

THE WORLD BANK

ALTERNATIVE DISPUTE RESOLUTION WORKSHOP

Thursday, January 6, 2000

11:00 a.m.

Room MC4-800

1818 H Street, N.W.

Washington, D.C.

[TRANSCRIPT PREPARED FROM A TAPE RECORDING.]

MILLER REPORTING CO., INC.  
507 C STREET, N.E.  
WASHINGTON, D.C. 20002  
(202) 546-6666

MILLER REPORTING CO., INC.  
507 C STREET, N.E.  
WASHINGTON, D.C. 20002  
(202) 546-6666

C O N T E N T S

AGENDA ITEM:	PAGE	
Remarks of Dianna Chigas and David Fairman, Conflict Management Group, Boston, Massachusetts "ADR: A Practitioner's Perspective"		3
Remarks of Deborah Hensler, Stanford Law School "Empirical Research on ADR Programs"		43
Remarks of Nan Shuker, Superior Court of the District of Columbia	71	
Discussion	76	

P R O C E E D I N G S

MS. CHIGAS: A couple of words before we actually get into some of the meat of what we'd like to talk about, just about how it was and how we went about doing it.

The purpose of it was to review and analyze ADR experience in developing countries and develop some guidelines for USAID staff on what key issues they might need to consider when initiating and designing ADR programs. It wasn't a guide on how do you go about designing an arbitration program or a mediation program, but it was really about what do you need to be thinking about in order to prepare--whether it is appropriate and then, if you are going to go ahead, what kinds of things you might want to consider in the design--and then to provide some ongoing support to USAID missions in implementing and assessing ADR programs.

The methodology, which David will talk about a little bit--we reviewed all the published--well, not "all," because there is a lot--a lot of published and sort of "gray" literature on ADR programs in developing countries. In the background materials, there is a copy of the guide,

and there is an annotated bibliography that summarizes a lot of what we reviewed.

We developed some hypotheses on background conditions and design criteria, and then conducted five case studies, both representing a geographical disbursement of variety and different kinds of programs to explore the hypotheses and then synthesized that in the guide, both the literature review and the case studies for the guide.

David will tell you more about what the case studies were and give you a little bit of summaries as we speak about some of the conclusions that we came up with so you'll have some port of reference for what we were talking about.

MR. FAIRMAN: Thanks, Dianna.

I apologize in advance for my scratchy throat and look forward to the amplification helping me out here.

Before we go further into talking about the findings from the guide and the case studies, I just want to make sure we start roughly on the same page about what we're talking about when we talk about alternative dispute resolution.

You can see that--well, maybe you can see--we are talking about a range of methods and techniques for resolving disputes that run from unassisted negotiation where parties directly seek to resolve the issues between them, through nonbinding forms of third-party intervention, conciliation and mediation in which a third party seeks to help the parties in dispute reach a decision or reach an agreement that meets their interests, but that third party does not himself or herself have binding authority, cannot force the parties to agree to anything; nonbinding arbitration, where the third party may give an opinion as to a fair or efficient solution and propose that to the parties, but again, does not have the power to compel them to agree to the proposed solution; and then, what we are mostly familiar with in the judicial system in which a third party, a judge in many cases, renders an opinion or a decision that is binding upon the parties.

The domain that we are primarily focused on in our study and in what we are going to talk about today is really in those two middle columns--conciliation and mediation primarily. To some extent as well we will see in some of the cases that we're going to talk about nonbinding

arbitration and some forms of binding arbitration, particularly in the commercial sector. But that's where we are starting from, and we just wanted to give you an overview of the concept that we're talking about.

You will see also some more specific options and procedures, particularly in regard to conciliation, mediation and nonbinding arbitration, different forms of procedure that can be used for different kinds of situations.

With that as background, I'll just say a little bit about the kinds of programs that we looked at in our field work for this guide. We looked at five cases in different parts of the world. Our goal was to have a sample of different approaches to both community and commercial alternative dispute resolution, to have diversity in countries, some common law, some civil law traditions, diversity in levels of economic development.

What we found as we looked across these five cases was that some of the hypotheses on background conditions and design criteria that we had developed through a desk review of literature on ADR did indeed hold up pretty well as we probed in particular cases with field researchers who in

most cases went for between 5 and 10 days to each of these places and interviewed a range of stakeholders, including public officials responsible for managing these programs, users of the program, and academic and non-government experts familiar with their operation.

Very briefly, in Bangladesh, the Madurapur [ph.] Legal Aid Association, with support from USAID and the Asia [ph.] Foundation, is running a community mediation program that reaches roughly a couple of hundred villages, or did at the time we looked at it in 1997, and uses mediators selected by the community, offers them training and has some full-time staff for oversight, and that system was developed independent of the Bangladeshi court system--a deliberate choice--and that choice was itself based on a quite detailed and thorough needs assessment that involved interviews with over 200 villages in rural areas who were the primary target group for the program.

The program is generally viewed as successful. Satisfaction and settlement rates are high. There are questions about its financial sustainability and its long-term links with the judicial system, and we can talk more about that.

In Bolivia, we looked at an arbitration program for commercial disputes that was started with support from USAID and worked with three chambers of commerce in three Bolivian cities. The goal of that program--there was an indirect goal, which was to help the United States' long-term judicial reform process, particularly to speed and assist the process of dealing with narcotics cases by reducing the backlog of other kinds of cases in the Bolivian court system. There is also a goal of promoting economic efficiency and economic development in Bolivia through promoting faster resolution of commercial disputes.

That program has had mixed success. There is a major question in its design about the sequencing because there was not a law in place that gave court sanction to arbitration awards or to conciliation agreements prior to the beginning of the program, and actually, in the first three years of the program, there was a simultaneous effort to get that law passed.

The lack of clarify about the status of agreements reached through arbitration or conciliation seems to have kept demand for this program quite low in Bolivia. It would be interesting to go back now that that law has been passed

and to see whether in fact there is greater demand, and some of you may know more about the situation in Bolivia now than we do.

In South Africa, we looked at an NGO called IMSA, the Industrial Mediation Service of South Africa, that is very well-established in a range of different sectors in South Africa. We looked particular at its work in the labor dispute sector--not so much collective bargaining as individual labor grievances. IMSA was started by practitioners who were trained in alternative dispute resolution in the United States and Europe and brought back a set of ideas and skills for mediation and arbitration of labor disputes. They started this NGO in relatively unfavorable political circumstances but where there was a strong legal framework protecting workers' rights, and have been quite successful in building up a program that now has about 200 trained, certified mediators and arbitrators for labor disputes across South Africa.

An interesting effect of the transition in South Africa has been the wholesale adoption of the kinds of procedures that IMSA pioneered by the South African Government for the arbitration of labor disputes. That has

actually been a mixed blessing for IMSA because most of those disputes now go to the Government rather than to its own program. However, a lot of IMSA staff have now themselves made the transition to working inside government, so this sort of institutional shift from the NGO sector to the Government overall seems to have been very effective.

The fourth case we looked at was Sri Lanka, where the Government has a very large-scale, compared to most ADR programs, community-based mediation and conciliation program. There are about 218 mediation boards across the country, mediating something like between 250,000 and 300,000 cases a year at the village level. Here, mediators are selected and nominated at the local level, usually village notables, but their appointment is reviewed by a national commission which determines their eligibility using a few simple criteria for service on local mediation panels. The local mediators are supported by a relatively small staff at the national level. They are all volunteers. They have a very small budget for payment of expenses. The national Government of Sri Lanka, particularly the Supreme Court, has been very supportive of the program and funds the

vast majority of its budget. Aid agencies fund additional training and supervision for mediators.

This is, broadly, a remarkably effective national-level effort and one that deserves study by people who are interested in promoting the use of ADR in community settings on a very wide scale in other parts of the world.

There is a lot more to say about how Sri Lanka was able to get to this point; also, that Sri Lanka had an earlier experiment at the national level that did not work very well, and a lot of the success of this program is based on learning from past mistakes.

The last program that we looked at was in the Ukraine, the Ukraine Mediation Group, which is a loose affiliation of roughly 40 or 50 trained professional mediators in four cities, plus a wider network of volunteers, who mediate a very wide range of cases, although their primary interest for the long term is in commercial disputes as part of the broader transition to a market economy in Ukraine.

The Ukraine Mediation Group has faced a number of very significant cultural and legal obstacles to its work. Culturally, there is very limited experience with and a

great deal of skepticism about third-party resolution of disputes both within the Government and outside it. It is part of a generalized cultural concern about the role of third parties as neutrals, and can anyone truly be neutral. There are also legal obstacles to Ukraine Mediation Group's work--both the limitation on the ability of NGOs to charge fees for service and a legal mandate that once a case has been entered into the court system, it cannot be mediated. If you want to mediate, you have to withdraw from the court system and loose your filing fee. Those are both issues that USAID and Ukraine Mediation Group and other agencies are interested in addressing as part of broader judicial and legal reform.

Nevertheless, Ukraine Mediation Group has been able to demonstrate the effectiveness of mediation, particularly in labor disputes. They mediated a couple of major mining strikes, and they are also doing dispute system design for organizations that are undergoing the privatization process, to resolve disputes during that process.

