesses and uses of ADR at the global level. One major USAID study has undertaken this task, combining broad literature and primary source research with in-depth field research on five foreign ADR programs in diverse transitioning states around the globe.³ Important aspects of implementation analyzed in this article include: how ADR can support rule of law development objectives; inappropriate ADR applications; political

1. See SCOTT BROWN, CHRISTINE CERVENAK & DAVID FAIRMAN, *ALTERNATE DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR USAID* (1997) [hereinafter *GUIDE*].

2. See *id.*

3. The author conducted the Latin America literature and part of the field research for this study, which is incorporated in *GUIDE*, *supra* note 1.

conditions necessary for the success of ADR initiatives; and the organizational aspects of ADR programs. States in transition have qualitatively different capacities, needs and customs on which ADR (and indeed, any development project) will be built. Rather than assuming uniformity, this article explores such differences, and research findings provide a set of questions and guidelines useful for development professionals involved in ADR.

II. JUDICIAL REFORM ON A GLOBAL SCALE

A. *Drivers of Judicial Reform at the Global Level*

Judicial systems are the principal (but by no means the only) vehicle for the implementation of ADR programs. As noted, ADR is often a key component of judicial reform programs. Given its importance to ADR programs, it is instructive to understand the bases of judicial reform. Judicial reform is being driven by four systemic factors at the international level which reflect the typology of "transitioning states" described above: i) the transition from military to civilian rule, ii) a renewed emphasis in development as part of the peacebuilding efforts following a civil or interstate war, iii) transitions to a market economy, and iv) the emergence of independent or quasi-independent states.⁴ The categories are not mutually exclusive; some transitioning states are characterized by more than one of these factors.

More important than the simple proliferation of states is the fact that some are undergoing democratic transition and others economic transitions. Some experience both upheavals simultaneously.⁵ For the purpose of this study, we refer to all of these collectively as countries or states "in transition" without regard to the political or economic nature of the transition or the development status of the states being analyzed.

States that are transition economies and emerging democracies face the challenge of adopting and implementing their conception of participatory governance and then building new governing institutions or strengthening existing ones. This is no easy task. The World Bank warns that "the clamor for greater government effectiveness has reached crisis proportions in many developing countries where the state has failed to deliver even such fundamental public goods as

4. Examples include Palestine, East Timor and Kosovo.

5. See WORLD BANK, FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT (1996). The 1996 edition is dedicated to the realities facing transition economies in the NIS, CEE and other groupings.

property rights, roads, and basic health and education. At the limit, as in Afghanistan, Liberia and Somalia, the state has sometimes crumbled entirely, leaving individuals and international agencies to pick up the pieces.⁶

B. *Internal and External Dimensions of Transition*

The challenge of transition has both an internal and an external dimension. In the former, states must provide adequate mechanisms for the resolution of disputes and determination of rights and responsibilities for individuals and organizations that live and operate within the jurisdiction of that state. As to the external dimension, states participate in multilateral organizations and subject themselves to international legal regimes that have far-reaching consequences for the treatment of nationals and foreigners, as well as for interaction with other states and international organizations. Participation in organizations such as the World Trade Organization, the European Union, or arrangements such as the North America Free Trade Area ("NAFTA") for the purpose of furthering economic development and liberalizing international commerce requires that states meet minimum standards of governance and can safeguard economic rights of foreign investors.

In terms of the internal dimension, the transitional quality of governance in emerging democracies and developing countries tends to mean that the institutions and practices that define, safeguard and interpret rights, as well as resolve conflicting rights, are distorted, weak or sometimes even non-existent. In a republic, these tasks are the primary responsibility of the judiciary. However, well-known problems plague the development of functioning judiciaries: bribery of judicial personnel and judges, non-enforcement of judgments, insufficient legal frameworks to adjudicate disputes or set forth rights, politicization of choice of judges and inefficiencies regarding case management and case load are just some of the obstacles. Other important obstacles to justice include prohibitive attorney and court fees, labyrinthine and archaic judicial procedures, and the inability to insulate judges from threats.

Regarding Latin America, the Lawyers Committee for Human Rights writes that "many Latin American legal systems . . . are institutionally weak, heavily politicized and corroded by corruption, and

6. WORLD BANK, *THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT* (1997). This edition focuses on strengthening states undergoing transition and reform by "reinvigorating state institutions."

thus unable, absent significant reforms, to serve as independent and effective guarantors of political and economic rights."⁷ This observation could be accurately generalized to numerous regions of the world without requiring significant modification.

The demands of global interaction, coupled with the inadequacies of internal institutions have helped fuel the search for alternative mechanisms of conflict management. Some of these alternatives are found outside the judicial systems. In numerous cases, Chambers of Commerce, trade associations, and private NGOs have begun offering services that permit disputants of all kinds to circumvent the expense, inefficiency and adversarial context of the courts. Several of these alternatives are to be found in the present case study and are examined in detail here. Where judicial reforms and institution-building efforts are taking place, model ADR programs are often a small though integral program component. In this sense, a judicial system, by employing ADR efforts, seeks to create experimental but functional *internal* institutions that demonstrate new techniques in conflict management and at the same time help to alleviate bureaucratic problems such as case backlog.

C. *Development Assistance*

In order to implement reforms of the justice sector, transitional states need assistance. Development assistance is provided by donors who range from regional and global multilateral banks, such as the Inter-American Development Bank ("IDB"), the World Bank, donor states' own development agencies such as USAID, and private philanthropic foundations. Traditional international development assistance has been predominantly, although by no means exclusively, of a technological and material nature, characterized by the provision of funds to be used for purchases from the donor's home industries, or direct provisions of agricultural technology, food, housing, potable water technology and other "hardware" provided directly to the recipient state by the donor agency.

At the beginning of the 1980s, numerous developing countries experienced an intense "crisis of the state"⁸ that manifested itself in explosive external debt and bloating of state bureaucracies, which set

7. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM* 1 (1996).

8. S. Shahid Husain, *Civil Service Reform and Economic Development in CIVIL SERVICE REFORM IN LATIN AMERICA AND THE CARIBBEAN*, WORLD BANK TECHNICAL PAPER NUMBER 259, 9, 10 (S. Chaudry et al. eds., 1994) [hereinafter *CIVIL SERVICE REFORM IN LATIN AMERICA*].

off a stream of connected phenomena: over-regulation, hyperinflation, closed economies, stagnant growth and isolation from international trade. In combination with the domestic and international transitional pressures described above, many countries began a process of downsizing of government, privatization of industry and private provision of public services, bureaucratic decentralization and revision of regulatory frameworks.⁹ This crisis of the state led to a realization on the part of many donors that provision of material assistance is insufficient to facilitate equitable economic growth and improve standards of living for the population in recipient countries.

A qualitative change in donor assistance programs began, as institutions such as the World Bank, IDB, and USAID instituted programs to finance institutional reforms of the state itself (even where their mandates proscribe financing political reform) especially of the judicial sector, in order to explicitly support economic reform efforts. As recently as 1994, the Vice-President and General Counsel of the World Bank stated that "we are beginning to realize that without effective government administration, structural adjustment programs and other economic reform initiatives are seriously handicapped."¹⁰

Judicial reforms in transitioning states are also the embodiment of efforts to solidify ROL. The goals of judicial reform programs include "strengthening the independence of the judiciary, simplifying and updating legal procedures and laws, improving administration of courts, providing alternative mechanisms for dispute resolution, expanding access to justice, improving legal education and training . . . and building user confidence."¹¹ One practitioner sums up: "Judicial reforms benefit all sectors. The private sector benefits when commercial transactions become more predictable, thus lowering costs. The public sector benefits through the establishment of better regulations and responsibilities; and the general public benefits by increased access to programs and legal assistance services. The public's confidence in civil society is thereby increased."¹²

9. *See id.*

10. Ibrahim F. I. Shihata, *Civil Service Reform in Developing Countries*, in *CIVIL SERVICE REFORM IN LATIN AMERICA* *supra* note 8, at 11, 14. Shihata continued: "Support for judicial reform is not mentioned in the Bank's charter . . . Judicial reform [is] often a prerequisite for the facilitation of investment . . . I advised the Bank in 1990 that [such] assistance might readily fall within the Bank's mandate if requested by an interested borrowing member country." *Id.*

11. Waleed H. Malik, *Overview* in *JUDICIAL REFORM IN LATIN AMERICAN AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE, TECHNICAL PAPER NUMBER 280* (M. Rowat et al. eds., 1995).

12. Waleed H. Malik, *El Desarrollo Económico y la Reforma Judicial*, *REVISTA DE DERECHO INTERNACIONAL ECONOMICO* (1996).

The importance of ROL for countries in transition came gradually for USAID, which evolved through various phases of support for judicial systems since the 1960s, beginning with ill-fated "law and development" initiatives that sought to train lawyers in developing countries to use Western legal concepts in the hope that they would "spearhead" modernization.¹³ The progressive broadening of USAID's vision regarding the judicial sector led it to abandon the "Administration of Justice" label for such activities and to adopt the terminology "Rule of Law."¹⁴ USAID's ROL activities are conceived of as supporting the objectives of its democracy programs, although in practice, USAID justifies much of its ROL activities on grounds that they facilitate foreign investment and, therefore, economic growth.¹⁵

Both the World Bank and USAID have emphasized the use of ADR from the beginning of their ROL initiatives. The link between ADR and larger strategic goals has differed slightly for both, with USAID stating that ADR is an element of ROL that supports democratization and the World Bank seeing ADR as an element of ROL that facilitates economic transition efforts. Nevertheless, in practice, both the Bank and USAID recognize the need to support judicial institutions in order to create the conditions for economic growth.

III. ADR AS AN ASPECT OF JUDICIAL REFORM

A. *ADR under Conditions of Power Asymmetry*

While the benefits of ADR to businesses, courts and governments are much-publicized, there are some calls for caution: in situations where there are litigants without representation, Professor Russell Engler finds that such parties are "vulnerable to the waiver of important rights in mediation."¹⁶ Engler warns that mediation is a forum that "produces systematically unfavorable results to unrepresented litigants when measured in terms of outcome."¹⁷ He reminds us that "[p]roviding justice, rather than clearing the court's docket, must remain the primary goal of the mediation process."¹⁸ Engler's note of

13. See HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: USAID PROGRAMS AND OPERATIONS ASSESSMENT REPORT NO. 7*, 3 (1994).

