USAID | AFGHANISTAN
FROM THE AMERICAN PEOPLE

REPORT ON ASSESSMENT OF POTENTIAL FOR COMMERCIAL MEDIATION

March 17, 2010

Authors		
Pete Swanson Short Term Advisor Senior Partner/Carr Swanson & Randolph, LLC USAID/EGGI Pswanson@csradr.com		

Disclaimer

The author's views expressed in this publication do not necessarily reflect the views of USAID or the United States Government.

TABLE OF CONTENTS

I. Introduction and Acknowledgement 5

II. Executive summary 6

III. Definitions 8
1. ADR (Alternative Dispute Resolution) 8
2. Conciliation 8
3. Mediation 8
4. Arbitration/Litigation 8

IV. Doing Business Indicator 9

V. Background and Current Context 10

VI. Provincial Issues 12
1. Increase in Litigation 12
2. Quality of Resolutions 12
3. Poor Implementation of Commercial Law 12
4. Lack of Education and Expertise 12
5. Arbitration 13
6. Enforcement 13
7. Islamic tradition 13
8. Feedback 13
9. Mixed Acceptance 13
10. Courts 13

VII. Key Issues 14
1. Varied Approach 14
2. Education 14
3.Enforcement 14
4. Engagement 14

VIII. Recommendations 15
1. Two Track System 15
2. Design and Implementation of Mediation Policies and Procedures 15
3.Training of Mediators 15
4. Provincial Track 17
5. Pilot Facilitative Mediations in Kabul 18
6. Coordination with Court 18
7. Develeopment of Curricula in ADR 18
8. Public Dialogue 19
9. Partnering Initiative 19
10. Design and Implement a Public Information and Awareness Campaign 19
11. Settlement Week 20
12. Commercial Contract Law and Enforcement 20
13. Evaluation 21
14. Arbitration 21

IX. Conclusion 22

Annex A Schedule of Meetings Trip 1……..……..23

Annex B Schedule of Meetings Trip 2……..……..26

Annex C Scope of Work Trip 1……..……..28

Annex D Scope of Work Trip 2……..……..30

Annex E Model Procedures for Commercial Mediation Providers……..33

Annex F Model Procedures for Commercial Mediators……..39

Annex G Draft Regulations for Implementing Commercial Mediation Law……..43

Annex H Draft MOU Between MoCI and ACCI……..45

Acronyms 22

I. Introduction and Acknowledgement

Between January 18 and March 19, 2010, Pete Swanson (the consultant) conducted an assessment for implementation of a commercial mediation program in Afghanistan. The initial portions of the assessment, focusing on the potential for a mediation initiative in Kabul, occurred from January 19 to February 12. His efforts during the first trip focused on understanding the cultural context of dispute resolution in Afghanistan, meeting key stakeholders, and developing a strategy for how commercial mediation could be institutionalized in Kabul and the major cities. From February 28 to March 19 he returned to Afghanistan. In the second trip he focused on creating draft regulations to implement the Commercial Mediation Law, draft procedures for mediators and provider organizations, traveled to Mazar to study provincial dispute resolution mechanisms, and completed his recommendations for creation of a commercial mediation initiative to be implemented by the donor organization Harakat. This report reflects the findings and recommendations of both trips.

Mr. Swanson would like to thank the representatives of local and international institutions, corporations and the Government of the Islamic Republic of Afghanistan (GIRoA) authorities for providing access, information and discussions in this matter. Mr. Swanson would also like to thank Monique Couchesne, Richard Laliberte and Kevin Fogarty of Deloitte/EGGI and Heath Cosgrove, Alexander Newton and Geoff Minott of the United States Agency for International Development and Tom Rosenstock, an American attorney living and working in Kabul for guidance, perspective, input, feedback and suggestions during the assessment.

II. Executive summary

To benchmark its progress, EGGI relies heavily on a set of indicators used by the World Bank in its annual “Doing Business” reports. It appears the relevant issue with respect to improving the Doing Business Indicator (DBI) most relevant to mediation is not reducing the backlog of cases, but reducing the time, cost and complexity (number of steps) for commercial dispute resolution in the increasing number of cases where the court is involved. Where mediation can directly improve the DBI is in reducing the factors involved in settling a case, and in preserving (or often improving) business relationships to foster continued economic activity between parties.

The recommendations in this report call for creating a two track pilot system focused on developing a formally based mediation initiative (see definition, below) for major cities like Kabul, and a more informal and culturally appropriate form of mediation that would work within traditional dispute resolution systems for the provinces. Different mechanisms should be developed for international investor-Afghan and large domestic disputes vs. small and medium sized Afghan-Afghan disputes that may occur provincially. Previous commercial mediation initiatives in other countries have experienced mixed results due to an over-emphasis on training of mediators and institutional development rather than on creating market demand. The Afghan mindset is more arbitration oriented, but people in Kabul clearly want to explore more formalized mediation. The interest for formal mediation in the province the consultant visited was not as high. Much effort will need to go into augmenting any mediation initiative with education on basic contract law and creation of enforcement mechanisms in contracts that require cases to go to mediation, arbitration and other forms of dispute resolution in Afghanistan. Further, much effort should be made at targeting prospective users and creating marketing and public education efforts to persuade people to try mediation. It should be noted no donor is exploring implementation of an arbitration initiative. This gap should be addressed, as arbitration is much more closely aligned with Afghan culture, so should not be ignored in any alternative dispute resolution initiative here in Afghanistan.

The following recommendations stem from research on the World Bank *Doing Business in Afghanistan* Report, the Commercial Mediation law, and interviews with 31 organizations, individuals and companies including:

- Ministry of Commerce and Industry
- World Bank
- Central Bank
- Kabul University Faculty of Law
- Roshan Telecommunications
- The Hoqooq section of the Ministry of Justice
- Kabul Bank
- Financial Disputes Resolution Commission
- Afghanistan Independent Bar Association (AIBA)
- Kabul Commercial Court
- USAID/D&G
- Afghanistan Independent Bar Association (AIBA) Committee on Mediation and Arbitration
- Tom Rosenstock, private lawyer in Kabul
- Malalai Wasil, Lawyer and part time employee of EGGI
- Suleman Fatimie – CEO, Harakat
- Ministry of Women’s Affairs
- Hoqooq Kabul District
- Don Ritter, President, US-Afghan Chamber of Commerce
- Afghanistan Chamber of Commerce and Industry
- Katherine Blanchett UN/EGGI
- Federation of Women’s Business
- Ministry of Justice, Technical Professional Deputy Minister
- International Development Legal Organization
- Afghan Financial Service

- Afghanistan Investment Services Agency
- US Institute of Peace
- Hoqooq (Mazar)
- Afghan Chamber of Commerce and Industry (Mazar)
- Business roundtable (Mazar)
- Ministry of Economy (Mazar)
- Commercial Court (Mazar)

III. Definitions

1. ADR (Alternative Dispute Resolution)

ADR is a term that is used generically to encompass any alternative to the formal court system of litigation for resolving disputes. ADR thus embraces many different forms of dispute resolution in addition to mediation, such as negotiation, conciliation, non-binding advisory evaluative opinions, non-binding mini-trials, arbitration[1] and med-arb[2].

2. Conciliation

Conciliation is a form of ADR that is often confused with, and used interchangeably with mediation. More commonly used in civil law countries, conciliation is a process where the "conciliator" meets with the parties, listens to the parties' discussion of the facts and law favoring their respective legal positions and then proposes a non-binding solution or resolution for the dispute at issue. "Mediation", as it has been traditionally practiced in Afghanistan, is really a form of conciliation or, perhaps, a form of "evaluative mediation" where the third party structures an optimal outcome for resolution of the dispute or provides the complainant with an "evaluation" of the merits of the complaint.

3. Mediation

In the case of facilitative mediation, the parties choose a third party neutral to assist with the resolution of their dispute. However, unlike arbitration, the neutral third party has no power to decide the case for the parties. Further, unlike conciliation, the mediator's job is not to evaluate the merits of the case or recommend a solution, but instead to facilitate the negotiation of a settlement by the parties. Thus, the mediator uses communication and facilitation skills to assist the parties in reaching a mutually agreeable resolution of their dispute. In classical "facilitative" mediation, the mediator does not render an "opinion" on the resolution of the dispute between or among the parties. However, if both parties agree beforehand, an experienced mediator will sometimes, as a last resort, provide the parties with an "evaluation" of the strengths and weaknesses of their respective positions. Unless otherwise stated, this report refers to the facilitative method of mediation as the basis for its recommendations.

4. Arbitration/Litigation

In arbitration and litigation, the primary relationship is between the parties and the decision-maker, be it arbitrator, judge or jury. In mediation, the relationship is between the parties who remain in control of their fate throughout the process. Commercial parties in many countries are increasingly opting for mediation because it is relatively inexpensive, expeditious, produces high settlement rates and usually preserves the business relationship. The consultant and the vast majority of those he interviewed for this report believe that with proper educational efforts and a comprehensive promotion campaign disputants will also come to see the benefits of facilitative mediation and begin to use it as an alternative to litigation.

---

[1] In arbitration, the parties retain and pay a private-sector third party, the arbitrator, to resolve their dispute. Parties who lack confidence in the courts of a foreign country where they are doing business will usually contract to have their disputes resolved through arbitration. In its basic format, arbitration resembles litigation in the sense that the parties have a hearing in which they present evidence to the neutral third party, file briefs, make arguments and usually have rights of cross-examination and rebuttal. Arbitration is like litigation in that the parties are willing to let a third party make the decision but want to have greater control over the choice of the decision-maker-- a choice usually unavailable in litigation. Commercial parties will also opt for arbitration because it is quick, has limited discovery and provides finality with only limited rights of appeal.