I just wanted to give you some flavor of the range of programs that are out there under the broad rubric of ADR, and again, we can come back and talk more about them.

Let me just say a little bit about the key findings from our study, again, looking both at our literature review and the case studies that we did.

What we wanted to highlight coming out of this experience is that it is very clear that ADR programs can play a positive role in support of judicial reform. There is evidence that they can reduce the cost and time to resolve disputes compared to what people would go through in the court system. Deborah may want to say more about how that evidence stacks up against evidence from the U.S. court system which may be a little less clear--evidence of dispute in satisfaction with process and outcome, those who have used ADR systems, and significantly for broader social development objectives, greater access for the poor and disadvantaged groups to some form of justice. Whether that is second-class justice compared to what might be possible if broader legal reforms and political reforms were achieved is very much an open question, and the question of whether ADR systems divert political energy from promoting the

rights of women or poor or minority groups in society to resolving particular disputes is something that I think we all can talk further about, and I don't think we have any kind of definitive answer. We have anecdotal evidence that indeed, in some cases, ADR programs can provide better outcomes than a realistic assessment of a near-term alternative that is available to the poor, women, et cetera, particularly low-income groups.

We also really wanted to highlight in our findings that although our main focus was on court-annexed or at least legally-sanctioned ADR programs in the commercial sector and then on community dispute resolution, there is a broad range of development objectives that ADR programs can support, and they can go beyond court-annexed and community-based programs.

For example, in land reform disputes, the Philippines has established a Land Reform Mediation Program that is not directly related to the court system but falls under the jurisdiction of the Department of Agrarian Reform in the Philippines.

Indonesia has had an interesting and rather mixed experiment in mediating major environmental disputes. There

is some controversy over the use of government officials as mediators in those disputes. But the idea is that ADR, in terms of conciliation and mediation and non-binding and binding forms of arbitration, provides a set of techniques that are generic and can be used whether within the domain of a court system or beyond it in particular sectors. We think it is important to remember that.

It is also important to remember some limitations of ADR programs. They really can't and shouldn't, arguably, be used as substitutes for the reform of corrupt or grossly inefficient judicial systems, partly because there are fundamental rule of law concerns that ADR processes cannot answer. They cannot establish precedents. They cannot establish rights. And where those are fundamentally important concerns from a rule of law perspective, it is important to focus on judicial and legal reform.

Nor is it realistic to expect ADR programs in and of themselves to reverse longstanding social and political patterns of discrimination--although, as we say, in particular cases and particular programs, some progress can be made for disadvantaged groups.

Lastly, as Dianna is going to launch into in more detail, we found that a number of specific background factors and design criteria can have a significant impact on the chances for an ADR program to succeed in meeting its stated goals.

Just a clarification about those two terms. By "background factors," we primarily mean factors that are largely beyond the scope of the design of the program itself. By "design factors," we mean things that can be directly affected in the design of the program and in its implementation.

Let me turn it back to Dianna to say more about that.

MS. CHIGAS: We came up with a sort of process answering four kinds of questions that we'll go through in order--I'll take the first two and David, the second two-- and what kinds of factors as we are thinking about developing an ADR program.

The first two, I'd call sort of a preparation or pre-design phase, assessing what the dispute resolution needs and goals are and thinking about is ADR appropriate at all, will it fit the needs. I'm thinking about cases where

it is appropriate and not. That will partly depend on the other two questions that David will talk about. One is the background factors--is it feasible, is it realistic to say that even if it's a good thing to put in an ADR process or some sort of mechanism, given what is going on and certain background factors which seem to be consistent across the case studies that we use, is it feasible to put in something that will have some chance of success. And then, how can the design process effect the possibilities for an ADR program succeeding, and there are certain factors that we identified that seem to be common again across the case studies.

We are not coming up with "how to," but certainly identifying certain issues that would be critical.

Coming back to the needs assessment piece--this is probably something that everybody goes through--but I just wanted to highlight a couple points that seemed to come out of the studies that we did.

First is identifying what are the needs, what are the gaps, and what are the barriers to the existing systems performing whatever functions need to be performed. There was a wide range, I think, in the case studies--certainly,

let's say it was harder to detect from the literature, because there was not a lot of evidence--but certainly in the case studies that we did, there was a range of assessment methodologies that were used, from a very, very complete and complex one in Bangladesh to something that was much more cursory in Bolivia, for example.

And the couple of things that seemed to come out from the more successful programs among the case studies that we used was when was the need to look at that general context and the barriers to both the courts and other ADR mechanisms performing some of the functions and learning not only lessons from the past but looking at those kinds of barriers--but also looking at broader public attitudes toward whatever kinds of ADR systems might be developed.

We looked at a couple of cases. In Costa Rica, for example, there were a number of ways of assessing public opinions. In Costa Rica, they did a public opinion poll which showed that--I can't remember what the statistics--but a large proportion, up to 90 percent, of people thought that family cases were cases that the courts should not have exclusive jurisdiction over. So as they were designing the ADR system, when they put it into the family sector, it

immediately took off and immediately had very great demand and seemed to be very successful. They actually did a Gallup poll, a very broad public opinion poll.

Bangladesh was a narrower but still very extensive assessment. They did two sets of interviews. The first set interviewed 320 people from a variety of backgrounds in the villages to get a sense of what their perceptions were, broadly, in terms of participation in social groups, in democracy, as well as dispute resolution needs, and then formulated a set of hypotheses about goals for a program and then went back and interviewed another 550 people to test the goals that they had set before they actually sat down and designed the nitty-gritty of it.

The interesting thing in Bangladesh--two things. One is that the Government participated, but to a very limited extent. I think the Government in that case had decided that it neither had the resources nor the expertise to really run that kind of program. So they were consulted, but they didn't take the lead.

The other piece that they did in Bangladesh which was also very interesting and I think not the norm in a lot of the ADR design was that the elites in the cities were

pretty much deliberately left out of or had a limited role in interview and the assessment process. This was quite deliberately, in that they thought the target audience was going to be rural populations, and they really wanted to get a sense of the target audience and what the needs were there, and they were afraid that the elites' agenda and the agenda of the target population might be different. So they were really quite consciously trying to avoid having the elites run and take over the process.

Going back to the needs assessment again, the kinds of issues that come up are issues of accesses and then what are the barriers to access, because there is a wide range, and we have found anything from issues around illiteracy, issues around social norms and cultural norms-- in Bangladesh, for example, we found that not only illiteracy but issues around hiring lawyers and dealing with people of different castes was a big barrier to people actually moving and using the court system, and they felt much more comfortable with a more informal system that relied a lot more on oral presentation in which enforcement didn't need a great degree of documentation.

It may be geography. People may be dispersed. In China, for example, I think there are more than a million people's mediation centers serving populations that would have a hard time getting to courts because they were quite remote geographically.

There may be resource issues around costs, not only filing fees, cost of lawyers. In cases where there is corruption or is perceived to be corruption in the courts, having the resources needed to be able to manipulate your way through the system is another kind of barrier to access; and then discrimination, certainly in a number of the cases. I think women in Bangladesh directly addressed that issue and felt they didn't have access to the courts.

There may be issue around cost, which we talked about. There may be issues of time--the IMSA program that David talked about was really pretty directly designed to address issues of cost and time. The conciliation courts that were dealing with labor disputes in South Africa in the apartheid times had an extraordinarily complex and archaic set of procedures which meant that you could wait up to five months to even get to court, and then, with the appeals

process, it could be several years before very simple kinds of cases would even get resolved.

By contrast, with IMSA, within a day, most small cases were resolved. More complex cases took two to three days.

In Sri Lanka as well, the program there was really designed to deal with some of the cost and time factors, because the courts in Sri Lanka in fact are viewed quite positively. But the backlogs, particularly in some of the geographic issues, made it useful to have some sort of complementary, supplementary method for resolving disputes.

Then, there may be issues of fairness--are the courts biased, are they easily manipulated by powerful state actors or powerful social actors, and how is that perceived by the public.

Going back to the goals issue, we raised a couple of issues on the goals definition, because that clearly had a very big impact on success, and I think Deborah will probably talk more about that as well in the evaluation process.

The first is how important are the clarity of the goals and clarity of the understanding of the context and

background factors, which David will also talk about later, how important that is. There are a number of cases that have had very mixed success, I think partly because the goals were not very clarified and did not tightly fight with the design of the program.

Colombia had a conflict resolution project whose goal was to provide low-cost services to disadvantaged parts of the population. The local partner chosen was the Bogota Chamber of Commerce whose clientele was primarily business elites.

So in the project, there was neither a very clear definition of the target client nor a very clear definition of a goal for reaching the target. As a result, they had low-cost and very efficient processes that served a small business elite, but not the population that it was supposed to be designed to serve.

In Bolivia, which we studied directly, again--I don't know what kind of pre-evaluation they did do; I don't think that came out in the study--but the goal was really related to counter-narcotics goals of the U.S. Government. The idea was to be investing in commercial arbitration to

reduce the backlog and allow the narcotics cases to proceed more efficiently and more quickly.

Two problems came out in Bolivia. One was the demand, presumably influenced by the ambiguity of the legal framework that David referred to; but I think the second was that the connection between the backlog and the arbitration of commercial cases was not well-established. We didn't see any statistics on what percentage of the backlog or the cases were commercial cases, so that you would know that if you take those out--there were no statistics that we saw and no documentation that we saw.