14. See *id.* at 4.

15. See the Bolivia case study in GUIDE, *supra* note 1.

16. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2032 (1999).

17. *Id.*

18. *Id.* at 2033.

caution is important to consider in the context of using ADR in transitioning states because there are often even greater disparities of power between the common citizen and state organs, and between businesses and other parties, including foreign corporations and international organizations, who may use ADR services where the courts fail to perform their functions efficiently. When power asymmetries are embedded in the social policy, laws, customs or other normative framework of a society, there is little reason to believe that an ADR program within that society will be immune from them. ADR services may thus perpetuate asymmetries, discrimination and other social dynamics. On the other hand, to the extent that an ADR program is well-designed, results in enforceable agreements that are linked to courts, protects the rights of parties and helps weak parties efficiently resolve disputes, it may help traditionally marginalized or weak parties.

B. *Definitions*

Alternate dispute resolution mechanisms should be at least briefly described here for conceptual clarity. Typical definitions include the activities of negotiation, conciliation, mediation, arbitration, early neutral evaluation, and mini-trials.¹⁹ These activities and their variations are also usually divided between those that are conducted through and overseen by institutions of the judiciary and are therefore regarded as "court-annexed," and those that are carried out by private organizations, individuals and service providers. All of these activities are "alternatives" to court litigation and therefore seek to decrease transaction costs associated with litigation (financial, time and opportunity costs), increase the transparency of process, preserve the relationships among the parties, and provide speedy solutions.²⁰ In the developing world, these models are sometimes adopted as-is or combined with indigenous methods of dispute resolution.

IV. USAID'S FIELD WORK ON ADR

The widespread adoption of ADR practices in the U.S., both private and court-annexed, has not in itself answered the question of whether ADR is actually effective (and if so, how effective) in meeting its goals. The information and infrastructure requirements needed

19. See generally GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION MEDIATION AND OTHER PROCESSES* (1992).

20. See *id.* at 8.

in order to take measurements of this sort are significant. One would need to know, for example, how many cases were resolved or settled by ADR mechanisms, estimate time and money savings, survey the parties in order to determine satisfaction with the process and outcome, and ask if the adversarial relationships remained so or if they had improved. These are just some of the data required. In the transitioning states, such information resources are often simply absent, and there is inadequate infrastructure in place to capture or seek out such data. Nevertheless, where donors such as USAID focus their efforts, there is programmatic monitoring (by NGOs or government oversight or self-monitoring) and some internal studies do exist. In the late 1990s, USAID set out to evaluate the impact of its investments in ADR and wished to ascertain whether and how to best promote ADR programs. There continues to be an ongoing need for empirical research on the savings of time, money, increase in user satisfaction, problems of power asymmetry, reduction of delay, and access to services.

In 1997, the Conflict Management Group (CMG) was subcontracted by USAID in order to conduct such empirical research on the incorporation of ADR programs in ROL initiatives.²¹ CMG formed a team of prominent ADR practitioners and scholars to advise their efforts, assembled a group of researchers whose task was to perform an exhaustive literature review on global implementation and evaluation of ADR, and undertook five international research missions to both gather actual data from the field and to examine the development hypotheses about ADR. The missions were to Bangladesh, Bolivia, South Africa, Sri Lanka and Ukraine.²² Findings from the Bolivia study are detailed below.

V. BOLIVIA

Alternative dispute resolution mechanisms in Bolivia are characterized by several paradoxes: they are both ancient and new, they are ambitious and humble, they seek to facilitate flows of business capital and resolve the social problems of society's most disenfranchised

21. CMG is a non-profit organization centered in Cambridge, Massachusetts and whose mission is to train people and organizations in negotiation skills and otherwise facilitate the management of local, national and international conflicts. It grew out of the Harvard Negotiation Project that was started by Roger Fisher, Samuel Williston professor *emeritus* at Harvard Law School.

22. The author conducted the Bolivia field mission. The Bolivia case's findings are used extensively in this article.

members, they seek to incorporate private international law and various layers of indigenous norms. In short, they address an extraordinarily broad range of social needs and thus reflect the inadequacy of past and existing state institutions to address those needs over time. The reforms, market transitions and democratization efforts make Bolivia's ADR program an ideal candidate for study regarding the implementation and evaluation of ADR in transitioning states, many of which are undergoing analogous changes.

A. *The Context of ADR in Bolivia*

The field of ADR in Bolivia is advancing in a forceful context of ongoing political democratization, a recently passed national ADR law package,²³ rapid urbanization and rural flight, increasing national consciousness of the multiple and distinguishable cultural and ethnic layers that constitute the Bolivian population, the ever-present national debate on the links between subsistence cultivation of the coca plant and the need to cultivate favorable bilateral relations with the United States.²⁴

The providers of ADR services fall into three categories: Court-annexed pilot programs, Chamber of Commerce conciliation and arbitration centers, and extrajudicial community conciliation programs for marginalized communities, which are typically provided by civil society organizations, law school clinics and other NGOs.

B. *Summary of USAID/B's ADR Project Evolution in Bolivia*

An independent judiciary is a new phenomenon in Bolivia. USAID-funded ADR activities in Bolivia were originally designed to assist in the creation and strengthening of an independent judiciary in Bolivia which, it was thought, could neither face the strength of the drug traffickers nor hold its own institutionally against a powerful executive branch.²⁵ The USAID mission in Bolivia's (USAID/B) support for ADR began in 1988, but took more concrete form in

23. Ley de Arbitraje y Conciliación, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997) in GACETA OFICIAL DE BOLIVIA (Mar. 11, 1997).

24. Announcements regarding the termination of USAID funding for ADR programs studied here (due to a shift in funding emphasis to anti-drug programs) were made as this case study was being conducted, in some cases at the same meetings, giving rise among service providers to immediate concerns for the timing of development support and the immediate need for self-sufficiency/alternative sources of financing.

25. This historical background is set forth in USAID, PROJECT PAPER (AND ANNEXES) JUSTICE SECTOR PROJECT (Sept. 1990).

1990.²⁶ One of five components of AID's Justice Sector project was to "provide information on modern commercial arbitration practices and institutions," which would be demonstrated by the adoption of arbitration mechanisms for commercial disputes.²⁷ USAID/B subcontracted with the Inter-American Bar Foundation (IABF) to sponsor commercial arbitration seminars in Bolivia.²⁸ Declared U.S. policy priorities were the strengthening of democracy, promotion of economic stability/recovery, and control of illegal drug production/trafficking.²⁹

In 1992, USAID/B began a new project entitled Bolivia Administration of Justice, whose goal was to "improve the effectiveness and accessibility of key democratic institutions in Bolivia," with two of three objectives being the creation of "a more expeditious judicial process to make court managed conflict resolution and criminal prosecution more efficient,"³⁰ and "a more accessible and public judicial system through alternative dispute resolution and delay reduction programs."³¹ The underlying concern was the removal of institutional obstacles to effective criminal (especially narcotics) prosecution.³² However, one core activity contemplated under this amendment was the institution of private commercial arbitration, though further actions were foreseen (conditionally—depending on the implementation of legislation and new political will). These included court-annexed arbitration and extra-judicial private conciliation.³³ The Democratic Initiatives Division of USAID was to be responsible for overall implementation.³⁴ One can infer that USAID meant to help the courts clear their dockets of cases generally in order to focus on criminal prosecutions related to drug trafficking.

USAID/B democracy initiative activities hinge on the following "development hypothesis": "If key judicial, legislative and municipal government institutions continue their structural development, and civil society interaction with these institutions increases, Bolivia will become more democratic and better governed."³⁵ In 1994 a newly

26. *See id.*

27. *Id.*

28. *See id.*

29. *See* USAID, *supra* note 25.

30. USAID/B, Results Framework: Democratic Strategic Objective (undated internal document).

31. *Id.*

32. *See id.*

33. *See id.*

34. *See* USAID/B, *supra* note 30.

35. *Id.*

elected government in Bolivia and the passage of several relevant judicial and legislative reforms led to the realization of several of the "conditions" upon which several USAID/B activities were predicated, including the creation of Bolivia's first cabinet-level Ministry of Justice and ongoing government emphasis on "popular participation in the democratic process."³⁶

USAID/B began supporting the following commercial ADR activities: visits to Colombia so that future arbitrators could observe live arbitration sessions; support for attendance at two ADR seminars in 1993 in Argentina; sponsoring three Bolivian ADR seminars in 1993; a series of roundtable discussions to promote commercial arbitration; and the provision of equipment and presentation materials to set up three arbitration Centers via their respective Chambers of Commerce.³⁷

When the Bolivian government expressed interest in opening the justice system to more popular participation, USAID/B responded with a new emphasis on access to justice.³⁸ The definitions of "access to justice" for USAID/B and its subcontractors/beneficiaries differ in practice. USAID/B has, in practice, been more concerned with re-channeling existing demand for services into other fora than in providing services to those who would otherwise not avail themselves of the courts anyway.³⁹ New activities came within the scope of the project, including grass roots civic legal education (actually training in ADR techniques) mostly through a local NGO called *Capacitación de Derechos Ciudadanos* (Citizens' Rights Training) or CDC.⁴⁰ The underlying purpose for these ADR-related activities was expressed as the "removal of obstacles to . . . and [provision of] information necessary to more effectively use the [judicial] system."⁴¹

Despite progress in three ADR fora: the courts, civil society and the private sector, commercial ADR was the first ADR activity supported by USAID/B and received more support for a greater duration

36. *Id.*

37. See USAID, PROGRAM DESCRIPTION, TERMS OF REFERENCE FOR INTER-AMERICAN BAR FOUNDATION, ADMINISTRATION OF JUSTICE PROJECT, ADR COMPONENT (1993).

38. See interview with Paola Barragan, Democracy and Governance Officer, USAID/B (Oct. 13-21, 1997) (La Paz and Cochabamba).