[2] "Med-Arb" is a hybrid mediation-arbitration technique where a neutral first attempts to resolve the dispute through mediation and, if unsuccessful and if the parties agree, the same neutral or another neutral will be selected by the parties as the arbitrator to render a final and binding decision terminating the dispute

IV. Doing Business Indicator

The DBI indicators Numbers 9 and 16 (Enforcing Contracts) place Afghanistan 164th out of 183 countries. The DB report recommends 1) streamline the process for resolving commercial disputes and reduce the number of steps involved and 2) conduct a feasibility study for establishing a high-powered commercial court in Kabul to hear all major commercial disputes. The DBI report acknowledges that most people wish to avoid courts due to costs, timeliness of decisions, and potential for bias/corruption. As the report indicates, creation of a high-powered central commercial court, to be effective, would need to be structured such that it would be free of corruption (e.g. higher judicial salaries and significant changes in the legal system). It is questionable whether higher salaries alone will provide incentive enough to offset corruption. The Kabul commercial court did not agree with the DBI report that stated there were 47 steps necessary to resolve commercial disputes. The Kabul court indicated that there are essentially four steps required. Clearly, an apples to oranges comparison is occurring. Anecdotally, without exception all interviewees indicated the time and cost to pursue action in courts is exorbitant. What remains to be quantifiably ascertained is the number of commercial cases going to the commercial courts and traditional shuras/jirgas, their time and cost, monetary value, and the backlog of cases. It is difficult to get reliable data out of the courts. The commercial court has not responded to requests for information. While the consultant has spoken to a number of stakeholders, he has not had the opportunity to speak to many individual business owners about their perspectives, concerns and wishes with respect to more efficient commercial dispute resolution.

It appears the relevant issue with respect to improving the DBI is not the backlog of cases, but reducing the time, cost and complexity (number of steps) for resolving them. It is beyond the scope of the commercial mediation initiative to engage in court reform. In most instances, as we directly observed, decisions made at one court can be sent to another for reconsideration. Arbitral awards can be re-considered, and it is not uncommon for courts to “contract out” justice to local shuras or jirgas. Where mediation can directly improve the doing business indicators is in reducing the time, cost and number of steps involved in settling a case, and in preserving (or often improving) business relationships to foster continued economic activity between parties.

V. Background and Current Context

Afghanistan has a rich tradition of settling disputes through informal dispute resolution mechanisms. This informal system reflects the values of Islam, which focus on negotiation rather than judgment. Negotiation permeates all aspects of Afghan culture, and disputes can carry on for a long time. If parties do not like a proposed settlement they receive from traditional processes, they may often seek the intervention of a court. However, primarily due to perceived corruption, cost and time, people want to avoid courts at all costs.

Most people put a lot of faith in using informal councils (jirgas or shuras) comprised of elders and leaders with social or subject-matter standing. Jirgas are typically convened for a specific purpose – a one-time event. Shuras tend to be bodies that meet to address issues on a regular or semi-regular basis. Their mode of operating is largely directive oriented – i.e., the underlying premise and approach, generally, is to provide a binding or non-binding recommendation/solution.

This directive focus to problem- solving is consistent with a theme that emerged in all the discussions -- the Afghan mindset is largely positionally oriented in its thinking when it comes to negotiation. An example of positional thinking is "I must have this, or I must have that", rather than thinking, "I must have that and the *reason* behind this position is…" which is illustrative of an interest-based approach. The repercussions of this manifest themselves in all aspects of negotiation and dispute resolution. For instance, when a trade dispute erupts the first point of call for party A may be the police, because party A automatically assumes Party B is trying to "win" one over on them or doing something illegal. This is prevalent in the Afghan version of mediation. The basic concept of mediation as the consultant saw it practiced equates to someone listening to a problem and then telling the parties what to do. If the parties choose subject matter experts as mediators, they may get a substantive decision but there are no skills or training in place for mediators to help the parties resolve the underlying relationship issues. This showed itself in a hearing we observed, when the Director of the Hoqooq in the Kabul District said, "when I mediate a case I listen to each party and then determine who is right and who is wrong, then I tell them. There is always someone who is right and someone who is wrong".

During this assessment, there were found very few examples of "mediators" facilitating agreements between the parties themselves without weighing in on the outcome. If, for instance, a court refers a case to mediation the judge will ask the parties to each choose two mediators. The judge then charges the four mediators with reviewing all records and then recommending a reasonable solution that they feel meets the parties' needs. While traditional mechanisms provide rapid and efficient resolution to disputes, they also have the impact of reinforcing the mindset of third party decision-making rather than self-reliance. This is not to say attempts at mediation are not made. However, they do not appear to be the default approach, and those who serve on jirgas or shuras often resort to making recommendations or giving opinions, as they have not been formally trained or educated in the mediation process. The idea of facilitative mediation – in which a third party refrains from decision-making or advice and instead focuses on creating the environment for the parties themselves to work out the issue, is counter to the prevailing mindset in dispute resolution. If mediation can be effectively implemented, it will have second-order impacts such that the mindset of empowering people to resolve issues on their own rather than seek a decision maker will spill over into other aspects of Afghan society outside commercial mediation.

These mechanisms [WHICH?] appear to be as much a social event and means for building community cohesion as a means for resolving disputes, and are therefore part of the social fabric. Several interviewees, however, made it clear their impression was that traditional mechanisms have, over time, become more prone to being partial. This is largely reflective of the belief that 30 years of war have changed traditional values such that people serving on shuras are more concerned with bettering their own situation at the expense of the greater interest of the disputants. A second concern raised is people do not feel shuras have the necessary expertise (substantively or from a process perspective) to resolve more sophisticated commercial disputes. The President of the Independent Bar is interested in working with shuras to modernize them (i.e., involve women and also attorneys).

The World Bank report discusses these shuras specifically and recommends they somehow be brought into a formalized, or more streamlined process, for resolving commercial disputes.

Typically, commercial mediation initiatives are a complement to an existing system, i.e. a functioning court that is overburdened and needs relief from its caseload. In Afghanistan, very little is known statistically about the courts. While the Kabul Commercial Court agreed to provide statistics about settlement rates, none were received in time for the writing of this report. However, the Kabul Commercial Court has made it clear they want to refer cases to mediation, as has the Hoqooq (part of the Ministry of Justice) that administers 66,000 cases a year.

As noted, parties distrust the courts and want to avoid them at all costs. Therefore, a mediation initiative will not necessarily function as a compliment to any existing institutional mechanism as we perceive it in the West. It will be a new effort that should be introduced in the broad context of commercial reform. It is clear from the DB report and interviews conducted for this assessment that implementing any commercial mediation initiative must be handled in a systemic fashion, which also involves basic education in contract law for Afghan businesses and the inclusion of enforcement clauses in contracts for Afghan and international businesses that allow dispute resolution to occur in Afghanistan. Simply building a program (i.e., identification of mediators, their training and development, creating provider institutions, public marketing and awareness, coordination with the courts, etc.) will not result in improving the efficiency or outcome of resolving commercial disputes, as measured by more efficient case settlement (reduction of the time, cost and complexity of steps) and preservation of business relationships.

A Commercial Mediation Law has been passed. It is a very simple law with very few requirements. At the request of the Ministry of Commerce and Industry the consultant provided a minimal set of draft regulations (attached, Annex G), which would provide the legal framework to implement the law. The MoCI was concerned that the mediation law did not provide for the establishment of mediation providers, as does the Law on Arbitration. EGGI advised the Ministry that the regulations the consultant provided would address that concern, and that the practice of mediation should be not be licensed or regulated. Should the MoCI believe it would be advantageous or necessary in any way to partner with a provider or provide public support to any effort, a draft MOU (Annex H) has been created between MoCI and ACCI for establishment of a mediation Center. The consultant and EGGI do not believe this is a necessary step.

VI. Provincial Issues

From March 13 to16 the consultant traveled to Mazar Sherif, a large city located 300 kilometers northwest of Kabul in the Balkh province to meet with business leaders, the Mazar Hoqooq, the Ministry of Economics, and the Afghan Chamber of Commerce and Industry. It should be noted that the consultant did not get out to any villages to see shuras or jirgas at work. Therefore, the recommendations and concerns for provincial work mirror many of those for Kabul, with some differences. At some future point it is recommended Harakat or AID devote resources to doing a study of rural or district dispute resolution and how mediation practices may be incorporated to augment traditional mechanisms. In speaking with the Director of the Ministry of the Economy in Mazar, he stressed that education and training be given at the district level for government and private citizens serving in local dispute resolution mechanisms, and thought it would be very beneficial. He did not believe people in the districts would pay for professional third party services, but did believe there was a market for them in major provincial cities. He was very supportive of the idea of creating dispute resolution centers around the country in major metropolitan areas. It is unknown if Mazar is representative of the other 33 provinces. If it is, the information gleaned from interviews (below) should be taken into account when proceeding with any provincial commercial mediation effort:

1. Increase in Litigation

30 years of war and the resulting fallout throughout society created a culture of corruption and dysfunction such that people are looking for justice. The Mazar Hoqooq administered 2,388 petitions in 2009. Of those 876 were closed and only 8 went through mediation/arbitration. The rest remain open. These mediation figures are down from ten years ago due to the fact many of the disputes are over land and involve forgeries in land titles. The parties believe they have to take these documents to court to be reviewed by experts. The Hoqooq also mentioned many disputes are debt-related, in which people want to be told whether they are right or wrong, or which are resolved when one party makes a payment. It should be noted both the primary and appellate courts in Mazar disputed the figures of the Hoqooq in mediation and insisted that mediation is regularly practiced. They suggested the Hoqooq must have a different interpretation of the mediation process.

2. Quality of Resolutions

The Hoqooq may request a jirga or shura, and the Hoqooq/court must notarize all such decisions. When a written decision is made and presented to the Hoqooq or court, the quality of the decision is often poor and may need reconsideration.

3. Poor Implementation of Commercial Law

Often, the law does not support businesses but holds them hostage to fees, fines or penalties that make little sense. For instance, the need to renew licenses each year, or pay a daily fine if a business is not operating, is taking significant resources for companies to address that could otherwise be devoted to building the company. Short-term loans requiring companies to put up significant resources for security are working against all interested parties in this time of recession when business cannot pay short-term loans back.

4. Lack of Education and Expertise

Like Kabul, the provinces face an issue with lack of education and expertise in contractual matters. This is especially rampant in dealing with foreign investors. Afghan businesses seldom review, or even know what to look for in contracts, that may give rise to disputes. This must be addressed and emphasized in ay mediation initiative.