So actually, really thinking through and getting the information correct so you can really establish your goals clearly seemed to be a very important piece of the whole preparation process.

The second point I would make on the goals relates to David's point about second-class justice. In fact, there are tradeoffs, and I think that increases the importance of a very thorough preparation process, because in any case, you are always making tradeoffs between getting immediate, tangible results for especially disadvantaged populations and, in a larger scale, really advocating for and

establishing and protecting legal rights of groups of people who are currently disadvantaged, and that tends to be a much more long-term kind of goal.

I think Bangladesh did a really good job on collecting the kind of information they needed to make a judgment about that tradeoff, and they chose in that case to really opt for the tangible, more immediate results, but the conclusions they drew out of the interview--one, that there was no prospect in the near future for court reforms, or you were looking at a very long-term process that was linked to a lot of other political reform that was not likely to happen soon, and that was coupled with interviews showed that people and a lot of the legal aid centers believed that people needed to be educated about their rights before they were going to advocate for them. And in Bangladesh, the mediation was actually housed in NGOs that provided other social services, legal aid, and other kinds of educational programs, so the combination was a very good combination. They coupled it with legal education about the rights, about what they could do, about what rights they had in the courts. And there were some very pressing social problems that needed to be dealt with in the short term, so that led

them to opt for not reforming the court system, but using an ADR system that was outside of the courts to address those kinds of needs. It has been very successful in that, particularly in helping women who have been disadvantaged. They used the design to help, at least in the short term, women advance in a much more real sense by putting them on the mediation boards and giving them greater access to some sort of justice, a lot more than they had already.

Going to the goals definition--I'll come back to this in a second--there was a question about when, where, and under what circumstances would ADR be even appropriate. There were a number of cases where it probably would be appropriate--if costs limit access, if delays or complex procedures limit the effectiveness of the courts or cripple them, and they are not able to settle the cases; complex procedures or geography-limited access--that was clearly the case of the complex procedure in the case of IMSA and one of the reasons for its success, that it allowed it to bypass some of the very complex and byzantine procedural quagmires that were inherent in the conciliation courts.

In India, the people's court system again helped to address both the cost and the time and a geography

figure, although it did not address some of the discrimination. They had courts in 250 or so villages that gained a tremendous reputation for reducing the time and reducing the cost of dispute resolution and giving access to villages that normally would not have had access.

Also, when you are thinking about is it appropriate, as David said as well, as you are thinking about not just the court-annexed and legal cases, but also thinking about specialized, there may be specialized kinds of cases--in the Philippines, some of the land cases. The Philippines as well has moved labor cases out of the court-annexed and into the department of labor, because it is very highly specialized, and the department of labor and the national conciliation board was much more able to deal with that.

Or, there may be specific kinds of issues, again highly technical, but that may need resolution. Land issues in South Africa was an example. There are issues--I think you are working on one in Indonesia--around water resources and around disputes over building a dam that you might want to design some ADR systems to deal with in furtherance of

other development goals that are not specifically or solely related to administration of justice.

Where would it not be appropriate? It would probably not be appropriate where the real need is to protect individual or group rights--it goes back to the second-class justice. But it is worth thinking about quite carefully, as they did in Bangladesh, because I think the conclusions they came to in Bangladesh were really quite counter-intuitive. One of the goals in Bangladesh as USAID was going in to design the program was to help the disadvantaged gain greater access to justice, especially focused on women, who had not received particularly fair treatment in the courts nor in the traditional local community dispute resolution processes. I think the assumption was going in that the traditional processes would--because the local norms reflected a bias against women, the traditional processes would also reflect that bias and would not be particularly appropriate.

I think what they found coming out of the assessment was that if you compared the court and looked at some of the things that you could manipulate in terms of the design, that in fact women's rights, in at least the short

to medium term, might better be served by moving into some sort of reform diversion of the traditional system where women started being included on the mediation boards, where the criteria and oversight for mediation and mediator training was enhanced, et cetera.

Where legal standards need to be established, it may not be appropriate, particularly if there is a power imbalance between the parties. When there are no legal standards, powerful parties are probably much more able to manipulate, and ADR is much less able to be effective when there is some great disagreement and there is a power disparity on what norms ought to be applied, or when some public sanction is required for violent offenses or repeat offenders, where some sort of educational effect is required, and again, where there is extreme power imbalance--and I'll leave that one for David to talk about, because that is one of the background factors that we are going to deal with.

It's all yours, David.

MR. FAIRMAN: Thank you, Dianna.

I want to boil down what we learned into some design thoughts that we think it is useful to consider in

virtually any context where you as a program officer are tasked with thinking about whether an ADR program could be useful and appropriate.

We identified five background conditions that arguably--are there five--there are six--I wasn't a math major, even though I was at MIT--none of these is rocket science, and virtually all of them apply much more broadly than to ADR programs, but I just want to highlight them briefly.

Political support doesn't necessarily mean that the president and the cabinet have to pass a resolution declaring ADR the best thing since sliced bread. It may in fact be counterproductive if the president and the cabinet are widely viewed as corrupt and/or unpopular. When we say political support, what we mean is that the key stakeholders who are going to be designing and using and holding accountable the program need to buy into it. And in a diagnostic phase, it is important to determine whether and how those stakeholders can be brought on board.

For example, as Dianna was mentioning about Bangladesh, it was pretty clear early on that the Government was not going to buy into a substantial role for itself, and

then the question was would the Government be willing to leave it alone and let the experiment be tried and then come back around whether to pick it up later. The answer to that turned out to be yes, that was good.

In Ukraine, the hostility of the Government--or, I should really say specifically in the judicial system--hostility to the idea of mediation in principle has been a significant drag. In several Latin American countries, the bar and the judiciary have been skeptical about the informality of court-annexed or related ADR programs, and those are key constituencies to consider since a lot of the potential referrals need to come from them.

The basic point is that stakeholder consultation and scoping early on to determine whether whatever you are thinking about can fly and if so in what form, not to be torpedoed by those with the power to veto it.

Adequate human resources--we were especially talking about the potential supply of trained or trainable mediators and program staff on the ground in-country. This is not a trivial problem in countries that are very poor with very low literacy rates, and is something that needs to

be looked at carefully, especially when you are thinking about scaling up the pilot program.

Sustainable financing--the good news is that ADR programs, particularly at the community level, tend to be very, very cheap, particularly if you are able to get people to serve as volunteer mediators. They are looking primarily for the cost of their expenses, travel and paper. But if you are looking at Sri Lanka, and you scale that up to the national level, you are still talking about over half a million dollars a year, and the question is if you want to offer the service free to people at the village level, who then is going to pay for it, and can a sustainable source of finance be found. These are significant questions in places like Bangladesh, where an NGO is trying a program that is free for users, about what that NGO is going to do if and when donor financing is no longer available. Will they institute legal fees? Will they try to get the Government to pick up some of the tab? Will they cross-subsidize from other programs that they have as fee-for-service programs? In any case, the question is a clear and obvious one.

Support of cultural and institutional norms, we have already talked about in the context of Ukraine, where

people are fundamentally skeptical of the role of third parties in any context and their ability to be neutral and to be even-handed in their treatment of parties in dispute.

This is an uphill battle and one that requires a great deal of consultation, education and outreach to potential users to overcome, and it is going to be a time-consuming process as well.

Relative parity in the power of potential users-- this is actually a fascinating and rather hotly debated topic. How much parity is needed? In places like Cambodia, in very difficult political and social conditions, there have been quite successful uses of mediation to resolve local-level land disputes as long as the state was not a party. Where the state was a party in a land dispute, it is very difficult for mediators to come out with an even-handed treatment of the parties.

At the program assessment and design phase, what we would argue for is clearly specifying the types of cases and the types of disputants that you expect the program to reach, looking carefully at what their legal options are, what their relative rights and relative costs would be if they were to go through the court system or through

traditional systems--basically, what we call in the negotiation trade, their "BATNA," or their best alternative to a negotiated agreement. If the BATNAs, the best alternatives, for the parties are wildly uneven, you are likely to see very low use of the mediation program, because the more powerful parties will simply use other options that are open to them to get their disputes resolved.

Nevertheless there is evidence that, for instance, in landlord-debtor disputes in Sri Lanka and Bangladesh, the sanction of community norms can be powerful enough to bring relatively economically and socially powerful parties to the table to deal with much less empowered disputants when the community urges them to do so.

The last point on background conditions--adequate legal foundations. This does not mean that all ADR programs need to have legal sanction; in other words, it is not necessarily the case that all ADR agreements need to be enforceable in court. The closer you are to the commercial sector, labor, basically, modern, highly legalized sectors of the economy that you want to target for a program, the more likely it is that disputants are going to need to understand and have it clear what their legal sanction is if

they reach a voluntary agreement and then one party does not live up to it. We saw this very clearly in Bolivia, where the lack of clarity significantly seems to have lowered demand for the program.

However, in Bangladesh, the program operating completely independent of the judicial system is doing just fine in terms of user demand. That is because realistically, the users of that program don't have a strong legal option, so for them it is sort of this or nothing, and therefore, a clear short-term relationship to the legal system is not a necessity.