39. See *id.*

40. See interview with Mónica Jiménez, CDC Regional Coordinator, Cochabamba (Oct. 14, 1997).

41. USAID/B, *supra* note 30.

than the other areas.⁴² Perhaps unwittingly, USAID/B has supported the creation of a nascent but strong parallel forum for adjudication of disputes. It will most likely accomplish multiple goals: alleviate the courts of their case backlog while they undergo reforms, create new demand for time- and cost-efficient services, and support democratization and foreign investment. This case analysis therefore emphasizes commercial ADR since the court-annexed and civil society-based ADR sector programs were still in their pilot phase at the time of research.

C. Commercial ADR

Three Bolivian cities—La Paz, Cochabamba and Santa Cruz—have the most significant commercial activity in Bolivia and were the logical sites for the promotion of ADR as a mechanism for the speedy, efficient and inexpensive resolution of commercial disputes given the ostensible inability of the courts to accomplish this goal. USAID/B therefore targeted these cities and their Chambers of Commerce for the development of ADR as a means of saving time and money in the resolution of commercial disputes, promoting stable conditions for private investment and relieving the backlog in the official justice system.⁴³

Commercial ADR services in Bolivia have been supported by USAID/B directly through the gradual development of Conciliation and Arbitration Centers in the Chambers of Commerce in the three cities mentioned above and this initial activity has led to planning for arbitration/conciliation Centers in the smaller cities' Chambers. IABF proposed to work with the National Chamber of Commerce (in La Paz) and its regional affiliates.⁴⁴

USAID/B's role began with the introduction of arbitration concepts among the Chambers' business membership. Arbitration, though legally sanctioned, was not formally practiced in Bolivia until recently and the concept itself was not well-known or accepted in the business sector. One of the principal obstacles to arbitration's acceptance was the lack of a legal framework in which arbitral awards could be enforced. This, of course, was exacerbated by the general lack of confidence in the official justice system among the business

42. See interview with Fernando Knautt, Director, IABF Bolivia (Oct. 13-21, 1997).

43. G. Davidson, Deputy Director, USAID/B, Closing Remarks at the Commercial Arbitration Conference, Cámara Nacional de Comercio, La Paz, in Conference Proceedings (Nov. 1990).

44. See interview with Fernando Knautt, *supra* note 42.

sector. However, the legal framework was provided with the passing of the Arbitration and Conciliation Law of March 11, 1997.⁴⁵ Chapters V, VI, and VII of this law address the exact relationship between the Arbitral Tribunal (as well as discovery and dismissal motions and the enforcement of the award) and the official court system.⁴⁶ IABF designed several seminars to bring together Chamber of Commerce business members (potential service users), lawyers and other professionals (potential arbitrators/conciliators), development professionals and government officials (potential political advocates). After promoting and supporting the concept of commercial ADR, IABF coordinated the training of arbitrators and conciliators (through the provision of training workshops, and study trips to other operational Latin American arbitration Centers), as well as the physical establishment of Centers in each mentioned city.⁴⁷

1. *The Goals*

The goals of commercial ADR were defined differently by different stakeholders. Principal parties involved included USAID/B, IABF's local office and the Chambers of Commerce (General Counsel's office).⁴⁸ USAID/B's main interests concern the alleviation of the courts with a view to more efficient judicial functioning and the counter-narcotic caseload. The Chambers of Commerce and their members are also concerned with the provision of a service that they do not consider otherwise available; that of speedy, efficient and inexpensive resolution of commercial controversies. This is done by offering two different services: arbitration and conciliation (mediation).

The ongoing internal migration to provincial capitals and especially to El Alto (a burgeoning low income satellite city on the outskirts of La Paz) are cited by some as a motivating factor in the development of ADR in general, due to the increased need for small business dispute resolution that arises due to ethnic and cultural differences.⁴⁹ While this phenomenon has the potential to create a market for commercial ADR users, it has not influenced the development of commercial ADR in Bolivia to date.

45. See Ley de Arbitraje y Conciliación, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997), in GACETA OFICIAL DE BOLIVIA (Mar. 11, 1997).

46. See *id.*

47. See interview with Fernando Knaudt, *supra* note 42.

48. See *id.*

49. The different cultural characteristics of the Quechua and Aymara indigenous people are cited as an example of cultural differences that can generate conflict at the micro-enterprise level. Commercial ADR via the Chambers of Commerce, does not, as yet, have any impact at this level of business activity, most likely due to the economic

Power imbalances, political support, cultural fit and adequate resources were and continue to be relevant issues to ADR goal-setting in Bolivia.

The power imbalance issue has affected the implementation of commercial ADR: while the Centers claim that conciliation has the potential to even the power disparity between parties due the requirement for a cooperative posture that it implies, one Center notes that state enterprises, while legally subject to arbitration regarding contract law issues, may indeed prove too powerful for the arbitration system as it presently exists.⁵⁰ The solution lies in the effective reform of the court system, where arbitral awards eventually will have to be enforced in case of non-compliance. While elaborate planning in the Arbitration and Conciliation Law links arbitral awards to the courts, it remains to be seen whether or not the broader USAID/B-supported judicial reforms will suffice to make the judiciary independent enough to enforce awards against the power of the state itself.

Should one party exercise unduly coercive power in the process of resolving a dispute, the Arbitration and Conciliation Law empowers the "weaker" party to withdraw from a commercial ADR conciliation unilaterally and to resort to the official court system. Arbitrations, on the other hand, were designed to be binding procedures and so unilateral withdrawal is impossible. This assists weaker parties who, for example, might want to force the stronger party to comply with the arbitration's rules or award. ADR in Bolivia has evolved along three sectors, as previously noted, and each sector generally excludes members of the others. If the sectors can be said to correspond to income categories and thus, to level of power, then it would appear that there is a *de facto* separation of parties by power level according to whether a particular party would resort to commercial ADR (private enterprises), court-annexed conciliation (middle class litigants and family/labor issues), and extra-judicial community conciliation (lower income parties with a variety of case characteristics). ADR in Bolivia is, in this broad sense, designed to match parties of similar levels of power, since these parties might not seek to resolve their disputes in any of the other ADR venues. Challenges may arise when parties from different sectors "cross-over" as when a private individual sues a multinational corporation.

and social marginalization of such parties, and their consequent lack of participation in the ADR planning process.

50. See interview with anonymous Bolivian arbitrator (Oct. 16, 1997).

During previous Bolivian government administrations, USAID/B had set out to support a high level "National Council for Judicial Reform and Modernization," chaired by Bolivia's Vice President.⁵¹ It seems to have had little political effect on commercial ADR through the various changes of government. More important has been the passing of the Arbitration and Conciliation Law, drafted by Bolivia's first Minister of Justice.⁵² This high level political support for ADR was created by the linking of USAID/B support for ADR to the passing of the Arbitration and Conciliation Law, which in turn was part of a much broader package of legal system reforms in part supported by USAID/B.⁵³ This approach by USAID/B appears to have successfully linked judicial reform and ADR. Thus while Bolivian government officials and Congressional Deputies worked to gain support for broad judicial reforms and the international development resources they implied, they also built up support for ADR and provided it with a critical legal framework, which gives potential users confidence in such services.

Cultural fit is not a major obstacle in goal-setting regarding *commercial* ADR.⁵⁴ Nonetheless, one center is concerned that what it calls "the Harvard model" of dispute resolution is not directly adaptable to Bolivian commercial ADR.⁵⁵ In practice, this has meant that ADR trainers are better received when they speak Spanish and present teaching material in terminology and contexts easily related to by the trainees. Nevertheless, there is increasing evidence to support the contention that prescriptive "models" of conflict management are often founded on assumptions that may or may not fit with the cultural assumptions and behaviors of those learning a given model. While relatively little systematic attention has been paid to the issue of cultural relevance and fit, there are increasing numbers of practitioners and scholars who emphasize the value of eliciting models of

51. See interview with Fernando Knaut, *supra* note 42.

52. Such high level political support has been also important in community extra-judicial ADR and court-annexed ADR, for example, legitimizing popular forms of governance and giving conciliation agreements the power of law. Extrajudicial ADR however, will rely more on community participation and support than high level support. The lesson seems to be that the process requires the support of those closest to it (Congress and Ministries for commercial ADR, Supreme Court for court-annexed, and organized community groups for extrajudicial ADR).

53. See interview with Paola Barragan, *supra* note 38.

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

55. See interview with anonymous arbitrator in Santz Cruz (Oct. 18, 1999).

conflict management, rather than prescribing and imposing them.⁵⁶ If negotiation and conflict management practices can be considered forms of communication, and if we accept that communication is intensely shaped by culture-based assumptions and norms, then much is to be gained from integrating the theories and findings of intercultural communication specialists with the model of conflict management.⁵⁷

The background condition most widely cited by ADR stakeholders in Bolivia, regardless of their sector is a self-perceived "culture of conflict," predisposing the population in general to seek out absolute, judicial/legal style resolutions for their disputes.⁵⁸ Another group that subjects itself to similar self-criticism is the Bolivian legal profession, whose training has traditionally been highly formalistic, procedural and adversarial.⁵⁹ This reality has not been directly addressed by the commercial ADR goal setting in Bolivia, but has been a factor in other sectors. The Santa Cruz Center is however partnering with its Chamber-operated Universidad Privada to spread ADR concepts at the community level and thus "sell" non-adversarial approaches to dispute resolution to the broader population.⁶⁰

Commercial ADR responds to a well-defined social need in Bolivia, that of creating the conditions which encourage investment. Bolivia's return to stable democracy was accompanied by exorbitant

56. See, e.g., Paul Salem, *A Critique of Western Conflict Resolution from a Non-Western Perspective*, 9 NEGOTIATION J. (Oct. 1993); David W. Augsburger, *CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS* (1992); F. E. Jandt & P. B. Pedersen eds., *CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA PACIFIC CASES* (1996); Douglas W. Young, *Prescriptive and Elicitive Approaches to Conflict Resolution: Examples from Papua New Guinea*, 14 NEGOTIATION J. (July 1998); William Ury, *Conflict Resolution Among the Bushmen: Lessons in Dispute System Design*, 11 NEGOTIATION J. (Oct. 1995); Stephen E. Weiss, *Negotiating With "Romans"—Part 1*, 35 SLOAN MGMT. REV. (Winter 1994); Stephen Weiss, *Negotiating With "Romans"—Part 2*, 35 SLOAN MGMT. REV. (Spring 1994).