5. Arbitration

Participants in the consultant's Mazar roundtable discussion also indicated a strong interest in creating an arbitration initiative as soon as possible; they made it clear they were more comfortable

with any arbitration program than a facilitative mediation program.

6. Enforcement

Most contracts involving foreign partners call for dispute resolution outside Afghanistan. This creates major problems for Afghan businesses. Contract language and clauses need to be developed and routinely inserted into contracts calling for disputes to be heard in Afghanistan or by Afghan third parties.

7. Islamic Tradition

Any mediation initiative should align with the traditions, beliefs, values and codes of conduct for Islam. Advice should be sought form appropriate sources in this regard such as clerics, scholars or Islamic lawyers.

8. Feedback

The participants requested that Harakat and its implementer travel to Mazar to discuss directly with them how a provincial mediation initiative be implemented. They were very concerned about having their voice heard, and about a Pakistan-based mediation firm conducting the actual implementation effort. Their feeling was Pakistan already had significant negative influence over the country.

9. Mixed Acceptance

Reaction to the mediation project in Mazar was decidedly mixed. Some wanted arbitration more, some did not want mediation at all (use the money elsewhere) and some embraced it.

10. Courts

Primary and appellate courts in Mazar welcomed the professionalization of traditional mediation mechanisms, especially when it pertained to international disputes.

VII. Key Issues

1. Varied Approach

Due to different levels of education, sophistication, training and resources, there is a vast difference in the ways disputes may potentially be resolved in major cities and in the provinces. A more internationally recognized mechanism is appropriate for Kabul and other major cities, while a system that integrates into traditional shuras/jirgas may be more appropriate for the provinces.

2. Education

Individual and organizations alike agree that a more formalized means of mediation and arbitration should be introduced as a method of better resolving commercial disputes, and it needs to be implemented within a larger systemic approach. Afghan culture is largely orally based. Typically, contracts are agreed upon orally. Potential risk is typically not addressed in contract negotiations, and using attorneys to preemptively review contracts prior to signing is not an accepted practice. This leads to many commercial disputes, especially with foreigners. There is a widespread lack of knowledge both in the cities and provinces regarding basic contract law, use of representatives such as attorneys and the difference between mediation and arbitrations. Without exception all the consultants interviewed said mediation and arbitration are widely used to resolve commercial disputes. Digging deeper, one finds that what they mean is that disputes go before un-trained neutral third parties who provide the disputants with either a non-binding recommendation if they cannot get the parties to agree (their view of mediation) or a more formalized semi-binding resolution that may involve subject matter experts (arbitration) and is open to appeal to the courts. If even a truly neutral mediator makes a recommendation, binding or otherwise, inevitably he or she can be perceived as biased. Therefore, perpetuating a mediation model in Afghanistan where mediators too easily make recommendations may only serve to perpetuate the status quo.

3. Enforcement

Most foreign investors have contracts that include provisions for dispute resolution outside Afghanistan, which is very difficult for Afghan businesses to pursue. Enforcement provisions that require parties to go to mediation or arbitration for resolution of disputes in Afghanistan need to be included in contracts.

4. Engagement

Afghan society rejects efforts at centralized control and is very independently minded. Harakat and its implementer should continually engage all stakeholders in seeking suggestions and guidance in how to implement any mediation initiative wherever it takes place. Stakeholders want to be engaged. Concerns were also raised about a Pakistan-based mediation firm conducting the actual implementation effort, and about the secondary impact this may have on Harakat's credibility to fund such an effort.

VIII. Recommendations

1. Two-Track System

The consultant recommends creating a pilot two-track system to match the appropriate business environment (i.e., major cities vs. the provinces). The first pilot program would be a more formalized commercial mediation initiative under the auspices of the Afghan Chamber of Commerce and Industry (ACCI). Other institutions may wish to create centers, but none have come forward at this time. This could be expanded after evaluation of the pilot project to include other provider institutions in major cities for use with medium and large businesses and international investors. The courts, Hoqooq, lawyers, ACCI and its affiliate unions, the Central Bank, the Afghan investment Support Agency (AISA) or companies themselves would refer cases. Formal mediation service would be offered, and mediators would be drawn from a variety of sources (e.g., the Afghanistan Independent Bar Association (AIBA), ACCI and its affiliates, AISA, professionals such as lawyers and accountants, business persons, Hoqooq, registered shuras, etc).
Once the program has been piloted in Kabul, it can eventually be expanded to the provinces and other major cities. The programs do not need to be of identical design – different models can be tried in different areas. For instance, in one province the main provider center may belong to ACCI, while in another a registered shura or the Hoqooq could sponsor it. Since some shuras are actually registered with the government, this may be a sound approach. Perhaps a pilot project institutionalizing ADR mechanisms within these registered bodies could be considered. It might be interesting to explore how the AIBA efforts to modernize the shura system could be included in EGGI efforts. The President of the Afghan Independent Bar has indicated he wants to work with EGGI in this initiative.

2. Design and Implement Mediation Center Policies and Guidelines

Mediation centers cannot function successfully without written procedures and forms (where applicable) for (1) governance and operation of the center; (2) recruitment, training and evaluation of mediators for the center roster; (3) case management, tracking, record-keeping and billing; (4) the rules for conducting mediations; and (5) dealing with the public, convening mediations and marketing the center.

The consultant proposes developing rules and procedures to cover these aspects of any operational center. For this pilot program, the development will involve significant consultation with ACCI staff, and their input and comments will be an integral part of the process. In the course of this process, center staff should come to feel a sense of ownership of their procedures and will be more likely to use and heed the administrative and logistical process for conducting mediations if they have had a hand in crafting the process rather than being handed a set of procedures which they have had no involvement in creating. Once established, a training program in the procedures would be necessary for staff of the ACCI and any other potential service-provider.

Model procedures for both mediators and provider organizations operating in Afghanistan are attached in this document (Annexes E and F). These were adapted from the American Arbitration Association.

3. Training of Mediators

Mediators

The consultant recommends a training program for mediators and mediation center administrators which would include basic mediation training, advanced mediation training, a mediation “practicum” (where trainees mediate “mock cases”), administrative training for

mediation administrators at ACCI, including case evaluation and referral training, "train the trainer" modules, and a foreign study tour.

The consultant contemplates training mediators drawn from ACCI, the Independent Bar Association of Afghanistan, the Lawyers Association, Hoqooq, the academic community, and the private sector. Candidates would be interviewed beforehand to assess their natural mediation skills, and no one would be guaranteed that simply by virtue of having received the training they would be certified. The development of qualified mediators requires extensive training in communications, process, and the dynamics of interpersonal relationships. A standard mediator-training program typically includes four separate segments--basic training, advanced training, a practicum, and mentoring[3]. Typically, mediation training programs will also include a fifth and sixth segment—(5) periodic skills enhancement/refresher course; and (6) a "Train the Trainer" module and foreign study tour. Mediators would be assessed at the end of their training program by the consultant(s) for their ability and be duly certified upon fulfilling certification requirements.

Each segment of the Advisors' proposed mediation training program is described below:

A. Basic Mediation (24 hours—3 days)

The basic mediation course is a fundamental, highly interactive program that is designed to introduce students to the core concepts of mediation, and to provide them with opportunities to develop and practice the skills necessary to effectively serve as a neutral third party. The class focuses on an in-depth study of the process and its constituent elements. In addition, the course focuses on developing such communication skills as negotiation, active listening, effective questioning techniques and problem-solving. Significant portions of the class are devoted to interactive exercises that provide students with opportunities to experience mediation in a variety of situations.

B. Advanced Mediation (24 hours—3 days)

The advanced mediation program focuses both on mediating commercial mediation cases and dealing with some of the more challenging interpersonal aspects of mediation – handling difficult behaviors, overcoming impasse, facilitating difficult conversations, and working with multiple parties in situations specifically tailored to reflect the unique circumstances of the Afghan business culture. As with the basic mediation course, the commercial mediation workshop is highly interactive and provides significant opportunities for participants to practice and refine their skills under the guidance of experienced mentors.

C. Practicum (8 hours—1 day)

The mediation "practicum" is designed to provide an opportunity for students to practice and hone their newly acquired skills in a highly realistic commercial environment. Through the use of specially designed role-plays tailored to reflect

[3] Mentoring is a commonly used transition process from classroom training to live casework for mediators across the world. Upon completing the basic, advanced and practicum training, the trainee typically moves to a mentoring period where he or she works with a senior mediator over a period of 3-5 cases. During the mentoring period, the senior mediator gradually shifts more and more responsibility for the handling of a mediation to the junior mediator. By the 5th mediation, the junior mediator will generally take the lead with the senior mediator acting as a coach. As there are, at present, insufficient mediation cases in Afghanistan to institute a viable mentoring program, initiation of a mentoring program must await the development of a sustainable mediation center in Kabul.

Afghan commercial situations, the practicum will afford students an opportunity to perfect and refine their skills prior to being mentored through live casework.

D. Skills Enhancement/Refresher Training (4 hours—half-day)

If trainees have not had sufficient opportunity to mediate cases within the first three months of completion of their "practicum," then ACCI should provide refresher and skills- enhancement training. This training would typically include a role-play, a session on mediator strategies for bringing the parties to closure and, for attorneys, a session on representing parties in mediation.

E.Train the Trainer Program (40 hours—five days)

The goal of the ACCI mediation initiative will be creation of a sustainable corps of mediators at ACCI Center and in Afghanistan generally. To that end, it will be necessary to transfer commercial mediation training skills to selected Afghani participants. The consultants' "Train the Trainer" program has been field tested in a number of developing countries and can be easily adapted to the Afghani environment.

F. Foreign Study Tour

Conduct a foreign study tour, preferably in neighboring Islamic countries to study both live commercial mediations and how mediation centers operate from a practical and administrative basis. These tours are especially effective in the initial stages of a commercial mediation program, as the participants typically observe live cases, which initially may be in short supply in Afghanistan.

It is NOT recommended that mediators be sent to the West for such a trip. It is better that they see how commercial mediation is being implemented in an Islamic society where the "jump" in culture is not so significant as compared to the West.

G. Assessment and Credentialing

The students will be assessed and graded by the consultant(s) for proficiency. After having shown proficiency in mediation they will be duly certified.