Let me turn to some program design considerations. We have talked already about the need for a participatory design process. That does not mean that everyone in the country needs to be involved. The primary target should be potential users and managers of the program and stakeholders who might potentially be opposed and have the power to stop the program from achieving its goals. We need to figure out whether, when and how the sequencing involving them in the design involving them in the design process so that it does not get captured by those hostile to it, but nevertheless we

would argue that more consultation earlier is generally in your interest.

Very critical to the success of virtually every ADR program is that the neutrals themselves, or the third parties, be perceived as impartial. Cultural context matters here. In Asia, it is often the case that local notables who are really influential over the parties in disputes are seen as good mediators despite the fact that they have close personal relationships, because they bring with them the authority of the community.

In Latin America, there is relatively more emphasis on making clear distinctions between third parties and disputants and making sure that they don't have close relationships. But the question has to be addressed.

Monitoring, oversight and retraining are very critical for long-term sustainability and particularly getting some kind of ongoing feedback from the disputants themselves about how they felt about the way that the third party handled their dispute. This tends to be a huge, gaping hole in the monitoring and evaluation components of most ADR programs that we have looked at. We could speculate about the reasons for that, but for whatever

reason, it seems to be an area that is often given short shrift.

Finally, but very importantly, education and outreach for potential users, particularly where the concept of ADR is not well-established. In places like Ukraine, lots of seminars and workshops and public information are important. In places like Sri Lanka or Bangladesh, particularly Bangladesh where literacy rates are low, the outreach strategy has got to be geared to word-of-mouth, visual, village-level presentations so that people can really get an understanding without having to rely on print.

Those are things that we found to be very important in both the initial feasibility stage and then the design process for ADR programs, and we would be delighted to hear more of your thoughts, particularly those of you who are engaged in this business on a daily basis, on other things that we might have overlooked or also on the relative weighting among these factors.

We will wrap up, having talked for quite a while, and turn it back over to Deborah.

MR. MESSICK: Deborah, do you want to just step up to the plate? And thank you both very much.

MS. HENSLER: Well, Rick asked me, as he asked David and Dianna, to talk with you about factors to consider in adopting, designing and evaluating ADR as a component of the judicial reform program.

Unlike David and Dianna, my experience has been exclusively in the U.S. court system, although from time to time, I have provided some informal advice and information to judicial system leaders from other parts of the world. But I'm going to talk this morning principally about my experience doing research and analysis on the use of ADR in state and federal courts in the United States.

Listening to the discussion up until now, I am really struck by the fact that much of what I have to say is similar to what has already been said and complements that, even though we did not have the opportunity to chat before this session.

I will try to be somewhat brief so that we will have time for discussion, so I am going to kind of leapfrog across five different issues.

I want to start by talking a little bit about some definitional issues and then talk about how I as an advisory consultant to systems in the U.S. that are considering

reform and how you, doing that same task or seeking assistance with that task--

[TAPE 1, SIDE B]

MS. HENSLER [continuing]: --what questions someone coming into a system ought to ask, what information is needed, et cetera.

Then, I am going to summarize what we know based on empirical research in U.S. courts about what ADR does and does not do when it is introduced within a court system. And I think that what you will find as I chat is that the sharpest difference between what I have to say and what has already been said is that the experience within the United States has been primarily an experience with introducing ADR within a court system as a method of what I will call "court reform" rather than an experience of trying to re-think or re-make a dispute system generally. And whether that speaks to differences in the ADR community within the United States or difference in the public perceptions of the courts within the United States, I will leave for further discussion, but I think there are enormous and important differences to consider when we talk about using ADR as a component of trying to fix the court system versus using ADR as providing

a range of services that are not provided within the court or indeed are intended to substitute for a court system that is regarded, at least within the short run, as irreparably broken.

That brings me to my definitional issues and the question of defining judicial reform on the one hand and ADR on the other. I have not had extensive experience with the USAID efforts, but I do have friends and colleagues who have been engaged as consultants to some of your experts, and at least those that I am familiar with come out of the court reform movement in the U.S. which I think is quite different from what is often discussed as judicial reform in countries with modernizing economies.

In the United States, we talk about court reform, and we mean efforts to improve the delivery of justice through changing procedural rules and judicial management practices within the existing system. We generally distinguish those kinds of efforts from substantive reform of the law--for example, changing sentencing standards or civil penalties, jury verdicts, et cetera.

U.S. court reform efforts tend to focus on efficiency, defined as saving time and money. So court

reform is not about changing substantive norms; it is not about fixing imbalances of power; it is not about righting issues, denial of rights to particular groups. Court reform in the United States in a way assumes that the fundamentals of the judicial system are in place and are all right and are not to be changed, and it is an effort to fine-tune the system to be more efficient.

I think this is very important because, of course, that is quite different from judicial reform efforts in many of the nations that you are dealing with, particularly when you are dealing with a judicial system that is widely viewed as subject to political pressure from other branches of government, from political parties, or to financial favors from groups or individuals. Obviously, U.S. judges are not immune to such pressures and influences, but most court reform efforts in the United States assume you have an independent judiciary.

Drafting U.S. court reform measures onto courts that are driven by very different dynamics and operating under different constraints may produce quite different and perhaps really undesirable, and I am not persuaded that

everybody who offers you advice in this area is as sensitive to those issues as they ought to be.

ADR also is a term that we should pause about, and I am grateful to David for laying out the taxonomy that at least you saw briefly before you in terms of different ADR procedures, so I am not going to go through that again.

I do want to say that I think ADR is used in what--I'll view you as a friendly group, so I'll call it a sloppy fashion by many of those in my field of ADR. ADR is used to mean many different things, and I think it makes our discourse about ADR very difficult, and it makes research about ADR very difficult because you hear things about, "Well, there is evidence that...", and then, "On the other hand, there is evidence that...", and both the folks who are presenting evidence say they are talking about ADR, but they are talking about very different things, and you don't always get that when you read the summary reports.

So in the U.S. context, ADR can mean a management practice, something about getting judges to manage their courts differently; and I have seen people in print use ADR to mean that--or it can mean more specifically the kinds of processes that David delineated.

For the ADR movement, which has propelled much of the writing and the efforts to change the legal system in the United States, ADR has primarily meant engaging attorneys or parties in efforts to resolve their disputes with less litigation, with less adversarial process, in a more conciliatory way using a process such as mediation or some variant of mediation, and the most important distinction as we talk about ADR programs or procedures in a formal sense, and we put labels on them, is, as David pointed out, the distinction between what that third-party neutral is doing and whether the third-party neutral is helping the disputants either directly or through their agent lawyers or other representatives to try to find their own resolution of the dispute, or whether the third-party neutral is providing an opinion.

In the American system, once you have a case that you have brought into court, the parties cannot be required to deliver that case to a third party other than a judge or a neutral for a binding decision, so we have seen grow up in the American court system programs that are either mediation or a form of nonbinding arbitration. Binding arbitration, which is a very vigorous field in the U.S., and growing, is

something that takes place out of court for cases that are never filed in court.

I will note also that there are a number of other terms in discussions of judicial reform in ADR that are ill-defined or contested. Obviously, not only do different jurisdictions have different norms and different desires for access to justice, but within jurisdictions, within nations, individuals and institutions differ about what kinds of procedures and outcomes are regarded as fair, how much access to the courts is good for society.

In public debate, everyone tends to agree that it is better to deliver justice efficiently rather than inefficiently, but in private, parties will often admit that efficiency can sometimes serve them. A business can benefit from keeping another business tied up in court. A large institution can benefit from inefficiency if that deters individuals or less powerful organizations from bringing complaints to court.

So I think it is important to adopt a more sophisticated attitude toward claims of efficiency and inefficiency and look at the underlying question of who does efficiency serve. And, as has also been said earlier this

morning, efficiency is only one norm that one might have for a dispute resolution system, and people are also less prone, I think, to discuss what tradeoffs they are prepared to make between fairness and efficiency. One can produce a very efficient system that is very unfair, and it may be true that in order to produce a fairer system, you have to lose some efficiency. I think those might be interesting issues for us to discuss.

Let me move on to some more concrete advice. Court reform in ADR efforts are solutions, and the discussion about ADR is a solution-oriented discussion. I am always uncomfortable when people start recommending solutions before they know what the problem is.

Mindful of the time and because David and Dianna have touched on this issue, I won't lay out a detailed series of questions, but I think it is enormously important when we start talking about court reform, judicial reform, or ADR, to ask what is it that we are trying to do here. So this is clearly not a problem or an issue that applies only outside the U.S. I go into courts that think they have problems--that is usually why they are seeking some advice--and I want to know what people think is currently wrong in

the system. And if people tell me it is too slow, I want to know what they mean by that. And how slow is too slow? What is the right amount of time? Different court users have different views on that. Different court systems have different views on that.

Similarly, what does it mean to say that a system is too expensive? Whom is it too expensive for?

So I think there is always a qualitative diagnostic process that has to take place in which analysts seek to understand what those who work in the system and those whom it serves think are the problems.