57. A landmark work in the intercultural communication literature is Geert Hofstede, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (1991), which informs this author's approach to designing culturally appropriate practices of conflict management.

58. See interviews with arbitrators, mediators and judges in Cochabamba's courthouse and at the Conciliation Center of the Chamber of Commerce (Oct. 15, 1997).

59. See interviews with Bolivian lawyers and judges; interview with Dr. E. Ramirez, Universidad de San Simon Conciliation Center and Law School Dean.

60. Similarly, the Universidad Mayor de San Simon's Law School is introducing mandatory ADR coursework into the curriculum for existing and incoming students, which should have a broad impact on lawyering in Bolivia in the long run. See interview with Dr. E. Ramirez, *supra* note 59; interview with Dr. J. Iporre, Conciliation Center Director.

inflation rates that reached the thousands in the 1980s. Privatization and global competition damaged several key industries in terms of job and income loss. One imperative response by the state is the strengthening of rule of law that, among other things, encourages foreign and Bolivian investors to stay in Bolivia and create jobs and markets. ADR has begun to provide a low cost, speedy alternative to litigation that also has the capability to preserve commercial relations among the dispute parties. In terms of relieving the backlog in the judicial system, hard evidence of this must await the completion of other USAID/B-sponsored modernizations to the court system, including a USAID project to computerize case management information.⁶¹ This will enable researchers to measure decreases in backlogs and draw inferences as to the source of the reduced backlog, whether it be commercial, extrajudicial or court-annexed ADR, general improvements to court procedures, some combination of these, or extraneous factors.

Commercial ADR service providers believe that they have created a service with the potential to both alleviate court backlog and satisfy new demand by providing services to those who would otherwise not seek out judicial resolution.⁶² It would be wise to link commercial ADR to the broader judicial reforms which are USAID/B-supported in order to capture the lessons of case management, speedy resolution, specialization, and others and transfer such learning to the court system. Only an agency that has promoted both of these activities, in this case USAID/B (or IABF), and has active connections to both could play such a role.

There are other serious social concerns in Bolivia that are not, of course, addressed by commercial ADR. In this regard, USAID/B supported other initiatives that seek to provide increased access to justice, social dialogue, civil society and individual empowerment.⁶³ According to one Bolivian observer, "there is no justice system for the majority of people in Bolivia."⁶⁴ The latent need for access to justice is great in Bolivia and USAID/B's initial support for the diverse ADR initiatives was certainly on track insofar as creating services and constituencies.

61. See interview with Paola Barragan, *supra* note 38.

62. See interview with official, Conciliation Center, Chamber of Commerce of Cochabamba (Oct. 15, 1997).

63. See interview with Paola Barragan, *supra* note 38.

64. Interviews with anonymous mediators, La Paz (Oct. 17, 1997).

2. Program Design

In all three cities—La Paz, Cochabamba and Santa Cruz—the Arbitration and Conciliation Center operates within the organizational framework of its corresponding Chamber of Commerce; IABF has provided basically similar types of support to all three.⁶⁵ All three currently have operational Centers and trained professionals arbitrating and conciliating commercial disputes. This is clearly the most developed side of ADR in Bolivia.

The Centers target resolution of disputes of commercial nature due to contractual differences: payment disputes for goods/raw materials purchased or sold, problems within partnerships, heavy equipment sales/leasing disputes, construction contract disputes, corporate dissolutions, and numerous other types of civil/commercial causes of action.⁶⁶ Types of disputants targeted include domestic business enterprises, individuals involved in disputes with business entities, foreign and international investors and businesses, domestic government agencies and finally the national government itself when it is party to a contract or otherwise subject to private law.⁶⁷ Such state submission to domestic and international arbitration is recognized in Art. 3 of the Arbitration and Conciliation Law.⁶⁸

Screening of cases must be based on the criteria set forth in the Arbitration and Conciliation Law (Arts. 3, 6)⁶⁹ which include any contractual/extra-contractual matter that arises between parties and which is not a matter of public interest or law. Explicitly excluded are only: labor disputes, state actions governed by public law, any matter in which a judgment has been issued (except as related to controversy over execution of the judgment), matrimonial matters, or estate matters where one party is considered incompetent.⁷⁰

The criteria for selection of arbitrators and conciliators are similar in all the Centers. Potential arbitrators and conciliators are drawn from the following groups: business professionals of diverse fields of specialization (engineering, accounting, economists, general managers, bankers, doctors, architects, insurance experts), lawyers,

65. See interview with Fernando Knaut, *supra* note 42.

66. See interview with Dr. Patricia Hurtado, Director of Conciliation Center, Chamber of Industry and Commerce, Santa Cruz (Oct. 20, 1997).

67. See interview with Dr. Ramiro Orias, Legal Director, National Chamber of Commerce, La Paz (Oct. 1997).

68. See *Ley de Arbitraje y Conciliación*, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997), in *GACETA OFICIAL DE BOLIVIA* (Mar. 11, 1997).

69. See *id.*

70. See *id.*

and ADR experts (foreign or national). The available list of arbitrators/conciliators is made public by the Centers so that potential users may choose from this list, if they agree, or the Center may choose the arbitrator/conciliator(s) in the absence of such agreement.⁷¹ This stands in marked contrast to the model adopted in other developing countries, which places severe constraints on non-lawyers regarding the practice of ADR.⁷² The Bolivian approach permitting more diversity in the qualifications of practitioners may be a result of the perceived desire to take advantage of the fact that non-lawyers may be substantive experts in a given dispute area.

The "neutrality" of ADR practitioners is also an issue of program design. It was the enactment of the legal framework (supplemented by internal institutional rules of procedure) that provided guidance on who exactly is *excluded* from serving on an arbitral panel in the interests of maintaining neutrality.⁷³ Economic interests in the disputing parties, certain defined blood/legal relations, having known opinions on a dispute that would prejudice the outcome of an arbitration, and intimate friendship or hostility with one or more of the parties, are the criteria for disqualification of a potential arbitrator.⁷⁴ In interviews, there was also an "implied" criterion for third parties: to be *known* to the community (in the sense of being recognized and of distinguished stature in the business community), rather than simply trained in the techniques of dispute resolution.⁷⁵ This is a lesson generally overlooked by the proponents of ADR training when considering the cultural acceptability of mediators. There is also an emphasis on arbitrator specialization (as compared to the deliberate non-specialization of judges in the Bolivian court system), which leads to more intimate familiarity with the issue in dispute and methods of arriving at adequate resolution.⁷⁶

As is evident in their name, the Centers offer two services to users: arbitration and conciliation. Arbitration is structured in traditional fashion with the composition of an institutional arbitral tribunal temporarily vested with adjudicative powers, which considers documentary, expert and testimonial evidence and issues a judgment and/or an arbitral award not subject to appeal. Conciliation is a less

71. See interview with official, *supra* note 62; interview with Ramiro Orias, *supra* note 67; interview with Patricia Hurtado, *supra* note 66 [hereinafter interviews with official, Orias and Hurtado].

72. See interviews with official, Orias and Hurtado, *supra* note 71.

73. See *id.*

74. See *id.*

75. See *id.*

76. See interviews with official, Orias and Hurtado, *supra* note 71.

adversarial procedure, similar in design to U.S.-style mediation. It is less structured than arbitral procedures, relying on cooperative, joint problem-solving by the parties with greater or lesser degrees of intervention by the conciliator, according to his or her conciliation practice style, and resulting in a written Agreement totally or partially settling the dispute. These are the only types of ADR services offered by the Centers.

The way to enforce arbitral awards or conciliation agreements is by resorting to the judicial system.⁷⁷ Arbitral awards and conciliation agreements are recognized as *cosa juzgada* under the Arbitration and Conciliation Law and are thus legally binding final determinations. Arbitrations and conciliations can be initiated at almost any stage of an ordinary litigation and have the effect of temporarily suspending such action. Should the process break down prior to the termination of the ADR activity, one or more of the parties may end the process and resort to the courts by unilateral or joint declaration (for a conciliation) and joint declaration (for arbitration).⁷⁸ Although the internal rules of the National Chamber do not explicitly indicate, Ch. VI of the Arbitration and Conciliation Law of Bolivia provides that the courts can entertain motions to annul an arbitral award in very limited, well-defined cases. This is the only method of legally challenging a Bolivian arbitral award.⁷⁹

Operational program funding is mainly provided by users fees and subsidized by the budget of the respective Chambers of Commerce. The fee structure is pre-set. For amounts in dispute under U.S. \$3,000, the minimum arbitrator fee (per arbitrator) is 10% of the disputed amount. This extends all the way up to disputes valued at over U.S. \$1,000,000, for which the maximum arbitrator fee is 0.5% of the amount in dispute (i.e., U.S. \$5,000 if the disputed amount were one million dollars). Additional costs include expert witness fees, a nominal amount for administrative costs to the Center (ranging from \$200 to 0.3% of disputes valued over \$1,000,000) and any costs incurred by the Tribunal itself (for travel to a case site for visual inspection, for example). The Tribunal also determines the portion of costs each side is responsible for and includes it in the arbitral award.⁸⁰

The National Chamber operates with a Commission on Conciliation and Arbitration, which acts as a kind of Board of Directors and is

77. See Ley de Arbitraje y Conciliación, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997), in GACETA OFICIAL DE BOLIVIA (Mar. 11, 1997).

78. See *id.*

79. See *id.*

80. See interviews with official, Orias and Hurtado, *supra* note 71.

composed of Commissioners named by the Chamber's management. It includes the principal officers of the Chamber, all conciliators, arbitrators and administrative staff of the Center. This body collectively is to supervise the operations of the Center and its compliance with the internal rules. It will receive applications for conciliator/arbitrator positions, fix the fee schedule, designate conciliators or arbitrators in the absence of party consensus. This Commission also provides procedural oversight for arbitrations and maintains the power to intervene and correct procedural errors or delays, without prejudice to the substance of the dispute being arbitrated. Procedural complaints may be brought to the attention of the Commission by the parties or via direct supervision by Commission members. Finally, the Commission maintains files on all active conciliators and arbitrators, sponsors marketing efforts and conferences, and is supposed to provide periodic reports on the work accomplished by the Center.⁸¹

The approach the Centers have taken is not to be a catalyst to the official justice system, but rather to *circumvent it entirely* with a more viable option. There is no explicit monitoring and review mechanism linking the Centers with the courts in order to transfer lessons learned or procedural innovations to the courts.