Jirgas and Shuras

There is much room for innovation and high impact in this area. Equipping those who participate in jirgas and shuras with mediation, facilitation and conflict resolution skills, appropriately tailored for Afghan society, will have impact outside the mediation arena. Training and education can be appropriately modified and constructed from the proposed mediator training guidelines (above).

It is anticipated that working through jirgas and shuras will mostly occur in the provinces. Since shuras are pre-existing bodies, members should be targeted for potential development. While those who preside or assist in these matters could be assisted with improved training, it is questionable whether the creation of a new class of professional mediators will be successful, certainly in the provinces. Afghans place a high degree of importance on a person's social standing and familiarity as a way to counter distrust. An Afghan will generally prefer the less educated/trained mediator whom he knows, or whose standing in the community has been established, than a highly trained mediator who may not have equal social standing, or may even be from a different community. Therefore, the best way to have an impact is to identify those who are currently providing these services and provide training to them.

4. Provincial track

The second track would focus on more provincial matters and align with existing mechanisms and

politics of provinces and districts such as local shuras and the Hoqooq provincial offices. The consultant recommends targeting and training specific business and social leaders and elders serving as existing dispute resolution providers in mediation skills to augment and formalize their "facilitative" conflict resolution abilities. This would not preclude a mediation capacity being built, but indicators are that a purely facilitative approach might not sustain a mediation initiative and may be counter to local culture.

Participants in the Mazar roundtable recommended the creation of a formalized provincial level tri-partite commission compromising businessmen, government representatives and contract/legal professionals to serve as a body through which disputes could be brought for mediation, conciliation, arbitration, or traditional dispute resolution mechanisms. This reflected their concern that government was not a partner with businesses in resolving disputes, and that there was a significant lack of legal expertise available to help Afghan business owners, especially with respect to disputes with foreign companies. Interviewees in Mazar were also concerned that official government involvement may signal the potential for corruption or undue influence by the government. Alternatively, they welcomed a similar initiative from ACCI that would focus on creating provincial mediation centers, assuming ACCI can persuade government ministries to volunteer the services of key employees to serve without pay, and legal professionals to work and get local and foreign-investment disputes resolved through this mechanism.

Since the demand for dispute resolution services in the districts may vary, and parties will likely not be able to pay for services, these provincial committee or commissions may consider volunteering their services in the more remote districts.

Participants also indicated a strong interest in creating an arbitration initiative as soon as possible, as they made it clear they were more comfortable with an arbitration program than a facilitative mediation program.

The participants were adamant that equal weight should be given to education in basic contract law, drafting contracts, inclusion of dispute resolution clauses and other educational efforts to compliment any provincial mediation or other dispute resolution initiative.

Finally, participants indicated that any mediation initiative should align with the traditions, beliefs, values and codes of conduct for Islam. Advice should be sought form appropriate sources in this regard such as clerics, scholars or Islamic lawyers.

The consultant was not able to meet any shuras or witness any shuras or jirgas in action. Nor was the consultant able to visit any rural or district areas. This additional research is critical to forming any further recommendations for implementation of a mediation initiative at the rural or district level, or for incorporating any traditional mechanisms into a mediation initiative.

5. Pilot Facilitative Mediations in Kabul

The consultant recommends that professional mediators provide western-style mediations to select cases to show Afghan businesses, mediators and potential service-provider organizations a different approach. Some businesses may choose to try this to test the appropriateness of mediation for their cases.

6. Coordination with the Courts

The courts are a good source of disputes, and judges will need to be trained in mediation and how to properly refer the cases. While it is common for judges to actively encourage settlement in Afghanistan from the start, they are unfamiliar with the mediation process itself, and as the Rule of Law initiative progresses to modernize the courts, so too should the knowledge of mediation and means of referring cases in commercial disputes. This aspect of the project would involve training the various elements of the legal sector (commercial courts, Attorney General, Ministry of Justice) in the benefits of both ADR and case referral procedures.

7. Development of curricula in ADR

a. Law students and lawyers so they may competently advise their clients
b. Business schools
c. Hoqooq (at national and provincial levels)
d. Shuras (national and local levels)

8. Public Dialogue

Create a public dialogue process to inform people about mediation and get their input into building the initiative –what is the extent to which dissatisfaction with current processes is really a problem, and who is suffering the most? How should our efforts be adjusted culturally? This would involve first hosting some roundtable discussions in Kabul and in the provinces on ADR as it is practiced elsewhere in the world, and then engaging stakeholders in discussions on their concerns and how best to address them.

9. Partnering Initiative

Partnering is a process designed to prevent disputes from the beginning of a commercial venture such as a construction project or creation of a company. The process helps align organizations to achieve a mutual vision, reap economic benefits, improve working relationships, and prevent litigation. The process is designed to promote an environment for teamwork, problem-solving and attaining common goals. The parties, with the assistance of a facilitator, commit to establishing effective communications, building trust, and sustaining strategic relationships.
Partnering has a proven record of achieving realistic and measurable benefits for all stakeholders. The most highly touted benefits of partnering are within budget and on-time completion of projects. Other benefits of partnering are more innovative solutions to problems, expeditious resolution of disputes, improved safety and increased productivity. In addition, there are certain intangible benefits that include improved quality performance, customer satisfaction, enhanced business reputation and a great working atmosphere.

Currently, this process does not exist in Afghanistan. The consultant recommends special emphasis be placed on the creation of this capacity within the mediation center, as most disputes arise out of disagreements over the management of expectations, roles, responsibilities and obligations, especially where no contract is present. Creating this capacity to focus on the prevention of disputes before they occur may yield impact on the Doing Business Indicators as it will increase investor confidence in the good faith efforts to seriously partner by their Afghan counterparts. The consultant recommends the Afghan Financial Service or AISA as good organizations to implement this under the auspices of the center.

10. Design and Implement a Public Information and Awareness Campaign

In order to overcome the awareness barrier identified in our discussions, it will be critical for the MoCI and ACCI to launch an extensive media and public information campaign which emphasizes the benefits of mediation over litigation and the importance of preserving business relationships. MoCI/ACCI must generate support for the initiative among key champions, such as members of the AISA, various chambers of commerce, other businesspersons, attorneys, key government officials and the media. Experience in Central and Eastern European countries, as well as in Egypt and Central Asia show that well publicized and organized media events, TV and Radio “spots”, and print media articles generate public awareness and interest in mediation by potential consumers (disputants and litigants) and serve as a tool for recruiting mediators.

The public information rollout would include:

Phase 1: Conduct a series of roundtables, both in Kabul and provincial centers, with private and public sector stakeholders, attorneys and the media. The roundtables should be combined with a media campaign to reach key business people, attorneys, law schools and other key stakeholders to include: (1) placement of articles in newspapers and magazines;

(2) TV and radio interviews with potential supporters of mediation; and (3) periodic press briefings.

Phase 2: Creation of both a promotional and a training video.

Phase 3: Publicizing mediation successes, particularly in the context of mediation "settlement weeks" (see below).

The Phase 1 rollout would serve a number of important functions. First, the rollout would increase awareness about mediation among the public at large and mobilize support for mediation among key stakeholders, such as businesses and business associations, attorneys, judges and government officials. Second, the roll-out will educate potential users of mediation and gate-keepers – litigants, attorneys and courts – about specific benefits of mediation and important mediation concepts, such as case selection, finding mediators, the mediation process, confidentiality, settlement agreements and enforceability.

In Phase 2, it will be important to keep the roll-out "rolling" with periodic articles, news items and media spots highlighting mediation and mediation practitioners and, even more importantly, enlist key decision-makers as allies in the campaign to expand mediation in Afghanistan. During phase 2, it will be important to develop two separate videos—one as a training aid and a second as an integral part of the marketing campaign in order to provide additional public information sources.

The goal in Phase 3 will be to publicize successes. The media consultant can assist in development and implementation of a highly publicized "Settlement Week" designed to incentivize and encourage commercial litigants to agree to go to mediation. The purpose of "Settlement Week" is to generate a critical mass of cases for ACCI-trained mediators to mediate during a finite period of time.

11. Settlement Week

In a Settlement week, the courts commit to assigning a percentage of their caseload to mediation prior to considering formal adjudication as a way of showcasing mediation. Settlement Week serves three major functions: First, "bundling" a number of cases into a 5-10 day period generates excitement and publicity about mediation as an alternative to litigation which, in turn, increases public awareness about the mediation alternative. Second, the center and mediators participating in the process will gain almost instantaneous experience in referring, managing and mediating ACCI/court/Hoqooq-referred cases, which might otherwise take many months, if not a year or more, to acquire. Third, donor and contractor program goals relating to numbers of cases processed can be more readily achieved in a shorter period of time by utilization of the Settlement Week process.

12. Commercial Contract Law and Enforcement

It is strongly recommended Harakat look at the commercial mediation component not as a separate initiative but within the framework of developing these both education, enforcement and dispute resolution as important aspects of modernizing the business environment. As stated elsewhere in this report, Afghan business culture is largely orally based. Typically, contracts are agreed upon orally. The mindset appears to be, "Let's enter into an agreement to operate in good faith. If there is a problem we will negotiate it at the time and compromise on the outcome." Potential risk is typically not addressed in contract negotiations and attorney review of contracts prior to signing is not an accepted practice. As noted, this leads to many commercial disputes, especially with foreigners. As the World Bank Report indicates, dispute resolution is a system and not an isolated event. For a commercial mediation initiative to be successful it often serves as a compliment to an existing framework, i.e., as a means to handle overflow from the courts. In Croatia, a country of approximately 4.5 million, there are over 1 million court cases in backlog. Here in Afghanistan, actual case figures are not known. *Commercial mediation will be a new element introduced in a traditional system that is in the process of being modernized. Critical to that modernization effort should be fundamental educational efforts to familiarize the Afghan business community with basic contract law and to create an environment and incentives for parties to come to the mediation in the first place.*

International relationships are a special case because the international parties have no real access to the domestic informal system. One of the pillars of the domestic system is that the participants are long-term repeat players, and therefore subject to social pressures to conform to norms of fair and appropriate behavior. The international parties are not part of this. International parties, because they don't know the local system, are not willing to trust it. Further complicating the issue is that most international parties have provided for exclusive jurisdiction in the courts of their own country, or for international arbitration. There are significant barriers to Afghans actually obtaining justice through these means, so the actual effect is that most of the time, international parties need fear no judicial or arbitrator review of their behavior. In this context, it is irrational to expect these parties to then voluntarily submit to a local process, which increases oversight of their activities. *For this reason, any approach that attempts to address the international business disputes will likely fail unless incentives or mandates to submit to oversight are included.* Such a mechanism could take the form of a requirement in donor organizations prime contracts that some subcontract disputes be submitted to the jurisdiction of a local dispute resolution forum. Moreover, if such a forum, from the perspective of the internationals, stopped at mediation and did not include an arbitration component, there would still be no incentive for international parties to participate in good faith in such procedures.