I was really fascinated by the discussion this morning about focusing on non-elites within the system because my observation about court reform efforts in the United States is that they largely exclude users. Lawyers are assumed to represent the full set of perceptions of users, and courts that are engaged in reform efforts in the U.S. are usually very careful to include lawyers who represent diverse constituencies, not just those who represent big business or those who represent consumers. But they are not always as careful to go beyond the lawyer agents and ask the users themselves what they think is wrong

with the system. So I think that that is incredibly important.

With regard to ADR itself, I think it is important to ask a system that is talking about ADR or a consultant that is promoting ADR why do you want to institute an ADR program? Are you trying to solve a problem that currently exists with the system, and if so, what problem are you trying to solve--or, are you just trying to deliver a different kind of dispute resolution? One doesn't necessarily need to think that there is a problem in the existing system to think that there might be complementary systems, supplementary systems, that would provide some value.

In my experience in the U.S. when I ask those questions of a court that tells me they want advice on setting up an ADR program, I have been frequently told that because ADR is good or because the court down the road has just adopted an ADR program, everybody is doing it, so that I often find I have to make clear to people that ADR costs money just like anything else. This is not a free good. There is no way to run a good program without investing in resources, which either have to be new resources added to

the system or shifted. So it needs to generate something different, something that will be regarded as better to justify that investment, and you need to know what outcomes you are looking for before you can design the system.

Now, I have talked about qualitative diagnosis. Given the kind of research that I do, but also given the often softness of people's ideas about what is going on in the legal system and about what is needed, I always find that I have to turn quickly to saying do you have any data, and if issues of efficiency are on the table, and there are questions about how long it takes to process cases, whether certain cases are somehow reaching a bottleneck, I want to know where are those data, what do we know about cases that are filed in different parts of this legal system, what do we know about how they move, if there are already a number of different kinds of procedures, do we know something about how many cases are on this track versus that track, et cetera.

As many of you probably know, most courts do not have this information. Many courts in the United States, where we generally have more developed court statistical systems than elsewhere, don't have this information.

So that if a court wants to move forward with reform efforts before there is time to put a data system in place, the issue is often to figure out how one can do some pilot data collection. Over the long term--and I return to this point--there is an issue of building the system, a database system, for monitoring the outcomes of whatever programs are in place; but in the short term, it may be a question of trying to see if you can collect data over a short period of time, and in lieu of having hard statistical data about what's going on in a court, one does sometimes turn to surveys.

Surveys can be useful tools for gathering the information about what is going on within a court system, but it is very important to keep in mind that even users of a system may have or will report perceptions of how the system operates that are not consistent with what you would observe if you actually had the hard data. We all tend as human beings just to remember either our very good experiences or our very bad experiences, and neither lawyers or judges or others are immune to those kinds of tendencies, so people's reports of how long it takes, how much money it

costs, when they are couched in terms of, "Oh, it takes too long," are not necessarily supported by actual data.

So when one goes through this process where one has the luxury of actually doing qualitative data collection and perhaps supplementing that with quantitative data, one comes to a point where hopefully, you have some sense of what is actually going on in the courts. But in a situation in which you are trying to design a program to solve problems, I think it is important to recognize that even these kinds of data--reports of what is wrong with the court or information about case loads--isn't really sufficient to determine what the source of problems in a system is, and cases may proceed slowly in a system because if they are cases against business organizations, for example, businesses are trying to regulate their cash flow, and that's a factor that somehow is not reflected in court rules or in court statistics. Lawyers have developed practices based on expectations. We need to understand now only what those expectations are and what the expectations of users are but what their incentives are to keep operating in the way that they have always operated. Those incentives are very strong.

So the point here really is that the legal system is just an example of a complicated social/economic process, and if you try to change the system without understanding what the incentives are, the parties in the system, you are very liable to just move the locus of whatever problem it is you are trying to solve around, rather than really solving the problem.

Let me move on and talk in a little more detail about ADR design and what we have seen in the U.S. about the consequences of instituting ADR now, specifically within a court system, and let me turn to a few slides at this point.

[Slide.]

As you can see from this chart, the ADR movement in U.S. courts has really been quite successful in extending through the system. These data are somewhat out-of-date, although the most up-to-date data that I have been able to get, and they are from several different systemwide surveys.

The first row shows you the number of States and federal district courts that had adopted this kind of nonbinding arbitration in which disputants are ordered to attempt to resolve their dispute in an advisory arbitration

process before they will be allowed to take full advantage of judge and jury trial.

The second row shows the range of adoption of mediation of disputes. What I am showing there is the number of States that require mediation--there is a larger number of States that allow people to volunteer for mediation--but require mediation of cases that have been brought into court, and in some of those States, the only kinds of cases that are required to go into mediation are family law cases and other courts. There is also a variety of other kinds of civil cases. And as you can see, a substantial number of States in the U.S. now have what are variously referred to as comprehensive programs or sometimes referred to as "multi-door courthouses." The D.C. Superior Court was a pioneer in this area where people would bring a case into court and then would be given advice as to the variety of ways in which they might seek to resolve that dispute, and either directed down the hall to that program or told how they can get that service.

So there has been this great spread of programs in the United States, and that leads us to conclude that these

programs must really be doing a lot for people, or why would they be so successful?

So it is often surprising when I tell people that there is actually little empirical evidence that ADR achieves what is most frequently touted as its efficiency goals--that is, that it will save time and money.

Now, the work that I have done and that colleagues at Rand have done has focused on civil damage suits outside the family law area, but the work in family mediation and the work with regard to nonbinding arbitration and mediation actually produces quite consistent results.

Nonetheless, lawyers and litigants appear to like these programs, which no doubt is an explanation for why they continue to be supported.

Now let me just say a little bit more about what the empirical research says. Dianna, I think, touched on this issue that sometimes when programs are put in place, there is a concern or criticism that they will provide second-class justice. This was a source of considerable debate particularly in the U.S. Congress when Federal district courts were considering this nonbinding arbitration program, because what nonbinding arbitration provides is a

kind of quasi-adjudicative hearing, sort of like a stripped-down trial, and people who were considering it said that looks like you're getting a second-best kind of system, and we ought not be doing that for citizens who happen to have cases that involve smaller amounts of money.

Interestingly, given both the claims that were made for these programs and the criticisms of the programs, what most of the empirical studies found was that the programs tended overall to increase the time it took on average in the courts to resolve disputes, tended not to have any effect at all on cost, but tended to be not just satisfactory in the way people say, 'Yes, I am satisfied,' but to actually appear in the litigants' judgments in particular to provide a fairer process than they would otherwise be accorded.

The explanation for this in U.S. courts, at least, is the bottom bullet. The perception as ADR programs were put in place in the U.S. courts was that cases were being diverted from trial--large, expensive, protracted trials. But by the time this movement reached its full-blown stage in the U.S., most litigants who bring cases in U.S. courts did not take their cases to trial; most cases were settled.

So this kind of procedure is an alternative way of settling a case, and it turned out not to be cheaper, because settling a case is not as expensive as taking a case to trial on average, but it turned out to be judged as more fair, because litigants--and this is a litigant/disputant view rather than a lawyer view--felt that settlements involve the lawyers going into a room without the disputants there and striking a deal, and the disputants always wonder whether they could have gotten a better deal on what was actually being discussed there, and here instead, they had an opportunity to actually have the kind of a kind of mini day in court.

Many people thought that these results with regard to arbitration would be contradicted if we took a look at these more popular--if you remember the earlier chart, you could see there are far more States and federal district courts that have now adopted mediation programs--so there has been an interest in seeing what the data on mediation might show.

And there is just beginning to be the same kinds of data on mandatory mediation in courts in the U.S. that there was accumulated over more than a decade on arbitration

programs. These data that I am going to show you in a minute come from something called the Civil Justice Reform Act evaluation. This was a major effort in the federal court system in the United States to reform United States federal courts and make them more efficient. In this program, some courts were asked to adopt mediation programs, other courts didn't adopt the programs, and an analysis was done about outcomes within the courts that adopted the programs. In some of the courts that adopted programs, there was actually an experiment where some cases were randomly assigned to the mediation track and others were not. In other courts, there was not the support for doing this kind of randomized experiment, so that these data are based on matched cases.

Basically, what I am showing you here is a measure of time showing the average time to disposition. Each set of bars across represents a different court in the U.S. These are quite different courts, and I am not going to take the time to explain all the ways in which they differ, and the programs are quite different.

The right-hand side of the chart refers to programs called "early neutral evaluation," and they are

somewhat different from the other mediation programs, but I have put them on the same chart. Basically, the story here is that we didn't find any statistically significant differences in average time to disposition, and similarly, we didn't find any statistically significant differences with regard to costs.

So the data on mediation--it remains to be seen whether other studies on court mediation in the U.S. will show the same results or, as these programs become better established and we accumulate more data, whether we will see more positive results on the efficiency dimension or whether we will see, if not overwhelmingly positive, a greater mix of results.

I think that given this little review of the experience with ADR and some data with ADR, I want to close by making some comments about what advice I would give with regard to ADR. My own feeling is that if we are talking about putting ADR into a court system as a mechanism for trying to make the court system more efficient the way it has been used primarily in the U.S., I wouldn't expect ADR by itself to achieve that efficiency goal. The way I interpret the data--and there are other data from other

studies similar to the data that I have shown you here--it appears to me that introducing ADR along with other changes such as simplifying the ways that people have to take cases through courts, relaxing evidentiary standards, or just tightly enforcing schedules in situations where they have not been enforced before might make a difference, and where we see ADR appearing to produce efficiency gains in the United States, it looks like when it is accompanied by those other changes. And it seems to me at least possible that introducing those other changes without ADR might make the same difference, and it might be cheaper and simpler to do that.