In reality, three very different sectors have developed ADR solutions in Bolivia. They all benefitted from USAID/B support via IABF, but were linked by little other than the fact that they seek to offer alternate means of dispute resolution. IABF (alone or in conjunction with USAID/B) identified the stakeholders in each sector in which it was developing ADR. Each sector was involved in its own particular goal setting process, distinct from the strategies of USAID/B and of the other sectors. The goal-setting process for the commercial ADR sector had little or no links to the extra-judicial community conciliation Centers. The very compartmentalization of stakeholders in the ADR development and implementation stages in Bolivia appears to have assisted in the creation of several non-overlapping pro-ADR constituencies, and thus several pools of educated potential service users/providers. ADR goals have been designed by and for different sectors in Bolivia in response to their distinct needs, and these very people who participated in the planning of programs are becoming the conciliators, users of and advocates for the methods. The only potential obstacle is the difference of underlying interests and goals that is perceived to exist between USAID/B and some of the Centers,

81. See interview with Ramiro Orias, *supra* note 67.

which concerns the question of whether or not ADR will create and service new markets not otherwise served, or whether it will primarily alleviate the courts of existing backlogs. Clearly, goals should be reached by consensus between and among donors, executing agencies and end-users, even if they are subject to evolution and change.

The greatest issue facing the program designers in terms of commercial ADR was, for several years, the lack of a unifying, legitimizing legal framework. While the new law addresses both arbitration and conciliation, its main regulatory value is in the elaboration of arbitration procedures and the enforcement of awards. The existence of the law now gives service users the confidence that a reforming judicial system will back up their investment in arbitration or conciliation. Service providers similarly feel more confident that they can market ADR now as part of a bundle of services.⁸²

Early on, the absence of the law led to examination of the trade-off between applying program resources to either arbitration or conciliation. Conciliation, relying on cooperative dynamics rather than the handing down of a judgment, began to be practiced even without the backing of a legal framework. The Centers felt that they could not really offer arbitration services widely until there was assurance that an arbitral award would be recognized as the final determination of a disputed matter (*res judicata*) and thereby prevent relitigation.⁸³ As a direct result of the lack of such official legal support for arbitration until 1997, there was considerably more experience gained in conciliation as compared with arbitration in all the Centers.

Outreach and education of users was strengthened by the existence of the law as well. Since it was drafted by the administration and approved by the President of Bolivia, it demonstrated high level commitment to commercial ADR, a point which is made clear in the marketing materials of each Center. The commencement of outreach and education in the design phase has been determinative in building advocates for commercial ADR and informed users who understand the trade-offs between conciliation and arbitration on one hand and between commercial ADR and the courts on the other.

The counter-narcotics-driven USAID policy goal of alleviating the court system may be laudable but should be supplemented with a

82. See interviews with Pol, Orias and Hurtado, *supra* note 71.

83. See interview with Mónica Jiménez, *supra* note 40; interviews with official, Orias and Hurtado, *supra* note 71.

valuation of commercial ADR for its own sake as a facilitator of conditions that encourage private investment that fuels economic growth and supports democracy.

The issue of power imbalances was anticipated in the design phase of all ADR sectors in Bolivia, and has been resolved mostly because power imbalances are minimized by the separation of ADR services into three the distinct sectors which the resulting general homogenization of types of parties within each sector. Addressing the critical issue of state agency compliance with the country's own Arbitration and Conciliation Law will be a different issue, however, and adequate enforcement measures are not embedded in the law itself. State agencies have the capability to flout arbitral procedures and awards. The only recourse a private party would have is to the official court system, which is still in the process of strengthening itself and becoming independent and modernized. Explicit anticipation of state submission to commercial ADR procedures was a laudable, but perhaps insufficient measure for those who designed commercial ADR. Adequate enforcement measures must be created and will likely rely on the upgrading of the court system.

Cultural legitimacy is not a serious obstacle for commercial ADR in Bolivia. It will become an issue if and when commercial ADR providers begin to offer non-commercial ADR services by interacting with the court-annexed centers and opening community conciliation centers. At that moment, these providers will face the cultural legitimacy issue facing the other ADR sectors; how to integrate indigenous norms in a national rule of law framework and how to respect customs and practices that may or may not be consistent with democratic rule of law initiatives. They will also have to face cross-cultural conflict dynamics that are present, but not controlling, issues in commercial ADR. Commercial ADR should learn from the other ADR sectors to the extent that they confront this problem in a fruitful way.

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

Maintaining political support through the democratic changes of administration in Bolivia will be a factor of obtaining sufficient bureaucratic investment in ADR so that such support survives changes of political leadership. It will also be a matter of encouraging new leaders in the government to endorse and actively promote ADR. Exploiting links to the newly formed Ministry of Justice and to the new Justice Minister are essential tasks. The lack of a formal link between commercial ADR and the court system is an obstacle to obtaining such political support. By transferring knowledge from the commercial ADR sector to the government, such a link can be created and can then be the basis of new relationships with the government. Related to this is the national debate on narcotraffic and coca production which tends to underlie much of Bolivia's relational dynamics with the U.S. generally and USAID/B in particular. The U.S. may wish to de-emphasize the link between counter-narcotics policy and support rule of law reforms, including ADR activities, for the broader development aims that they accomplish, such as facilitation of international private investment, and adoption of respect for rule of law in foreign business dealings.

Political support from within the country receiving the assistance is, of course, a key factor in ADR's success. But the issue is more complex than simply obtaining high level endorsement. In Costa Rica, for example, a successful family mediation center faced shutdown when its operations were transferred from the supervision of the judicial branch to the executive branch of government. Executive agencies are more subject to political fortunes and misfortunes, and this has implications for budgetary stability, staffing and other issues of viability.⁸⁴

3. *Operations*

The National Chamber of Commerce has the most complete performance data, and of the three Chambers, its Center is the one that had conducted both arbitrations and conciliations. From 1994, when ADR activities were begun, to October 1997, the Center had taken in 77 cases for conciliation, of which 59 were brought to a final written conciliation agreement. Five cases were pending and 14 had been discontinued, due to the failure to appear of a responding party or the

84. DPK CONSULTING, *EVALUACIÓN DEL CENTRO DE MEDIACIÓN PARA LA RESOLUCIÓN DE CONFLICTOS (COSTA RICA)* (1996).

CONCILIATION AND ARBITRATION CENTER, NATIONAL CHAMBER OF
COMMERCE, LA PAZ CONCILIATION CASES

Year	Cases	Cases Resolved	Cases Pending	Cases Discontinued
1994	19	17		2
1995	21	19		2
1996	27	18	1	9
1997	10	5	4	1
Total	77	59	5	14

Arbitration Cases

Year	Cases	Cases Resolved	Cases Pending	Cases Discontinued
1994	1	1		
1995	1	1		
1996	2	1		1
1997	8		8	
Total	12	3	8	1

Source: National Chamber of Commerce, Bolivia

withdrawal of a party. Of the 5 pending cases, 4 had been initiated in 1997 and 1 had begun in 1996.⁸⁵

The Center that operates out of the Santa Cruz Chamber describes conciliation as resulting in case resolution after 4 to 7 meetings with the parties and the conciliator, each meeting lasting up to three hours, and scheduled on a weekly basis, yielding an approximately one to two month duration for conciliations in Santa Cruz. This time period varies according to the complexity of the case and the availability of the conciliator and parties. Arbitrations, by law, are to last no more than six months, but upon application of the parties, can be extended for another two months.⁸⁶

All three Centers claim high rates of satisfaction with conciliation/arbitration for users who reached an accord, although there is no documentation to corroborate this. All claim that there was 100% compliance with agreements and arbitral awards.⁸⁷

A concern shared by all Centers is continued financial support for commercial ADR activities. The initial support provided by

85. The data was provided to the author by Bolivia's National Chamber of Commerce in October 1997.

86. See Art. 55, Ley de Arbitraje y Conciliación, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997), in GACETA OFICIAL DE BOLIVIA (Mar. 11, 1997).

87. As of the time this field research was undertaken, for cases between 1993 and 1997.

USAID/B was discontinued at the end of 1997.⁸⁸ The long term effect on commercial ADR operations is uncertain, since USAID/B support has been used to furnish the Centers, train conciliators/arbitrators and to inform potential users. Actual operations, in any case, do not seem to have been underwritten by USAID/B. In practice, the Centers borrow physical space, resources and even personnel and supplies provided by the Chambers to which they belong.

Case management happens along highly structured procedural lines, as is typical in the Latin American civil law tradition. In addition to the specific provisions of the Arbitration and Conciliation Law, the Centers operate with their own institutional rules of procedure that serve to codify the national law.

Relations between the Centers and the donor organizations, USAID/B and IABF, have been generally cooperative, although some Centers have complained that a more comprehensive and strategic approach to commercial ADR (on the part of the donors), is required in order to move beyond the pilot phase.⁸⁹

Monitoring and oversight seems to have received little emphasis in the operations of the Centers. The National Center functions under the oversight of a Commission but the Commission is partly made up of some of the people who actually participate in the Center's operations already. In practice, no Center actually exercises direct supervision of arbitration or conciliation sessions. Rather, informal interviews with users are conducted to determine satisfaction. This information is not systematically gathered, stored or analyzed. There is a complaint procedure against conciliators/arbitrators but it does not appear to have been employed to date in any Center.⁹⁰

Monitoring and evaluation seem to have little impact on the Centers themselves. They have no effect on the official court system due to the fact that results and lessons learned are not systematically channeled into any restructuring of the judicial system, or for example, into the education and training of lawyers and judges. There is no attempt being made to influence the official judicial system in any structured way. USAID/B, given its oversight role, and as a stakeholder in both the broader judicial reform program and the various ADR activities, had the potential to be a channel for such learning. IABF, by the nature of its role as executive agency involved in court-annexed and commercial ADR, also had the potential to link their

88. See interview with Paola Barragan, *supra* note 38; interview with Fernando Knaut, *supra* note 42; interviews with official, Orias and Hurtado, *supra* note 71.