13. Evaluation

An evaluation component should be constructed that measures

1. Knowledge of the parties before and after the mediation process
2. The impact of the mediation process on the substantive and relationship outcomes of the process vs. court proceedings or traditional dispute resolution methods; also the comparative costs of settlement in terms of time and resources.
3. Perceived benefit to end-users.

In essence, the evaluation component should measure both the quantitative and qualitative aspects of introducing mediation to the commercial dispute resolution process. This will a) provide quantitative and qualitative data useful in raising the DBI ranking and b) enable the advisors and service-providers to better tailor the initiative as it proceeds and evolves.

14. Arbitration

At this time both EGGI and Harakat are not involved in any arbitration assessment. However, it is clear the Afghan society and mindset are much more arbitration oriented than mediation focused. A dedicated arbitration assessment should be conducted and whatever recommendations stem from that report should be closely woven in to any ADR initiative implemented.

IX. Conclusion

There is much interest in Kabul and a moderate interest in Mazar for creation of a commercial mediation initiative. This report has provided a suggested roadmap for developing and nurturing such a capacity. Since AID is transitioning the work to another donor, the consultant recommends the following actions to ensure a smooth transfer:

- Follow up the Mazar roundtable meeting. AID or Harakat should contact the Mazar ACCI and roundtable attendees to discuss potential follow-on work. Attendees were very wary of expectations created not being followed through upon, although we were very clear not to promise or commit to anything on AID's or Harakat's behalf. The simple facts a mediation roundtable was held, that a discussion took place of the reasons behind the roundtable and that Harakat is implementing a program ignited interest.

- Harakat should reconsider using a Pakistani-based organization as ADR implementer. Participants at the roundtable accepted this very poorly.

- It should be noted the consultant did not get out to any villages to see shuras or jirgas at work. Therefore, the recommendations and concerns for provincial work mirror many of those made for Kabul, with some differences. It is recommended that at some future point Harakat or AID devote resources to doing a study of rural or district dispute-resolution and how mediation practices may be incorporated to augment traditional mechanisms.

- Roll out a provincial commercial-mediation initiative in a timely manner, whether through AID or Harakat.

- Begin work on the arbitration initiative, as there was great demand for this by the user roundtable.

Appendix

This section includes meeting schedules, scopes of work for both trips, model procedures for mediators and mediator providers, draft regulations for implementing the law on commercial mediation, and a draft memorandum of understanding for the MoCI to use in establishing relationships with ACCI or any provider organization if it is deemed necessary.

ANNEX A: SCHEDULE OF MEETINGS TRIP 1

S. No.	Date	Organization	Contact	Title	Address	Contact Info	Subject
1	21-Jan-10	Bar Association	Mr. Rohullah Qarizada	Director of the Bar	Street #1, Qalai Fatullah, Madina Bazaar	Tele: 700223595/786223595 rqarizada@yahoo.com president@aiba.af	
2	24-Jan-10	Legal Board of MoCI	Mr. Mohammad Yousuf Rajabi	Director of Legal Board	Ministry of Commerce and Industry	Tele: 0700280439 mohyusufrajabi@yahoo.com	
3	25-Jan-10	World Bank	Luba beardsley	World Bank		Lbeardsley@worldbank.org	
4	25-Jan-10	Financial	Mr. Abdullah	Chairman of the	Malik Asghar Avenue	Tele: 798275105	

		Disputes Resolution Commission	Dowrani	Commission		akhandowrani@yahoo.com	
5	25-Jan-10	Central Bank	Mr. Sharif Shirzad	Legal Advisor of DAB	Pashtonistan Avenue, Next to Presidential Palace	Tele: 700206141 sharif.shirzad@centralbank.gov.af	
6	26-Jan-10	Faculty of Law and Political Science	Mr. Wali Naseh	Professor of faculty of Law	Faculty of Law and Political Science, Kabul University	Tele:700292665 walinaseh@hotmail.com	
7	27-Jan-10	Department of Hoqooq	Mr. Mohammad Naseem Barna	Director of Hoqooq	Nahya Street, District # 3	Tele: 0700217270	
8	27-Jan-10	Roshan Company		Roshan Company			
9	27-Jan-10	Kabul Bank	Mr. Mohammad Ahrar	Legal Advisor	Share Naw, Mohammad Jan Khan Watt	Tele: 700280916 m.ahrar@yahoo.com	
10	30-Jan-10	Commercial Court	Mr. Abdul Wahab Sadeed	Director of Commercial Court	Kabul Governor's Compound	Tele: 0776869877/0799778902	
11	30-Jan-10	AID/Rule of Law		AID			
12	31-Jan-10	Bar Association of Afghanistan	The Committee	Bar Association Arbitration Committee	Street #1, Qalai Fatullah, Madina Bazaar	Tele: 700223595/786223595	

13	1-Feb-10	Tom Rosenstock, private attorney				772164044	
14	1-Feb-10	Ministry of Women's Affairs, commercial section		Deputy Director of Economic Development	Share Naw, Close to Share Naw Park	Tele: 0779568064	
15	2-Feb-10	Afghanistan Chamber of Commerce and Industry	Mr. Atiqullah Nasrat	Deputy of ACCI	Chaman-e- Hozori, Next to Kabul Theater	Tele: 0799462388/787698952 atiqullah.nusrat@acci.org.af amnusrat@gmail.com	
16	3-Feb-10	Hoqooq observation and meet again afterward with Director	Mr. Sayed Rasool Shaheer	Deputy Director	Kabul Governor's Compound (Wolayat Kabul)	Tele: 0799303479	
17	3-Feb-10	Katie Blanchette	UN Rule of Law/EGGI				
18	4-Feb-10	Harakat	Sulaiman Fatimie				
19	4-Feb-10	EGGI	Malali Washil			0795-980-231	
21	7-Feb-10	Observation of disputes at Governor Compound	Mr. Sayed Rasool Shaheer	Deputy Director of Hoqooq	Kabul Governor's Compound	Tele: 0799303479	

22	7-Feb-10	Women's business federation	Ms. Gul Jan	Director of Federation	Qalai Fatullah, Close to Attorney's Office	Tele: 0700187299	
23	8-Feb-10	IDLO	Mr. Shafiq	Head of IDLO	street 15 block 2 (on the left) house number 1063	Dr. Waheed Tele: 0799432016	
24	8-Feb-10	Harakat	Sulaiman Fatemi			EGGI	
25	9-Feb-10	Ministry of Justice -- Technical professional Deputy	Mr. Qasem Hashemzai	Deputy Minister for Technical Affairs	Ministry of Justice	Tele: 0202100321	
26	10-Feb	MoCI	Mr. Mohammad Yousuf Rajabi	Director of Legal Board	Ministry of Commerce and Industry	Tele: 0700280439 mohyusufrajabi@yahoo.com	
27	11-Feb	USAID	Heath Cosgrove	COTR			

ANNEX B – SCHEDULE OF MEETINGS TRIP 2

S. No.	Date	Organization	Contact	Title	Address	Contact Info
1	3 –March-10	Afghanistan Chamber of Commerce and Industry	Mr. Kohi	Deputy of ACCI	Chaman-e- Hozori, Next to Kabul Theater	Tele: 0799462388/787698952 atiqullah.nusrat@acci.org.af amnusrat@gmail.com
2	4- March-10	US Institute of Peace	Shahmahmood Miakhel	Chief of Party		**E-mails:** smiakhel@usip.org ; smiakhel@gmail.com **Tel: +93-799-327-051** www.usip.org
3	6-March-10	Afghan Financial Services	Sanzar Kakar	CEO	D-120 Gulbahar Center	93-796-000-111 sanzar.kakar@afs.af
4	6-March-10	EGGI/AID	Oliver Dziggel Susan Coleman			
5	6-March-10	EGGI	Malalai Wassil	Energy sector head		mwassilw@yahoo.com,

6	7-March-10	Harakat	Sulaiman Fatimie	CEO		suleman.fatimie@harakat.af,
7	7-March-10	Afghan Investment Services Agency	Naseem Akbar	Vice President		
8	8-March-10	Legal Board of MoCI	Mr. Mohammad Yousuf Rajabi	Director of Legal Board	Ministry of Commerce and Industry	Tele: 0700280439
9	10-March-10	Legal Board of MoCI	Mr. Mohammad Yousuf Rajabi Mr. Husani	Director of Legal Board	Ministry of Commerce and Industry	Tele: 0700280439 mohyusufrajabi@yahoo.com
10	10-March-10	Legal Training Center				
	TRIP TO MAZAR					
11	13-March-10	Justice Directorate/Hoqooq	Mr. Nasratullah Hotak and Mr. Nasir khan		Mazar-e-Sharif	
12	13-March-10	ACCI Mazar	Mr. Said Taher Roshanzada	Director, ACCI Balkh	Mazar-e-Sharif	
13	14-March-10	ACCI Roundtable			Mazar-e-Sharif	
14	15-March-10	Balkh Court House	Mr. Omar and Mr. Abdul Ghafor	Heads of Appeals and Pleadings, Commercial court	Mazar-e-Sharif	

15	15-March-10	Economy Directorate	Mr. Abdul Rahman	Director	Mazar-e-Sharif	
	KABUL					
16	17 March	AID	Heath Cosgrove/Susan Coleman	COTR		
17	17 March	Harakat	Suleman Fatimie	CEO		

Proposed Advisor	Peter J. Bryan Swanson
Title	Commercial Mediation Advisor
Ministry	Ministry of Commerce & Industries (MOCI)
Component	Component 3: Business Enabling Environment
Contract Name and #	EGGI: EEM-I-00-07-00005-00, TO #04
Assignment Dates	From January 17, 2010 to February 12, 2010

ANNEX C. APPROVED SCOPE OF WORK TRIP 1

Statement of Work: Economic Growth and Governance Initiative (EGGI)

Assignment Background & Information

A Commercial Mediation Law of Afghanistan was adopted in 2007 but not yet implemented. The Ministry of Commerce and Industries is responsible for administering the training program for mediators and to establish an Official Registry of Mediators. --- Informal mediation processes exist in Afghanistan but need to be formalized to comply with the new Law.