If, on the other hand, court reformers, proponents of change, want to introduce a different type of dispute resolution, if their main goal is not efficiency, if they want a more conciliatory procedure--an adjudicative hearing with different standards, special judges, some of the variety of kinds of goals that we heard about in the earlier presentation--because there is a sense that the community, or at least some important part of the community, would prefer those procedures for at least some disputes, then I think ADR may indeed satisfy those objectives.

I think that whatever a system decides to do, it really is best if new programs can be put in place in an experimental context, and if you can establish some way of monitoring the experience with a program over time. Procedural reform like this is very well-suited to real experimentation using a kind of scientific experimental paradigm. Experiments can also test variations in program features.

Experiments don't need to be very expensive. Everybody always worries about research, particularly when you are talking about very constrained resource situations. You can do experiments with small numbers of cases, small numbers of disputes, but experiments take time because you need to see a program kind of work itself out, and you need to see disputes work themselves through the program, and that is sometimes more of an obstacle to doing experimentation before going "whole hog" in terms of program adoption than costs are.

I would also not that in my experience working with courts that have experimented--and the D.C. Superior Court is one of those--experimentation is also a way of promoting judicial and lawyer and user buy-in to a reform

process as people become interested in seeing what is it that their program that they have argued about and agreed to try out is actually accomplishing.

I am going to conclude with a few pieces of advice that I wanted to highlight. First, I don't think you should assume that court reform efforts in the United States have direct relevance for judicial reform in countries that are modernizing their legal system. U.S. court reform rarely involves significant restructuring of participants' roles or power or substantive legal reform. They are efforts to fine-tune the judicial system, not efforts to re-think it.

Second, don't expect large effects from what constitutes institutional tinkering that doesn't change actors' incentives. Most research on court reform in the U.S.--not just on ADR but court reform generally--finds small, if any, effects. Court reform can reduce the time that it takes cases to go through a court system, but in the U.S., we find that most of the variation in litigation costs and the burdens that people worry most about are really attributable to what the lawyers and the disputants do about their cases and are outside of the control of formal procedural rules and judicial practices.

Third, don't treat ADR as a panacea. It is not a magic bullet for a troubled court system. Don't expect to save time or money by instituting ADR. You might, but I wouldn't adopt ADR if my main purpose were to try to produce efficiency gains. I think what you want to do instead is ask how ADR might serve other goals of the justice system. You want to design programs that are consistent with those goals, and you want to evaluate those outcomes against those goals.

Finally, I want to return to the point that I began with, that my strong suspicion, based on what is still a developing field and a rather thin empirical database, is that the promise of ADR lies outside the courts in the kinds of programs that you heard Dianna and David talk about, not within the courts. In a country that has a court system that needs fixing, ADR is most likely not the fix.

Thank you.

MR. MESSICK: Thank you very much.

We had thought about taking a break for lunch now, but I think that since we are sort of into a discussion, it might make sense if we went on for about 15 minutes.

Judge Shuker was going to comment for a couple minutes on what she has heard based on her experience, take a few questions, and then, maybe as we get going, if people want to trickle out to get lunch, and we'll maybe take a formal break at about 10 after one.

MS. SHUKER: Yes, because then they can carry over. I'll take responsibility for keeping you hungry. It's just that we went much later, and so I thought that if everyone went to lunch, people would get relaxed, and you really won't get the discussion.

You have heard two things here that are so--I think it is really an important dichotomy, and I hope you really get the full benefit of it. What you got was the international piece outside the courts, the D.C. piece inside the courts. And if you put them together, I think you get a phenomenal experience.

What is interesting--because my experience is basically breaching those two gaps--we did the experiment, and I was very much a part of that in the D.C. Superior Court, and we found one very interesting thing that backs up exactly what Deborah just said, which is that we found--because we did have the data, which is one thing the foreign

courts don't have, and when I've gone into other countries, you ask, where is our basic data to start building on, and they ask, "What data?"--but we had it, and what we found was that 6 to 7 percent of all of our cases went to trial before we instituted ADR and case management, and--guess what, everyone--6 to 7 percent of our cases still go to trial after we have ADR and case management.

So in that sense, it doesn't change. Now, what we found--which may be different than the civil justice situation, and I think we have to be careful about comparing the federal courts where the cases are so much more complex, and there are so many more lawyers, and they bill so much more, compared to the foreign courts and the local courts in the United States--but what we found is that where it made a difference is that people settled earlier, which meant that our judge power was more efficiently used.

Now, that may not be a cost basis--we can fire judges--but people got answers to motions faster. There was a user satisfaction with the overall court system. The big example of what happened in our court, because D.C. is so unique, is that they started filing all the federal malpractice cases in our court. In other words, our case

load went up tremendously. And that is one reason also why you have to be careful about delay time, because usually, if you get efficient, you increase your case load, so there is a short-term delay increase that can take as much as a year or two until you absorb the change.

Now, jumping on the other side of it and saying that it is also critical when you start to know why you are doing this--and I'll give you an example of where we didn't and where we did. In Tanzania, which was the first country that I worked in, we didn't go in and do the kind of statistical critical assessment at the beginning. We went on the fact that I had been spending time there, and I knew what the problems were anecdotally. And for part of it, we did. But we found out when we instituted ADR in a system without good case management that what we did was to create more delay. Why? Because people got--they call them "adjournments," not "continuances," like they do here--ADR became just another matter on the calendar to adjourn. I mean, they could now adjourn trials, they could adjourn motions hearings, and they could adjourn ADR events.

So what happened was that we didn't anticipate that. So we did our study in the middle and then figured out what we needed to do and made those changes.

In Ghana this summer, we went in and did an assessment before we tried to suggest how to institute an ADR system. We got data that was wonderful, and we can use it as a basis to build on, and we pinpointed exactly where the delays are, so that when we are able to make recommendations, we can make them.

Now, I totally agree, though--you don't put ADR in if you are going into court annex; you don't put it in without case flow management. You are wasting your time. It won't work. We tried it, and we have tried it in the United States. You just make yourself more inefficient.

I think that what you want to look at--and again, the difference here--what you saw was outside the court system versus inside the court system. And I think the issue that you want to raise is does outside--and I guess this is sort of a question for both--that is, if you've got ADR inside, you're saying it doesn't necessarily help the court system become more efficient.

The question is how can court reform be a goal of external ADR. The question I would ask is--and I'll even use some of your own quotes--Indonesian people who used this system--the other alternative was nothing--so you didn't save one day of court time in Indonesia although you may have developed another system. And I guess what we're getting to here is not ADR being good or bad outside the system, but looking at the goal and the solution.

And the question would be do people not get an impression if you go outside and establish a good system to basically take the position that the courts aren't worth system, and does it, rather than stimulate court reform, take away the impetus for court reform?

MR. MESSICK: Thank you.

Who wants to go first?

MS. SHUKER: And I want to throw it out here and hear first, and then I'd like responses, and I think we also want to start some dialogue here, but I just thought it was a little controversial, and I could throw it out to you at the beginning and get some discussion going.

MR. MESSICK: Dianna?

MS. CHIGAS: Do you want me to take that one first, or--

MR. FAIRMAN: Somebody has got to say the first dumb thing today, and it might as well be me--actually, I probably already have that distinction.

I think that the question you are raising is a very good one. Part of it comes back to a combination of political and institutional assessment of what is the prospect for judicial reform in a particular national context absent the ADR program initiative.

The case that made that comment about the alternatives, probably nothing related to the court system, is Bangladesh, and there, I am reflecting back to the assessment that was done by the USAID team there. I think that one interesting possibility is that programs that are started at a pilot scale that provide a relatively effective and increased access to justice for those who are disenfranchised may lead to more activism by them and their representatives for greater access to the formal legal system for cases that they can't get resolved using the informal methods.

For that to be true, there needs to be some linkage between these kinds of informal pilot programs whether in rural or urban areas, and advocates within the judicial and legal system. So it goes back to the design process and getting by in at least some kind of ongoing oversight, review and dialogue with those within the formal legal system about what are we learning from this kind of experiment that might influence what we do with court reform.

Where that linkage is not made, I think there is more risk that basically, aid agencies divert resources to what is looking good out there, which is the informal system, and decide that that long-term prognosis for the difficulty of court reform, they just keep on perpetuating it, because what they are doing is going well enough.

MS. : Can I ask you then to also look at what we found in Africa, which I found interesting. You seem to feel that the disenfranchised in the rural settings got a better deal, because the women that we dealt with in terms of some of the probate issues, the divorce issues, the sexual mutilation issues, all were telling us that in the rural setting where they are more traditionally steeped, it

was much more scary than to go into an urban court where, although they may not get a fair system either, at least there, people were more modern-looking, and they had a shot. I mean, there are in these countries women judges. So does that not come into play at all in your study?

MR. FAIRMAN: That's a good question.