89. See interview with anonymous Bolivian arbitrator (Oct. 19, 1997).

90. See interviews with official, Orias and Hurtado, *supra* note 71.

respective people and lessons learned. It appears that this was not done, or only very informally, if at all.

The early emphasis on conciliation (due to the lack of legal framework supporting arbitration) may have had the effect of concentrating experience in conciliation and consequently in educating more users and service providers in its value. The Cochabamba Center's recent successes in assisting disputing parties to stay their arbitration proceedings and ultimately resolve their differences via conciliation evidences both a preference for conciliation and the benefits it provides.⁹¹

Conversely, the time lag to make arbitration operational was definitely due to two related factors discussed above: the lack of an explicit legal framework linking private arbitral awards to the public judicial system and the general lack of confidence in the judicial system prior to the enactment of reforms.

The successes of conciliation have had a positive impact on users and providers alike despite the newness of an entirely non-adversarial approach to dispute resolution. This is principally due to users' experiences indicating that conciliation is not just a substitute for litigation in the way that arbitration is (it keeps open the possibility of renewed commercial interaction between the parties). Other reasons cited for the positive impact of conciliation include the fact that complex legal regulation is not needed for conciliation and the process itself as practiced in Bolivia is informal and uncomplicated. The absence of attorneys in conciliation processes is also cited as a factor affecting the positive impact of conciliation, since attorneys' legal training/culture has not included ADR concepts or emphasized settlement. The power of commercial conciliation lies in the fact that it stays judicial or arbitral proceedings on the same dispute. The possibility that it be used as a delay tactic is partly addressed by the inability to commence conciliation without the consent of all parties. Unilateral withdrawal from a conciliation procedure is permissible and can have the effect of delaying justice if utilized in bad faith.

From the remarkable progress made on commercial (and other ADR) during the previous administration in Bolivia, it is apparent that political will to support ADR implementation is a key background condition. The first Minister of Justice was easily accessible

91. See interview with official, *supra* note 62.

to key stakeholders in ADR planning. This was evident in his attendance at their meetings, entertainment of funding requests, and his receipt of criticisms of relevant legislation.⁹²

The absence of a national level body promoting ADR as part of wider reform may have affected the progress and continued funding of ADR programs, especially in light of the USAID/B change in funding priorities (although this may impact non-commercial ADR due to its nonprofit nature).⁹³ The second Minister of Justice (appointed in 1998) is a member of the Cochabamba Chamber of Commerce and is reportedly a conciliator with its Center, which awakened hope for continued high-level political support.⁹⁴

The three conciliation and arbitration Centers discussed here are reaching a point of increased provision of services, but are not, by their own estimates, at capacity yet. They seek both to create and to meet new demand, as well as to act as a truly alternative avenue to the court system for contractual disputes. Their expressed concern is that, to grow, they need to have adequate numbers of trained service providers (conciliators and arbitrators), which is precisely the kind of expense they do not feel capable of funding. The growth in their case load has been strong over the last several years even if absolute numbers of cases resolved do not amount to more than approximately 75 per Center to date. Aggressive marketing and educational activities, they feel, will enhance demand for services before there are adequate numbers of trained ADR professionals there to handle it.⁹⁵

The first requirement for assessing staff and case management adequacy is sufficient financial resources to maintain separate commercial ADR staff. Independent third party evaluation may be required in order to periodically assess neutrality, third party performance and competency. Staff at each Center is currently minimal and increased staff will be a requirement for proper growth of each center. Obtaining alternative sources of development funding, in the absence of USAID/B funding, and moving toward financial self-

92. See *id.*; interview with Rodolfo Salama Attie, Official, Conciliation Center, Cochabamba (Oct. 16, 1997).

93. Funding for court-annexed programs and community ADR initiatives are especially vulnerable to a decrease in the level of political support. Such a decrease may result from the lack of outside emphasis on ADR as a distinct element of judicial reform that is to be valued on its own merits and not solely as a means of reducing judicial backlog.

94. See interview with official, *supra* note 62; interview with Rodolfo Salama Attie, *supra* note 92.

95. See interview with official, *supra* note 62; interview with Patricia Hurtado, *supra* note 66.

sufficiency are the obvious recommendations in this regard. While it seems that legal provisions for case duration are a good first start, better measurement of such data as case duration, number of sessions, length of sessions, and ultimate costs to parties are all needed and should be maintained in database form by each Center. Each Center, at least, does have access to computer and software resources that could be used for this purpose. What is required is the systematic design of a process to capture this information and a process for sharing it and utilizing it for planning.

4. *Impact*

In part due to the continuing lack of accurate databases in the court system, direct comparative data on commercial ADR's impact *on the court system* (cases resolved by ADR that would otherwise have been litigated) was not available for the case research. The traditional court system simply is not considered an alternative for the adequate resolution of commercial disputes. Anecdotal evidence of the delay, costs, imprecision and dissatisfaction with court system was amply provided. Qualitative assessments by commercial ADR stakeholders do however indicate that the growing number of cases denotes increasing awareness by potential users of commercial ADR services. Still, in interviews with local business managers who were members of the Chambers of Commerce, it was apparent that there was still great growth potential for commercial ADR. People simply do not know about the services and still need to learn *how* to best utilize the commercial ADR services (inclusion of arbitral/conciliation clauses in contracts, execution of arbitral/conciliation agreements in the absence of pre-existing contractual clauses, etc.). Much material distributed by the three Centers focuses on education of the potential market.

The excellent, though limited, results provided by the Centers are not channeled directly into any learning opportunities for the formal legal system and will have little, if any, discernible impact on the court systems in terms of emulation.

As mentioned above, an explicit linkage between the courts and commercial ADR providers does not exist but would be of great use to both. The Centers would gain political access that can lead to leverage and advocacy, while the government would benefit from the lessons that could be applied to the court system. While there are contemplated instances of interaction between an arbitration proceeding and the court system, there is no such link at the program level. In the program design phase, impact of ADR programs should

be an explicit part of strategic planning. Lateral links to law school faculties and students, bar associations, professional associations of ADR practitioners and the general public can all strengthen and multiply the positive effects of ADR programs by educating potential users, supporters and practitioners.

D. *Other AID Supported ADR Activities in Bolivia*

1. *Court-Annexed Mediation: Cochabamba District Court Conciliation Center (Pilot Program)*

The court-annexed ADR activities supported by USAID/B were initiated in the city of Cochabamba, Bolivia and were designed to serve as a pilot program for other district courts around the country. Art. 95 of the Bolivian Arbitration and Conciliation Law of March 1997⁹⁶ explicitly authorizes the Supreme Court to create such Centers in the district courts around the country. The Cochabamba court-annexed Center, during October 1997, was actively interviewing and selecting candidates for the conciliator positions and had an office and equipment, but was not operational in late 1997 due to the lack of Supreme Court funding authorization.⁹⁷

As designed, the center will entertain only civil cases (but not family law matters) that are brought into the Cochabamba District Court. The referral system is the court itself: all new cases coming into the court first will be considered by the conciliation center and subject to an analysis to determine eligibility for the conciliation. The center's administrator will himself conduct the case review, followed up by a plenary session of the five conciliators, who will together decide on the appropriateness of conciliation. Eligible cases are projected to amount to 50-60 cases per day and would exclude any criminal matters and family law matters, leading to a case load of ten per day per conciliator assuming very speedy resolutions. No fees are charged for court-annexed services.⁹⁸

An element in catalyzation is seen in the fact that Bolivian judges are theoretically empowered to practice conciliation from the bench under existing law and rules of procedure. A *circular directivo* from the Supreme Court recently directed national judges to make use of these inherent conciliation powers and ordered that all trial

96. Ley de Arbitraje y Conciliación, Ley No. 1770 (Arbitration and Conciliation Law) (Mar. 10, 1997), in GACETA OFICIAL DE BOLIVIA (Mar. 11, 1997).

97. See interviews with judges and mediators of the Cochabamba Superior Court (Oct. 14, 1997).

98. See *id.*

judges call parties to at least three judicial conferences for the settlement or acceleration of civil lawsuits, beginning with the interposition of an answer to the complaint (only one settlement conference is scheduled in summary proceedings). Appeals Courts are directed to supervise and enforce the compliance of lower court judges with this order, and in theory can impose some kind of sanctions on non-complying judges.⁹⁹ The center is supposed to interact with this judicial conciliation although the exact relationship is not clear, given practical concerns about mixing the declaratory role of judge and the mediating role of the conciliator. Ostensibly, cases that do not proceed through the court-annexed center and go to the trial docket will be called to conciliation conferences by the presiding judge in much the way that settlement conferences are called by judges in other systems.

A further interesting element is the awareness among Cochabamba's judges and conciliators that indigenous norms may have a role to play in the resolution of conflict within the official justice system. While there is currently no formal link to such norms, the judges are aware of the work of Dr. Ramiro Molina, an anthropologist who worked for the prior administration's Ministry of Justice as Coordinator of Indigenous Justice, who proposes that Bolivia consider itself a multi-ethnic society and state with a pluralistic justice system that recognizes indigenous norms without limiting them only to defined territories.¹⁰⁰

The development of court-annexed, as opposed to commercial ADR, is evidently much slower in Bolivia, due to the design factors discussed above. The links to be made between the two are absent, or at best are tenuous where they do exist.

2. *Extrajudicial Community Conciliation: University of San Simon Conciliation Center*

USAID/B has supported several different types of ADR activities that would fit under this rubric, including the opening of a pilot university-affiliated conciliation center and several different conciliation Centers in marginal communities (some operated by university-affiliated groups). At least four other university-based Centers were in

99. *Acuerdo de la Sala Plena*, Corte Suprema de Justicia (Supreme Court Full Bench Order) (Oct. 11, 1995).