The purpose of this SOW is to provide advice to the Minister of Commerce & Industries with respect to best international practices consistent with local conditions for the establishment of an official Registry of Mediators and to develop a curriculum for selecting and training any person who meets the conditions for becoming a registered mediator.

Proposed Tasks

Key tasks are expected to include:

1. Develop a strategic plan for the implementation of the Commercial Mediation Law of Afghanistan and propose such regulations as needed.
2. Propose suggestions regarding the best institutional location, taking into consideration the Afghanistan Chamber of Commerce and Industry and alternatives, to host the official registry of mediators; and propose steps to implement it.
3. Develop selection criteria for persons who meet the general conditions for employment as a registered mediator.
4. Participate in the selection of candidates.

5. Design mediation, facilitation, interested based negotiation and conflict resolution training programs.

Deliverables and Reporting Requirements (Indicators)

1. Briefings and reports to USAID and Afghan counterparts upon request.
2. Prepare a strategic work plan covering best international practices on mediations.
3. Develop selection criteria document for candidate mediators and participate in selection.
4. Develop mediation, facilitation, and interest based negotiation and conflict resolution training programs for the mediators.

Significant Responsibilities of the Counterpart(s) to Achieve Tasks & Deliverables (email and cell number)

- Access to relevant MOCI officials and timely decision-making
- Access to commercial court judges, Bar Association and to the Afghanistan Chamber of Commerce and Industry

Location

Kabul with possible trips in the regions as required.

Deloitte & Afghan Counterpart(s)

Richard Laliberte, Chief of Party
Oliver Dziggel, Deputy Chief of Party
Monique Courchesne, Sub–Team Leader and Advisor at the Ministry of Commerce & Industries
Minister Sharani, Minister of Commerce & Industries

ANNEX D. APPROVED SCOPE OF WORK TRIP 2

Proposed Advisor	Peter J. Bryan Swanson
Title	Commercial Mediation Advisor
Ministry	Ministry of Commerce & Industries (MOCI)
Component	Component 3: Business Enabling Environment
Contract Name and #	EGGI: EEM-I-00-07-00005-00, TO #04
Assignment Dates	From on/about February 28, 2010 to March 20, 2010

Statement of Work: Economic Growth and Governance Initiative (EGGI)

Scope of Services To Include But Not Limited To the Following:

a) Description of Work

Assignment Background & Information

From January 19-February 10, Mr. Pete Swanson conducted an assessment on the feasibility of creating a commercial mediation initiative to implement the 2007 law on mediation. The Capital Demand survey shows that 42% of large companies surveyed settled their disputes through local tribal shuras out of 59% of disputes settled informally. If this is correct then 71% of financial disputes in which at least one party is a large company are settled by tribal shuras (these large companies are urban based). This data suggests that tribal shuras are the preferred means of settling financial disputes, even for those disputes involving larger urban based companies.

His recommendations were to create a two track system – a more formalized approach for major cities like Kabul, and a more informal approach that would work within traditional dispute resolution systems for the provinces. However, it may be that the system for training is identical, but the effort be parsed out between Kabul and provincial based approaches. He also noted that different mechanisms be explored for international investor-Afghan disputes and Afghan-Afghani disputes. His efforts in his initial trip focused on understanding the cultural context of dispute resolution in Afghanistan and how such a program may be best institutionalized in Kabul and the major cities. It should be noted he wants to avoid making mistakes of previous donor funded mediation programs that train mediators, develop centers, and then declare victory when there are no cases. The Afghan mindset is more arbitration oriented, but people clearly want to explore mediation. Much effort will need to go into targeting prospective users of the

system and creating marketing and public education efforts to allow persuade users to try mediation. Further, the commercial mediation initiative should work very closely with Harakat, as they have invested heavily in exploring funding a similar initiative and want to work closely with AID in this.

The purpose of this SOW is to: 1) begin the process of implementing the strategy for the major urban centers, focusing primarily at this stage on Kabul; and 2) investigating how mechanisms may be set up in the provinces. Critical to this understanding will be a visit to one or two provinces to talk to stakeholders.

Mr. Swanson did not address some items in the initial scope of work (i.e. identifying specific mediators and designing mediation training programs because these steps are premature and actually less critical at this point than focusing on creating the awareness and market for mediation services.

Proposed Tasks

Key tasks are expected to include:

6. Finalize the strategic plan for the implementation of a pilot program for the Commercial Mediation Law of Afghanistan in Kabul that may extend to other major urban centers. This will require significant coordination efforts amongst major stakeholders (ACCI, Hoqooq, FDRC, possibly MoJ and the registered Shuras).
7. Travel to one-two provinces to assess how mediation initiatives may be wove into traditional dispute resolution mechanisms such as shuras and jirgas. Activities in the provinces will include meetings and roundtables with:
    - Provincial Chamber of Commerce;
    - Business owners for small, medium and large enterprises, conduct an information gathering roundtable of their needs for commercial disputes
    - Local Hoqooq Office;
    - Local influential business Shura, possibly observe a settlement conference; and
    - Commercial courts
8. From these visits develop a strategy for implementing a pilot mediation initiative in the provinces.
9. Begin development of a comprehensive media strategy for educating the end user on the benefits of mediation (i.e. large private businesses, Chamber of Commerce, Hoqooq, Commercial courts).
10. Begin to work with potential service provider organizations in planning for the creation of provider centers. This will include preliminary discussions on identifying mediator candidates, planning for training programs, case administration, etc.
11. Coordinate with other donors and appropriate Afghani governmental agencies and businesses to create regulations and policies that will need to be in place, as well as identifying specific benchmarks raise the indicators for the World Bank report.

Deliverables and Reporting Requirements (Indicators)

5. Briefings and reports to USAID and Afghan counterparts upon request.
6. Prepare a strategic work plan covering implementation of a pilot mediation initiative in Kabul and one or two provinces.
7. Coordinate with dispute case providers, neutral services providers and appropriate government ministries to develop workplans for public education and awareness campaign for business owners, investors, judges, attorneys;
8. Develop workplan for service providers that addresses creation of provider cernters, coordination mechanisms, selection criteria for mediators and a training/mentoring plan for their development.

Significant Responsibilities of the Counterpart(s) to Achieve Tasks & Deliverables (email and cell number)

- Access to relevant MOCI officials and timely decision-making
- Access to commercial court judges, Bar Association and to the Afghanistan Chamber of Commerce and Industry

Location

Kabul with possible trips in the regions as required.

Deloitte & Afghan Counterpart(s)

Richard Laliberte, Chief of Party
Oliver Dziggel, Deputy Chief of Party
Monique Courchesne, Sub–Team Leader and Advisor at the Ministry of Commerce & Industries
Minister Sharani, Minister of Commerce & Industries

b) Period of Performance – From on/about February 28, 2010 to March 20, 2010

c) Place of Performance – Kabul, Afghanistan

d) Consultant shall report to Richard Laliberte, Chief of Party and Oliver Dziggel, Deputy Chief of Party

ANNEX E:

MODEL PROCEDURES FOR COMMERCIAL MEDIATION PROVIDERS IN AFGHANISTAN

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the Provider or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the Provider as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under Provider's auspices by making a request for mediation to any of Provider's offices or case management centers via telephone, email, regular mail or fax.

Any party or parties to a dispute may initiate mediation.

The initiating party shall provide the following information to the Provider and the other party or parties as applicable:

1. A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
2. The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
3. A brief statement of the nature of the dispute and the relief requested.
4. Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the Provider, a party may request the Provider to invite another party to participate in "mediation by voluntary submission". Upon receipt of such a request, the Provider will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation. Ultimately, both parties must agree to mediation.

M-3. Representation

Subject to any applicable law, persons of the party's choice may represent any party. The names and addresses of such persons shall be communicated in writing to all parties and to the Provider.

M-4. Appointment of the Mediator

Parties must jointly agree on the mediator. One or more mediators can mediate disputes if the parties agree.

The provider shall furnish credentials and biographical data on all mediator candidates. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

3. Upon receipt of a request for mediation, the Provider will send to each party a list of mediators from the provider's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the Provider of their agreement.
4. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the Provider. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the Provider shall invite a mediator to serve.
5. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the Provider shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator Qualifications

At a minimum, mediators shall possess the following qualifications:

1) 40 hours training in basic mediation 2) 32 hours training in commercial mediation 3) 8 hours mediation practicum 4) 5 "mentored" mediations with a written evaluation of performance 5) certification of ongoing training (16 hours each year).

M-6. Mediator's Impartiality and Duty to Disclose

Providers will establish a mediator code of conduct based on those published by the Association for Conflict Resolution, which the mediators will agree to be bound by.

Unless otherwise agreed, mediators are required to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. Mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. Mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, may waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-7. Vacancies

If any mediator shall become unwilling or unable to serve, the Provider will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-8. Duties and Responsibilities of the Mediator

Unless otherwise agreed to:

- In order to maintain transparency and integrity of the mediation process, at the beginning of each mediation the mediator should discuss the process of mediation and clarify expectations, roles and responsibilities of all parties (including the mediator), how the mediation will proceed, whether the mediator will make proposals or remain neutral on the subject matter, and the intended outcome of the process (i.e. a written or verbal agreement).

- In accordance with the terms agreed to by the parties in this initial phase of the mediation, The mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express, and the need for a speedy settlement of the dispute.

