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TRIP REPORT: COURT- CONNECTED MEDIATION 13 August – 2 September 2006

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27 September 2006

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STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS IN NEPAL

TRIP REPORT: COURT-CONNECTED MEDIATION
For the Period: 13 August 2006 – 2 September 2006

Dated: 27 September 2006

DISCLAIMER

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

**ALTERNATIVE DISPUTE RESOLUTION (ADR)
IN NEPAL**

**Report on Trip to Expand Opportunities
In
Court-Connected Mediation (August 13-September 2, 2006)**

Robert C. Randolph and Frank Carr

Carr, Swanson, and Randolph, LLC

September 30, 2006

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NARRATIVE

Purpose of Trip and Statement of Work

The firm of Carr, Swanson, and Randolph, LLC (“CSR”) was engaged by ARDROL to assist the Nepal Supreme Court in implementing Strategic Intervention 12 of its Strategic Plan. This plan calls for strengthening mediation and encouraging consensus building between litigants.

To further USAID's and ARD's objectives for strengthening mediation and encouraging consensus building, CSR consultants, Bob Randolph and Frank Carr visited Nepal August/September 2006 to: (1) visit the Debt Recovery Tribunal and the Labor Court to conduct outreach for the generation of cases to mediation; (2) provide an advanced mediation training course for lawyers and business entrepreneurs; (3) provide an advanced mediation training course for court officials and judges; (4) conduct a mediation “practicum” to evaluate all training participants; and (5) design a management plan for the forthcoming mediation “settlement week” and the train-the-trainer program.

Results

(1) Visits to the Labor Court and Debt Recovery Tribunal.

During the August/September trip, CSR visited both the Labor Court and the Debt Recovery Tribunal (DRT) to conduct outreach for the generation of cases for mediation and particularly settlement week.

The Labor Court hears appeals from employees who have disputes with their employers. At this time, the Labor Court has had no judges for over six months and its backlog of workplace cases is growing. The clerk of the court was agreeable to referring cases voluntarily to mediation but he needs guidance and a plan for case referral.

The Debt Recovery Tribunal (DRT) hears cases brought by banks and other financial institutions against defaulting debtors. The DRT has three Members: a law member, a banking member and an accountant member, with the law member serving as Chair. The Debt Recovery Tribunal also has a large number of pending cases and was interested in mediation but the officials had several concerns. They expressed concerns about the time for the mediators to prepare for these complex cases, the impact on the time for the DRT to move the case as the DRT has five months to get the case decided, and the additional workload for the DRT administrative staff. The officials requested that ARD prepare an action plan.

The enabling legislation for both agencies allows for mediation

(2) Advanced Mediation Training for Lawyers and Business Entrepreneurs.

CSR provided a second three-day advanced training course in mediation for lawyers and business entrepreneurs in August 2006. The advanced training course had a focus on reviewing the mediation process, improving the technical competencies of the mediators, and providing experiential training in mediation for every participant. The training was well received and all the participants completed their training in the mediation practicum.

In reviewing the mediation process, the participants had to identify and fully describe each stage of the mediation process. Also, each mediator had to draft and deliver a sample Mediator's Opening Statement covering such areas as: the role of the mediator, the nature of the mediation process, ground rules/code of conduct: the caucus, confidentiality, the right to an attorney, note-taking, and the preparation of a settlement agreement. The participants also received instruction on the effective use of the caucus and tools to use in the caucus such as reality testing. Finally, in a group exercise, the participants had to identify the characteristics of a mediator that are necessary for success.

Regarding mediator technical competencies, the participants received instruction in communication skills, active listening, identifying the interests of the parties, moving from positions to interests, conducting difficult conversations, handling disruptive behavior, and settlement agreement writing. Another area covered was the individual working styles of the participants. Each participant completed individual working style assessment which divided the participants into four groups: amiable, expressive, directive (driver), and analytic. In a group exercise, the participants were able to recognize the strengths and weaknesses of their individual working styles as a mediator, the working styles of parties in mediation and how to "borrow" other working styles when required. Finally, participants learned mediator strategies and tactics for the dealing with these working styles of the parties to the mediation.

The participants also received training in the use of co-mediation and the evaluative mediation approach in commercial cases. In co-mediation the participants learned when co-mediation is useful and the challenges for a mediator in co-mediation. In evaluative mediation, the participants were given instruction on the nature of the evaluative mediation process, its limited application to commercial cases, and how to prepare for evaluative mediation.

Mediation role plays were conducted on each day of the Advance Course. Every participant had an opportunity to serve as a mediator in one role play and a party in two other roles. Each role play was debriefed for training objectives.

(3) Advanced Mediation Training for Court Officials and Judges.

In this three day training course, the court officials and judges received the same training as in the above described training course for attorneys and business entrepreneurs.