100. See interview with Dr. Ramiro Molina, former Coordinator of Indigenous Justice, Ministry of Justice, La Paz (Oct. 17, 1997).

the planning stages in 1998.¹⁰¹ Other activities related to ADR include: leadership and mediation training for neighborhood leaders, especially women, high school peer counseling in situations of conflict, support for a research institute's project to train people in negotiation skills to be used in national debates concerning coca cultivation and eradication. The most fascinating activities in Bolivia are taking place under the auspices of CDC, a Bolivian NGO staffed and operated by law students. It operates several community conciliation centers in Bolivia and performs numerous ADR related activities at the popular level. Its success has also tended to provide access to justice for those who might otherwise have no recourse whatsoever to formal systems. The Universidad Mayor de San Simon's Conciliation Center is here briefly considered as a case of extrajudicial community conciliation.

IABF has been instrumental in supporting the development of an operational conciliation center under the auspices of Cochabamba's major university. The law school and faculty, in particular, have advanced the project in response to the inaccessibility, cost and structural delays that prevent the official justice system from serving the poorest members of the population. They cite the costliness of even the application process for exemption from court costs as a factor preventing the poor from bringing their concerns to the attention of the judiciary. The center is linked to the law school's Consultorio Jurídico Popular (legal aid clinic). Other articulated justifications for the center include the "preservation and use of cultural methods of applying alternative conflict resolution techniques," and the moral obligation to serve society that is incumbent on a public university.¹⁰² As defined by the center's own procedural rules, conciliation is defined as "assisted negotiation" that the conciliator *facilitates*, while also retaining the ability to propose elements of an eventual agreement when necessary.

Based on a review of the 1995 Cochabamba District Court System caseload (including the provincial and capital branches of the court), the University concluded that 34,019 cases were filed in that year, of which exactly 50% were for misdemeanors and "conflicts resolvable by ADR," such as family matters including division of marital property, child custody, visitation, level of child support, labor

101. See interview with Paola Barragan, *supra* note 38; interview with Mónica Jiménez, *supra* note 40. See also interview with Gardy Costas, Director, La Paz Foundation (Oct. 17, 1997); interview with Nardy Suxo, Director, Centers for Conciliation (Oct. 18, 1997); interview with Dr. J. Iporre, *supra* note 60.

102. Interview with Dr. J. Iporre, *supra* note 60.

disputes, housing disputes, civil damages in criminal matters, damages in traffic incidents, and other private causes of action.¹⁰³ The potential to capture the 17,000 cases that would be resolvable by ADR, as well as the cited phenomenon of conflicts that never enter the system due to its "onerous" nature, constitute the potential demand for services according to the center's own analysis. The center subscribes to a broad approach that seeks to maximize the types of cases that can be conciliated, rather than limit its caseload.

This is the least-developed and least-supported of the three areas of ADR that USAID/B funded. Here too, the links to the judiciary are evident and the potential impact is great. To the extent that law students at the university center are trained to use ADR techniques and exposed to its inherently non-adversarial approach to dispute management, donors can have a potentially large impact on the future generation of ADR practitioners at relatively low cost.

Also, since this is one of the two ADR sectors in Bolivia that would serve the vast majority of rural and urban poor, it is a sector with the potential for a significant grass-roots impact. Investment in it should therefore be proportional to the social benefits that can be derived from such an impact. Such ADR has the potential to develop into an entirely independent and parallel "system" of justice that would serve the population, provided that rights are upheld, agreements are enforceable and systemic injustices do not creep into a given ADR system.

VI. GENERAL LESSONS FOR ADR TECHNICAL ASSISTANCE PROGRAMS

The findings of the above case on ADR in Bolivia are analogous to similar in-depth field research in Bangladesh, South Africa, Sri Lanka, and Ukraine that was used to write *Alternate Dispute Resolution Programs: A Guide for USAID*.¹⁰⁴ While each case study had its distinct features, the case findings generally supported each other. Furthermore, published reports of ADR programs around the world were analyzed for aspects of their design, operation and impact. In all of our research on the practice of ADR, the researchers and authors of the *Guide* found support for the following "lessons" that should be highly useful for the implementation of future ADR projects and the operation of existing ones in states in transition.¹⁰⁵

103. See interview with official, *supra* note 62.

104. *GUIDE*, *supra* note 1.

105. Analyses in this section are either based on the author's observations or are derived from *GUIDE*, *supra* note 1, in which the author contributed segments of the literature review and the Bolivia case study.

A. *Uses of ADR*

ADR programs in transitioning states can support and complement court reform efforts. Insofar as they alleviate court backlogs, the courts are freer to implement other systemic reforms. Alleviation of backlogs is itself an absolute benefit. The interaction between ADR and courts, however, must be explicitly designed. Lessons learned from non-court ADR fora must be systematically transferred to the court context, as well as court-annexed ADR programs. Such suggestions include:

- By-pass ineffective and discredited courts while also helping to resolve cases that are poorly handled by courts, such as ethnic conflicts, public environmental and land use disputes or other cases requiring specialization that courts cannot or do not (by design) provide.¹⁰⁶
- Increase popular satisfaction with dispute resolution, especially where there may be a societal preference for conciliation, as opposed to “prevailing” over an opponent. Numerous cultures under-emphasize the competitive value of winning or prevailing and instead place greater value on the maintenance of social networks and relationships. Even in adversarial systems, the reduction of the intensity or the streamlined procedural quality of ADR (relative to court procedures) help to promote satisfaction.¹⁰⁷
- Increase access to justice for disadvantaged groups. Economic marginalization and illiteracy often prevent people from using court systems. In some countries’ judiciaries, such as in Guatemala until at least the mid 1990s, there was still no planning to integrate oral presentation or argument. This is a marginalizing factor for those who cannot write and necessitates the expense of lawyers. The inaccessibility of the courts is also due to backlogs, a labyrinth of procedures, prohibitive fee structures, and the sheer intimidation of ponderous bureaucracies, among other factors. Well-designed ADR programs can circumvent or mitigate all of these.¹⁰⁸
- Reduce costs and delays in the resolution of disputes. Costs derive from court and attorney fees, delays that interrupt relationships and opportunity costs. To the extent that ADR service providers do not impose fees on users and preserve social or commercial relationships that are in conflict, these costs are reduced. Even where

106. See GUIDE, *supra* note 1, at 9.

107. See *id.* at 12-13.

108. See *id.* at 13-14.

fees are charged, as in commercial ADR, they still represent significant savings over litigation.¹⁰⁹

- ADR can also support other development objectives, including strengthening civil society, increasing public participation in policy debates that affect economic restructuring and other political debates. Capacity-building in ADR methods often takes the form of negotiation and conflict management training. This in itself can be empowering for the individuals who go through it and grass roots organizations to which they belong. Several of the Bolivian initiatives are explicitly designed to strengthen social participation in this way. Of course, such empowerment is not in itself a "fix" for social problems with systemic causes. Where such social problems can benefit from the establishment of legal rights, such as minority/majority group conflicts, these must be separately concretized and enforced in order to address societal power asymmetries that can carry over into an ADR forum or any other dispute resolution forum, for that matter. If ADR is to stand on its own and provide alternatives to courts, then paradoxically, the links between ADR solutions and their enforcement in the courts must be strong and such enforcement must be efficient in time and cost.
- Generally reduce the level of conflict in a given community by disposing of outstanding conflicts and demonstrating the tractability of such conflicts. This does not replace the need for provision of social justice or structural changes that might be needed to resolve a particular dispute.¹¹⁰
- Help resolve social disputes that affect other development objectives. For example, where the strengthening of civil society is part of a donor's set of development goals, ADR may have a role to play. Environmental, land-use or natural resource conflicts with significant impacts, if equitably resolved, can benefit sustainable development generally, and increase popular participation in policy/decisionmaking on significant social issues.¹¹¹

B. *ADR's Limitations*

The field and literature research of this project lent support to those who are concerned that ADR programs have certain limitations arising from its reliance on party acceptance of outcome, rather than on judicial norms and processes. In particular:

109. *See id.* at 13-16.

110. *See* GUIDE, *supra* note 1, at 19.

111. *See id.* at 19, 20.

- ADR is not a legal framework per se. It does not create laws, precedents, rights, standards. Its main value is as a “tool of equity” rather than a “tool of law.”¹¹²
- ADR cannot redress pervasive injustice or human rights problems that require policy changes and possibly some kind of restitution. Social norms, biases and practices are easily embedded in ADR programs as they might be in any social institution. Gender, ethnic or religious discrimination and other forms of injustice may thus be perpetuated by a national ADR program if such concerns are not explicitly anticipated.¹¹³
- ADR cannot always adequately resolve cases between parties in which there are significant power asymmetries. In this regard, the state’s role as a party to a dispute is of concern. If state agencies and government organs do not have a history of compliance with judicial rulings or even of submitting to judicial procedures, the use of ADR initially may not be appropriate. Such disputes can probably be best addressed by a functioning, efficient and independent judiciary. Where government agencies or powerful state-connected entities have traditionally imposed their will on people by means of violence, or bribery or other imposition, it is difficult to envision their participation in consensus-based methods of dispute resolution. The slow emergence from civil wars and external intervention in Nicaragua, Guatemala, El Salvador, Cambodia and other countries, or the ongoing context of terrorism and state repression as in Sri Lanka, provide especially challenging contexts for the functioning of ADR programs. They may need to carefully restrict the types of cases they handle (for example to family, or small-claims matters) until imposition, repression and violence can no longer be relied upon as “solutions” to disputes.
- ADR does not provide demonstrative justice in cases requiring public sanction, since by definition, it relies on cooperative procedure rather than punitive measures. Crimes against which a deterrent effect is sought are of course not appropriate for ADR, although there may be residual value in providing conciliation services once a criminal procedure has run its course. Domestic violence, other violent crimes, and crimes in general often require sanction by an impartial system of justice because they result in situations in which there are clearly victims requiring restitution of some kind. In contrast, situations in which rights are in dispute, as in many

112. *Id.* at 21.