- The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

- The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

- The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

- The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

- In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

- The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-9. Settlement Agreement

Unless otherwise agreed to by the parties, any settlement reached in the mediation will not be legally binding until it has been reduced to writing and properly executed by, or on behalf of, the Parties.

M-10. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-11. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-12. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- Admissions made by a party or other participant in the course of the mediation proceedings;
- Proposals made or views expressed by the mediator; or
- The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-13. No Stenographic Record

No formal record or transcript of the Mediation will be made, unless otherwise agreed by the Parties.

M-14. Termination of Mediation

The mediation shall be terminated:

- By the execution of a settlement agreement by the parties; or
- By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- By a written or verbal declaration of any or all parties to the effect that the mediation proceedings are terminated.

M-15. Exclusion of Liability

Neither the Provider nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the Provider nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-16. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the Provider.

M-17. Deposits

Unless otherwise directed by the mediator or agreed to by all parties and the mediator in advance, the Provider will require the parties to deposit in advance of the mediation conference such sums of money as agreed to by the parties and the mediator necessary to cover the costs and expenses of the mediation. The Provider shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-18. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-19. Cost of the Mediation

Unless otherwise agreed to by the parties, the cost of mediation is based on the hourly or daily mediation rate of the mediator(s). The parties will be billed equally for all costs unless they agree otherwise.

There is no filing fee to initiate mediation or a fee to request the Provider to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the Provider's mediator profile. This rate covers both mediator compensation and an allocated portion for the Provider's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-18 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the Provider may levy a reasonable charge plus any mediator time and expenses incurred.

The parties will be billed equally for all costs unless they agree otherwise.

ANNEX F:

MODEL PROCEDURES FOR COMMERCIAL MEDIATION IN AFGHANISTAN

M-1. Initiation of Mediation

Any party or parties to a dispute may initiate mediation. The party initiating the mediation shall simultaneously notify the other party or parties of the request. Both parties must agree to mediation.

M-2. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice.

M-3. Appointment of the Mediator

Parties must jointly agree on the mediator. Disputes can be mediated by one or more mediators if the parties agree

M-4. Mediator's Impartiality and Duty to Disclose

Unless otherwise agreed, mediators are required to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. Mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. Mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, may waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-5. Duties and Responsibilities of the Mediator

Unless otherwise agreed to:

- In order to maintain transparency and integrity of the mediation process, at the beginning of each mediation the mediator should discuss the process of mediation and clarify expectations, roles and responsibilities of all parties (including the mediator), how the mediation will proceed, whether the mediator will make proposals or remain neutral on the subject matter, and the intended outcome of the process (i.e. a written or verbal agreement).

- In accordance with the terms agreed to by the parties in this initial phase of the mediation, The mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express, and the need for a speedy settlement of the dispute.

- The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

- The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

- The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

- The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

- In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

- The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-6. Settlement Agreement

Unless otherwise agreed to by the parties, any settlement reached in the mediation will not be legally binding until it has been reduced to writing and properly executed by, or on behalf of, the Parties.

M-7. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-8. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-9. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- Admissions made by a party or other participant in the course of the mediation proceedings;
- Proposals made or views expressed by the mediator; or
- The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-10. No Stenographic Record

No formal record or transcript of the Mediation will be made, unless otherwise agreed by the Parties.

M-11. Termination of Mediation

The mediation shall be terminated:

- By the execution of a settlement agreement by the parties; or

- By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- By a written or verbal declaration of any or all parties to the effect that the mediation proceedings are terminated.

M-12. Exclusion of Liability

The mediator is not a necessary party in judicial or other formal proceedings relating to the mediation. The mediator shall not be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-13. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities.

M-14. Deposits

Unless otherwise directed by the mediator or agreed to by all parties and the mediator in advance, the mediator will require the parties to deposit in advance of the mediation conference such sums of money as agreed to by the parties and the mediator necessary to cover the costs and expenses of the mediation. The mediator shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation**.**

M-15. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-16. Cost of the Mediation

Unless otherwise agreed to by the parties, the cost of mediation is based on the hourly or daily mediation rate of the mediator(s). The parties will be billed equally for all costs unless they agree otherwise.

ANNEX G: Draft Regulations for Commercial Mediation Law

Article 1: Scope

This regulation is promulgated pursuant to article 24 of the Commercial Mediation Law ("the Law") to regulate the implementation of the Law.

Article 2: Definitions

"**Mediator**" is the neutral third party (a natural person) defined in article 2(1) of the Law.

"Provider organizations" are legal persons or unincorporated associations that publicly offer to provide or arrange the mediation services of one or more mediators in connection with a commercial transaction, as defined in the Law.

Article 3: Credentialing

Unless the parties agree otherwise, mediators should be persons who:

1. Are not under investigation and have not been convicted of serious crimes;
2. Have graduated from a mediation training course;
3. Have at least two years relevant work experience in dispute and conflict resolution;
4. Are open-minded, impartial and able to help parties resolve issues between themselves without depending on the mediator for a solution;
5. Are in good standing in the community, respected by their peers, and knowledgeable in business affairs and relevant laws and traditions

Natural persons serving as mediators shall inform the parties to the mediation of their credentials to serve as a neutral mediator in advance of the mediation, including disclosing any fact or circumstance material to a possibility of bias.

Provider organizations may establish minimum standards of training and credentialing for their mediators.

Article 4: Licensing

There is no requirement for licensing either mediators or provider organizations.

Article 5: Conduct of the mediation

Parties are free to choose any mediator, Afghan or foreign, that they mutually agree on for their mediation.

The parties are free to agree otherwise on the manner in which the mediation is to be conducted.

In order to maintain transparency and integrity of the mediation process, at the beginning of each mediation the mediator should discuss the process of mediation and clarify expectations, roles and responsibilities of all parties (including the mediator), how the mediation will proceed, whether the mediator will make proposals or remain neutral on the subject matter, and the intended outcome of the process (i.e. a written or verbal agreement).

In accordance with the terms agreed to by the parties, including acceptance of any conditions required by the mediator or provider organization, the mediator may in this initial phase of the mediation conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express, and the need for a speedy settlement of the dispute.

Article 6: Costs

For individuals serving as mediators, parties can arrange by agreement how and by whom costs and fees shall be covered, if fees are involved.

Provider organizations may set fees for mediation services, and may negotiate those costs with the parties.

Unless otherwise agreed or regulated by law, each party shall bear its own costs with joint costs borne equally by parties.

ANNEX H:
Draft MOU for MOCI and ACCI

Afghanistan Chamber of Commerce & Industries
The Voice of Afghanistan's Private Sector

DRAFT Memorandum of Understanding Between the Ministry of Commerce and Industry and the Afghanistan Chamber of Commerce and Industry

Memorandum of Understanding Between the Ministry of Commerce and Industry and the Afghanistan Chamber of Commerce and Industry

The mission of the Ministry of Commerce & Industries (MoCI) is to create an enabling environment for sustainable and equitable economic growth and opportunity for all Afghans by promoting private sector development in a socially responsible free market economy. The vision of the MoCI is an improved quality of life, decent employment, and higher standards of living for all Afghans through the development of the formal economy.

The Afghanistan Chamber of Commerce and Industry Afghanistan Chamber of Commerce and Industries (ACCI) is an independent, legal, non-government, non-profit and non-political organization which serves the private sector of Afghanistan and strives to facilitate an environment conducive to the economic development of the country. ACCI's mission is to serve the private sector of Afghanistan and to promote an environment conducive to the growth of Afghan Economy.

Both the MoCI and ACCI are committed to the economic growth and stability of Afghanistan, and both recognize that a substantial impediment to that goal is the time and complexity involved in resolving commercial disputes arising out of enforcement of contractual issues, especially those issues involving the courts. This was corroborated by the World Bank in its 2010 Doing Business Indicators (DBI) Report, which found Afghanistan 160 among 183 counties. The DBI report specifically focused on contract enforcement and the resolution of commercial disputes as a critical issue to be addressed. According to the report, the problem is not the backlog of cases in the courts, but reducing time, cost and complexity (number of steps) for resolution. Where mediation can directly improve the DBI is in reducing these variables, and in preserving (or often improving) business relationships to foster continued economic activity between parties.

While a law on mediation has been passed, and the MoCI may propose regulations and enact and approve rules and procedures, no formalized structure yet exists to enact the law. This memorandum of understanding provides the framework for a joint effort between the MoCI and ACCI to implement the mediation law through the creation of a Center for Dispute Settlement for the efficient resolution of commercial disputes.

Now, therefore, the MoCI and ACCI have agreed to the following:

A) PURPOSE

The purpose of this MOU is to provide the framework for a partnership arrangement between MoCI) and ACCI to create a Center for Dispute Settlement that will serve to implement the Mediation law. It is not envisioned that the ACCI Center will be the sole organization of its kind, but serve as a pilot for other provider organizations that may be created in the future. A set of proposed procedures in presented in Annex 1.

B) AREAS OF COOPERATION

The activities shall include but not be limited the areas outlined below:

Creation of the Center

Memorandum of understanding for participating organizations (commercial courts, AISA, Afghan Bar) etc.

Draft Procedures for Mediation (attached)

C) FUNDING

Will this be included?

D) IMPLEMENTATION OF THE MOU

1. The MoCI and ACCI shall make the necessary arrangements to ensure satisfactory implementation of the Partnership as described above.
2. The parties agree to communicate systematically to exchange views and report on accomplishments with regard to this MOU.
3. Whenever the receipt of funding from MoCI or the timely completion of the activities by ACCI is delayed or disrupted, ACCI and MoCI will jointly investigate all possible remedial actions to be taken.

E) GENERAL PROVISIONS

1. DURATION

1.1 This MOU shall be valid upon signature by both parties and until agreed upon date, on the understanding that either party is at liberty to terminate it at any time, after furnishing to the other party a written notice of termination 3 months in advance of the date on which the party furnishing such notice wishes to have the MOU terminated.

1.2 Without prejudice to the foregoing, steps shall be taken to ensure that termination of this MOU will not be prejudicial to any activities or programmes undertaken within the framework of the MOU or to the completion of tasks for which binding obligations exist.

2. AMENDMENT / MODIFICATION

2.1 The present MOU, including the Annexes, may be modified and/or amended at any time by the signatories, by mutual written MOU (through formal amendments).