MS. : And I think it's contextual. Bangladesh is a really special case, and I think it goes back to really going in and getting the data that you need. And I don't think people expected to get the answer that they got. In India, I think women were very much along those lines, that here was this wonderful people's court system that did great on efficiency and cost and all these other kinds of scales, but women particularly found that because they were using local customs, they were not quite as progressive and not pushing the more recently-gained legal rights.

So I think you would need to look at it contextually, and in some contexts, you might be able to take a traditional system and work with it, which is what they did in Bangladesh--they didn't just import it, but they worked with it, and they were able to work with it, and they

found points where they could work with it and start to deal with that issue. In other systems, you may not be able to. In Sri Lanka, I think that's still a problem.

MS. CHIGAS: Let's let Deborah respond and then Rick.

MS. HENSLER: Well, I think that as you probably know, Judge Shuker, this is a question that people are beginning to have in the United States, and in jurisdictions where there are very strong private judging, private dispute resolution services, there is a concern that the leading institutional users of the court and leaders of the bar who have historically been those who promoted providing resources to courts so that courts would be there for people are turning their attention to these private services, and the analogy that is often drawn in the States is to the private school system--if everybody who has political resources has their children in private schools, then there is a lot less impetus to make sure that we have a well-functioning public school system.

We don't know where this is going in the United States, but I think it is a legitimate concern. But in principle, one could see the converse. In principle, one

could see people saying that if we can do that in a private system, why can't we take the same concept into the court system. On occasion, I talk with judges whom I do think feel a little bit competitive now and do think that they need to be a little more analytical about what they are doing and how their courts--

[TAPE 2, SIDE A]

MS. HENSLER [continuing]: --in other areas.

MS. CHIGAS: Rick?

MR. MESSICK: Well, I was going to put in a pitch for one of the readings that's in the background materials I circulated, and that is Number 9, which is an excerpt from an evaluation of the NGO that has worked with the local community dispute resolution mechanisms in Bangladesh. And the author of this evaluation went and sat in a variety of community disputing actual cases where women were bringing cases of abuse to the local community. And these were communities where women had been put on the mediation board, where the NGOs had worked to try to change the norm from a completely male-dominated system in which the answer was the man always won, to one where there was a neutral resolution, and the mediators were neutral.

Steve found that, you know, they were still biased against the women, and I thought it was a very moving description of what one woman who had obviously suffered a great deal was going through in this, quote, "reformed" community dispute resolution mechanism.

So on the one hand, no, it is not very good, but unlike maybe the situation in Africa, Steve makes the point--the woman had no alternative--it was this or nothing. And moreover, the root problem was the societal norms which were tilted rather sharply against women that no community dispute resolution mechanism and no NGO training, no matter how earnest and well-conducted, is likely to tilt or level.

So therefore, leveling that playing field was asking a bit more than what community dispute resolutions can do, but in the end, he still concludes--look, what's the next best alternative--the next best alternative for women in villages in Bangladesh, even those who live in villages where they have been fortunate enough to have significant NGO involvement in reforming these local dispute resolution mechanisms, the next best alternative is to bad that they have got to take what they can get.

MS. CHIGAS: Well, let me throw out to the group with this issue--let me add to it and just throw it out--and that is maybe that's why we need courts. The history of this country is--where did the civil rights movement start--it started in the courts to a certain extent. So where do we come out?

Yes?

MS. HAMMERGREN: I guess I'm not so sure--

MR. FAIRMAN: Would you stand up and identify yourself, please?

MS. HAMMERGREN: Yes. I'm not so sure that all the interpretations of the civil rights movement say the courts started it, but anyway, the courts were instrumental in moving it along.

MR. FAIRMAN: I'll try again. Linn, there is a microphone right there, and just say what organization you're with--in case there is someone here who doesn't know.

MS. CHIGAS: Everyone knows her, but go ahead.

MS. FAIRMAN: Turn it on.

[Microphone not switched on.]

MS. HAMMERGREN: Okay. I'll just stand up. I'm Linn Hammergren from the World Bank.

I guess we have introduced a lot of issues, and I'm not sure which one now I want to go with, but in terms of taking off the pressure for the reform of the courts, to the extent that we know alternative methods deal with the dispossessed, those people are going to be a source of pressure for fixing the courts, anyway, which I think pretty much is what Ruth was saying.

I have two examples in Latin America, which is basically where I work--one of which would support what Linn has suggested and the other one against. The supporting one is the case of contemporary Peru, where it looks as if the Government, in an effort to perhaps discourage judicial reform--not court reform--has introduced a lot of alternatives for all kinds of population, and a lot of it for businesses and for the [inaudible]. And I guess in that case, one could say it is a strategy that may even be working, but in any case, it is giving people other things to do.

But if you look at Ecuador, for example, where there was an AID program that worked in indigenous communities and introduced new kinds of mediation, it was interesting that after a while, those communities came back

to AID and said this is good, we want it, but we also want legal assistance to deal with the courts, because there are also cases that we want to make there. So it is six of one, half dozen of the other.

I think something we may want to think about, though, in terms of discouraging reform is that people who may be important in either supporting the ongoing system or asking to change, who tend to be elites, maybe we want to think about things like binding arbitration and also a very popular movement with all of the donor agencies, which is setting up commercial courts. And we will want to make those people stick with the bad system they already have instead of giving them something that is [inaudible.]

MS. CHIGAS: Yes?

MR. : [Microphone not switched on.]

Mike Trotter Forem [phonetic]. I am with the Irish Center, Department of Economics, University of Maryland.

I have a number of comments, not all of which I will talk about now, but I want to follow up on a couple of things that Professor Hensler said. Before I start, I just

want to make sure that we all recognize that the reason we are having this session is because Alexandra Berginska [ph.], who put together this program, and that is something that he doesn't always do, which is try to think carefully about what to do. And she won't say anything--you have to hold a gun to her head to get her to speak up.

Professor Hensler made a comment about a market for what we might call dispute resolution or whatever, and she also said something about not knowing very much about what happens on the completely private side of dispute resolution. In this country, if you recently signed a deal with your stockbroker, you have agreed to AAA arbitration for a dispute for any dispute--it won't be in front of a judge except to have that decision enforced.

One of the things that we are interested in and that I want to come back to is the idea of how does this all fit into economic development. I didn't hear very much about that. I have actually written down something here that asks: Are there tradeoffs between putting resources into ADRs and building swimming pools in this country?

What I want to think about, though, is enforcing property rights, or protecting property rights and enforcing

property rights. One of the things that has happened in this country is that we have a competitive court system and an [inaudible]. We have competition among States, we have competition between States and the federal level, and we also have diversity jurisdiction to guard against bias. And I can tell you I have litigated cases which were outcome-determinate because I can assert federal jurisdiction.

What that says is that we were worried about bias in this country in state judges, or bias against a foreign entity, somebody from [inaudible]. And what I want to suggest is that there are useful things that can be done in a country and that there is a question of how much you can afford, but that rules that permit completely private determination of disputes in commercial disputes, [inaudible], and where you have a situation where the result is simply that once you have binding arbitration, and the parties agree to it, it cannot be overturned, then I feel that there is very limited review of it.

I also want to suggest that there is a difference between civil law countries and common law countries, and that is that it is very difficult to get civil law countries to agree to a system where in effect they know [inaudible].

You need to think about what it is you are really trying to accomplish in terms of what happens in these countries. The idea of having people feel a lot better about litigation outcomes in [inaudible] may be a useful thing in this country--although we could ask at what cost--but it seems to me it is something that a lot of countries cannot [inaudible] and that most countries--most countries that we are talking about will not meet the conditions that CMG says are essential for ADR.

MS. CHIGAS: Yes?

MS. : [Inaudible comments; microphone turned off.]

I have a question. What do you mean exactly when you are talking about ADR within the courts and outside the courts. I have this question because I get kind of confused. In [inaudible], they just passed a law providing for the use of ADR mechanisms, and they are binding in some cases. And in the cases where it is binding, it just means that if you do not do what you agree to do, you can go to court and ask the judge to make the other person comply to what they agreed with.

We have private ADR right now, but the court wants to establish it within the court, but it is not judges who are going to be doing it; it is people who are paid by the government, but it is not going to be exactly within the system--it is outside but inside. So that's my point.

MS. HENSLER: Let me at least explain what I meant. I think that when we think about the U.S. system, we tend to think in the dispute resolution context about cases that never come into court versus cases that do come into court. And in the United States, historically, binding arbitration has been a provision that is part of contractual agreements that state that those cases will never come into court. And if one of the parties to the agreement when a dispute arises wants to abrogate the agreement, he or she will discover that the court will not allow them to do that; the court will, in almost every circumstance, say that, no, you agreed to this, so you have to arbitrate. Similarly, outcomes in arbitration in the United States are not subject to de novo review unless the parties have stipulated that such a review will take place.

So those cases are going on entirely outside of the court system, and they do raise some questions. Since

we have heard some support for that kind of dispute resolution, and since I think it clearly has a role in business relations, I think it is important to not that the developments we are seeing in the U.S. now are a movement from using that kind of system for business-to-business disputes where businesses knowingly have agreed to that to a situation in which businesses have essentially required consumers or employees to enter into such agreements, often when those people didn't really quite realize what they were doing--

MS. : Insurance policies.