113. *See id.* at 21-22.

civil disputes, are far more amenable to ADR since there is no need for punishment, which ADR cannot by definition provide.¹¹⁴

- Although ADR procedures may be capable of handling multiparty and complex disputes, it is an inappropriate mechanism when one or more party is excluded from the process because costs may be shifted to absent parties who might be otherwise protected as a matter of law in a court or other official forum.¹¹⁵
- Development resources should not be diverted to ADR at the expense of comprehensive judicial reform. The inter-relationship between ADR and efficient courts, in terms of linkages, enforcement, and other areas, makes this concern self-evident.¹¹⁶

C. *Background Conditions*

Not surprisingly, background conditions are of great importance in the implementation of successful ADR programs. The background conditions associated with ADR programs that meet their goals include:

- Political and grass-roots support. Naturally, support from high-level government officials is essential to the success of any public project. ADR is no exception. This includes securing the legal framework within which ADR will be legitimized, placement of ADR activities within (or outside of) bureaucratic organizations where they are protected against loss of resources. High-level support can overcome skepticism and vested interests that oppose ADR. In the Bolivia case, we found that ADR had co-opted opposition by including bar associations in the planning and design stages. Bolivia also benefitted from having justice ministry officials who were members of chambers of commerce with ADR programs. The support of constituencies that will eventually use the services is also important and requires both an up-front and ongoing commitment to education and marketing. Support from prominent local leaders can also facilitate public acceptance.¹¹⁷
- Supportive cultural context. The findings affirmed the importance of several cultural norms that are associated with successful public acceptance and implementation of ADR programs, including any indigenous traditions of informal dispute resolution, widely-held standards of justice and equity, the absence of generally accepted discrimination and social emphasis on non-enforced compliance

114. See GUIDE, *supra* note 1, at 22.

115. See *id.* at 22.

116. See *id.* at 23.

117. See *id.* at 24-25.

with agreements. Furthermore, ADR programs should be culturally protected from broader, socially expected and official corruption or bias. An Indonesian ADR program suffered from user perceptions of mediator bias and the concern that discriminatory social structures were perpetuated in the ADR program itself. This in turn had a negative impact on the success of mediation efforts.¹¹⁸

- Adequate human resources. ADR programs need several layers of human resources in order to operate effectively: professional practitioners (those who arbitrate, mediate, etc.); managerial staff that handle case load, procedures and policies; and staff that can administratively support these tasks. The skill level of ADR staff is a key factor in success, including the proper selection, preparation and supervision of staff. While some programs (such as all ADR in Argentina) limit practitioners to certain professions such as law and psychology or social work, it appears that professional training and substantive knowledge are somewhat less important than acceptability and respect of the community of users. Not surprisingly, the quality of personnel directly impacts both outcomes and user satisfaction. This is the human interface of ADR: ADR programs need adequate numbers of informed, honest, well-trained and supervised staff to succeed. Sweeping legislative changes in a state undergoing political and economic transition can dramatically increase the demand for ADR services. Therefore, the timing and quality of training, as well as the retention of adequate numbers are important human resource factors. The question of personnel and staff is also arguably, a consideration for program design.¹¹⁹

D. Program Design Considerations

The following design considerations were sketched out with the understanding that ADR programs will differ in their goals and their cultural and institutional setting. Nevertheless, they should be considered general guidelines with fairly universal application to development projects of this type. The analysis used in the *Guide* divides design considerations into two subsections: i) planning and preparation, and ii) operations and implementation.

118. See Christopher Moore & Mas Achmad Santosa, *Developing Appropriate Environmental Conflict Management Procedures in Indonesia: Integrating Traditional and New Approaches*, CULTURAL SURVIVAL Q. (1995).

119. See GUIDE, *supra* note 1, at 33-47.

1. *Planning and Preparation*

- Planning and preparation begins with conducting an assessment of dispute resolution needs the program will meet, defining the goals and understanding the background conditions in which the program will operate. There are different assessment methods available, including polling constituents, as Costa Rica and Bangladesh have done, and conducting surveys of those who use the courts. It is important at this stage to understand what kinds of cases are not being resolved under existing structures, what populations are not being served and why. The answers help determine what kinds of disputes for which ADR will be appropriate. The early definition of goals for ADR programs is an important part of good planning, as are the ongoing assessment of feasibility of such goals, and their match with other development activities.¹²⁰
- It is important to assess the state of judicial training and attitudes toward ADR early on, as judges and lawyers will both participate and be challenged by ADR mechanisms. USAID's own studies of ADR in Uruguay showed that the Ministry of Justice had to be circumvented while ADR programs took hold in the Ministry of Labor to deal with work disputes.¹²¹
- Public participation in the design of ADR programs has been shown to be especially important where local customs and norms are strong. This helps to build supportive constituencies and public input demonstrates where there may be clashes among customs, norms and ADR goals. It is also essential to understand and respect predominant local institutions for community dispute resolution. Indigenous populations often employ traditional mechanisms with clearly defined roles and responsibilities. These will have to be left untouched or incorporated into ADR design.¹²²
- As noted in the Bolivia case, ADR programs may have to be legitimized by legislation, with clearly defined relationships between ADR agreements and court enforcement, in order to operate. Other related considerations include the kind of disputes that are excluded from ADR, whether referral is mandatory or voluntary, at what points in an existing judicial proceeding ADR can be used, provisions for unilateral withdrawal, and the oversight of the courts. All linkages between ADR and courts lead the program designer back to questions of public trust in the courts, the courts'

120. *See id.* at 34.

121. *See* HARRY BLAIR ET AL., A STRATEGIC ASSESSMENT OF LEGAL SYSTEMS DEVELOPMENT IN URUGUAY AND ARGENTINA (USAID WORKING PAPER 192) (1994).

122. *See* GUIDE, *supra* note 1, at 36-37.

capacity, and the courts' reputation for honesty and efficiency. The Bolivia case demonstrates the linkage USAID drew between judicial reform and ADR by conditioning support for judicial reform on the passing of the ADR legislation, which tended to encourage support for ADR.¹²³

- Development agencies, donors and development consultancies are to some degree removed from the local context of their work. It is imperative that they form effective local partnerships with parties who will manage the implementation of a program. Criteria include financial stability, representativeness, and being attuned to prevailing social norms of conflict resolution.¹²⁴

2. Operations and Implementation

- Related to the background condition of human resources is the selection, training and supervision of ADR program staff. In transitioning countries, the key concern is acceptability of the mediator/arbitrator/conciliator, however acceptability is defined. Criteria include "notable" status, as is often seen in Latin American, Asian and Middle Eastern contexts. This sometimes gives rise to a concern for mediator neutrality. Other practitioners, often "outsiders," may not have the vested authority of notables, but may provide other benefits, including concern for advocating for disenfranchised parties, concern for process and transparency, and objective norms of dispute resolution. On the other hand, non-notables may be removed from locally acceptable norms of fairness.¹²⁵
- One design consideration that seems particularly under-emphasized in the literature is program oversight. Most programs claim to have some mechanism of supervision of mediators and other practitioners, but few discuss the results of such supervision. In order for ADR programs to protect themselves from being tainted by the corruption that sometimes characterizes judicial proceedings, they must demonstrate their trustworthiness on an ongoing basis, not simply at program initiation. Mechanisms for observation of ADR sessions, receipt of user complaints, exit interviews with users and continuing education of ADR practitioners are some of the mechanisms that should be considered in a supported ADR program.¹²⁶

123. See interview with Paola Barragan, *supra* note 38.

124. See GUIDE, *supra* note 1, at 40.

125. See *id.* at 40-42.

126. See *id.* at 43.

- Related to supervision is the need for program evaluation. Alignment of outcomes and initial goals should be regularly determined and continuous improvement should be part of the goal set of an ADR program. This involves the collection and analysis of reliable case data, including quantity of cases processed, qualitative outcomes, party satisfaction, compliance, savings, and length of proceedings. Regular review of such data is needed to understand where program progress is being made or is needed. Obviously there are material needs, such as computers and software, that are essential for the maintenance and analysis of data.¹²⁷
- Case selection and case management. In the needs assessment phase, the kinds of cases susceptible to ADR must be determined. Then the program must be designed to address such cases. Inappropriate fit between cases and program will harm the credibility of any ADR program, especially where this mismatch leads to poor case outcomes. In Costa Rica, one family mediation program set up very stringent “filtering” processes for determining case eligibility and thereby maintained a high success rate. Although it is important for programs to succeed, there may be a trade-off between stringent case criteria that reduce chances of failure, and attaining adequate numbers of successful cases. On the other hand, the Costa Rica program cultivated a good reputation among its user population and kept up levels of user satisfaction.¹²⁸

VII. CONCLUSION

Intensified global interaction, coupled with dilemmas and challenges faced by states in transition have helped fuel the search for alternative mechanisms of conflict management. States in transition will need to seek institutional solutions to both traditional and emerging social problems, ranging from traditional disputes over contracts and minor commitments, to equitable and sustainable use of natural resources, to complex transnational and transcultural business disputes. The ability to manage these disputes while strengthening rule of law and the climate for globalized economic development, and simultaneously providing access to justice for the least powerful members of society are key challenges. ADR programs can help achieve these goals in a number of ways even while their limitations must be kept in mind. ADR must be understood in terms of contextual factors and it must modify or adapt these factors. The

127. *See id.* at 46-47.

128. DPK CONSULTING, *supra* note 84.

design and implementation factors to be considered require long-term management and investment in terms of human and financial resources, a consideration that both donors and host countries and local partners must bear in mind.

The internal and external demands on states in transition are overwhelming. The provision of services and creation and protection of rights, norms and institutions for constituents are tasks often carried out with the assistance of the international community as well as expatriates and local experts. They will need jointly to design appropriate ADR mechanisms that can address internal and external needs. In the external context, investors, multilateral regimes and international organizations make their own demands on states in transition and often condition their assistance. In this regard, it is important for donors and hosts/local partners to be in substantial agreement on program goals, indicators of success (to the extent that support is based on such indicators), areas of responsibility and duration of development support. ADR programs can then play an effective role in satisfying both internal and external demands.

As ADR programs evolve in transitional contexts, new research will have to be conducted in order to determine if the analytical frameworks used in this study were balanced and sufficient, or if others suggest themselves in order to best plan, implement and evaluate ADR programs.