3. CONTACT POINTS / COMMUNICATION AND NOTIFICATION

3.1 For purposes of communications or notices with respect to this MOU, MoCI shall be represented by _____ and ACCI by _____.

3.2 Unless otherwise specified in the Annexes, all communications between the Partners should be between the above representatives.

4. STATUTORY COMPLIANCE

4.1 This MOU is not intended to create a legal and binding obligation to expend funds or resources by either party, but is a statement of bona fide intent of the Parties. It sets forth the entire understanding of the Parties in respect of the collaboration considered.

F) CENTER FOR DISPUTE SETTLEMENT LEGAL STATUS

The Center for Dispute Settlement is a subsidiary organ of the Afghan Chamber of Commerce and Industry

G) SIGNATORIES

In witness hereof, the Parties hereto have signed this MOU in 2 original copies on the date(s) herein bellow indicated.

_____

For and on behalf of MoCI

_____

For and on behalf of ACCI

Acronyms

ABA	Afghanistan Bankers' Association
ACBR	Afghanistan Central Business Registry
ACCI	Afghan Chamber of Commerce and Industry
ACD	Afghanistan Customs Department
ACH	Afghanistan Clearing House
ACLA	Associate Commissioner for Legislative Affairs
ACSP	Afghanistan Credit Support Program
ACSS	Afghanistan Clearing and Settlement System
ADB	Asian Development Bank
ADIC	Afghan Deposit Insurance Corporation
ADP	Alternative Development Program
AEAI	Advance Engineering Associates International
AEGPSS	Afghanistan Economic Growth and Private Sector Strengthening
AFMIS	Afghanistan Financial Management Information System
AFS	Afghanis
AFSSP	Afghanistan Financial Sector Strengthening Program
AGO	Attorney General's Office
AIB	Afghanistan International Bank
AIBF	Afghanistan Institute of Banking and Finance
AIHRC	Afghanistan Independent Human Rights Commission
AIMS	Afghanistan Information Management Services
AISA	Afghanistan Investment Support Agency
AML/CFT	Anti-Money Laundering and Combating the Financing Terrorism
ANDS	Afghanistan National Development Strategy
APAP	Afghanistan Parliamentary Assistance Project
APTTA	Afghanistan Pakistan Trade and Transit Agreement
ARD	Agriculture and Rural Development
ARIES	Agriculture Rural Investment and Enterprise Strengthening
ARTF	Afghanistan Reconstruction Trust Fund
ASEAN	Association of South East Asian Nations
ASI	Adam Smith International
ASMED	Afghanistan Small and Medium Enterprises Development
ATM	Automatic Teller Machine
ATRA	Afghanistan Telecom Regulatory Authority
AUB	Afghan United Bank
BDS	Business Development Services
BIS	Bank of International Settlements
BRAC	Bangladesh Rural Advancement Committee
BRT	Back Room Technician
CADR	Commercial Alternative Dispute Resolution
CAO	Chief Administration Officer
CBS	Core Banking System
CCNS	Cooperating Country Nationals
CCO	Chief Compliance Officer
CDP	Capacity Development Program, USAID
CEAP	Chief Economic Advisor to the President
CEO	Chief Executive Officer
CERP	Commanders Emergency Response Program
CFSS	Correctional Facility Shift Supervisor
CIMIC	Center for Information Management, Integration, and Connectivity
CIO	Chief Information Officer
CMO	Contract Management Office
CMRS	Central Monitoring and Reporting System
CO	Contracting Officer
COO	Chief Operation Officer
COP	Chief-of-Party
CPI	Consumer Price Index
CSO	Central Statistics Office
CTO	Cognizant Technical Officer

DAB	Da Afghanistan Bank
DABS	Da Afghanistan Brishna Sherkat
DACAAR	Danish Committee for Aid to Afghan Refugees
DCOP	Deputy Chief-of-Party
DFR	Donor Financial Review
DG	Director General
DHS	Department of Homeland Security
DM	Deputy Minister
DMFI	Depositor Microfinance Institutions
DOJ	Department of Justice
EFT	Electronic Fund Transfer
EGGI	Economic Growth & Governance Initiative
EGO	Economic Growth Office
EGPSS	Economic Growth Private Sector Strengthening
EMIS	Education Management Information System
EXBS	Execute By Sting Project
FAD	Fiscal Affairs Department
FAU	Fiscal Analysis Unit
FMFB	First Micro Finance Bank
FPU	Fiscal Policy Unit
FSD	Financial Supervision Department
FSSP	Financial Sector Strengthening Project
GCC	Government Coordinating Council
GDP	Gross Domestic Product
GIAAC	General and Independent Administration Against Corruption and Bribery
GIROA	Government of Islamic Republic of Afghanistan
GL	General Ledger
GOA	Government of Afghanistan
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit
HIP	Herat Industrial Park
HIPC	Highly Indebted Poor Countries' Initiative
HR	Human Resources
HRD	Human Resource Department
IAIS	International Association of Insurance Supervisors
IARCSC	Independent Administrative Reform and Civil Service Commission
IBFIM	Islamic Banking and Finance Institute Malaysia
ICA	Insurance Corporation of Afghanistan
ICT	Information and Communication Technology
ID	Insurance Department
IDEA-NEW	Incentives Driving Economic Alternatives for the North, East, and West
IDLG	Independent Directorate for Local Governance
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IIFC	Islamic Investment and Finance Cooperatives
IMF	International Monetary Fund
IMFC	International Monetary and Financial Committee
INGO	International Non Governmental Organization
IP	Industrial Park
IROA	Islamic Republic of Afghanistan
ISDM	Information Systems Design and Management
ISP	Internet Service Providers
IT	Information Technology
JCMB	Joint Coordination and Monitoring Board
KED	Kabul Electricity Distribution
LBMA	London Bullion Market Association
LGCD	Local Governance and Community Development
LLDAs	Lottery-Linked Deposit Accounts
LLP	Limited Liability Partnership
LMTO	Large and Medium Taxpayers Office
LoC	Letter of Credit
LOI	Letter of Intent
LT	Long Term
LTO	Large Taxpayer Office
M&E	Monitoring and Evaluation

MAIL	Ministry of Agriculture Irrigation and Livestock
MAU	Macroeconomic Analysis Unit
MDF	Main Distribution(al) Facility
MEW	Ministry of Energy and Water
MFF	Multi-tranche Financing Facility
MISFA	Microfinance Investment Support Facility for Afghanistan
MOCI	Ministry of Commerce and Industry
MOCIT	Ministry of Communication and Information Technology
MOE	Ministry of Education
MOEc	Ministry of Economy
MOF	Ministry of Finance
MOHE	Ministry of Higher Education
MOI	Ministry of Interior
MOJ	Ministry of Justice
MOLSAMD	Ministry of Labor, Social Affairs, Martyrs and the Disabled
MOM	Ministry of Mines
MOT	Ministry of Tourism
MOTA	Ministry of Transport and Aviation
MOTCA	Ministry of Transport and Civil Aviation
MOU	Memorandum of Understanding
MOUD	Ministry of Urban Development
MP	Member of Parliament
MPU	Monetary Policy Unit
MRRD	Ministry of Rural Rehabilitation and Development
MSME	Micro, Small and Medium Enterprises
MTBF	Mean Time Before Failure
MTEF	Medium-Term Expenditure Framework
MTO	Medium Taxpayers' Office
MW	Minimum Wage
NBC	National Broadcasting Commission
NBFC	National Budget Finance Commission
NBFI	Non-Bank Financial Institution
NC	National Committee
NDC	New Deal For Communities
NEC	National Economic Commission
NGO	Non-Governmental Organization
NICA	National Insurance Company of Afghanistan
NSC	National Statistics Council
NSDP	National Skills Development Program
NSP	Normal Safety Procedures
NTR	Nothing to Report
OEG	Office of the Economic Growth
OFC	Optical Fiber Cable
OGC	Office of Government Commerce
OSS	One Stop Shop
P&L	Profit and Loss
PAU	Policy Analysis Unit
PBO	National Assembly Budget Office
PCO	Project Control Organization
PDC	Provincial Development Committee
PDP	Provincial Development Plans
PG	Participant Guide
PMO	Project Management Office
PMP	Performance Management Plan
PPP	Public Private Partnership
PPSCD	Policy for Private Sector Growth and Development
PRGF	Poverty Reduction & Growth Facility
PRT	Provincial Reconstruction Team
PSCSEC	Private Sector & Civil Society Enabling Council
PSD	Private Sector Development
PSD-SC	Private Sector Development Sub-Committee
PSEC	Private Sector Enabling Committee
QRF	Quick Reaction Force
RAMP	Rebuilding Agricultural Markets Program

RCS	Reports Control System
RFTOP	Request For Task Order Proposal
RM	Regional Manager
RMD	Resource Management Division
RMO	Regional Management Office
ROE	Rate of Exchange
ROI	Return on Investment
RRR	Revenue Reporting and Reconciliation
SC	Sub Committee
SCB	Standard Charted Bank
SDRs	Special Drawing Rights
SEAL	Support for an Effective Afghan Legislature
SEAP	Senior Economic Advisor to the President
SIGTAS	Standard Integrated Government Tax Administration System
SME	Small and Medium Enterprises
SMEFP	Supplementary Memorandum of Economic and Financial Policies
SOES	Small Order Execution System
SROI	Social Return on Investment
SSBC	Smart Service Business Center
ST	Short Term
SUNY	State University of New York
TA	Technical Assistance
TAFA	Trade Accession Facilitation for Afghanistan
TAPR	Technical Assistance for Policy Reform
TCC	Technical Coordinating Committee
TIN	Tax Information Number
TOR	Terms of Reference
TOT	Training of Trainers
UCC	Uniform Commercial Codes
UCLA	University of California, Los Angeles
UK	United Kingdom
UK-DFID	United Kingdom Department for International Development
UNDP	United Nation Development Program
US	United States
US$	United States Dollar
USAID	United States Agency for International Development
VSAT	Very Small Aperture Transmission
WB	World Bank
WOCCU	World Council of Credit Unions
WTO	World Trade Organization