MS. HENSLER: --and they have waived their rights. And that is now a source of great controversy and may result in the U.S. in some considerable changeover time in arbitration doctrine that might make arbitration somewhat less binding because of the concerns. So even in that area, I think there are issues that we could debate.

There are also many programs within the United States that are similar to the programs that were discussed in some of these other nations that are essentially community-based mediation programs--neighbors who have

problems; land use disputes where there is large, multi-scale, public dispute resolution, et cetera.

When I referred to "inside the court programs," what I mean was programs that would apply to disputes that people have chosen to bring to the courts, expecting within that court that the cases would be subject to whatever kind of dispute resolution has been up until this point available, which might be a judge making a decision--in the U.S., it is frequently a jury making a decision--and the court says now we are going to add either an option or a requirement that you use some different kind of procedure. And as in the situation you have described, sometimes that program is not run by a judge--it is not the judge who is making the decision--but there may be a mediator who is paid by the court, paid by the government in some fashion out of additional fees or what-have-you, or increasingly in the United States, the court may say you need to do this, but you should seek this assistance from mediators within the community who will charge you a private fee and who may or may not have been subject to some review by the court as to whether they have been trained properly and what their experience is, et cetera.

But the big division line is that we brought our case into court, and now the court is asking us to do other things from some mix of motives that may include a concern about reducing the amount of work that judges have to do so that you can save court money, or simply providing other kinds of services.

MS. CHIGAS: Okay.

MR. : I wanted to follow up with a question. Deborah just talked about within the court, the alternative of going to trial or going to a resolution by the judge versus an alternative mediation arbitration. I have seen in at least two World Bank projects in the last couple of months the issue at least vetted of the difference between requiring the parties as the price of getting a judge decision to at least try to mediate the dispute-- mandatory mediation ADR as a prerequisite to going to trial-- versus voluntary, where the judge says, "Why don't you try to mediate it? I'll still try your case. If you say no on the spot, you get a trial, or a hearing, or whatever you'd like to call it."

Could the panelists talk for a minute on the pros and cons of mandatory versus permissive ADR once the parties have entered the courthouse?

MS. : I'll say something about what I understand of the experience in the U.S., and I would be interested in the judge's views on that as well as the views elsewhere.

The experience in the U.S. has been that voluntary programs are not used much; that parties who have already entered into a legal dispute with each other will not on their own, with a high degree of frequency, take their case to mediation or some other nonregular process. And the explanation for that that is often given in the U.S. situation where we have an adversarial system is that somebody has to make the first move, and the party who makes the first move will be seen as indicating that he or she thinks that there is some weakness in the case--that they don't really think they would win if they proceeded, and that because litigation is a strategic interaction, there is that obstacle to somebody taking the first step.

As a response to that, jurisdictions around the U.S. have chosen, many of them, to mandate that you try this

procedure even though, as Rick says, you can then go on to exercise your full legal rights to a trial. In general, the mandatory programs appear to have a higher degree of usage than the voluntary programs.

With these nonbinding arbitration programs, although mandates were sometimes opposed with the concern of second-class justice that we have all talked about, there weren't other issues raised. With mediation, there is strong opposition in the practitioner community to the idea of mandating mediation, because many mediators think that it is just inimical to the notion of mediation, a conciliatory process where the parties are going to work something out together--it's like taking your children who are fighting and saying, "Mediate, share"--so there is a lot of opposition.

MS. : It is interesting, because that is not our experience. Our experience is--one of the big reasons we went mandatory is because the bar wanted us to, and the majority of our ADR is mediation. We find that for the very reason you say about the weaknesses, that that isn't true, for example, when it is a small bar. I'll give you an example in the District. We have a relatively small

medical malpractice bar. You see the same 10 or 15 plaintiffs' lawyers and the same 10 or 15 defense lawyers in practically every case.

I do a lot of their mediation. We don't require mediation until the end of our discovery process, which is down the road a while. I am frequently getting calls jointly from the lawyers long before they need to mediate, saying, "We need to mediate this case. Can you see us?" And it's really about the fact that they know each other so well, they no longer worry about this strength versus weakness thing because they are all mediation-oriented. Nearly all of them are mediators. Sometimes, they will get a third lawyer who will mediate the other two if some of us are not available to do it.

D.C. is a big bar except for this group. We have an enormous number of lawyers. But it is more the fact that even the court-practicing bar is not a small-town bar, but we find in family, for example, people wouldn't go if you didn't mandate it. They don't even want to sit in the same city let alone the same room. So you have got to tell people that they have to go.

The point is that although that does seem to be an oxymoron, "mandatory mediation," the fact is if it is presented properly--which is you just have to go, and listen, if you aren't happy, you come back, and we try your case. This isn't about having to settle. It's about having to try, having to make the effort.

A lot of it is cultural--and when I say "cultural," I mean the legal culture that you establish in your court system; that's the culture I am talking about. In our court, it is all understood. The lawyers from day one tell their clients everybody knows that's what you're going to do. So people not only learn to accept it, but the satisfaction level--we evaluate every mediation session--is just unbelievably high.

MR. : Good point.

MS. : We're probably going to say the same thing. I think there are concerns, and we found in our studies, too, there were concerns about stronger and weaker parties. I think it depends both on how you present it and what you need to do once you go into the procedure and how far along in a mediation.

I think it was in Bolivia, there were some concerns that the weaker party could be strong-armed by the stronger one in a disparity situation. So what they have done is to allow the weaker party to withdraw unilaterally and go back to court.

Just to correct the power disparity to make the mediation process go better and to deal with some of these concerns, I think our experience, certainly across all the cases, the satisfaction rate--if there was one thing that was pretty consistent, it was very, very high--

MS. SHUKER: Let me just say something, because I find this interesting. We have found that power disparity is a good time to mediate. The reason is that if you have well-trained mediators--that's the catch. The reason is a power disparity in court is unbelievable. The judge can't handle it. As a judge, when I have a big corporation with give lawyers, all carrying everybody's briefcase, and a little person over here who is trying to take them on and can't even hire a lawyer, and I can't help the rules of evidence, I can't do any of those things, that person is going to lose no matter how right they are on the law. I can still only rule based on the evidence presented to me.

On the other hand, if I mediate that dispute, I can help empower that person. Now, obviously, you have got to be careful, and you have got to know how to do it, and it takes a lot of training and a lot of ability to make sure you don't appear biased to the other side. You do a lot of that empowerment in the separate sessions. But the fact is that we find it differently.

The one thing I hope you are hearing is that there are no absolute answers to anything, and when you go to design whatever it is you are designing, you can do it any way. The idea is what does the country want, and what will fit with their culture and their background, and what makes them feel good.

But these are all factors to be discussed and thought through.

MS. : I just wanted to follow up on the comment on the difference between civil and common law countries and the suitability, because what you are saying somehow might pertain to them, particularly in the context of what you said about ADR being perhaps more effective when it is used in conjunction with effective case management and the role of the judge.

So I wonder if there is anything that you can offer in the way of advice about when you could consider using ADR and its suitability in a civil law versus a common law context.

MS. SHUKER: I think I would defer to--because you dealt with both. I have only dealt in common law Africa.

MS. : Yes. Broadly--and I would go back to Deborah's comments that ADR terminology is used in a sloppy way, because I think we are talking about a lot of different things. We are talking about arbitration, which is very different from mediation, and they all get lumped into ADR. And thinking about them, thinking about mandating them, thinking about their relationship to the courts and all of that should be and I think is very, very different. The processes are different. I am a mediator, and my experience is very much like yours.

I think that what mediators do in a lot of different systems--and that may be one difference between civil law and common law systems, at least in my experience, and it is very anecdotal, so there is no real hard data--there is a variety. Some mediators can move more toward giving arbitration mechanism--I found, working in civil law

countries, that people have a harder time thinking about the mediator being an empowering figure.

It takes a lot of outreach and education, and there is a piece on that I think you need to work on in your design as you are trying to do that, if you are going to try to deal with some of these issues in a mediation context in civil law countries. Certainly when we were working in Peru, that was the initial stage; it was really very much two years of outreach and training people to behave in ways that they were not used to behaving and dealing with disputes in ways that they are not used to seeing disputes being dealt with. And that is a very long process at the beginning before you can really launch into a full-scale program.

MS. : I'm going to let that be the last word. What I am going to suggest to the panel people-- oh, we will we have time to come back--

MR. : We might, or maybe to continue it at least informally.

MS. : Well, that's what I was going to say. I was going to suggest that--I don't know what the set-up is--is it one big table?

MR. : No. It's just grab a box lunch  
and find a place to sit.

MS. : Okay, then, if people don't  
mind.

MR. : Yes. We can maybe get them and  
come back.

MS. : A working lunch.

MR. : Yes, okay. I thikn byt his  
time, 2:00 would be fine. So anybody who leaves, thank you  
for coming. Please turn in your evaluation form to me if  
you haven't already gaiven it to Siddhartha, who is walking  
in the back and has his hand up. And look for the summary  
of the proceedings along with our model terms of reference  
on our external web page which will be public sometime in  
February, the internet gurus of the World Bank willing.

[Whereupon, the proceedings were concluded]