Additionally, the participants in this course were briefed on the status of the Nepal Mediation Law and were asked to describe three areas that the law should cover.

(4) Practicum for Training Participants.

Over the course of eight days, CSR conducted practicum training program for all participants who had completed the advanced mediation course. The purpose of the practicum was to evaluate each participant's knowledge of the mediation process and capacity to serve in the role of a mediator.

In the practicum each participant was required to function as a mediator in a commercial mediation role play: (1) a construction dispute, (2) a real estate dispute, and (3) an international contract dispute. During and after the role play, the mediators received individual coaching from the CSR instructors. The specific areas evaluated were the convening by the mediator, the welcome, the mediator's opening statement, the Mediator's conducting the joint session, moving to the caucus, using mediator tools and techniques, remaining neutral, respecting confidentiality, knowledge of and application of mediation techniques, and the preparation of the settlement agreement. Each participant was evaluated on his/her ability to perform in these areas.

(5) Settlement Week and Train-the Trainer Planning.

The first phase of the mediation program to train attorneys, business entrepreneurs, court officials and judges as mediators has been completed. The next phase of the mediation program is to promote the use of mediation by conducting a mediation settlement week and to promote sustainability in Nepal through a train-the-trainer course.

The purpose of settlement week is to promote mediation awareness throughout the legal and commercial communities and provide those mediators who have completed the practicum with on-the-job experiential training. The press will be invited to cover the kick-off opening ceremony to settlement week. Thus, Settlement Week will focus public, judicial, and press attention on mediation insofar as (1) the court makes a commitment to send cases to mediation and (2) FNCCI and other Mediation Centers are ready and able to mediate them at that time.

During settlement week CSR trainers will be available to assist and coach the mediators and the FNCCI Mediation Center when necessary. Preparation for settlement week has been outlined in a three-page management plan attached as a deliverable. The management plan includes a press coverage plan and detailed planning and requirements for coordination with the courts, the Nepal Bar Association and FNCCI.

The train-the-trainer course is designed to provide a sustainable mediation program for the courts and mediation providers in Nepal. CSR trainers will conduct a six-day training course for 6-12 Nepali mediators who are interested in becoming trainers in mediation. The train-the-trainer course will consist of training in principles of adult learning, developing lesson plans, teaching facilitation skills, organizing role plays and demonstrating and teaching mediation technique. The participants will be expected to

develop training modules, exercises, and Nepali role plays. The participants will present a training demonstration for the CSR trainers.

(6) Meeting with FNCCI Mediation Center Executive Director.

The CSR instructors met with Rudra Sharma, the new FNCCI mediation center executive director to review the status of the FNCCI Mediation Center. After reviewing the FNCCI draft “Regulation”, the CSR trainers had numerous suggestions for improving it. In general, the CSR trainers informed Sharma that the Mediation Center should not allow non-trained “experts” without mediation training to be mediators or co-mediators in FNCCI mediations. Furthermore, the CSR advised Mr. Sharma that the Mediation Center should stay focused on mediation rather than expanding to arbitration and “conciliation.” Additionally, the CSR trainers found deficiencies in the proposed FNCCI mediation procedures, including the areas of mediation definitions, qualifications of a mediator, removal of mediators from the roster, mediator compensation and record-keeping. Mr. Sharma agreed to revise the Procedures in accordance with the CSR comments.

CSR continues to recommend that the progress of the new FNCCI executive director and staff be closely monitored with a setting of milestones a close observation and review of work plan objectives and milestones to ensure their accomplishment.

Deliverables:

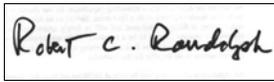
1. **Advanced Mediation Training for Attorneys and Business Entrepreneurs.**
CSR delivered a second three-day advanced mediation training program with training manuals for lawyers nominated by the Nepal Bar Association and business entrepreneurs nominated by FNCCI.
2. **Advanced Mediation Training for Court Officials and Judges.**
CSR delivered a three-day advanced mediation training program with training manuals for Court Officials and Judges.
3. **Practicum Training for Mediation Course Participants.**
CSR delivered eight one-day practicum training programs in commercial mediation for the mediation training course participants.
4. **Settlement Week Management Plan.**
CSR delivered a three-page “Settlement Week Management Plan” in order to prepare for settlement week.
5. **NCCI Mediation Procedures.**
CSR reviewed the FNCCI Mediation Procedures, met with the Executive Director and made specific recommendations in writing for revising and improving the Procedures.

6. **Trip Report.**

Delivered this written Trip Report

Respectfully submitted,

Carr, Swanson and Randolph, LLC



/s/ *Frank Carr*

**By: Robert C. Randolph and Frank Carr
September 15, 2006**

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